SUPREME COURT OF QUEENSLAND

CITATION: *Downey & Anor v Carlson Hotels Asia Pacific P/L* [2005] QCA 199

PARTIES:

PETER JUSTIN DOWNEY and TERESITA DOWNEY
(plaintiffs/respondents)
v
CARLSON HOTELS ASIA PACIFIC PTY LIMITED
ACN 000 708 332
(defendant/appellant)

DARRYL NORMAN GOSCHNICK
(plaintiff/respondent)
v
CARLSON HOTELS ASIA PACIFIC PTY LIMITED
ACN 000 708 332
(defendant/applicant /appellant)

MARTIN HALE and NORMA CHRISTINE HALE
(plaintiffs/respondents)
v
CARLSON HOTELS ASIA PACIFIC PTY LIMITED
ACN 000 708 332
(defendant/applicant/appellant)

GARY JAMES BIDNER
(plaintiff/respondent)
v
CARLSON HOTELS ASIA PACIFIC PTY LIMITED
ACN 000 708 332
(defendant/applicant/appellant)

GREGORY PAUL JENSEN
(plaintiff/respondent)
v
CARLSON HOTELS ASIA PACIFIC PTY LIMITED
ACN 000 708 332
(defendant/applicant/appellant)

WESLEY EARL ELPHICK and
IRENE ETHEL ELPHICK
(plaintiffs/respondents)
v
CARLSON HOTELS ASIA PACIFIC PTY LIMITED
ACN 000 708 332
(defendant/applicant/appellant)

EDWIN LOWE and STELLA FOH-LIN LOWE
(plaintiffs/respondents)
v

CARLSON HOTELS ASIA PACIFIC PTY LIMITED
ACN 000 708 332
(defendant/applicant/appellant)

DAVID JOHN PRENTICE
(plaintiff/respondent)
v
CARLSON HOTELS ASIA PACIFIC PTY LIMITED
ACN 000 708 332
(defendant/applicant/appellant)

TREVOR RICHARD GREEN
(plaintiff/respondent)
v
CARLSON HOTELS ASIA PACIFIC PTY LIMITED
ACN 000 708 332
(defendant/applicant/appellant)

KEITH DEREK BISHOP
(plaintiff/respondent)
v
CARLSON HOTELS ASIA PACIFIC PTY LIMITED
ACN 000 708 332
(defendant/applicant/appellant)

FILE NO/S:	Appeal No 8852 of 2004 Appeal No 8853 of 2004 Appeal No 8854 of 2004 Appeal No 8855 of 2004 Appeal No 8856 of 2004 Appeal No 8857 of 2004 Appeal No 8858 of 2004 Appeal No 8859 of 2004 Appeal No 8860 of 2004 Appeal No 8861 of 2004 DC No 4992 of 2002 DC No 1747 of 2003 DC No 2460 of 2003 DC No 2150 of 2003 DC No 2149 of 2003 DC No 2148 of 2003 DC No 2147 of 2003 DC No 1825 of 2003 DC No 1816 of 2003 DC No 1817 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane

DELIVERED ON: 10 June 2005

DELIVERED AT: Brisbane

HEARING DATE: 16 May 2005, 17 May 2005

JUDGES: Williams and Keane JJA and Atkinson J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **In Appeal No 8852 of 2004:**

1. **Appeal dismissed**
2. **Appellant to pay costs of the respondents to be assessed on the standard basis**

In Appeals numbered 8853-8861, in each case:

1. **Application for leave to appeal granted**
2. **Appeal dismissed**
3. **Appellant to pay costs of the respondent or respondents to be assessed on the standard basis**

CATCHWORDS: TRADE AND COMMERCE - TRADE PRACTICES AND RELATED MATTERS - CONSUMER PROTECTION - MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT - PARTICULAR CLASSES OF CONDUCT - ADVERTISING AND RELATED PUBLICATION - where advertising material prepared for the sale of apartments in a complex that would be operated by the appellant as a hotel - where advertising material prepared by a third party - where it was necessary to obtain the appellant's consent to the content of any advertising material making use of the appellant's name or logo - where the appellant could not require the third party to publish the advertising material - where advertising material contained statements about the appellant's own opinions and expectations concerning the success of the complex - whether the appellant adopted the representations made by the third party - whether the third party served only as a medium through which the appellant made representations directly to potential consumers

TRADE AND COMMERCE - TRADE PRACTICES AND RELATED MATTERS - CONSUMER PROTECTION - OFFICERS OR AGENTS OF BODY CORPORATE - CONDUCT "ON BEHALF OF" - where a third party purported to communicate views of the appellant concerning the prospects of an apartment complex that the appellant was to operate as a hotel - where the third party communicated these views with the permission of the appellant - where the appellant had approved the content of the communications made on its behalf - whether conduct of third party was done in the course of the appellant's own business, affairs or activities - whether the respondent's pleadings were sufficient to invoke s 84(2) *Trade Practices Act* 1974 (Cth) - whether conduct of third party engaged in "on behalf of" the appellant

TRADE AND COMMERCE - TRADE PRACTICES AND RELATED MATTERS - CONSUMER PROTECTION - MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT - CHARACTER AND ATTRIBUTES OF CONDUCT - RELIANCE - where the appellant had approved the inclusion of certain content in advertising material offering the opportunity to purchase an apartment in a new property development - where it was held that this amounted to 'conduct' for the purposes of s 52 *Trade Practices Act* 1974 (Cth) - where the appellant submitted that the respondents could not be shown to have entered into purchase in reliance on this conduct because they acted unreasonably on the erroneous assumption that the advertising material had actually been produced by the appellant - whether that was true nature of erroneous assumption held by the respondents - whether the response of the respondents to the advertising material was reasonable in the circumstances

TRADE AND COMMERCE - TRADE PRACTICES AND RELATED MATTERS - CONSUMER PROTECTION - MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT - CHARACTER AND ATTRIBUTES OF CONDUCT - REPRESENTATIONS - IN GENERAL - where advertising material alleged to contain representations that the appellant considered that a particular property development was a "guaranteed success", that the appellant was offering a rental guarantee, that the appellant's opinion as to the quality of the investment could be relied upon and that the property development would be a good investment by reason of its association with the appellant - whether these representations would have been conveyed to reasonable people who could be expected to have read the whole of the advertising material - whether the disclaimers contained in the advertising material qualified any of these representations

TRADE AND COMMERCE - TRADE PRACTICES AND RELATED MATTERS - CONSUMER PROTECTION - MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT - CHARACTER AND ATTRIBUTES OF CONDUCT - PUFFERY - where representation made by the appellant that a property development would be a "guaranteed success" - whether phrase "guaranteed success" can be construed as a puff - whether representation was misleading and deceptive because the appellant never actually held the view that the success of the development was guaranteed

TRADE AND COMMERCE - TRADE PRACTICES AND RELATED MATTERS - CONSUMER PROTECTION - MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT - CHARACTER AND ATTRIBUTES OF

CONDUCT - REPRESENTATIONS - AS TO FUTURE MATTERS - where advertising material for a new property development offered a rental guarantee to purchasers of apartments in the development - where material contained representation that the appellant considered that the future performance of rent guarantee obligations by a third party was assured - where material also contained representation that the appellant considered that the purchase of an apartment would be a good investment because of the appellant's association with the project - whether the appellant had adduced evidence disclosing reasonable grounds for the making of these representations as to future matters - whether the fact that the appellant had led some evidence in this regard was sufficient to shift the onus of proof back to the respondents

TRADE AND COMMERCE - TRADE PRACTICES AND RELATED MATTERS - CONSUMER PROTECTION - MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT - CHARACTER AND ATTRIBUTES OF CONDUCT - KNOWLEDGE OR INTENTION - where trial judge had found the appellant to have been knowingly concerned in the making of certain misleading representations contained in the advertising material relating to a new property development - where the representations made were that the appellant considered the development to be a "guaranteed success" and that the appellant would be offering a rent guarantee - where it was admitted that the appellant was aware of the terms of the representations and that the representations would be published - whether the appellant had knowledge of facts that would allow the representations to be characterised as misleading

Australian Securities and Investments Commission Act 2001 (Cth), s 12DA, s 12GD
Trade Practices Act 1974 (Cth), s 51A, s 52, s 75B, s 84(2)

Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd [2004] FCA 1363; V921 of 2003, 22 October 2004, cited
Australian Competition and Consumer Commission v Universal Sports Challenge Ltd [2002] FCA 1276; N274 of 2002, 23 October 2002, considered
Barton v Croner Trading Pty Ltd (1984) 3 FCR 95, applied
Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60; (2004) 212 ALR 357, applied
Campomar Sociedad Limitada v Nike International Ltd [2000] HCA 12; (2000) 202 CLR 45, applied
Cassidy v Saatchi & Saatchi Australia Pty Ltd [2004] FCAFC 34; (2004) 134 FCR 585, distinguished
Gardam v George Wills & Co Ltd (1988) 82 ALR 415, cited

Guglielman v Trescowthick [2004] FCA 326; (2004) ATPR 41-995, cited
Medical Benefits Fund of Australia Ltd v Cassidy [2003] FCAFC 289; (2003) 135 FCR 1, applied
National Exchange Pty Ltd v Australian Securities and Investments Commission [2004] FCAFC 90; (2004) 49 ACSR 369, considered
NMFM Property Pty Ltd v Citibank Ltd (No 10) [2000] FCA 1558; (2000) 107 FCR 270, considered
Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177, cited
Walplan Pty Ltd v Wallace (1985) 8 FCR 27, cited

COUNSEL: B D O'Donnell QC, with M R Bland, for the appellant
M M Stewart SC, with A P J Collins, for the respondents

SOLICITORS: Gilbert + Tobin (Sydney) for the appellant
Quinn & Scattini for the respondents

[1] **WILLIAMS JA:** I have had the advantage of reading the comprehensive reasons for judgment prepared by Keane JA and there is nothing I can usefully add thereto. I agree with the reasoning therein, and with the orders proposed.

[2] **KEANE JA:** The appellant in Appeal No 8852 of 2004, to which Mr and Mrs Downey are respondents, appeals against the judgment of McGill DCJ that it pay Mr and Mrs Downey damages by way of compensation for loss suffered by them in consequence of the appellant's contravention of s 52 of the *Trade Practices Act* 1974 (Cth) ("the Act").[1]

[3] In Appeals numbered 8853-8861 of 2004, the appellant applies for leave to appeal against the determination by McGill DCJ of questions in advance of trial which had been agreed between the parties. Leave is required pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) because those orders are not final judgments of the District Court. The preliminary questions concerned issues which also arose in the trial of the proceedings involving Mr and Mrs Downey. These preliminary questions were decided on the pleadings and the evidence adduced in the Downeys' action. There was no evidence adduced by the other respondents.

[4] The respondents to the applications for leave do not oppose the grant of leave to appeal. In these circumstances, and since the issues raised in these applications are substantial and might well return to this Court following the final determination of the action in each case, I consider that leave should be granted.

[5] The evidence at trial was largely documentary. Mr and Mrs Downey gave oral evidence. No officer or employee of the appellant gave evidence. The issues agitated by the appellant on appeal turned, for the most part, on the legal significance of facts which were not themselves in dispute.[2]

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1 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004.

2 Cf *Warren v Coombes* (1979) 142 CLR 531.

[6] I propose now to set out, as briefly as possible and by way of background, a summary of what was at issue and what was common ground between the parties. I will then summarise the decision below before proceeding to discuss the issues agitated on appeal.

Background

[7] It is convenient to refer to the facts of the proceedings involving Mr and Mrs Downey as generally typical of the case of each of the respondents. By way of exception to that general position, however, it should be noted that some of the other respondents did not receive all of the advertising material provided to the Downeys. I shall elaborate on which material was received by what party in due course.

[8] Mr and Mrs Downey were purchasers from the developer, Valco Developments Pty Ltd ("the vendor") of lots in what was then a proposed building unit plan (which was subsequently registered and is now described as Building Unit Plan 106993) in a development to be known as "Radisson Suites". The contract of sale provided, inter alia, that the respondents purchased their lots subject to a lease for five years between themselves as lessors and a company, 570 Queen Street Management Pty Ltd ("570 QSM") as lessee. This company was to act as the serviced apartment manager of the purchaser's unit. The rent payable by 570 QSM under the lease was equivalent to seven per cent per annum of the purchase price paid by the respondents.

[9] The appellant was previously known as Radisson Hotels Pty Ltd. It carried on business which included the operation of hotels. The appellant, as it admitted, held itself out within Australia, and particularly the State of Queensland, as a major hotel operator and maintained a reputation within Queensland whereby the name "Radisson" was intentionally promoted as being associated with hotels and apartments of high quality.

[10] In about the middle of 1997, the vendor, 570 QSM and another company, Southern Cross Investments Pty Ltd ("SCI"), began to advertise and promote the Radisson Suites development. The vendor, 570 QSM and SCI produced a brochure for the purposes of this promotion. This brochure became Exhibit 3. As the appellant knew, the brochure contained the following:

(a) on the front cover, the title:
"Because it's Radisson and it is on Queen",

(b) within the brochure, the words:
"The Radisson Advantage
Radisson Hotels International Inc. (RHI) is one of the world's major hotel companies, with over 330 properties and 76,000 rooms in 42 countries. It operates, manages and franchises deluxe plaza hotels, suite hotels, hotels, inns and resorts and is the parent of Radisson Seven Seas Cruises which operates four luxury cruise ships.
Radisson is a regional hotel management company with a strategic international affiliation through RHI, which has positioned it to allow the company to take advantage of outstanding opportunities in Australia.
Radisson Suites is just the one they were waiting for.

> The explosion in demand for visitor accommodation, both in Brisbane and nationwide, is expected to fuel 7% per annum growth in CBD-based serviced apartments to the year 2000. What's more, this figure does not take into account the extra boost which will certainly be generated by the Sydney Olympics. Such growth, coupled with the guaranteed success of such a centrally located and magnificently appointed complex as Radisson Suites, has propelled Radisson's decision to enter into a Hotel Management agreement to operate the $32 million development."

[11] The brochure, Exhibit 3, also contained, under the heading: "Radisson Suites Investment Analysis" a reference to" "Rental Income (7% p.a. net guaranteed for 5 years reviewed to CPI)". Under the heading: "Who pays for your property?" it was explained that the tax office and the tenant pay for the property and: "You receive $178 pw cash in your pocket … after all expenses". This analysis included the following:

> "Calculations presume a $45,000 p.a. income and an Interest Only loan of 8.75% p.a. First year calculations are based upon an anticipated settlement date of 25/10/98. Whilst every effort has been made to ensure the accuracy of these figures, no liability will be accepted by Southern Cross Investment Group Pty Ltd or any other firm in respect of any action taken as a result of using these figures. CPI figures calculated at 4%."

[12] The word "Radisson" appears in the brochure 31 times. Under the heading: "Maximise Your Income and Growth Potential", the following appeared:

> "A 5 year 7% per annum rental guarantee provided by 570 Queen Street Management Pty Ltd. You will earn $11,675 in the first financial year, or $330 per week."

Later on the following appeared:

> "Guaranteed 7% per annum for 5 years.
> Lease your apartment back to 570 Queen Street Management Pty Ltd and receive a guaranteed 7% per annum for 5 years. This rent is based on your apartment package purchase price and is after all annual expenses and outgoings have been paid."

[13] The appellant admitted that it approved of this brochure (and even suggested amendments to the draft), and knew that it would be provided to potential purchasers in order to promote the sale of units in the Radisson Suites development.

[14] SCI was involved in the marketing of units in the Radisson Suites development. As the appellant knew, SCI promoted the sale of the units on the basis that, according to a brochure, which became Exhibit 4, headed "Building has begun on Radisson Suites" and distributed by SCI:

(a) investors in units in the Radisson Suites development would have a guaranteed net return of seven per cent per annum for a period of five years;

(b) the units would be self-funding and would produce a positive cash flow from the date of purchase;

(c) an investor would receive the amount of $178.00 "in the pocket" each week (based on an average unit package price).

[15] The appellant admitted that it approved of the contract and authorised the use of the brochure headed "Building has begun on Radisson Suites" and its provision to potential purchasers.

[16] SCI also distributed to potential purchasers an advertisement entitled "Brisbane Property Investment Report". This document became Exhibit 5. The appellant did not admit that it knew and approved of the contents of this document or its provision to potential purchasers, but it did not deny the respondents' allegations to that effect. Accordingly, pursuant to r 166(5) of the *Uniform Civil Procedure Rules* 1999 (Qld), the learned trial judge proceeded on the footing that these allegations were deemed to have been admitted. There has been no challenge by the appellant to this aspect of his Honour's decision. This document stated, inter alia:

(a) the hotel is "to be managed by internationally acclaimed operator, Radisson.";

(b) "The management company is offering investors a seven per cent per annum guaranteed net return for five years. Outgoings such as rates, body corporate and management fees are paid by the lessee during that five year period.";

(c) "Investors who purchase a furniture package will be offered a 5 year 7% p.a. annum net rental guarantee so they receive a guaranteed income. During this period the management company as lessee will pay all of the running costs including body corporate fees, rates and maintenance."

[17] The parties were at odds over the representations conveyed by Exhibits 3, 4 and 5. In the event, the learned primary judge upheld the respondents' contentions in relation to a number of these representations while rejecting others. The correctness of his Honour's conclusions in this regard occupied a substantial part of the hearing of the appeal. I shall set out his Honour's conclusions in due course.

[18] The Downeys alleged, and the appellant denied, that the making of the representations in Exhibits 3, 4 and 5 was conduct engaged in by the appellant.

[19] The Downeys invoked the provisions of s 51A of the Act in relation to the representations, and asserted that the appellant had no reasonable grounds for making those representations. The Downeys alleged that the appellant had engaged in misleading and deceptive conduct in trade or commerce in contravention of s 52 of the Act. In the alternative, the Downeys contended that SCI engaged in misleading and deceptive conduct in trade or commerce in respect of which conduct the appellant was knowingly concerned within the meaning of s 75B of the Act.

[20] The Downeys alleged, and the appellant denied, that the respondents were induced to purchase their units by the representations referred to above and that, as a result, they suffered loss. This issue of reliance has, thus far, been resolved only in the action brought by Mr and Mrs Downey.

[21] The Downeys' contract for the acquisition of their unit was signed on 27 November 1997 and settled on 22 November 1999.

[22] In February 2000, 570 QSM failed to pay the rental due under its lease with the Downeys. On 15 March 2000, a provisional liquidator was appointed to the vendor and 570 QSM and, on 16 March 2000, a receiver and manager was appointed to the vendor and 570 QSM.

[23] The appellant denied that it engaged in, or was knowingly concerned in, any conduct in contravention of s 52 of the Act. It also advanced a number of alternative grounds of defence. In this regard, it contended that it had reasonable grounds for making the representations in that:

(a) it had executed a hotel management agreement in respect of the proposed development on 16 September 1997;

(b) the association of the proposed development with the appellant was likely to benefit the development because of Radisson's reputation for being associated with hotels of high quality;

(c) to the extent that the representations concerned the future feasibility or profitability of the proposed development, in or about May 1997, the appellant calculated preliminary forecasts for the operation of the proposed development as a hotel;

(d) to the extent that the representations concerned the future availability to the respondents of a seven per cent per annum rental guarantee for five years, the units were being sold on the basis that the units would be leased to 570 QSM on those terms.

[24] The appellant also contended that any potential for Exhibits 3, 4 and 5 to mislead or deceive was neutralised by express disclaimers in the documents. I will set out the terms of these disclaimers in due course.

[25] Further in this regard, the appellant relies upon the fact that the respondents, before entering into their contract for the purchase of their unit, signed a document entitled "Acknowledgment" contained within a disclosure statement included with the contract documents, which stated:

> "**ARRANGEMENTS WITH RADISSON HOTELS PTY. LTD.**
> The Serviced Apartments Manager proposes to engage Radisson Hotels Pty. Ltd. ('Radisson') as its Manager to operate the Serviced Apartment/Apartment Hotel Business and to carry out certain of its duties which are stipulated in the Building Management Agreement and the Letting & Liquor Licence Agreement. Notwithstanding any delegation of authority to Radisson, the Serviced Apartment Manager will remain primarily responsible for the obligations of the Building Manager in the Building Management Agreement and to the owners of Lots in relation to the terms of a Serviced Apartment lease. The Serviced Apartment Manager is entitled either before or after the date of completion of the Contract to appoint a suitably qualified Serviced Apartment/Apartment Hotel Operator as its manager in lieu of Radisson if Radisson fails to proceed with the proposed management arrangements with the Serviced Apartment Manager. Although this is not contemplated by the Serviced Apartment Manager, should this occur the Serviced Apartment Manager will inform the Purchaser of the change of management arrangements.
>
> …
>
> 6.2 **Acknowledgment by Purchaser**
> The Purchaser has read and understands all of these matters and agrees to enter into the Contract upon this basis."

[26] Finally, the appellant also contended that the respondents' claims were barred by the effluxion of time under s 82(2) of the Act.

The judgment below

[27] It should be noted at this point that all of the respondents in Appeals numbered 8853-8861 of 2004 agreed to the determination of questions by the learned trial judge dealing with representations made by Exhibit 3. Mr Goschnick, Mr Prentice and Mr and Mrs Hale also agreed to the determination of questions concerning Exhibit 4.[3] Only Mr Goschnick and Mr Jensen agreed to questions concerning Exhibit 5.[4] The questions agreed to concerning Exhibit 3 and 4 were the same. They are adequately addressed in the discussion of the issues agitated in the appeal involving the Downeys. There is one important difference about the questions agreed to concerning Exhibit 5 in the matters involving Mr Goschnick and Mr Jensen. That is a matter to which I shall return when it becomes relevant.

[28] The materials before the learned trial judge consisted of the pleadings, evidence from the Downeys and documentary evidence including documents disclosed by the appellant. No employees or agents of the appellant gave evidence at trial. His Honour resolved most, but not all, issues in favour of the respondents. It will be necessary to refer in some further detail to the learned primary judge's reasoning in the course of discussing the appellant's arguments in this Court; but, at this point, it is sufficient to note the bare bones of his Honour's conclusions in relation to the matters in issue in order to set the scene for a consideration of the arguments agitated in this Court.

[29] The learned trial judge found that:

(a) the advertising material made the following representations to investors who read it:

(i) the units would be a good investment by reason of their association with the appellant;[5]

(ii) the appellant considered the investment to be a guaranteed success;[6]

(iii) potential investors could rely on the appellant's opinion as to the quality of the investment in deciding to invest;[7]

(iv) a purchaser of an apartment who leased the apartment to 570 QSM was assured of receiving rental which would amount to seven per cent per annum net for five years reviewed to CPI;[8]

(v) an investment comprising the purchase of the apartment and the lease of it to 570 QSM would be self-funding and produce a positive cash flow from the date of purchase, provided the purchaser met the appropriate profile and the transaction was funded in the specified way;[9]

(vi) an investor purchasing an apartment and leasing it to 570 QSM would receive the amount of $178 "in the pocket"

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3 The respondents in Appeals numbered 8853, 8859 and 8854 of 2004.

4 The respondents in Appeals numbered 8853 and 8856 of 2004.

5 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [13].

6 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [15].

7 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [17].

8 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [26].

9 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [27].

each week, provided the purchaser met the appropriate profile and the transaction was funded in the specified way, but only during the first year;[10]

(b) by approving of the content of Exhibit 3, its provision to potential purchasers and its use in the promotion of the proposed development, the applicant engaged in conduct within the meaning of that term in s 52 of the Act;[11]

(c) that conduct was misleading or deceptive or likely to mislead or deceive within the meaning of those terms in s 52 of the Act;[12]

(d) in the alternative to (c), the appellant was a party knowingly concerned in a contravention by SCI within the meaning of those terms in s 75B of the Act;[13]

(e) each respondent's claim is not barred by s 82(2) of the Act.[14]

[30] In relation to the claim by Mr and Mrs Downey, the learned trial judge also found:

(a) that they entered into the contract for the purchase of the unit in reliance upon the appellant's misleading and deceptive conduct;[15]

(b) that they had suffered loss as a result of so doing;

(c) that the damages payable by way of compensation for that loss should be assessed at $125,419, inclusive of interest.[16]

The issues on appeal

[31] The appellant challenges the learned primary judge's conclusions in a number of respects. They may be summarised as follows:

(a) the appellant did not itself engage in conduct within the meaning of s 52 of the Act;

(b) it was not a person knowingly concerned in the conduct of SCI within the meaning of s 75B of the Act;

(c) the brochures did not convey a representation that the appellant considered the investment being offered to be a guaranteed success;

(d) the brochures did not represent that it was Radisson which was offering the rental guarantee;

(e) the brochures did not convey a representation that, by reason of the association with the appellant, the units would be a good investment;

(f) the brochures did not convey a representation that potential investors could rely on the appellant's opinion as to the quality of the investment in deciding to invest;

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10 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [28].

11 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [50] - [53].

12 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [66] and at [70] - [72].

13 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [105].

14 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [128].

15 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [79].

16 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [132].

(g) that the representations as to "seven per cent guaranteed return", "self-funding investment" and "in the pocket" return to investors were not misleading or deceptive.

[32] It will be seen that the appellant does not challenge his Honour's conclusion that the respondents' claims were not statute barred or his Honour's conclusions on causation or the quantification of the damages payable to the Downeys. Reliance was, however, in issue. I turn now to deal with the issues raised on appeal by the appellant.

The appellant's conduct

[33] The respondents contended that the conduct in which the appellant engaged included the making of the representations conveyed in Exhibits 3, 4 and 5 because the appellant authorized SCI to publish the documents to potential purchasers. The appellant, in its written submissions and oral submissions in chief, argued that the respondents could not rely upon s 84(2) of the Act to establish that the advertising material was published by SCI "on behalf of" the appellant. In the appellant's oral submissions in reply, the appellant suggested, for the first time, that s 84(2) had nothing to do with the case because the respondents had not pleaded their reliance upon it.

[34] The appellant accepted that it authorised the inclusion of some statements in the brochures and advertisement, but not their actual publication, and urged that his Honour erred in concluding that the appellant had engaged in the making of any representations to the respondents to whom the advertising material was actually published. The appellant contended that any liability on the part of the appellant to the respondents arises, if at all, only pursuant to s 75B of the Act by reason of the appellant's having been knowingly concerned in the making of the representations by SCI.

[35] While the appellant argues that in this case s 75B of the Act does not operate to render the appellant liable as an accessory of SCI, it is clear that significant advantages for the appellant would flow from the conclusion that the appellant's liability arose only by reason of the operation of s 75B. The most important of these is that, in order to establish the appellant's liability as an accessory of SCI via s 75B, the respondents would have to show a contravention by SCI and that the appellant actually knew of the facts which gave rise to the contravention by SCI.[17] Further, there is the point that the reversal of the evidentiary onus effected by s 51A(2) does not apply where accessorial liability is alleged under s 75B.[18] Where liability is alleged under s 75B, it is the plaintiff who bears the onus of showing that the respondent had actual knowledge that a representation was made by a corporation, that it was misleading and that the corporation had no reasonable grounds for making it.[19]

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17 *Yorke v Lucas* (1985) 158 CLR 661 at 667.

18 *Australian Competition and Consumer Commission v Universal Sports Challenge Pty Ltd* [2002] FCA 1276; N274 of 2002, 23 October 2002 at [43 - [45]; *Quinlivan v Australian Competition and Consumer Commission* [2004] FCAFC 175 at [11] - [13]; (2004) ATPR 42-010 at 48,843.

19 *Australian Competition and Consumer Commission v Michigan Group Pty Ltd* [2002] FCA 1439; Q105 of 2000, 26 November 2000 at [303]; *Quinlivan v Australian Competition and Consumer Commission* [2004] FCAFC 175 at [15]; (2004) ATPR 42-010 at 48,844.

Did the appellant engage in making representations?

[36] The learned primary judge held that the appellant had, and exercised, the capacity to control the content of the advertising material. The appellant argues that its capacity for control arose only because the hotel management agreement between the appellant and the vendor required the developer to obtain the appellant's consent to the content of any marketing material which used the Radisson name and logo. The appellant says that this gave the appellant a right of veto but not the power to dictate what was included in the advertising material or to cause this material to be distributed to potential purchasers. Even though changes, and indeed material changes, were proposed by the appellant and adopted by SCI as the vendor's marketing agent, it was SCI which decided whether any advertising material would be published. The appellant could not require it to publish any advertising material. There is no evidence that the appellant requested SCI to publish the advertising material. To permit publication, so the appellant argues, is not to cause publication to occur.

[37] The appellant contends that the learned primary judge's approach, as indicated by the following proposition:

> "Arming another with the capacity to make a particular representation to a third party, knowing that there is an intention to make that representation, can in my opinion amount to conduct for the purposes of s 52 of the *Trade Practices Act*."[20]

is in conflict with the decision of the Full Court of the Federal Court in *Cassidy v Saatchi & Saatchi Australia Pty Ltd*.[21]

[38] In that case Saatchi & Saatchi, an advertising agency, had been engaged by the NRMA, an insurance company, to develop a series of advertisements to be approved and published by the NRMA. The advertisements contained material which both the NRMA and Saatchi later admitted was misleading for the purposes of s 12DA(1) of the *Australian Securities and Investments Commission Act* 2001 (Cth) ("the ASIC Act"). That section is materially identical to s 52(1) of the Act. The NRMA consented to declarations that it had breached s 12DA. Saatchi & Saatchi disputed liability, however, on the basis that the advertising agency had not actually made the misleading representations. It was also submitted that Saatchi & Saatchi should not be taken to have done so purely as a result of its involvement in the preparation of the advertisements.

[39] The Full Court of the Federal Court held that Saatchi & Saatchi did not make representations to the public by preparing advertisements and providing them to NRMA expecting that NRMA would publish them or knowing that it was the natural and probable consequence of their preparation that they would be published.[22] In this regard, the Court rejected the claimant's attempt to draw an analogy with liability at common law for the publication of defamatory material.[23] The Full Court affirmed the reasoning of the learned trial judge that the presence of accessorial liability provisions such as s 12GD of the ASIC Act and s 75B of the Act in the statutory scheme leaves no room for the operation of common law

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20 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [48].

21 [2004] FCAFC 34; [2004] 134 FCR 585.

22 [2004] FCAFC 34 at [29] - [40]; (2004) 134 FCR 585 at 591 - 593.

23 *Cassidy v Saatchi & Saatchi Australia Pty Ltd* [2004] FCAFC 34 at [29] - [35] and [58] - [59]; (2004) 134 FCR 585 at 591 - 592 and 597. Cf *Webb v Block* (1928) 41 CLR 331 at 363 - 366.

principles of ancillary liability.[24] It is not necessary, for present purposes, to call the correctness of that view into question.

[40] More relevant to the disposition of this appeal is the consideration given by the Full Federal Court to whether the representations made in the NRMA advertisements could be said to have been made directly by Saatchi & Saatchi. It is apparent that both the learned trial judge and the Full Court regarded the question of who engaged in the making of the representations contained in the advertisements as a question of fact to be decided by considering the form and content of the advertisement to ascertain whether, in all the circumstances, the advertisement could convey to the relevant section of the public that representations were being made by Saatchi & Saatchi.[25] In this regard, the role of Saatchi & Saatchi in the preparation of the advertisements, the prominence of Saatchi & Saatchi's name and identification number as displayed on the advertisements and the terms of the advertisements were all matters that were considered to be relevant. The conclusion reached, both at first instance and on appeal, was that there was nothing to suggest Saatchi & Saatchi had adopted the representations that were made or that anyone other than the NRMA could be thought to have made the misleading representations contained in the advertisements.[26]

[41] In this case, the appellant adopted the representations which were made in the advertising material for the purpose of dissemination. It is true that, taken in abstract, the proposition applied by the learned trial judge in this case does not sit easily with the result in *Saatchi* where the advertising agency that knowingly prepared material to allow its client to make certain representations was found not to be liable for contravening s 52. In context, however, it should be noted that the passage in the learned trial judge's reasons cited in [37] above was preceded by the statement that:

> "… the conduct alleged to be in breach of s 52 by way of a representation does not necessarily have to be a representation directly by the defendant to the plaintiff."

Taking that statement together with the reasons which followed, it is clear that what his Honour was suggesting was that the conduct in which the appellant engaged was providing SCI with the capacity to convey information to third parties **about the appellant's own opinions and expectations**.

[42] That view of the facts is not in any way inconsistent with the reasoning in *Saatchi*. There the advertisements prepared for the NRMA could not be seen to convey any representations on behalf of the advertising agency. Unlike *Saatchi*, the learned primary judge here was dealing with a situation where, as his Honour found, the advertising material in question did convey representations about the appellant's own views of the project and its prospects as the appellant agreed it would.[27]

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24 *Cassidy v NRMA Health Pty Ltd* [2002] FCA 1228 at [71] - [74]; (2002) ATPR 41-891 at 45,242.

25 *Cassidy v Saatchi & Saatchi Australia Pty Ltd* [2004] FCAFC 34 at [40] and [63] - [64]; (2004) 134 FCR 585 at 593 and 598 - 599; *Cassidy v NRMA Health Pty Ltd* [2002] FCA 1228 at [31]; (2002) ATPR 41-891 at 45,236.

26 *Cassidy v Saatchi & Saatchi Australia Pty Ltd* [2004] FCAFC 34 at [28] and [65]; (2004) 134 FCR 585 at 591 and 599; *Cassidy v NRMA Health Pty Ltd* [2002] FCA 1228 at [32]; (2002) ATPR 41-891 at 45,236.

27 See, eg, *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [15] and [17].

Those findings of fact, which, in my respectful opinion, were correct, support the conclusion that representations were made by the appellant.

[43] His Honour's consideration of this issue was not informed solely by the proposition specifically attacked by the appellant. Having stated that proposition, his Honour went on to say:

> "There is also the consideration that the [appellant] allowed the marketer to associate the project with the Radisson name, in particular in these brochures, thus conferring on the project and the contents of the brochures an aura of respectability that they did not deserve. This added credibility to the brochures, by association with a prominent and respectable company. Even though the brochures may not have gone so far as to say that [the appellant] was guaranteeing the return which was such a prominent feature of the marketing programme the association with [the appellant] would have added credibility to this guarantee, particularly in the eyes of unsophisticated investors. This was something which in a practical sense the defendant contributed to the brochures, and in that way became a significant part of the process by which buyers such as the plaintiffs came to be misled. In my opinion it was an important feature of the [appellant's] conduct in approving the brochures that this associated the Radisson name with the representations they contained."[28]

[44] There is another feature that distinguishes this case from *Saatchi*, which has since been described by Mansfield J, who was a member of the Full Court who decided the case, as:

> "An illustration of circumstances where an advertising agent created a misleading advertisement but, on the particular facts, was not found to have engaged in misleading conduct where it had no role in its publication …"[29]

In this case, the learned trial judge found that the appellant had a role in the publication in that it had capacity to control what information was to be published on its behalf and exercised that capacity.[30] The usage of the appellant's official commercial insignia and the terms of the material, especially in Exhibit 3, conveyed what was presented as being the actual views of the appellant. The statements about the appellant's views of the prospects of the development were made with its authority. In this way the advertising material did convey that the representations were made by the appellant in the relevant sense despite the role of SCI as an intermediary.

[45] This approach draws some support from the reasons of French J in *Gardam v George Wills & Co Ltd*[31] where his Honour discussed what amounts to "making a representation". His Honour said:

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28 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [49].

29 *Guglielman v Trescowthick* [2004] FCA 326 at [76]; (2004) ATPR 41-995 at 48,650.

30 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [49] - [51].

31 (1988) 82 ALR 415 at 427.

> "The innocent carriage of a false representation from one person to another in circumstances where the carrier is and is seen to be a mere conduit, does not involve him in making that representation.
>
> … When, however, a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation. It will be a question of fact in each case, but in my opinion the wholesaler who resells goods labelled without attribution of authorship can be taken in ordinary circumstances to adopt the text of those labels."

[46] This approach is directly supported by that taken by the Full Court of the Federal Court in *Barton v Croner Trading Pty Ltd*[32] where it was held that a party will be responsible for representations made to consumers via a third party when that third party is no more than a "convenient medium" or serves only as a "vehicle of communication with the public". In *Barton v Croner Trading Pty Ltd*, the defendant was a wholesale supplier of toys to Woolworths. The toys had a label attached which contained representations. The question was whether the wholesale supplier made representations proscribed by s 53(a) and (c) of the *Trade Practices Act* in relation to toys offered for sale to the public by Woolworths. The Full Court of the Federal Court said:

> "In our opinion, the defendant is correct in its submission that no agency relationship subsisted between it and Woolworths (see *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652-653): their relationship was that of wholesale distributor and retailer of the goods respectively. It was thus primarily a transaction involving the sale of goods rather than agency, although it is possible that a marketing agreement of a more general application could also have come into existence (see *Prints for Pleasure Ltd v Oswald-Sealy (Overseas) Ltd* [1968] 3 NSWR 761). But, even if the absence of a relationship of principal and agent means that the defendant cannot be vicariously responsible for the actions of Woolworths, it does not necessarily follow that the display of the goods by Woolworths was not part of a matrix of facts which, when taken together, constitute a representation on the part of the defendant of the kind now charged against it.
>
> In our opinion, the determination of the question whether any, and, if so, when a representation of the kind proscribed by s 53(a) or (c) has been made is essentially one of fact. In a case such as this, it is possible that a number of representations as to the goods will be made to a number of persons by the wholesale distributor: he may make representations to the reseller on their wholesale acquisition, although no charge is made here on this account; and he may make representations to the ultimate purchaser even if, as a matter of contract, that purchaser deals only with the retailer. In our opinion, there is no reason of principle, derived from the construction of the statute or otherwise, why the defendant may not be liable for contraventions of s 53(a) and (c) in the event that it be established that it made representations of the proscribed kind to prospective

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[32] (1984) 3 FCR 95. See also *Cat Media Pty Ltd v McCoy* [2000] SASC 193; SCGRG-99-501, 30 June 2000 at [16].

retail purchasers, even if it were also previously engaged in a transaction with Woolworths for the sale by wholesale of those goods and whether or not it made similar representations to Woolworths: the question is whether the defendant made a representation to prospective purchasers by means of the label affixed to the goods upon the occasion when Woolworths displayed them for sale. In this connection, the circumstance that Woolworths may be making a concurrent representation to the same effect is, in our view, irrelevant to the question whether the defendant made such a representation. This is not to say that, ultimately, the position under the Act of Woolworths would be the same as that of the defendant: for example Woolworths may have the benefit of a defence under s 85(4) of the Act.

In our opinion, when the conduct of the defendant is looked at as a whole and all the surrounding circumstances are taken into account, the statements made in the labels affixed by the defendant to the goods displayed for sale to the public by Woolworths can properly be treated as representations made by the defendant at that point of time. We see nothing artificial or oppressive in such a result: it was the very thing the defendant wished to happen.

It is true, as the defendant submits, that the prospective purchaser never made any direct contact with the defendant. It may also be accepted, for present purposes, as the defendant contends, that Woolworths was at liberty to do what it liked with the goods and that the defendant had no control over Woolworths in this respect. It is also true, as the defendant argues, that the defendant cannot be held vicariously liable for the actions of Woolworths: the parties were at arm's length, there was no joint enterprise between them and the defendant had no claim to share in any part of the proceeds of sale of the goods by Woolworths. Nonetheless, the surrounding circumstances indicate that the defendant was seeking to implement a scheme for the marketing of the goods, a central feature of which was the display for sale to the public of goods bearing labels intended to be read by the public. The defendant required a retail outlet to market its product, and Woolworths, by assuming that role in the defendant's marketing plan, acted as an intermediary between the defendant and the ultimate purchasers.

In this sense, the defendant's conduct may be seen as the projection by it of the goods into the course of trade accompanied by representations as to their history, standard and sponsorship, intended for publication, not to its retail outlet, Woolworths, or some other reseller, but to potential purchasers in the form of members of the public who might be expected to see the labels on display with the goods at the retail outlet. In this sense also, the position of Woolworths may be seen, not as the agent of the defendant in any strict sense, but rather as a convenient medium through which the defendant chose to pass its message - as a channel for communication between the defendant and consumers, the class of persons primarily intended to be protected by s 53. We think that representations made under these circumstances may properly be characterised as a representation of the kind contemplated by s 53(a)

> and (c) and that such representations should be regarded as having been made whenever they are communicated to consumers. In the present case, since Woolworths was chosen by the defendant as its vehicle for the purpose of communicating with the public, the representations in question should be regarded as having occurred whenever Woolworths offered the goods to the public for sale."[33]

[47] The appellant submits that SCI cannot be seen as "a convenient medium" whereby the appellant communicated with the public because the brochures read as statements made by SCI and the appellant is only referred to in the third person. It may be true that the appellant is referred to in the third person; but it is also the case that SCI is not identified as the author or publisher (as opposed to the marketer of the project) and that neither SCI nor the developer speak in the first person. More importantly, the references made about the appellant are to views that the appellant had expressed. What is said on p 12 of Exhibit 3 serves to illustrate this point. After several introductory paragraphs establishing the appellant's expertise as an operator of upmarket hotels that is looking to "take advantage of outstanding opportunities in Australia", it is stated that "the guaranteed success of such a centrally located and magnificently appointed complex … has propelled [the appellant's] decision to enter into a Hotel Management agreement". This clearly conveys the appellant's apparent reasons for deciding to become involved in the project. It is not as if the passage could sensibly be read as mere speculation on the part of the author as to why the appellant had chosen to become involved.

[48] Further, it was submitted that the appellant's approval of the documents was given only in the context of protecting the goodwill in its name and logo. The difficulty with this submission is that the obvious reason for wanting to protect the goodwill in the appellant's name and logo is to prevent either of them being associated with content in the brochure that the appellant did not actually endorse. It is this authorized association that the appellant now seeks to deny. The presence of the official name and logo of the appellant means that a reader of the advertising material was entitled to conclude that the information about the reasons for the appellant's involvement in the project presented in the material was a statement of the appellant's actual reasons for its involvement. As in *Barton v Croner Trading Pty Ltd*, the publication of the material was merely providing the means for the appellant to communicate its own message to prospective consumers.

[49] In my opinion, the learned primary judge was correct to conclude that the appellant would be regarded by those to whom the advertising material was published as having adopted the representations conveyed thereby.

[50] The appellant also seeks to rely upon the decision of the High Court in *Butcher v Lachlan Elder Realty Pty Ltd*[34] to support its submission. In my respectful opinion that reliance is misplaced.

[51] In *Butcher v Lachlan Elder Realty Pty Ltd*[35] Gleeson CJ, Hayne and Heydon JJ said:

> "[38] *The relevant principles.* In *Yorke v Lucas*, Mason ACJ, Wilson, Deane and Dawson JJ said that a corporation could contravene s 52 even though it acted honestly and reasonably:

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33 (1984) 3 FCR 95 at 106 - 107 (citations in original).

34 *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 212 ALR 357.

35 [2004] HCA 60 at [38] - [40]; (2004) 212 ALR 357 at 367.

> 'That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false. 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 it its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive.'
>
> [39] In applying those principles, it is important that the agent's conduct be viewed as a whole. It is not right to characterise the problem as one of analysing the effect of its 'conduct' divorced from 'disclaimers' about that 'conduct' and divorced from other circumstances which might qualify its character. Everything relevant the agent did up to the time when the purchasers contracted to buy the Rednal land must be taken into account. It is also important to remember that the relevant question must not be reduced to a crude inquiry: 'Did the agent realise the purchasers were relying on the diagram?' To do that would be impermissibly to dilute the strict liability which s 52 imposes.
>
> [40] For the following reasons, the agent did not engage in conduct towards the purchasers which was misleading. Whatever representation the vendor made to the purchasers by authorising the agent to issue the brochure, it was not made by the agent to the purchasers. The agent did no more than communicate what the vendor was representing, without adopting it or endorsing it. That conclusion flows from the nature of the parties, the character of the transaction contemplated, and the contents of the brochure itself."

[52] In the same case, McHugh J, who dissented as to the outcome of the case, expressed similar views on this issue. His Honour said:[36]

> "[109] The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself. It invites error to look at isolated parts of the corporation's conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct. Thus, where the alleged contravention of s 52 relates primarily to a document, the effect of the document must be examined in the context of the evidence as a whole. The court is not confined to examining the document in isolation. It must have regard to all the conduct of the corporation in relation to the document including the preparation and distribution of the document and any statement, action, silence or inaction in connection with the document."

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[36] *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 at [109]; (2004) 212 ALR 357 at 383 - 384.

[53] In my respectful opinion, the fundamental error in the appellant's attempt to rely upon *Butcher v Lachlan Elder Realty* lies in its failure to recognise that the advertising material which the appellant had approved was directed to promoting the Radisson Suites project expressly by reference to the appellant's own views. The appellant's argument focusses narrowly on the purpose of the developer and marketer in relation to the publication of the advertising material as part of a campaign to sell units in the complex, and says that the appellant was not selling the units. But to say this is not to say the appellant had no interest in the promotion. While the appellant was not the marketer or the developer, it had a real interest in the success of the promotion of the project in which it was integrally involved. It approved the publication of what purported to be its views about the project. For these reasons the appellant's submission on this point should be rejected.

Liability under s 84(2) of the Act

[54] Even if the conduct in question was engaged in by SCI, rather than by the appellant or by both of them, in my opinion, the respondents were entitled to succeed on this issue by reason of s 84(2) of the Act. Section 84(2) of the Act deems certain conduct "to have been engaged in also by the body corporate" so that conduct by another person with the consent of an employee of the body corporate becomes its conduct where the act constituting the conduct is done "on behalf of" the body corporate.[37]

[55] The appellant has submitted that the correct interpretation of "on behalf of" is that given to the phrase by Lindgren J in *NMFM Property Pty Ltd v Citibank Ltd (No 10)* where his Honour stated that:

> "It seems to me that an act is done 'on behalf of' a corporation for the purpose of s 84(2) if either one of two conditions is satisfied: that the actor engaged in the conduct intending to do so 'as representative of' or 'for' the corporation, or that the actor engaged in the conduct in the course of the corporation's business, affairs or activities."[38]

The appellant then goes on to assert that SCI did not publish the brochures "as representative of" or "for" the appellant. There are, in my respectful opinion, two reasons for rejecting the appellant's assertion. First, it should be remembered that Lindgren J recognised that this definition could not be exhaustive. Before reaching this passage, his Honour had referred to previous decisions, such as *Walplan Pty Ltd v Wallace*,[39] where it had been noted that:

> "The phrase 'on behalf of'' is not one with a strict legal meaning and it is used in a wide range of relationships. The words are not used in any definitive sense capable of general application to all circumstances which may arise and to which the sub-section has application. This must depend upon the circumstances of the particular case …"

The wide range of relationships to which the phrase is applicable are those that are "in some way concerned with the standing of one person as auxiliary to or representative of another person or thing".[40]

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37 *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719 at 740.

38 [2000] FCA 1558 at [1244]; (2000) 107 FCR 270 at 550.

39 (1985) 8 FCR 27 at 37.

40 *The Queen v Toohey; ex parte Attorney-General (NT)* (1980) 145 CLR 374 at 386. This principle is of continuing validity: see also *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719 at 739 - 740 and *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* [2004] FCA 1678; V315 of 2002, 17 December 2004 at [101].

[56] Whether or not the appellant made representations directly, it is not open to doubt that SCI purported to communicate the appellant's views as to the prospects of the project. SCI held itself out, with the appellant's approval, as representing of the appellant's views. This is enough, in my view, to engage the operation of s 84(2) of the Act.

[57] Secondly, in terms of the exegesis by Lindgren J, in this case SCI was acting on behalf of the appellant in that SCI engaged in the publication of the advertising material "in the course of" the appellant's business, affairs or activities having regard to the evident intention of the appellant to act as hotel manager of the Radisson Suites.

[58] The appellant submits that because the appellant was not itself in the business of marketing units in the proposed development, it cannot be said that the advertisements were published "on behalf" of the appellant for the purposes of s 84(2) of the Act. In my respectful opinion, that submission once again takes too narrow a view of the business of the appellant and its interest in relation to the successful marketing of the Radisson Suites project. To say that the selling of the units was not part of the appellant's business is not to say that aspects of the appellant's business were not promoted by the advertising material.

[59] An act is done "on behalf of" a corporation for the purposes of s 84(2) of the Act if the actor "engaged in the conduct in the course of the corporation's business, affairs or activities".[41] It may be accepted that the appellant is not in the business of marketing units; but it is in the business of operating hotels including, by its own admission, suite hotels; and it intended to operate a hotel in the complex.

[60] The promotion of the Radisson Suites development of which the appellant was to be the hotel manager was indisputably a promotion of the appellant's own business having regard to its active participation in a promotion the success of which was important in relation to its proposed role as hotel manager. Further, the evidence showed that the appellant identified the Radisson Suites project as calculated to advance its wish to re-establish its presence in the Brisbane hotel market. That being so, it seems to me that, whatever the position otherwise, s 84(2) operated to deem the publication of the advertising material as conduct engaged in by the appellant.[42]

[61] The appellant, in its oral submissions in reply, argued that it was not open to the respondents to rely upon s 84(2) because they had not pleaded a case based on its provisions. This was surprising, given that the appellant, in both its written and oral submissions in chief, had argued that s 84(2) of the Act, while available, did not operate to make the appellant liable in this case. Indeed, the appellant stated as much at [11] of its written submissions in chief where it was asserted that:

> "The trial judge ought to have approached this issue by asking whether the conduct of [SCI] was to be treated as the conduct of [the appellant] either by reference to common law principles of agency or by reference to s 84(2)".

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41 See *NMFM Property Pty Ltd v Citibank Ltd (No 10)* [2000] FCA 1558 at [1244]; (2000) 107 FCR 270 at 550.

42 *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719 at 740.

As I have noted, the appellant did not argue that the respondents were not entitled to rely upon s 84(2) even if it were applicable according to its true construction until its oral submissions in reply.

[62] While it is true that the respondents did not, in their pleadings, expressly invoke the deeming provision of s 84(2), they did plead that the appellant:

> (a) carried on business which included the operation of hotels and apartments;
>
> (b) promoted the 'Radisson' name insofar as it was associated with hotels and accommodation as having integrity and possessing goodwill;
>
> (c) knew that Exhibit 3 would:
>
> (i) utilize the appellant's name and the goodwill associated therewith;
>
> (ii) utilize the appellant's name and reputation for the purpose of inducing potential investors to purchase units;
>
> (iii) contain the representations referred to therein;
>
> (d) approved of, and consented to, Exhibit 3;
>
> (e) knew or ought to have known that Exhibit 3 would be provided to potential purchasers in order to promote the sale of units in the Radisson Suites development;
>
> (f) approved of the content and authorized the use of Exhibits 3, 4 and 5 and the provision thereof to potential purchasers and in promotion of the project.

The only allegation wanting from a full pleading of facts necessary to make a case under s 84(2) is an express allegation that the appellant was acting in the course of its business in approving the use of the advertising material and its provision to potential purchasers. That allegation was, in my view, implicit in what was pleaded. There is no prejudice to the appellant in this Court having regard to s 84(2). That this is so is confirmed by the appellant's conduct of the appeal up to its oral submissions in reply. In my view, the respondents would be entitled to rely upon s 84(2) to sustain the judgment in their favour if it were necessary to do so.

The appellant's representations

[63] I turn now to a consideration of the appellant's arguments in relation to the representations which were held to have been conveyed by the advertising material.

[64] The appellant's attack on the learned primary judge's conclusions as to the specific representations conveyed by the advertising material Exhibits 3, 4 and 5 begins with a number of general criticisms of his Honour's approach. First, it is said that his Honour did not consider the effect of the three brochures taken together. That argument is hardly fair to the learned trial judge who expressly accepted that it was "necessary to look at the whole of the documents, and to read them by reference to the particular section of the public to which they were addressed".[43]

[65] Next it was said that his Honour wrongly identified the class of persons targeted by the advertising material as "people who were gullible". It is to be noted that, contrary to the appellant's submission, his Honour distinctly did not find that the advertising material was targeted at a class of "people who were gullible". In truth,

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[43] *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [83].

his Honour held that the advertising was directed at ordinary readers who were not sophisticated investors and who were not likely to read the material with a close and rigorous scepticism. What the learned primary judge actually said in this regard should be set out in full. His Honour said:

> "I accept that it is necessary to look at the whole of the documents, and to read them by reference to the particular section of the public to whom they were addressed. The marketing process involved holding seminars for providing information as to the advantages of investing in real estate, with reference to negative gearing and other matters. That is likely to attract people who have funds available for investment but who are not experienced investors, particularly not experienced investors in real estate. Experienced investors are not going to be interested in obtaining that sort of information, which they will probably already have. The marketing effort is directed to unsophisticated investors. People who were attracted by this were then seen on a subsequent occasion when there was some opportunity for marketing particular projects, specifically this one. This material was made available to people who appeared to be interested in this project. That would have been inexperienced, unsophisticated investors.
>
> The plaintiffs submitted that the target market was people who were gullible. The marketing submission prepared by the marketers for the developer reveals an expectation that most sales would be to investors rather than owner occupiers. The marketing features recommended included a 'solid guarantee', a 'positive income stream', and a 'Brand Name Manager - investors strongly feel that the experience of the operator will impact on their future income returns and the strength of their guarantee, so you will find that a Brand Name operator will greatly increase the saleability of the units. The strength and credibility of the manager becomes a key selling feature of the project.' (page 22, document 7). There is nothing in particular in this document to suggest targeting the gullible.
>
> Nevertheless there are certainly indications in the publicity material Exhibits 3, 4 and 5 that suggest that they were drafted to target the gullible. The idea of an investment which would pay for itself, so that one could borrow the whole purchase price and have (at least during the first five years) a positive cash flow, certainly sounds too good to be true. If it really was that good, the developer would not have to engage in an expensive marketing campaign to sell these units; they would be snapped up by his friends, and their friends. This is a marketing campaign which is directed to the sort of people who are not going to think that, if it looks too good to be true, it is. An astute reader will note that although there is a good deal of reference to the returns being 'guaranteed' there is no material to identify any basis upon which that guarantee is being provided. It does not unambiguously state who is providing the guarantee, or provide any basis for a conclusion that the guarantee was going to be worth anything. It does suggest that it is Radisson, that is, a Radisson company, that is providing the guarantee, something that an astute reader would realise was unlikely. Certainly it seems to me that the target market for the campaign, and therefore the relevant

> section of the public to whom the representations were directed, was those who were not experienced or sophisticated in matters of investment, particularly investment in real estate, who were not astute, and who were not wary or suspicious of claims being made to them. If that is what is meant by 'gullible', then the target market was the gullible."[44]

[66] It should also be noted his Honour did not make these findings as a foundation for a conclusion that the advertising material would have been understood by the Downeys, or the other respondents, as conveying an impression different from that which was conveyed by that material as a matter of the ordinary meaning of the words used. While the learned primary judge does make reference to there being "indications" that suggest the publicity material was drafted to target the gullible, by the time his Honour came to identify what he saw to be the relevant section of the public, he described that section to include "those who were not experienced or sophisticated in matters of investment … who were not astute, and who were not wary or suspicious of claims being made to them". This goes no further than saying that the relevant section of the public were those people who were interested in investing in property but had little prior experience in doing so and who were likely to take at face value representations made to them by persons of some perceived standing offering opportunities to participate in such investments without subjecting those representations to a wary and suspicious scrutiny.

[67] At this point, I should say that it is not clear to me that, if this Court were to adopt the appellant's approach to the definition of the relevant target class, it would lead to the identification of a target class different from that identified by his Honour. As the appellant asserted in its written submissions, "the marketing was targeting people who already owned their own homes, and were looking to purchase a unit as an investment" and who were "looking for tax effective investments in real estate of the order of $200,000 or more". One would expect that these people would often, or even usually, be people with little or no background in property investment as such. Certainly, the examples given in Exhibit 3 assumed an annual income of $45,000, a figure not usually taken to be indicative of having high levels of disposable income to invest in property.

[68] It was suggested by the appellant, however, that these are the kind of people that could be expected to have access to legal advice and to take that advice before committing to a contract of purchase. A real difficulty with this submission is that there is no evidence that legal advice would have been of much assistance to prospective purchasers. There was nothing suspect about the actual legal mechanics of the sale of the property in question. I am not persuaded that the learned primary judge identified the relevant section of the public as persons who are unusually gullible or that the relevant class that he did identify differs in any material respect from the one that the appellant urges on this Court.

[69] I would add that, to my mind, the description of the target class propounded by the appellant, not only applies to the putative members of the class at which the advertising was found by the learned primary judge to be directed, but also serves as a good description of the Downeys themselves given the evidence that emerged

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[44] *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [83] - [85].

about their circumstances at trial. That may be important so far as the Downeys' case is concerned because, as is apparent from the decisions of the High Court in *Campomar Sociedad Limitada v Nike International Ltd*[45] and *Butcher v Lachlan Elder Realty Pty Ltd*[46] it is only necessary to consider the response of "ordinary" or "reasonable" members of a class of persons to conduct that is alleged to be misleading or deceptive when that conduct is directed to the public at large. That approach has been held to be inappropriate in cases like the Downeys' where:

> "… monetary relief is sought by a plaintiff who alleges that a particular representation was made to identified persons, of whom the plaintiff was one."[47]

In such circumstance the proper approach has been held to involve an inquiry into what "a reasonable person in the position of the [representees], taking into account what they knew, would make of the [representor]'s behaviour".[48]

[70] At this point, I should observe that, in the light of the decisions of the High Court referred to in [69] above, so far as the respondents other than the Downeys are concerned, the absence of evidence of the circumstances of the sale process in which they were involved means that one must approach the issue as to what the advertising material conveyed to them on the footing that they are taken to be ordinary and reasonable readers of the material.

[71] The appellant also seeks to contend that the Downeys did not enter into the contract to purchase the unit in reliance on the appellant's conduct. The appellant submits that the evidence given by Mr and Mrs Downey should be taken to show that they acted unreasonably on the erroneous assumption that it was the appellant which was making the statements contained in the advertising material. In this regard, the appellant also makes the remarkable submission that the appellant could not "reasonably be understood by a reader of the brochure to be endorsing what was said in it." I describe that submission as remarkable because, as the appellant admitted, it did in fact endorse what was said in relation to its participation in, and its views of the prospects of, the Radisson Suites project.

[72] In the first place, it should be made clear that the phrase "erroneous assumption" is not a term of art. As Deane and Fitzgerald JJ observed in *Taco Co of Australia Inc v Taco Bell Pty Ltd*,[49] in a passage quoted with apparent approval by the High Court in *Campomar*,[50] the fact is that "no conduct can mislead or deceive unless the representee labours under some erroneous assumption". The issue is, as the High Court explained in *Campomar*, whether the erroneous assumption is extreme and fanciful or is of a kind that may be attributed to an ordinary or reasonable member of the class of person at whom the allegedly misleading and deceptive conduct is directed.[51] It is therefore necessary to determine the true nature of the erroneous assumption held by the Downeys and then to consider whether or not the holding of this assumption was reasonable.

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45 [2000] HCA 12 at [102]; (2000) 202 CLR 45 at 85.

46 [2004] HCA 60 at [36]; (2004) 212 ALR 357 at 366.

47 *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 at [37]; (2004) 212 ALR 357 at 366.

48 *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 at [50]; (2004) 212 ALR 357 at 370.

49 (1982) 42 ALR 177 at 200.

50 [2000] HCA 12 at [104]; (2000) 202 CLR 45 at 85 - 86.

51 *Campomar Sociedad Limitada v Nike International Ltd* [2000] HCA 12 at [105]; (2000) 202 CLR 45 at 86 - 87.

[73] In my opinion, the fact that Mr and Mrs Downey formed the erroneous impression that the appellant was solely responsible for the production of the advertising material means no more than that they formed an erroneous impression as to the identity of the person or persons who were responsible for putting the adverting material together. That impression was not what induced the Downeys to invest in the project.

[74] The inducement lay in the appellant's prominent appearance in the material, and the evident input of the appellant in its content, and what was conveyed in the appellant's endorsement of the positive views put forward in the advertising material. It is that which was relied upon when the Downeys decided to invest.

[75] The issue then is whether the Downeys' response to the advertising material was reasonable in the circumstances in which they found themselves.[52] In this regard, I would, with respect, adopt the words of Dowsett J (with whom Jacobson and Bennett JJ generally agreed) in *National Exchange Pty Ltd v Australian Securities and Investments Commission*,[53] where his Honour stated that:

> "While it is true that members of a class may differ in personal capacity and experience, that is usually the case whenever a test of reasonableness is applied. Such a test does not necessarily postulate only one reasonable response in the particular circumstances. Frequently, different persons, acting reasonably, will respond in different ways to the same objective circumstances. The test of reasonableness involves the recognition of the boundaries within which reasonable responses will fall, not the identification of a finite number of acceptable reasonable responses."

[76] The type of investment being promoted by the advertising material would obviously benefit from having the appellant involved in the project. The front page of Exhibit 3 carried nothing else but the statement "Because it's Radisson and it is on Queen". The general tenor of this statement, that the appellant had an intimate involvement with all aspects of the project and a positive view of its prospects, is to be found throughout the advertising material.

[77] The appellant submits that a close reading of the advertising material would have dispelled any misconceptions and that the Downeys had the time and, it was submitted it was reasonable to assume, the inclination to undertake a detailed analysis of what was a substantial investment. Reliance is placed upon the terms of the disclaimers that were contained in the advertising material. This submission can only be dealt with in the context of the individual representations that were alleged to have been made. I will consider those particular representations after making two further preliminary observations.

The appropriate level of analysis

[78] One question that must be addressed before embarking on an examination of whether or not the particular representations found are, in truth, made out is what approach should be attributed to a reasonable reader in his or her perusal of the relevant material. In *National Exchange Pty Ltd v Australian Securities and*

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52 *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 at [50] - [51]; (2004) 212 ALR 357 at 370.

53 [2004] FCAFC 90 at [24]; (2004) 49 ACSR 369 at 375 - 376.

Investments Commission[54] the Full Court of the Federal Court found, on the facts of the case, that it was reasonable for a mistaken view about the content of an offer to have been based on only a "general impression" of a document containing an offer for the purchase of small parcels of shares. In *Butcher v Lachlan Elder Realty Pty Ltd*[55] a majority of the High Court held that the importance and brevity of the information contained in the material given to a prospective purchaser of land about the property concerned meant that, particularly when the purchasing process was not being conducted with undue haste or in the absence of the opportunity to obtain independent advice, "reasonable purchasers would have read the whole document".[56]

[79] Here, the proposed investment was substantial and its success or failure would have significant consequences for the Downeys' future financial security. As the appellant also points out, the Downeys' had the material in their possession for three weeks before they decided to proceed with the purchase. Adopting the approach used in *Butcher*, I would accept the appellant's submission that reasonable persons in the position of the Downeys could be expected to have read the whole of the advertising material rather than merely taking a "general impression" of what the project involved. I note in passing that I do not wish to be taken as casting any doubt on the reasoning or the decision in *National Exchange* by reaching this conclusion. Acting on only a "general impression" could be reasonable in the appropriate circumstances. Such an approach is not appropriate here, however, given the facts of this case.

The effect of the disclaimers

[80] An argument made by the appellant in relation to each particular representation in issue on appeal is that the disclaimers contained within the advertising material were sufficient to ensure that it was clear what was being represented and what was not.

[81] In this regard, the appellant submitted that:

(a) the brochure Exhibit 3 contained the following express disclaimers:

(i) under the heading "Radisson Suites Investment Analysis": "no liability will be accepted by [SCI] or any other firm in respect of any action taken as a result of using these figures";

(ii) on the last page under the heading "Guaranteed Net Returns": "Whilst the information inside this publication is believed to be true and correct, the figures and advice supplied are given as a guide only and no responsibility will be taken for any errors or omissions. Savings, projections, pay out terms and benefits will vary according to interest fluctuations, market conditions and a client's individual situation. Specialist taxation or investment advice should be sought.";

(b) the brochure Exhibit 4 contained the following express disclaimers:

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54 *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 90 at [59] and [65]; (2004) 49 ACSR 369 at 382 - 383.

55 [2004] HCA 60; (2004) 212 ALR 357.

56 *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 at [50] and [76]; (2004) 212 ALR 357 at 370 and 376.

(i) under the heading "Radisson Suites Investment Analysis":

> "… no liability will be accepted by [SCI] or any other firm in respect of any action taken using these figures.";

(ii) on the first page the following appeared: "*Refer to Radisson disclaimer on page 4." On p 4, the following appeared: "Guaranteed 7% per annum for 5 years*: … Neither Radisson, its subsidiaries and any of its officers, or any local or overseas affiliates (including Radisson Inc and Carlson Companies) make any representation or give any warranty or guarantee as to the performance of Radisson Suites 570 Queen. Investors should make their own independent assessment as to the likely performance of the hotel/apartment complex, and should note that the predictions and calculations in the future trading performance rely upon a number and variety of anticipated outcomes which may vary significantly depending upon the actual future events and outcomes.";

(c) the advertisement Exhibit 5 contained the following express disclaimer:

> "While the information [SCI] has supplied inside this publication is believed to be true and correct, the figures and advice are given as a guide only and no responsibility will be taken for any errors or omissions. Savings, projections, pay out terms and benefits will vary according to interest fluctuations, market conditions and a client's individual financial situation. Specialist taxation or investment advice should be sought from an Accountant."

[82] Before going any further it is necessary to summarize the applicable legal principles. It is well established that:

> "… exclusionary and disclaimer clauses cannot override the statutory prohibition against misleading and deceptive conduct or prevent the grant of appropriate statutory relief where loss or damage is, as a matter of fact, caused by a contravention of the statute."[57]

[83] It has been recognised, however, that disclaimers can be effective "if the clause actually has the effect of erasing whatever is misleading in the conduct";[58] in other words, if the effect of the disclaimer is to make clear something that, if allowed to remain vague or ambiguous, could have led a person into error. Disclaimers had this effect in *Butcher* where it was held that the effect of reading an entire brochure, including the disclaimers, was to make it clear that the survey report included in the brochure had not been prepared by the producer of the brochure but was simply being passed on without any representations being made as to its truth or falsity.[59] It is apparent that if a disclaimer is to function in this way it must be worded unambiguously, feature prominently and it must be communicated to the reader that

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57 *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191 at 207.

58 *Benlist Pty Ltd v Olivetti Australia Pty Ltd* (1990) ATPR 41-043 at 51,590. See also *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 at 561; *Australian Competition and Consumer Commission v Oceana Commercial Pty Ltd* [2003] FCA 1516; Q232 of 2001, 18 December 2003 at [190].

59 *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 at [50] - [51]; (2004) 212 ALR 357 at 370.

the disclaimer is relevant to the information it is seeking to qualify.[60] As Jacobson and Bennett JJ noted in *National Exchange*:

> "Where the disparity between the primary statement and the true position is great it is necessary for the maker of the statement to draw the attention of the reader to the true position in the clearest possible way."[61]

[84] Because I consider that regard should be had to the entirety of the material provided to the Downeys, as opposed to the "general impression" which that material might have created, I will take the disclaimers contained in the material into account as information to which attention should have been paid. The appellant submits that the disclaimers were designed to make clear exactly what was being promised and what was not. The question to be considered in relation to each of the following representations is whether that is what would actually have been communicated to the careful reader.[62] Once it is determined whether the disclaimers qualified the representations that were actually communicated, it is possible to decide whether or not what was actually communicated was misleading and deceptive. I turn now to consider the representations which are disputed by the appellant.

The representation that the appellant considered the investment a guaranteed success

[85] Page 12 of Exhibit 3 proclaimed the "guaranteed success of such a centrally located and magnificently appointed complex as Radisson Suites, [which] has propelled Radisson's decision to enter into a Hotel Management agreement to operate the $32 million development." The appellant submits that this part of Exhibit 3 was not expressing an opinion as to the likely success of an investment by way of the purchase of a unit off the plan, but was saying no more than that the operation of the hotel would be a guaranteed success.

[86] In my opinion, this submission must be rejected. The passage in Exhibit 3 is speaking of an appreciation on the appellant's part of the prospects of the proposed Radisson Suites development as a whole. That is because it is speaking of "the complex", and of the appellant's assessment of the prospects of the proposed hotel as a manifestation of the "guaranteed success" of such a "complex as Radisson Suites". In this statement the word "complex" is synonymous with "Radisson Suites". As is clear elsewhere in Exhibit 3, the title "Radisson Suites" is meant to embrace both the hotel and residential apartment development. Page 6 of Exhibit 3 defines "Radisson Suites" as a "four star international-standard hotel/apartment complex" while on p 9 it is stated first that "Radisson Suites will offer four star international standard service at rates to suit the most price-aware travellers" before it is stated that "Radisson Suites also makes it possible for you to maximise your rental income without high purchase costs…". This usage is carried through into the other brochures. Page 1 of Exhibit 4 describes the project as "a four star international hotel/luxury apartment complex". On p 1 of Exhibit 5 there are two separate descriptions of the project referring to "Radisson Suites 570 Queen, a … international standard apartment hotel". There are similar references elsewhere in

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60 *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289 at [35] - [38]; (2003) 135 FCR 1 at 17 - 18; *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 at [54] - [55]; (2004) 212 ALR 357 at 370.

61 *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 90 at [55]; (2004) 49 ACSR 369 at 381.

62 *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 at [49]; (2004) 212 ALR 357 at 369.

both Exhibit 4 and Exhibit 5. The use of the term "Radisson Suites" in this manner makes it extremely difficult to interpret the representation made on p 12 of Exhibit 3 as anything other than a reference to the prospects of the Radisson Suites as an integrated whole.

[87] It is not as though there is any reason to assume that both aspects of the development could not be successful. While it certainly can be said that the appellant's particular interest was in the success of the hotel to be operated by it, that does not mean that, speaking objectively, the success of "the complex" as a whole was irrelevant to the success of the hotel. Indeed, the contrary is more likely to be true. Whether or not that be the case, what is said on p 12 does not, in my view, draw any distinction between the appellant's opinions as to the prospects of the hotel and those of the entire development. The reference to "such a … complex as Radisson Suites" cannot be interpreted as referring only to the operation of the hotel. This means that the appellant's other submissions that assume that the reference to the "complex" must be read only as a reference to the hotel must also fail.

[88] The disclaimers contained in the advertising material do not "erase what is misleading" in the statement in Exhibit 3. Unlike the disclaimer contained in Exhibit 4, there is no statement contained in Exhibit 3 that the appellant should not be taken to have made any representation as to the performance of the project. There is also no statement in Exhibit 4, in the same terms as Exhibit 3, which talks about "guaranteed success". The wider disclaimer in Exhibit 4 cannot be understood to apply to Exhibit 3 because of the express limitation contained at its commencement that it concerns " … the information in this publication …". The unqualified representation that is made, therefore, on p 12 of Exhibit 3, is that the appellant considered that the entire project, including both the hotel and the property development, was a "guaranteed success".

[89] It is not to the point to say, as the appellant does, that many market factors, such as supply and demand and movements in interest rates, will bear upon the success of the investment so far as individual investors are concerned. The point made in the passage cited at [85] above is that the appellant, which because of its experience and expertise can be expected to have an appreciation of such matters and especially likely demand for the suites and vacancy rates, regards the complex as so attractive that it will be a success notwithstanding the obvious vagaries of the market place to which the appellant refers. Demand for the suites will meet the appellant's immediate and direct interest in vacancy rates and ensure that the 570 QSM will receive funds from which to meet its guaranteed rental obligations to investors. The important passage in Exhibit 3 is not itself saying that the appellant guarantees the success of the investment, but that the appellant regards the success of the project as an integrated whole as assured. One aspect of that integrated whole was the hotel which the appellant would operate, another aspect was that element of the project concerned with the rental guarantee. The attractions of the complex, and consequent low vacancy rates, were essential to both.

[90] Even if one could read the disclaimer in Exhibit 4 as extending to other publications so as to include this representation in Exhibit 3, the disclaimer in Exhibit 4 is not apt to "erase" the suggestion that the success of the project as a whole was, in the appellant's view, guaranteed. What the disclaimer in Exhibit 4 did was disclaim responsibility on the part of the appellant or its affiliates for the ongoing

performance of the companies associated in the project. It did not disclaim the appellant's view that the complex was a guaranteed success. The appellant's position as conveyed by the entirety of the advertising material can be summed up as follows:

> "We don't promise that the project will succeed, but we ourselves regard it as a guaranteed success, which is why we are associating ourselves with the project."

[91] It is necessary now to deal with the final submission made by the appellant on this issue, which was that the representation about "guaranteed success" was only puffery. As Kenny J has recently noted in *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd*:[63]

> "Whether representations in an advertisement are actionable or merely in the nature of puffery depends on the particular facts, considered 'in the light of the ordinary incidents and character of commercial behaviour'."

[92] The appellant submits that the use of the phrase "guaranteed success" was made in the same vein as other references made in the material to "outstanding opportunities", "magnificently appointed" and "a striking sculptured tower". This submission cannot be accepted. Comments about the aesthetics of the project, which may well be entirely subjective, cannot be compared with a statement that the project will be a "guaranteed success". In the ordinary course of commercial behaviour some results are guaranteed and some are not. The concept of "guaranteeing a result" is not something that is usually associated with puffery but with the making of a firm commitment for which responsibility will be taken. The phrase "guaranteed success" cannot be construed as a puff.

Was the appellant offering the rental guarantee?

[93] The learned primary judge concluded that Exhibits 3, 4, and 5 conveyed that it was the appellant which was offering the rental guarantee. The appellant attacks this conclusion on the basis that the information provided to the respondents, including the contract and associated disclosure documents, shows that the rental guarantee was being provided by a different entity, namely 570 QSM.

[94] In my view the appellant's submission on this point must be accepted unless, contrary to my opinion, it is correct to test the affect of the material by a consideration of the impressions it might make on the gullible. The advertising material read as a whole, taken together with the contract documentation provided to the Downeys, is apt to differentiate the appellant from the vendor and 570 QSM.

[95] On p 9 of Exhibit 3 it is stated that there is a "5 year 7% per annum rental guarantee provided by 570 Queen St Management Pty Ltd" and "Lease your apartment back to 570 Queen St Management Pty Ltd and receive a guaranteed 7% per annum for 5 years". There is a further mention of a "5 year 7% Rental Guarantee" on p 18 but a connection is not made with any person or company.

[96] On p 1 of Exhibit 4 it is said that "Equally confident is the developer, who is offering a nett investment return of 7% per annum for five years, in view of the involvement of an international operator such as Radisson". Earlier in the same

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63 [2004] FCA 1363; V921 of 2003, 22 October 2004 at [122]. See also *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164 at 178.

passage, the developers of the project are identified as "Valco Developments". On p 4 it is stated that "the hotel management company 570 Queen Street Management Pty Ltd is offering investors a 7% per annum guaranteed nett [sic] return for five years" and "Lease your apartment back to 570 Queen St Management Pty Ltd and receive a guaranteed 7% per annum for 5 years". The reference in the top right hand corner to a "7% pa nett guaranteed for 5 years" does not mention who is responsible for providing the claimed return.

[97] On p 1 of Exhibit 5 it is said that "the management company is offering investors a 7% per annum guaranteed net return for 5 years". The other mentions of the rent guarantee made in this exhibit do not state who will be responsible for providing it.

[98] Clause 23 of the contract of sale that was entered into by the Downeys provides that the "Serviced Apartment Manager" is the entity who will be responsible for leasing back apartments and paying the rent owing on them. Clause 45 of the contract defines the "Serviced Apartment Manager" to be 570 QSM.

[99] The references that are made to 570 QSM as the "hotel management company" do create some potential for confusion when combined with the references to the appellant having agreed to "manage" or "operate" the hotel. It appears that it was this that led the learned primary judge to find that 570 QSM would have been considered a company operated by the appellant.[64] In that section on p 2 of Exhibit 4 entitled "One of the world's top hotel operators chooses Brisbane's top hotel/apartment development", however, the appellant's corporate identities are described as "Radisson Hotels Pty Limited (Radisson)" and "Radisson Hotels International Inc". It is not suggested that 570 QSM has a corporate connection with the appellant. And in those parts of the advertising material, such as Exhibit 4, when the role of the appellant and its corporate associates is discussed, there is no suggestion that 570 QSM is an associate of the appellant, or that a corporate associate of the appellant is giving the rental guarantee. Furthermore, cl 4 of the disclosure statement attached to the contract of sale, which was also signed by the Downeys, makes clear that it is the Serviced Apartment Manager who is engaging one of the appellant's companies to operate the Serviced Apartment business.

[100] It is necessary to pause for a moment to consider an issue relating to the questions answered in the other appeals. His Honour concluded that two specific representations alleged to be contained within Exhibit 5, which were that it was the appellant who would manage the proposed development and that it was the management company that would provide the rental guarantee, were made out.[65] These representations were only made the subject of questions answered in the matters of Mr Goschnick and Mr Jensen where questions 2(a) and 2(b) were asked and answered as follows:

> "2. Whether by Exhibit 5, Southern Cross represented that:
>
> (a) the defendant would manage the proposed development.
>
> Answer: Yes

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64 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [25].

65 *Downer & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [41] - [43].

> (b) the management company was offering investors a seven percent per annum guaranteed net return for five years.
> Answer: Yes."

[101] It was represented in Exhibit 5 that the appellant had "entered into a management agreement" and, as I have already noted, that "the management company is offering investors a 7% per annum guaranteed net return for 5 years". His Honour went on to conclude that:[66]

> "The real problem however in relation to Exhibit 5 is the misleading impression created by the combination of the two representations, that it was Radisson that was offering the guaranteed return to investors. That representation was conveyed by that document, and was obviously misleading, since Radisson was not guaranteeing any return to anyone, and undertook no obligations to the investors whatever."

[102] In my respectful opinion, this conclusion cannot stand, given what I have said above about what was conveyed by a reading of the advertising material as a whole and in conjunction with the disclosure statement attached to the contract of sale. In no case was Exhibit 5 the only material to which the relevant respondents might have had regard if they wished to determine which entity was actually offering the rent guarantee. The Downeys, Mr Goschnick and Mr Jensen all received Exhibit 3 and the contract of sale along with Exhibit 5 while the Downeys and Mr Goschnick also received Exhibit 4.

[103] A reasonable reader may well have been left with doubts about the provenance of 570 QSM and its relationship with the appellant but would not, in my view, have concluded that it was one of the appellant's companies. Even if a reader did reach that conclusion, the Radisson disclaimer in Exhibit 4 would have been apt to make it clear that the appellant was not offering to guarantee the performance of the rental payment obligation.

[104] It is true that the situation is slightly different in the case of Mr Jensen who did not receive Exhibit 4. Nonetheless, my view is that, given the contents of Exhibit 3, Exhibit 5 and the disclosure statement attached to the contract of sale, there was sufficient information available to make clear what the true situation was. It should be remembered that nowhere is it ever expressly stated that the appellant would be offering the rent guarantee. At its strongest it can only be a matter of inference. I do not think that inference could have been sustained in the case of any of the relevant respondents if regard was had to the terms of the other materials with which they were provided. The answers provided to the questions agreed outlined above are correct but only in the limited sense that they are confined to the effect of Exhibit 5.

[105] Having said that, however, it does not seem to me that the conclusion I have reached regarding this representation detracts significantly from the persuasive force of the other representations which were fully conveyed by the brochures and their strength as inducements to investors to acquire units. That is because, as I have

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66 *Downer & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [75].

said, Exhibit 3 conveyed the suggestion that the appellant itself regarded the development including that element concerned with the performance of the rental guarantee by 570 QSM as assured. An assurance of that kind is calculated to engender confidence in potential investors so that the identity of the lessee is of less moment to them in making a decision to invest.

[106] His Honour's conclusion in relation to reliance did not depend on the correctness of the appellant's assumption that the advertising material was published by the appellant. His Honour's view on the issue of reliance was that, whether or not the Downeys identified the appellant as the particular company making the representations in the brochures Exhibits 3 and 4:[67]

> "… if in fact the making of the representations in those brochures is to be characterized as the conduct of the defendant, or as the result of the conduct of the defendant … and a person acts on those representations, relevantly by being induced by them to enter into a contract, and as a result suffers loss, then that person has suffered loss by that conduct, even if that person is unaware of the identity of the relevant party by whose conduct the loss has been suffered … In these circumstances, it does not matter if the plaintiffs were not consciously relying on the [appellant], that is this particular company, at the relevant time."

[107] Further, his Honour made it clear that, so far as the issue of reliance was concerned, the crucial issue was not the existence of a belief that Radisson was providing the rental guarantee. What was important was Radisson's representation that it considered that the project was a guaranteed success. His Honour referred to that belief, and said:[68]

> "But the important consideration was the representation … that they were assured of receiving the rental return for five years. That was the crucial misrepresentation, and is not different from what is relied on in the pleadings, nor does it differ from what the plaintiffs were relying on. Just why the plaintiffs were relying on that representation, and how they thought the representation could be sustained, in my view is irrelevant to the question of causation."

[108] The assurance which his Honour is speaking of in this passage is the assurance derived from the appellant's representation that the complex was a guaranteed success. As I have already explained earlier in these reasons, it can be seen from the evidence that it was the appellant's endorsement of the project as a guaranteed success that was of real importance to the Downeys. It is easy to conclude that it would have been of importance to an investor. The likely effect of this endorsement on potential purchasers was a good reason for its conclusion. It is hardly surprising if it had the effect it was objectively likely to have.[69]

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67 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [81].

68 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [82].

69 *Smith v Chadwick* (1882) 20 Ch D 27 at 44; *Arnison v Smith* (1889) 41 Ch D 348 at 359; *Gould v Vaggelas* (1984) 157 CLR 215 at 236 - 238.

Did the brochures convey a representation that by reason of the association with the appellant the units would be a good investment?

[109] The appellant did not shrink from the difficult task of demonstrating that advertising material which explicitly proclaims "the Radisson advantage", and commends the investment "Because it's Radisson", did not convey a representation that, by reason of the association with the appellant, the units would be a good investment.

[110] The appellant accepts that Exhibits 3, 4 and 5 conveyed that the appellant was to be associated with the complex and that the appellant's association with the complex was a consideration in favour of making an investment. It argues, however, that they do not convey the suggestion that the association with the appellant **of itself** would make the purchase of a unit a good investment.

[111] In my respectful opinion, the argument unfairly states the learned primary judge's conclusion on this point. His Honour held that the association of the appellant with the development made the investment being proposed attractive, and indeed, more attractive than it would have been had the appellant not been associated with the project. His Honour did not, however, conclude that the only feature which made this investment attractive was the association of the appellant with the project.[70]

[112] The appellant points to what is contained in [67] of his Honour's reasons to support its submission. I am unable to see how what his Honour said can be taken to suggest that he took the relevant representation to be that the association with the appellant was, on its own, sufficient to make the project a good investment. The learned primary judge was aware there were other important factors. As his Honour states in the paragraph cited by the appellant in support of this submission:

> "Whether the purchase of a unit was a good investment depends entirely upon whether the scheme under which rent at those rates would be payable was viable."[71]

[113] Nothing that is contained in the disclaimers suggests that no weight should be given to the involvement of the appellant in the project or that the advertising material did not accurately represent the appellant's expectations for the viability of the scheme.

Did the brochures convey a representation that potential investors could rely on the appellant's opinion as to the quality of the investment in deciding to invest?

[114] The appellant's submission on this point is that the references to the appellant's success, expertise and experience in Exhibits 3, 4 and 5 would be understood as confined to hotel management and not as laying claim to expertise in property investment.

[115] First, it is not correct to say that the advertising material makes no claim to expertise beyond the strict confines of "hotel management". The advertising material lays claim to expertise and experience in relation to suite hotels. On p 12 of Exhibit 3 it is stated that Radisson Hotels International Inc "operates, manages and franchises deluxe plaza hotels, suite hotels, hotels, inns and resorts …". The regional subsidiary of this company is said to be "waiting to take advantage of outstanding

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70 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [13].

71 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [67].

opportunities in Australia". Given this statement follows on from that which I have already mentioned, it must be assumed that these opportunities will lie in one of the fields already described, that is, in the operation and management of a various kinds of accommodation. There are also indications elsewhere in the material that "hotel management" does involve investment in property and that the appellant has actually undertaken a significant amount of activity in this area. On p 2 of Exhibit 4 it is mentioned that the appellant "already has several properties" in Australia and that Radisson Hotels International Inc has "over 330 properties and 76,000 rooms in 42 countries". There was every indication that the appellant was able to speak knowledgably about property investment generally as well as about the more specific matters of "hotel management".

[116] More importantly, the advertising material was not concerned to solicit investments in shares in the appellant as a hotel operator. Rather, it was concerned to solicit investments in units in the complex. The reference to the appellant's decision making processes was relevant to the investment being proposed because of the obvious common interest of both potential investors and the appellant in the demand for rooms in the complex.

[117] It is clear from the appellant's submissions that this ground really amounts to another attack on the learned primary judge's conclusion that weight could reasonably be attributed to the appellant's representation that the project would be a guaranteed success. As I have already explained earlier in these reasons, I do not see the disclaimers contained in the material as significantly qualifying that representation.

Were the representations concerning the seven per cent guaranteed return misleading or deceptive?

[118] The appellant appears implicitly to accept, and rightly in my view, in its written submissions, that the learned trial judge was correct to find that, because these representations were made with respect to future matters, whether these representations were misleading and deceptive for the purposes of s 52 is to be determined by reference to s 51A of the Act. The first two subsections of s 51A relevantly provide that:

> "(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
>
> (2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation."

[119] The effect of the section is to "cast the burden of proof upon the representor to show that it had reasonable grounds for making the representation".[72] At trial, the responsibility was borne by the appellant to show that it had reasonable grounds for making the statement about the rental guarantee at the time it was made.

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[72] *Australian Competition and Consumer Commission v Gary Peer & Associates Pty Ltd* [2005] FCA 404; V1081 of 2003, 13 April 2005 at [55].

[120] The learned primary judge concluded that there was no reasonable basis for the appellant's expression of confidence that success of the project, including the performance by 570 QSM of the rental guarantee obligations, was assured. In particular, his Honour concluded that there was no evidence of any material on which the appellant could reasonably have represented this to potential investors. This conclusion is disputed by the appellant.

[121] The first limb of the appellant's submission in this regard depends on the proposition that the leases held by 570 QSM were themselves valuable and that the learned trial judge erred in not taking them into account. But to say this assumes that the project has been "a success" in the sense that the demand for accommodation in the units leased to 570 QSM is such as to enable 570 QSM to fund its obligations under the leases, or that it has that ability from its other resources until demand is sufficient. The effect of the representations which were conveyed by the advertising material was that investors in units would not be subject to the risks associated with these very assumptions.

[122] The appellant had no evidence that demand for accommodation on the units would be sufficient to enable 570 QSM to perform, or that 570 QSM had or would have that capacity. To be more precise, the appellant had no evidence which would afford a reasonable basis for representing that demand for accommodation in the units would be sufficient to enable 570 QSM to perform its obligations, or that 570 QSM would be able to derive that capacity from its other resources when the time came for 570 QSM to perform its obligations.

[123] The learned trial judge observed that the appellant's internal documentation relating to the project contained no financial projections and no information about the financial viability of 570 QSM. His Honour held that the apparent financial viability of the vendor, or those associated with it, in 1997 was not to the point because the appellant had no reason to believe that the vendor or those associated with it were, or would be, ready, willing or able to fund 570 QSM to enable it to perform its obligations to purchasers of units. His Honour concluded in this regard:

> "In my opinion it was misleading and deceptive to represent in relation to the proposed purchase of a unit on the basis of its leaseback to [570 QSM], that the purchaser was assured of receiving rental which would amount to seven percent per annum net for five years reviewed to CPI, with annual expenses and outgoings paid by that company. There was no reasonable basis for such a conclusion, indeed there was simply no material available which provided any support for the proposition that that company was going to be able to operate on a basis which would permit it to make such payments to the purchasers of units which were then leased back."[73]

[124] In my opinion, this finding of fact was open to his Honour. The three year forecasts which the appellant prepared and provided to the developer, and upon which the appellant sought to rely to provide a reasonable basis for its representation, were expressed to be subject to the completion of a "market study to validate occupancies and room rates adopted". There was no evidence that this market study was actually carried out, much less that such a study supported the appellant's projections. The

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[73] *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [66].

project's dramatic collapse provides some confirmation, albeit retrospectively, for the proposition that the appellant could never have had a reasonable basis for the confidence it expressed, at least in the absence of evidence of some other reason for the collapse.

[125] His Honour also concluded that "it was not true to say that by reason of the association with [the appellant] the purchase of the unit would be a good investment; it was not a good investment despite the association with Radisson".[74] These conclusions were open to his Honour for the reasons discussed in the preceding paragraphs.

[126] The alternative submission put forward by the appellant was that, even if it be accepted that the evidence before the learned primary judge did not disclose reasonable grounds for the making of the representations as to future matters, the fact that the appellant had led some evidence as to this issue at trial was sufficient to shift the evidentiary onus back to the respondents. In other words, once the appellant had put evidence forward it was up to the respondents to prove that reasonable grounds for making the representations **did not** exist at the time they were made. The appellant relies on the decision of Emmett J in *Australian Competition and Consumer Commission v Universal Sports Challenge Ltd*[75] as authority for interpreting s 51A in this way. In that case, Emmett J said that:

> " … [s 51A] does not ultimately reverse the onus but simply provides that the deeming takes effect unless the corporation adduces some evidence to the contrary. Once such evidence is adduced, it is for the Court to make a judgment, on the balance of probabilities, having regard to all the evidence, as to whether the corporation had reasonable grounds for making the representation. If an applicant elects to adduce no evidence as to that question, then the only evidence before the Court would be that adduced by the corporation. Whether that is adequate to establish that the corporation had reasonable grounds for making the representations is a matter for the Court. However, once the corporation has adduced some evidence, there is no deeming arising from s51A(2)."[76]

[127] This submission should be rejected for two reasons. The first is that, as has been recognised elsewhere, it was unnecessary for Emmett J to express any concluded view on this issue, and the appellant's contention is against the trend of established authority.[77] The second point is that it seems to me that, understood correctly, Emmett J is only advancing the common sense proposition that, when a representor does adduce evidence attesting to reasonable grounds, it will be a matter for the court to determine if that evidence does establish reasonable grounds, and so there will be no automatic deeming as there would be if a representor did not adduce any

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74 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [67].

75 [2002] FCA 1276; N274 of 2002, 23 October 2002.

76 *Australian Competition and Consumer Commission v Universal Sports Challenge Ltd* [2002] FCA 1276; N274 of 2002, 23 October 2002 at [46].

77 See *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881 at [173]; (2003) 60 IPR 296 at 333 - 334 and *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363; V921 of 2003, 22 October 2004 at [133].

evidence at all. If this is all that was meant by his Honour's remarks then I would respectfully agree with them.

[128] It follows that I do not read the reasons of Emmett J to go so far as to suggest that the burden shifts back to a representee once evidence has been adduced by the representor. The wording of s 51A(2) means that if the evidence adduced by a representor is not actually "to the contrary", ie it does not tend to establish reasonable grounds for making the representation, then no evidence of the kind required by the section will have been adduced and there is no reason why the deeming provision contained in s 51(2) would not continue to operate. It would, of course, be a matter for the court to determine whether or not the evidence adduced was "to the contrary". The result is that the learned primary judge in this case was correct to decide this issue by looking to see if the appellant had adduced evidence capable of proving that it possessed reasonable grounds for the representations that it made. He concluded that such evidence had not been adduced. That view was correct in my respectful opinion. The appellant's submission on this point must be rejected.

[129] For the sake of completeness, it should also be noted that, even if the appellant's submission as to the reversal of the onus in s 51A where a representor tenders evidence is correct, there are two further reasons why the appellant's challenge to this aspect of his Honour's decision should fail. First, the evidence of the appellant's preliminary forecasts relating to the project was tendered by the respondents. For that reason, the respondents contend, correctly in my view, that even on the view of the onus provisions of s 51A for which the appellant contends, the onus remained on the appellant to establish a reasonable basis for making the representations in question.

[130] Secondly, his Honour's conclusions that the representations were misleading stand on the evidence which was adduced irrespective of where the onus of persuasion lay.

[131] In relation to the representation that the appellant considered the investment to be a guaranteed success, the learned trial judge proceeded on the footing that the onus was on the respondents because the representation did not concern a "future matter" within the meaning of s 51A of the Act but, rather, the appellant's state of mind at the time of the publication of the advertising material. His Honour concluded that the appellant did not ever come to the view that it did regard the complex as a guaranteed success.

[132] His Honour said:

> "… all of the material that I have seen suggests that no consideration was given to the question of whether the project was assured of success. There was the preliminary forecast to which I have already referred, but that was prepared without having completed a market study or a detailed analysis of manning estimates for the hotel, as noted in the covering document. It appears to have been prepared simply to give some idea of what figures would be likely to be involved, on the basis of the [appellant's] experience in operating hotels of this nature, for use in connection with the negotiations with the developer as to the terms of the management agreement, which was not finally signed until about four months later …

> It does not appear that the defendant ever actually considered whether the project would be a success, let alone a guaranteed success. This projection is directed to the viability of the hotel business, and conveniently ignores the obligation to pay rent for the rooms to be used in running the hotel. Indeed it had no particular reason for being concerned about this, since none of its money was at stake …"[78]

[133] In my respectful opinion, his Honour's conclusion was correct. The appellant's employees did not give evidence in an attempt to dispel the obvious inference from the documentary evidence adduced by the respondents. To say this is not to draw on adverse inference from the appellant's failure to call witnesses.[79] It is simply to observe that there is no reason not to act upon what appears from the appellant's documents.

The appellant's liability as an accessory under s 75B of the Act

[134] Given that I have already reached the conclusion that the appellant is liable as a principle for contravention of s 52 it is strictly unnecessary for me, as it was for the learned primary judge, to deal with this issue. Nonetheless, I will do so, as did the learned primary judge, on a precautionary basis.

[135] Section 75B of the Act relevantly provides that:

> "(1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB, V or VC, or of section 75AU or 75AYA, shall be read as a reference to a person who:
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> (a) has aided, abetted, counselled or procured the contravention;
>
> (b) has induced, whether by threats or promises or otherwise, the contravention;
>
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
>
> (d) has conspired with others to effect the contravention."

[136] The learned primary judge found that the appellant had been knowingly concerned in the making of two of the representations contained in the brochures prepared by SCI, that these representations were misleading and that, as such, were in contravention of s 52.[80] These representations were that:

(a) the appellant considered an investment in Radisson Suites to be a guaranteed success; and

(b) that the appellant was the management company offering the rental guarantee.

[137] The appellant disputes the findings of the learned primary judge with respect to both of these representations. As I have already decided that the representation that the

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78 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [69] - [70].

79 Cf *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363; V921 of 2003, 22 October 2004 at [189].

80 *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2004] QDC 310; DC No 4992 of 2002, 14 September 2004 at [88] - [105].

appellant was the management company offering the rental guarantee was not made, it is necessary only to consider the further submissions of the appellant in the light of the first representation outlined above, that is, that the appellant considered an investment in Radisson Suites to be a guaranteed success.

[138] For liability to be imposed for being "knowingly concerned in" a contravention, it is necessary to show that the alleged accessory had knowledge of the "essential matters" making up the contravention.[81] In *Medical Benefits Fund of Australia Ltd v Cassidy*[82] Moore J, with whom Mansfield J agreed, defined the "essential matters" in relation to a television advertisement as being the fact of publication, knowledge of the content of the advertisement and an awareness of matters that would allow that content to be characterized as misleading.[83] The authorities canvassed by Moore J dictate a similar approach to the advertising material found in this case.

[139] The complaint that the appellant makes with respect to the reasoning of the learned primary judge on this issue relates to his Honour's conclusion that the appellant must be taken to have been aware of the representations made by the advertising material because it had seen and approved the material prior to its publication. The text giving rise to the relevant representation is that on p 12 of Exhibit 3 which states that:

> "Such growth, coupled with the guaranteed success of such a centrally located and magnificently appointed complex as Radisson Suites, has propelled Radisson's decision to enter into a Hotel Management agreement to operate the $32 million development."

[140] Returning to the three "essential matters" identified by Moore J, it is admitted that the appellant was aware of the terms of this statement and that the material containing this statement would be, and was, published. The appellant submits, however, that what has not been shown is that it appreciated that this statement would convey an impression that was misleading. I have already explained, earlier in these reasons, why a reasonable reader would take from this passage the understanding that the appellant did consider an investment in Radisson Suites to be a guaranteed success. The effect of the statement is that one of the reasons why the appellant has decided to enter into the management agreement is because the success of Radisson Suites is guaranteed. Special knowledge is not required to understand that this is the effect of the words used.

[141] As the appellant knew of the terms of the material before publication, it knew that its belief in "guaranteed success" was being put forward as one of its reasons for participation in the project. As the learned primary judge pointed out, the appellant never actually had this belief. It is an inference of fact readily to be drawn in the absence of evidence to the contrary that the appellant knew its own mind. It follows from that inference that the appellant had knowledge of facts that would allow the statement to be characterized as misleading. If it were necessary to do so, I would hold the appellant liable under s 75B with respect to this representation.

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81 *Yorke v Lucas* (1985) 158 CLR 661 at 667.

82 [2003] FCAFC 289; (2003) 135 FCR 1.

83 *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289 at [13] - [15]; (2003) 135 FCR 1 at 10 - 11.

Conclusion

[142] The appellant has been successful in its appeal only in relation to the representation that it was offering the rent guarantee. This issue did not occupy a lot of hearing time. More importantly, the appellant's success on that issue does not materially affect the appellant's position vis-à-vis the respondents. I would not regard this measure of success on the part of the appellant as warranting an approach to the award of costs other than that they should go to the respondents on the basis of their substantial success in the appeal.

[143] In Appeal No 8852 of 2004, I would dismiss the appeal and order that the appellant pay the costs of the respondents to be assessed on the standard basis.

[144] In Appeals numbered 8853-8861 of 2004, I would, in each case, grant leave to appeal, dismiss the appeal and order that the appellant pay the costs of the respondent or respondents to be assessed on the standard basis.

[145] **ATKINSON J:** I agree with the reasons for judgment of Keane JA and the orders proposed.