SUPREME COURT OF QUEENSLAND

CITATION:	*Avis & Anor v Mark Bain Constructions Pty Ltd* [2011] QSC 80
PARTIES:	**BS2488 of 2007** **CAROL LYNETTE AVIS** (plaintiff) **v** **MARK BAIN CONSTRUCTIONS PTY LTD** ACN 010 846 385 (defendant) **BS2491 of 2007** **BARNSCAPE PTY LTD** ACN 077 636 367 (plaintiff) **v** **MARK BAIN CONSTRUCTIONS PTY LTD** ACN 010 846 385 (defendant)
FILE NO/S:	2488 of 2007 2491 of 2007
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 April 2011
DELIVERED AT:	Brisbane
HEARING DATES:	15 – 19 February 2010 31 March 2010 16 April 2010 31 May 2010 – 1 June 2010 3 June 2010 Further submissions received 15 June 2010, 22 June 2010 and 25 June 2010
JUDGE:	Atkinson J
ORDERS:	**The first defendant in BS2488 of 2007 pay the plaintiff the sum of $283,917 as compensation under s 82 of the *Trade Practices Act 1974* (Cth);** **The first defendant in BS2491 of 2007 pay the plaintiff the sum of $216,483 as compensation under s 82 of the *Trade Practices Act 1974* (Cth).**

The court will hear submissions about orders to be made in each matter as to interest and costs.

CATCHWORDS: TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – ACTIONS FOR DAMAGES – ASSESSMENT OR AVAILABILITY OF DAMAGES – PARTICULAR CASES – DAMAGES ARISING OUT OF PURCHASE OF LAND OR BUSINESS OR LEASE – where plaintiffs separately entered into a contract to purchase a luxury apartment off the plan from the developer vendor – where, in entering the contract, plaintiffs relied on representations made by the real estate agent that the ocean view from the apartment would be uninterrupted – where contracts settled and plaintiffs were dissatisfied with their view as it was obstructed by a new building – where plaintiffs claimed that the representations with respect to the view were false, misleading and deceptive in contravention of s 52 and s 53A *Trade Practices Act 1974* (Cth) – where plaintiffs instituted proceedings against the developer on the basis that the real estate agent was its agent duly authorised to make these representations – where the defendant contended that the real estate agent was only authorised to market the apartments for sale – whether the representations made by the real estate agent fell within the scope of its actual or apparent authority

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where at trial the pleadings particularised the plaintiffs' damage on the basis of loss of investment opportunity – where, at the beginning of the trial, the plaintiffs and first defendant compromised proceedings against the second defendants/third party real estate agents on the basis of the plaintiffs' pleadings as they then were – where after the trial concluded the plaintiffs sought leave to amend pleadings and broaden the particulars of damage – where witnesses were recalled and further evidence led – where first defendant opposed the amendment on the basis of prejudice – whether leave to amend the pleadings should be granted at late stage

EVIDENCE – ADMISSIBILITY AND RELEVANCY – SIMILAR FACTS – TO PROVE FACT IN ISSUE – PARTICULAR CASES – EVIDENCE ADMISSIBLE – where plaintiffs sought to lead evidence of similar representations made to another purchaser who was not a party to the proceedings – whether the similar fact evidence was sufficiently relevant and probative to be admissible

TRADE AND COMMERCE – COMPETITION, FAIR

TRADING AND CONSUMER PROTECTION – ENFORCEMENT AND REMEDIES – ACTIONS FOR DAMAGES – ASSESSMENT OR AVAILABILITY OF DAMAGES – WHAT LOSS OR DAMAGE RECOVERABLE – LOST COMMERCIAL OPPORTUNITY – where the plaintiffs claimed damages for loss of investment opportunity on the basis that they would have purchased an alternative property or otherwise invested the money – whether the claim of lost opportunity was sufficiently certain for damages to be assessed on that basis

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION – ENFORCEMENT AND REMEDIES – ACTIONS FOR DAMAGES – ASSESSMENT OR AVAILABILITY OF DAMAGES – PARTICULAR CASES – DAMAGES ARISING OUT OF PURCHASE OF LAND OR BUSINESS OR LEASE – where, at the beginning of the trial, the plaintiffs and first defendant compromised proceedings against the second defendants/third party real estate agents – where the first defendant argued that the plaintiffs suffered a single loss and the compromise operated as a compromise of the entire proceedings – whether the compromise affected the quantum of damages that should be awarded

Competition and Consumer Act 2010 (Cth)
Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth), s 2, Schedule 3
Corporations Act 2001 (Cth), s 1466
Law Reform Act 1995 (Qld)
Property Agents and Motor Dealers Act 2000 (Qld), s 366(1)
Trade Practices Act 1974 (Cth), s 51A, s 52, s 53A, s 82, s 84
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 156, r 375, r 478, r 658

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175, cited
Borg & Ors v Northern Rivers Finance Pty Ltd & Ors [2003] QSC 112, considered
Bull v Attorney-General for New South Wales (1913) 17 CLR 370, cited
Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304, cited
Coppo v Banalasta Oil Plantation Ltd; Borg v Pawski [2005] QCA 96, applied
Dare v Pulham (1982) 148 CLR 658, cited
Demagogue v Ramensky (1992) 39 FCR 31, cited
Devenish v Jewel Food Stores Pty Ltd (1991) 172 CLR 32, cited
Downey v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199, cited
Gates v City Mutual Life Assurance Society Ltd (1982) 43

ALR 313, considered
Gates v City Mutual Life Assurance Society Ltd (1985) 160 CLR 1, cited
Hehir & Anor v Smith [2002] QSC 92, cited
Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1) (1988) 39 FCR 546, cited
Henville v Walker (2001) 206 CLR 459, cited
HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640, applied
I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109, considered
ICI Australia Operations Pty Limited v Trade Practices Commission (1992) 38 FCR 248, cited
MacCormick v Nowland [1988] FCA 53, cited
Marginson v Ian Potter & Co (1976) 136 CLR 161, cited
Mark Bain Constructions Pty Ltd v Tim Barling, Alex Watson and Timothy Scott [2006] QSC 48, cited
Marks v GIO Australia Holdings (1998) 196 CLR 494, considered
Martin v Osborne (1936) 55 CLR 367, considered
Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd (1981) 36 ALR 23, applied
Moore v Flanagan (1920) 1 KB 919, cited
Mullens v Miller (1882) 22 Ch Div 194, applied
Petersen v Moloney (1951) 84 CLR 91, considered
Pollak v National Australia Bank Limited [2002] FCA 237, cited
Potts v Miller (1940) 64 CLR 282, cited
QCoal P/L & Anor v Cliffs Australia Coal P/L & Anor [2009] QCA 358, cited
Re Benlist Pty Limited v Olivetti Australia Pty Limited [1990] FCA 289, cited
Scott v Numurkah Corporation (1954) 91 CLR 300, cited
Sellars v Adelaide Petroleum (1994) 179 CLR 332, cited
South Australia v Johnson (1982) 42 ALR 161, cited
Thompson v Australian Capital Territory Television (1996) 186 CLR 574, cited
Toteff v Antonas (1952) 87 CLR 647, cited
Unsted v Unsted (1947) 47 SR (NSW) 495, cited
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, applied
Warwick Entertainment Centre Pty Ltd v Alpine Holdings Pty Ltd [2005] WASCA 174, applied
Webb Distributors (Aust) Pty Ltd v Victoria (1993) 179 CLR 15, cited

COUNSEL: S Monks for the plaintiff in both matters
A Collins for the first defendant in both matters

SOLICITORS: Boyd Legal for the plaintiff in both matters
Holland & Holland for the first defendant in both matters

[1] The Sunshine Coast, north of Brisbane, is a holiday area which attracts many people to purchase units or houses for the purposes of investment, both for capital growth and rental income, and for personal use. In 2003, two couples from Sydney were quite independently looking to purchase property on the Sunshine Coast. They were Gary and Carol Avis, who intended to purchase a property in her name; and Grant and Lynette Brecht, who intended to purchase a property in the name of their company Barnscape Pty Ltd as trustee for the York Unit Trust ("Barnscape"). Both purchased penthouse units off the plan in a residential unit development known as "Number One Park" situated at 1 Park Crescent, Sunshine Beach. Unfortunately the purchases did not meet their expectations and this litigation is the result.

[2] The plaintiffs in each matter, Carol Lynette Avis, in matter no 2488 of 2007, and Barnscape, in matter no 2491 of 2007, commenced proceedings against the first defendant, Mark Bain Constructions Pty Ltd ("Mark Bain Constructions"), which was the builder, developer and vendor of Number One Park and against the second defendant, the real estate agent who marketed and sold the units in Number One Park off the plan. In the case of Mrs Avis, the real estate agent was Roombridge Pty Ltd which traded as Laguna Real Estate ("Laguna Real Estate"). In the case of Barnscape, the real estate agent was Noblemont Pty Ltd, trading as Dolphin Bay Real Estate ("Dolphin Bay Real Estate"). In each case, the first defendant brought third party proceedings against the second defendant.

[3] In directions prior to the hearing, PD McMurdo J ordered that the two matters be heard together and that evidence in one be evidence in the other. The evidence in one was admissible in the other as similar fact evidence, which is admissible in civil proceedings where it is sufficiently relevant and probative of a fact in issue.

[4] At the commencement of the first day of the trial, senior counsel for the second defendant real estate agent in each matter informed the court that the proceedings against them by the plaintiffs had settled and requested orders granting leave to file a notice of discontinuance in those proceedings. He also sought orders that the third party proceedings in each action be dismissed with no order as to costs. Those orders were made by consent and the second defendants therefore took no further part in the proceedings. The settlement required the second defendant in each matter to pay $200,000 inclusive of interest and costs to the plaintiff in that matter. Barnscape had by then incurred costs of $121,610.16 and Mrs Avis had incurred costs of $113,057.16.

[5] Earlier on that day, at the request of the parties, the court, accompanied by the legal representatives, had a view of the two units the subject of this litigation and their surrounds. Views are permitted by r 478 of the Uniform Civil Procedure Rules ("UCPR") which provides that the court may inspect a place, process or thing, and witness any demonstration about which a question arises in the proceeding. In relation to the utility of a view, the High Court in *Scott v Numurkah Corporation* (1954) 91 CLR 300 at 313 and 315 cited *Unsted v Unsted* (1947) 47 SR (NSW) 495 where, at 498, Davidson J observed that:

> "Whilst a view is frequently a valuable adjunct to a hearing to enable the truth to be elicited, there are well-recognised limits within which such a procedure must be kept. … In a general form the rule is that a view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and to apply it, but not to put the result of the view in place of evidence: *London and*

> *General Omnibus Co. Ltd. v. Lavell.*[1] Yet, sometimes, for example, in cases of passing off, or otherwise when what appears to the eye is the ultimate test, the Judge, looking at the exhibits before him or examined by him as if they were exhibits in the case, and also paying attention to the evidence adduced, can apply his own independent judgment notwithstanding what witnesses have deposed to on the particular point: cf. *Bourne v. Swan & Edgar Ltd.*;[2] *Payton & Co. v. Snelling, Lampard & Co.*[3] It is not permissible, however, for the Judge to gather anything in the nature of extraneous evidence and apply it in the determination of the issues unless the facts are openly ventilated and exposed to the criticism of the parties: *Way v. Way*;[4] *Kessowji Issar v. The Great Peninsular Railway Co.*[5]"

The view was very useful in understanding the evidence which was subsequently given during the trial.

Issues

[6] In each case the following were in issue:

(1) Were representations made by the second defendants to the plaintiff? If so, what were those representations and were they false, misleading or deceptive? If so, were the representations relied upon by the plaintiff?

(2) Is the first defendant liable to the plaintiff for any such representations made by the second defendants?

(3) Did the plaintiff suffer damage as a result of any such representations and if so, what is the quantum of any such damage?

[7] As the plaintiffs submitted, to succeed they must prove that the representations that they alleged were made to them, that they were made by agents of the first defendant acting within their apparent or actual authority, that they relied upon them in purchasing the units, and that the representations were misleading or deceptive and that, as a result, they suffered loss.

[8] The statement of claim in each matter at the opening of trial was the second further amended statement of claim filed 17 July 2009. It will be referred to in these reasons as the statement of claim. The defence of the first defendant at that time was the second further amended defence filed 5 August 2009. It will be referred to in these reasons as the defence. The pleadings at the opening of trial revealed what was and what was not then in issue. Where facts were not in issue they will be referred to in these reasons without any evidence being required to establish them.

[9] The first defendant admitted that the transaction between itself and each of the plaintiffs for the sale and purchase of units in Number One Park was in "trade and

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1 [1901] 1 Ch. 135 at 139.
2 [1903] 1 Ch. 211 at 224.
3 [1901] AC 308 at 311.
4 (1928) 28 SR (NSW) 345 at 347.
5 (1907) 23 TLR 530.

commerce" within the meaning of s 52 of the *Trade Practices Act 1974* ("TPA");[6] was in connection with the sale of an interest in land; and that the representations made concerned the characteristics of land within the meaning of s 53A(1)(b) of the TPA which provides, *inter alia*:

> "**53A False representations and other misleading or offensive conduct in relation to land**
>
> (1) A corporation shall not, in trade or commerce, in connexion with the sale … of an interest in land or in connexion with the promotion by any means of the sale … of an interest in land:
>
> …
>
> (b) make a false or misleading representation concerning the … the characteristics of the land … ."

[10] In each case the plaintiff alleged and the first defendant denied that the representations were made by the second defendant or that, if they were made, they were misleading and deceptive.

[11] In each case the plaintiff alleged, and Mark Bain Constructions denied, that the second defendant was duly authorised to act on behalf of or to bind Mark Bain Constructions in all material respects. The first defendant said that the extent of the second defendant's authority was to market the proposed units for sale.

[12] In each case the first defendant disputed the quantum of damage claimed by the plaintiff.

Procedural matters

[13] In order to deal with a question raised about the pleading with regard to the actual or apparent authority of the first defendant, the plaintiffs sought leave to plead explicitly and particularise apparent authority once the trial was underway. In my view, contrary to the submission made by the first defendant, apparent authority had already been pleaded so I was prepared to allow an amendment which clarified and further particularised a claim of apparent authority. In any event, it is not strictly necessary to plead s 84 of the TPA.[7] The amended pleading was the third further amended statement of claim filed by leave in the Avis matter on 16 February 2010 and in the Barnscape matter on 17 February 2010. They will be referred to in each matter as the amended statement of claim. The first defendant did not seek an adjournment to deal with the amended statement of claim. The amendments were not in my view strictly necessary but were rather sought "out of an abundance of caution" and the first defendant suffered no prejudice because of them.

[14] The first defendant pleaded to the amended statements of claim by amended defences filed, after the evidence had been heard, on 25 and 26 February 2010. The amended defences also pleaded the alleged effects of the compromise between the plaintiffs and the second defendant. The plaintiffs objected on the basis that the amended defences raised matters on which they would have led additional evidence at trial. The first of those matters was an allegation in paragraph 12A of the amended defence in the Barnscape matter that alleged that when Mr Conolly made

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6 *Trade Practices Act 1974 (*Cth) has been replaced by the *Competition and Consumer Act 2010* (Cth), which came into effect on 1 January 2011.

7 *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 at [62].

representations to Mrs Brecht and Ms Skinner on the site he was acting as an agent of the plaintiff (and not the first defendant) for the purpose of the plaintiff's satisfying itself of the matters in cl 34.1 of the Barnscape contract. The second was an allegation in paragraph 26(vi) that Barnscape "owned assets other than the subject property from which income was derived but has not disclosed the nature and extent of that income or any taxation benefits which may have accrued from the ownership of the property." Counsel for Barnscape said that accountants would have been called to deal with such an allegation. It was then deleted by counsel for the first defendant who submitted that as it went to "proof of damages", it "matters not whether it was pleaded or not." The first defendant also deleted the proposed paragraph 12A of the amended defence in the Barnscape matter as it was common ground between the parties that the clause it referred to in the Barnscape contract, clause 34.1, was deleted by the first defendant from the final contract signed between the parties.

[15] After the hearing, as a result of submissions made by the first defendant, the plaintiffs applied to amend the statements of claim based, at least in part, on evidence contained in their expert reports with regards to the appropriate measure of damages to be awarded under s 82 of the TPA. That evidence dealt, *inter alia*, with the true value of the properties at the time of purchase by the plaintiffs. That evidence was admissible at trial to show that the plaintiffs had in fact suffered a loss at the time they contracted to purchase the properties notwithstanding that the claim for compensation under s 82 of the TPA was not originally pleaded on the basis of the difference between the price paid and the true value.

[16] Rule 375 of the UCPR permits the court to allow an amendment to a pleading "at any stage of a proceeding." The rule must be read subject to r 5(1) of the UCPR which provides:

> "the purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense."

[17] The amendment was sought to preclude the possibility that the plaintiffs might succeed in proving that the representations were made to them, that they were made by agents of the first defendant acting within their apparent or actual authority, that the plaintiffs relied upon them in purchasing the units, and that the representations were misleading or deceptive and that, as a result, they suffered loss, but nevertheless fail to convince the court to assess compensation on the pleaded basis.

[18] The first defendant opposed the amendment on three interrelated bases: that the application was made far too late and that the plaintiffs had previously pleaded damages on that basis but had amended their statements of claim on 14 July 2008 abandoning the claim for compensation on that basis and instead claiming compensation for loss of opportunity and consequential damages. The third basis was the prejudice said to have been suffered by the first defendant if the amendment were allowed because it had compromised its third party proceedings with the second defendants on the basis of the pleadings as they were at the commencement of the trial.

[19] Any such application for amendment is to be governed by the relevant factors identified by the High Court in *Aon Risk Services Australia Ltd v Australian*

National University[8] including the nature and importance of the amendment to the party applying, the extent of the delay, costs and other prejudice occasioned by the proposed amendment to the respondents to the application and others and the explanation for the delay in seeking the amendment to the pleadings. I ordered on 16 April 2010 that the plaintiffs pay the costs of the applications to amend and any costs consequential upon those applications such as the costs of obtaining further expert reports as ordered on 16 April 2010. I shall deal with the proposed amendments should it prove necessary when I deal with the question of remedies.

The Barnscape purchase

[20] The Barnscape purchase occurred first. Lynette and Grant Brecht are the directors of Barnscape. Mr and Mrs Brecht were successful business people who started and developed a business providing corporate psychological services to large corporations and organisations. They sold the business in 2002 for almost $3,000,000. As result, they had money to invest.

[21] At that time they were living at a property in McMahons Point in Sydney. It was high set with an expansive, near 180 degree, view to Sydney Harbour. The view to the harbour was over the top of houses and trees as the land sloped down to the shore line.

[22] In April 2003, Mr and Mrs Brecht holidayed on the Sunshine Coast. At that time they did not own a beach house. They started looking with a view to purchasing an investment property on the Sunshine Coast in the area from Coolum to Noosa. They were interested in buying a house and did not mind if it needed renovation but required it to have uninterrupted sea views. They also required that it be close to the beach. Their long term friend and interior decorator, Linda Skinner, gave evidence that she looked for a property with them. She said the main characteristic they were looking for was a view of the surf.

[23] After some initial searching Mr and Mrs Brecht restricted their search to Sunshine Beach which was at that time within the area of the Noosa Shire Council ("the council"). Sunshine Beach is a discrete area within the Sunshine Coast which has a limited geographical area and generally more expensive properties than the Sunshine Coast as a whole. They approached Dolphin Bay Real Estate which was situated in Duke Street, Sunshine Beach. At Dolphin Bay Real Estate they dealt with a real estate agent, David Conolly. As was admitted in paragraph 2(ii) of the defence, Dolphin Bay Real Estate had been engaged by Mark Bain Constructions to market the units at Number One Park for sale.

[24] Mr and Mrs Brecht both gave evidence in these proceedings. Mrs Brecht was primarily responsible for their investments and took a major role in the dealings with the real estate agent. She was careful and frank in her evidence. I found no reason to disbelieve her. Likewise, she appeared to be careful and honourable in her business dealings. Mr Collins, who appeared for the first defendant, said of the witnesses who by then included all of the lay witnesses called for the plaintiff in the Barnscape matter and almost all of the lay witnesses called for the plaintiff in the Avis matter that "they were intelligent, articulate witnesses who answered responsively to questions". It is an observation which I readily adopt.

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8 (2009) 239 CLR 175 at 214-215.

[25] Mr and Mrs Brecht told Mr Conolly that they were looking for real estate at Sunshine Beach, that they preferred a house and did not mind if it needed renovation, but required it to be on the beach or near the beach with uninterrupted ocean views that could not be built out and that they wished to spend about $1,000,000. Mr Conolly informed them, no doubt correctly, that they would not be able to buy a house on the beach at Sunshine Beach for $1,000,000. He drove them around Sunshine Beach and pointed out properties that had sold from $500,000 to $4,000,000 and the prices for which they had sold and told them about the rise in property prices in Sunshine Beach. In fact Mr and Mrs Brecht had more than $1,000,000 available to invest but later used the rest of the money to diversify their investments.

[26] When they returned to the Dolphin Bay Real Estate office, Mr Conolly told Mr and Mrs Brecht about the development which was to be Number One Park. He told them that it was a "crème de la crème real estate investment opportunity". Number One Park consisted of apartments with four penthouses at the top, two of which had been sold, he said, to a company associated with the former celebrity tennis player, John Newcombe. Those were units 9 and 10. The third penthouse, unit 8, had been sold and the fourth penthouse, unit 7, was being held by the developer because he wished to keep it for himself. However Mr Conolly told them that perhaps the developer could be interested in selling the last penthouse at Number One Park.

[27] Mr Conolly told Mr and Mrs Brecht that unit 7 would be suitable for them because it was going to have uninterrupted views that could never be built out and although there was a development to be built in front called "Splash", the residents of the penthouses would be able to see over the roof of Splash because the balconies of the penthouses, in particular of unit 7, would be higher than the roof of Splash. Mr Conolly said there would be uninterrupted views from unit 7, Number One Park and those uninterrupted views would be views of the ocean. He said to them that if you were standing on the balcony "you may not see waves breaking onto the sand, but you will see waves breaking." He said that those surf views were panoramic, which Mrs Brecht understood to mean 180 degree views. In common parlance, the word "surf" is synonymous with the words "breaking waves" or "white water", so that a view of breaking waves has the same meaning as a view of surf or white water views.

[28] The apartments in Number One Park were yet to be built so they were to be bought off the plan. It was not therefore possible for intending purchasers to stand on the balcony to see if the representation made as to the views was correct. In such circumstances the vendor, real estate agent and intending purchasers all realise that purchasers must rely in the usual course on representations made by the real estate agent retained by the vendor to market the property for sale.

[29] The building referred to as Splash was to be built at 25 Park Crescent, Sunshine Beach. That block was situated to the east, north-east of Number One Park between it and the beach.

[30] Mr Conolly took Mr and Mrs Brecht to the site of Number One Park which was situated on the corner of Park Crescent and Henderson Street, Sunshine Beach. Construction had not yet commenced. He pointed to the building on the left-hand side known as "The Moroccan" and the building on the right known as "Monserrat" and indicated by pointing to them the height of Number One Park. He told them

about the building that was to be built called Splash. He said that because of the "lay [*sic*] of the land", the contours of the land going down the hill to the right and to the front towards the ocean, together with height restrictions imposed by the council of 12 metres, Splash would be lower than Number One Park and that therefore they would be able to see over the Splash building to the ocean. He told them that the views would be panoramic, expansive and never to be built out. Mr Conolly told them that he had personally checked with the local council on a number of occasions to make sure of that and had looked at the plans to make sure that what he was telling them about height and views was correct. Mr Conolly repeated this assurance on a number of occasions so, understandably, Mr and Mrs Brecht did not think it necessary to search the plans of Splash at the council themselves. Mr Conolly could not have been in doubt how significant this representation was to Mr and Mrs Brecht in their decision to have Barnscape purchase unit 7.

[31] At the first meeting with Mr Conolly, he provided Mr and Mrs Brecht with a brochure with an artist's impression of Number One Park on the front cover which contained floor plans. He did not give them that brochure to take away because he said that at that stage he was not sure if the property was for sale. Mrs Brecht noticed that the brochure contained plans marked with the name and licence number of Mark Bain Constructions. Mr Brecht said in his evidence that Mr Conolly explained to them that he was acting as real estate agent for Mr Bain through Mr Forsyth of Laguna Real Estate. After the first meeting with Mr Conolly, Mr and Mrs Brecht returned to Sydney.

[32] Consequently, I accept that the representations pleaded in paragraph 7 of the statement of claim were made by Mr Conolly at his first meeting with Mr and Mrs Brecht, namely:

> "(a) Number One Park would be a premium quality development with spectacular uninterrupted surf views from the penthouses;
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> (b) the views from the penthouses would not be built out because of the planned height of Number One Park, local council height restrictions and the slope of the surrounding land; and
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> (c) another development (the Splash Development) would be commencing shortly but that the Splash Development would have no impact on the views available from the penthouses at Number One Park and, in particular, there would be a view over the roof of the Splash Development to permit continuous surf views;
>
> (d) the views from Number One Park would be outstanding views."

[33] Mr Conolly contacted Mr and Mrs Brecht after their return to Sydney and said he had spoken to the owner of Number One Park. He said that the owner was Mark Bain of Mark Bain Constructions and that Mr Bain had decided that he would sell unit 7. In an email on 28 April 2003, Mr Conolly said the selling price was $1,250,000. He told them the selling price of nearby units at Splash, Casablanca, Moroccan and Le Onde as well as expected rental returns for the units. He said he would send Mr and Mrs Brecht a marketing guide and details on the fittings and plans.

[34] Mrs Brecht asked Mr Conolly again about the view from unit 7 because of what she referred to as her requirement that the property had to have uninterrupted views of the water and that it could never be built out. He reassured her of those matters. Again he used the term that the property was the "crème de la crème". On 30 April 2003, Mr and Mrs Brecht sent Mr Conolly a cheque for $500 as a "refundable holding deposit" for unit 7. Mrs Brecht said that they decided on this property rather than another more expensive one they looked at with another agent because it had everything they were looking for.

[35] On 11 June 2003, Mr and Mrs Brecht sent an email to Mr Conolly telling him that their Queensland solicitor, Anne Murray, had checked the contract and, apart from a few small things she had highlighted, the contract was acceptable; a real estate colleague who holidayed at Sunshine Beach had given them positive feedback; they were happy that the builder had a good reputation as a quality operator; and they were happy with the location being at Sunshine Beach. However before they paid the ten percent deposit they wanted to ensure that the view would justify the price so they were planning to come back up in the next few weeks to meet with Mr Conolly and make sure the finished unit would provide good ocean views.

[36] On the following day, 12 June 2003, Mr Conolly replied by email saying that he had met on the previous day with Richard Forsyth from Laguna Real Estate at Noosa who was dealing directly with Mark Bain. He said that after a site inspection he could inform them that the old buildings were being demolished to make way for the construction of Number One Park. He told Mr and Mrs Brecht that he was advised by Mr Forsyth that the floor level of Number One Park was to be one metre higher than the top floor of the adjacent Moroccan building. He said:

> "Both Mr Forsyth & Mr Bain have assured me the views as such will be outstanding."

[37] Mr Conolly said that both the developer and Mr Forsyth were keen to see a signed contract for unit 7 as other interested parties were showing strong interest in the property, particularly John Newcombe's company who had purchased units 9 and 10. Mr Conolly said that Mr Forsyth and Mr Bain had suggested that he encourage them to sign a contract with a special clause inserted which stated that they would have the opportunity to withdraw should the views not be to their satisfaction. He asked them to contact him to discuss this option. Objection was taken to the receipt into evidence of the email from Mr Conolly to Mr and Mrs Brecht on the grounds that it was not evidence that Mr Conolly had in fact spoken to Mr Bain. The email is only evidence of what Mr Conolly said to Mr and Mrs Brecht. It is evidence that he represented to Mr and Mrs Brecht that Mr Bain had assured him that the views would be outstanding but not that Mr Bain had actually said that to Mr Conolly.

[38] Mr and Mrs Brecht sent a return email to Mr Connolly on the same day saying that they would instruct their solicitor to insert a clause as he had suggested and send the signed contract and deposit to Mr Conolly as soon as their solicitor could get the revised contract to Mr and Mrs Brecht. They said that they would still try to get to Sunshine Beach again for a day to meet with Mr Conolly.

[39] On 13 June 2003 Mr Conolly asked Mr and Mrs Brecht to send him a draft of the clause they wished to insert into the contract so he could have it approved by "the developer". His suggestion for the clause was:

> "Purchasers for this property have 21 days from the date of signing this contract to satisfy themselves the view from the top floor penthouse number 7/ No. 1 Park Crescent, Sunshine Beach is to their satisfaction. Should the purchasers be unsatisfied with the views they will be required to inform the vendors solicitor in writing no later than 21 days from the date of this contract. Should the vendor not receive notice in writing within this period the contract will be binding."

[40] Mr Conolly sent Mr and Mrs Brecht the marketing brochure as promised. On the front cover was an artist's impression of the building from Park Crescent. It showed that Number One Park consisted of two buildings with a swimming pool on the frontage facing Park Crescent. Mrs Brecht recalled that it listed the finishes and fixtures and included the plans of each level. It showed that the builder and developer was Mark Bain Constructions. It revealed that there was only one parking space for the penthouse unit 7. Mrs Brecht particularly remembered that because she raised later that they wanted two car parks. There was no representation in the brochure about the view from Number One Park.

[41] On 21 and 22 June 2003 Mrs Brecht returned to Sunshine Beach and, accompanied by her interior director, Linda Skinner, met with Mr Conolly. Mr Conolly took Mrs Brecht and Ms Skinner to a property called Nereus across the street from Number One Park. Nereus is situated at 5/7 Henderson Street, Sunshine Beach. Mr Conolly took them to the balcony of the top storey unit in Nereus and explained to them the outlook that they could expect to see once unit 7 at Number One Park was built. He pointed out the Moroccan building and the Monserrat building and where the Splash building was going up and explained that they would be able to see over the roof of Splash.

[42] The three of them also referred to another site downhill of Number One Park, Sunshine Place, to ensure that the views from unit 7 would not be impeded by the building at Sunshine Place. Mr Conolly informed them that the views from unit 7 Number One Park would be better than the views from the Nereus building because Number One Park was on the other side of the street, closer to the ocean and the land fell away in front of Park Crescent and so they would have uninterrupted views that could never be built out. Ms Skinner's evidence was that he said the view would be "panoramic and uninterrupted." He said, "You will have a spectacular view because there will be nothing in front of you." He said something to the effect "You will not see waves crashing on the beach, but you will see waves." Ms Skinner candidly admitted that she could not remember his precise words.

[43] Mrs Brecht noticed that there was a television antenna on top of Sunshine Place and she said that she wanted that removed because it interfered with the view. Mr Conolly said that he did not think it would be a problem but that he would go back and discuss it with Mr Bain in order to have it removed. He assured them they would be very happy with the view.

[44] Mr Conolly took Mrs Brecht and Ms Skinner into the Moroccan building both to the second floor and to the roof. He told them that the views from unit 7 Number One Park would be better because the balcony would be higher and they would be able to look "clean over any development, either Splash or Sunshine Place" and once again he said "you may not see the waves breaking on the sand but you will have

uninterrupted views of waves breaking." Those views, he said, would be 180 degree panoramic views never to be built out. Ms Skinner said he kept on with the mantra, "uninterrupted, panoramic views."

[45] Mrs Brecht and Ms Skinner both said that during the site visit Mr Conolly indicated where the top of the Splash building would be by pointing to trees, antennae and other existing landmarks so that they could get a sightline of exactly where the roof of Splash would be in comparison to the balcony of unit 7. By referring to the photographs taken from the balcony of unit 8 found in exhibit 5, Mrs Brecht was able to give evidence that Mr Conolly pointed out the line that would be occupied by the roof of Splash as about equal to or just under the established tree line which can be seen in photograph 2 in exhibit 5. As that photograph shows, when it was built Splash protruded well above that tree line. In fact it protruded well above the horizon and, as that photograph shows, substantially interrupted the view of the ocean. There was no view of the ocean over the top of Splash from unit 7 Number One Park.

[46] The plaintiff has consequently proved that the representations pleaded in paragraphs 9, 9A, 12 and 13 of the statement of claim were made. Those representations were made on 21 June 2003. They were to the following effect:

> "9. Mr Conolly advised that due to the contours of the land and council development restrictions, there would be no opportunity for any development in front of Number One Park to interrupt the surf views from the penthouses.
>
> 9A. The conduct of Mr Conolly pleaded and particularised in paragraphs 7 and 9 above, and in paragraphs 12 and 13 below, amounted to representations that the first and second defendants each:
>
> (a) had the means, ability, skill and experience to conduct appropriate searches of local or State government records, make enquiries of relevant local or State government authorities, and otherwise determine (whether themselves or by engaging appropriate qualified experts) whether the views from the penthouses at Number One Park could be built out, and if so the extent to which those views would be built out or impeded by the Splash Development;
>
> (b) had undertaken the said searches and enquiries and made the said determination; and
>
> (c) had exercised due care and diligence in undertaking the said searches and enquiries and making the said determination.
>
> …
>
> 12. Mr Conolly, for and on behalf of the first and second defendants, said words to the effect that the views from the property would be equivalent to those from the Moroccan Development and in particular that surf views would be obtainable over the rooftop of the Splash Development.
>
> 13. Mr Conolly, for and on behalf of the first and second defendants, also took Mr [*sic*] Skinner and Mrs Brecht to see the view from the Unit 7, 5-7 Henderson Street, Sunshine

> Beach and, in the course of conducting that inspection, said words to the effect that the surf views from Park Crescent would be better than the views available from 5-7 Henderson Street."

[47] In paragraph 16(b) of the statement of claim the plaintiff alleged and I am satisfied that to the extent that the representations were representations as to future matters, they fall within the provisions of s 51A of the TPA which provides:

> "**51A Interpretation**
>
> (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.
>
> (3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead."

[48] The plaintiff alleged that the representations were false. In paragraph 17 of the statement of claim it alleged:

> "(a) the surf views from the property were not going to be uninterrupted views or outstanding views because they would be and were in fact substantially impeded by the roofline of the Splash development which was then under construction; and
>
> (b) the views from Number One Park as planned and built could in fact be built out if a building was built on the site of the Splash development to within the maximum legal height, that such a building (namely the Splash development) had already been approved by Noosa Council and was then under construction, and the views were built out by the Splash development."

[49] The first defendant denied this allegation and said further that only a minor part of the ocean views from unit 7 were in fact impeded by Splash and the views were consistent with the opinions expressed by Mr Conolly. From the evidence before me to which I have referred, both the oral evidence and photographic evidence, I am satisfied that the representations were false as pleaded in paragraph 17 of the statement of claim.

[50] The first defendant denied the following allegations in the statement of claim:

"18. The representations referred to in paragraph 9 were false in that:

(a) despite the contours of the land in front of Number One Park and Council's height restrictions, it was and is possible to build a development of such a height that whilst it complies with the height restrictions, it blocks views of the surf from the penthouses in Number One Park; and

(b) a development (namely, the Splash Development) had at that time already been approved and construction of it had commenced, such that when constructed it would and did in fact impinge upon and interrupt the surf views available from the property.

19. The representations referred to in paragraph 12 were false in that:

(a) the views from the Moroccan development would be and were superior to the views available from the property when it was built, because the surf views from the Moroccan development were not comparably affected by any other development in the way that the views from Number One Park would be and were affected by the Splash development when Splash was completed; and

(b) given the contours of the land and the approval that had already been given for the Splash development (which was then under construction), when Splash was completed it would not be and was not possible to obtain surf views over the rooftop of Splash as Splash would and did in fact impinge upon and interrupt the surf views available from the property.

20. The representations referred to in paragraph 13 were false in that:

(a) the surf views from 5-7 Henderson Street would be and were superior to the surf views available from the property when it was built, because the views from 5-7 Henderson Street were not comparably affected by any other development in the way that the views from Number One Park would be and were affected by the Splash development when Splash was completed; and

(b) given the contours of the land and the approval that had already been given for the Splash development (which was then under construction), when Splash was completed it would not be and was not possible to obtain surf views over the rooftop of Splash as Splash would and did in fact impinge upon and interrupt the surf views available from the property.

20A. In the premises pleaded in paragraphs 17, 18, 19 and 20 above, the representations by the first and second defendants

that are pleaded in paragraph 9A were false in that the first and second defendants:

(a) lacked the means, ability, skill and experience to conduct appropriate searches of local or State government records, make enquiries of relevant local or State government authorities, and otherwise determine (whether themselves or by engaging appropriately qualified experts) whether the views from the penthouses at Number One Park could be built out, and if so the extent to which those views would be built out or impeded by the Splash Development;

(b) had failed to undertake the said searches and enquiries and make the said determination; or

(c) had failed to exercise due care and diligence in undertaking the said searches and enquiries and making the said determination."

[51] I am satisfied that the representations were false for the reasons pleaded in paragraphs 18(a) and (b), 19(b), 20(b) and 20A(c). Contrary to what Mr Conolly said it was possible to build a development in front of Number One Park which was within allowable height limits and which interrupted the white water views from the penthouse units, and the white water views from the penthouse units at Number One Park were adversely affected by Splash. If Mr Conolly did carry out council searches as he told Mr and Mrs Brecht, then he must have carried them out without due care and diligence.

[52] The representations were made in trade or commerce in connection with the sale of an interest in land. They were misleading and deceptive in contravention of s 52 of the TPA and false and misleading in contravention of s 53A of the TPA.

[53] In June 2003 Mrs Brecht also saw an artist's impression of the building with the heading "Sunshine Beach white water". She referred to an advertisement, which was found in exhibit 10, in the Sunshine Coast Daily Property section dated 17 January 2004 under the Laguna Realty heading which contained an artist's impression of Number One Park, showed a photograph of white water breaking waves and referred to the development with the headline "Sunshine Beach white water penthouses".[9] The narrative said:

> "Positioned to catch magnificent views of the waves crashing on to the sand at Sunshine Beach, with beach access only metres away, No. 1 Park will stand as a testament to state-of-the art ingenuity in design."

Mrs Brecht said she had seen an advertisement similar to that but without the reference to Laguna Real Estate.

[54] It appeared from evidence given by Alexander Watson, who was one of the purchasers of units 9 and 10 of Number One Park, that this advertisement was produced by Laguna Real Estate to on-sell those units before settlement and so is not relevant to any case against Mark Bain Constructions.

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[9] See exhibit 2, vol 2, p 484.

[55] However, the evidence given by Mr Watson fortifies me in the conclusion I have already drawn that misleading and false representations were made by the real estate agents marketing Number One Park for sale.

The Watson purchase

[56] Mr Watson gave evidence about the circumstances of his purchase of units 9 and 10 at Number One Park. His evidence was admissible as similar fact evidence which is admissible in civil proceedings where it is relevant to and probative of facts in issue. Its admissibility is established by relevant case authority.

[57] One of the earliest Australian cases to consider the admissibility of similar fact evidence in civil proceedings is *Martin v Osborne*.[10] In that case, the respondent was charged with driving an unlicensed commercial passenger vehicle. In order to prove that the passengers on the day in question were being carried for reward between Ballarat and Melbourne, the appellant sought to lead similar fact evidence of the defendant's carrying passengers for reward on the same route during the two preceding days. The High Court held that the evidence was admissible to show that the defendant was operating the vehicle regularly for the carriage of passengers between Ballarat and Melbourne and was sufficient to make it improbable that the passengers were not carried for reward. As Dixon J observed at 375, the similar fact evidence was admitted on the basis that it was relevant to the "probability or increased probability, judged rationally upon common experience", that the fact in issue existed.

[58] Significantly, similar fact evidence has been admitted in proceedings where the making of misleading and deceptive representations within the meaning of the TPA was in issue. In *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd*[11] the applicant alleged that a number of fraudulent, misleading and deceptive representations were made to it by the respondent's agent to induce the applicant to enter into two leases of shops in a shopping centre. The applicant sought to lead evidence of representations made to eight other tenants in the shopping centre on the basis that there was a probability or increased probability that similar representations had been made to the applicant. In considering the admissibility of the evidence, Northrop J observed at 28:

> "… The general principle is that proof of 'similar facts' done by a party to litigation does not tend to prove that the party did a particular act in issue alleged in litigation. The general principle is stated in *Cross on Evidence*, Second Australian Edition, para 14.2, p 342, as follows: 'Evidence of the misconduct of a party on other occasions (including his possession of incriminating material) must not be given if the only reason why it is substantially relevant is that it shows a disposition towards wrongdoing in general, or the commission of the particular crime or civil wrong with which such party is charged, unless such a disposition is of particular relevance to a matter in issue in the proceedings.'
>
> This is a general principle and there are many instances where evidence of 'similar facts' is admissible. Thus evidence of 'similar

[10] (1936) 55 CLR 367.
[11] (1981) 36 ALR 23.

> facts' is admissible where the facts include 'circumstances whose relation to the fact in issue consists in the probability or increased probability, judged rationally upon common experience, that they would not be found unless the fact to be proved also existed' … ."

[59] Northrop J allowed the similar fact evidence sought to be led by the applicant on the basis that it was sufficiently probative, saying at 30:

> "If it is established by evidence that Robertson [the respondent's agent] made representations which constituted conduct under s 52 of the Act to other prospective tenants of shops in the same complex, there is a probability or increased probability judged rationally upon common experience, that similar representations were made to Figgins. The representations, if constituting conduct of the requisite kind, established a pattern which would lead to support the proof of the fact in issue. The evidence of the eight witnesses would, in my opinion, have probative value and is logically probative of a fact in issue."

[60] His Honour also distinguished between the admissibility of similar fact evidence in civil and criminal proceedings and, at 31, expressed the opinion that in civil proceedings "the evidence of witnesses, otherwise logically probative of a fact in issue, is not rendered inadmissible by reason of oppression and unfairness."

[61] In a similar vein, similar fact evidence was admitted in *Gates v City Mutual Life Assurance Society Ltd*,[12] another case involving allegations of misleading and deceptive representations. In that case, the applicant alleged that an agent of the respondent, an insurance salesman, had made misleading and deceptive representations to induce him into purchasing disability cover. At the hearing the applicant led evidence of representations of a similar nature which had been made by the respondent's agent to five other persons. Citing Dixon J's comments in *Martin v Osborne*,[13] the evidence was allowed by Ellicott J on the basis that it was relevant to the issue of whether the representations alleged were made to the applicant and tended to support the probability of similar misrepresentations being made to the applicant.

[62] Two recent Queensland Supreme Court decisions have considered the admissibility of similar fact evidence in civil proceedings. *Hehir v Smith*[14] was an appeal against orders made by the Anti-Discrimination Tribunal that the appellants pay the respondent compensation for sexual harassment. One of the grounds of appeal was that the Tribunal had erred in admitting as similar fact evidence the evidence of a former employee who gave evidence of unnecessary touching and inappropriate remarks by the first appellant. After considering this ground of appeal, Wilson J held that there was no error of principle in the Tribunal's use of the evidence of the former employee. At [18] – [20], her Honour discussed similar fact evidence in civil proceedings, highlighting relevance as the single criterion for admissibility:

> "[19] In criminal proceedings, propensity evidence is not admissible unless it is sufficiently highly probative of a fact in issue to outweigh the prejudice it may cause. This is illustrative of the Court's discretion in weighing the probative value of evidence against its

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12 (1982) 43 ALR 313.
13 (1936) 55 CLR 367.
14 [2002] QSC 092.

> prejudicial effect. See *Pfennig v The Queen* (1994-95) 182 CLR 461; *Hoch v The Queen* (1988) 165 CLR 292.
>
> [20] In civil proceedings it is doubtful that the Court has such a discretion to refuse to admit evidence: see *CDJ v VAJ (No 1)* (1998) 197 CLR 172 at 215 per McHugh, Gummow and Callinan JJ, footnote 106. The basic test is that of relevance, subject to well known specific rules of exclusion."

[63] Her Honour cited with approval Northrop J's comments in *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* referred to earlier.

[64] Even more on point is *Borg v Northern Rivers Finance Pty Ltd*,[15] a case involving 21 plaintiffs all of whom alleged that the sellers of three tax minimisation schemes made misleading and deceptive representations that investments in the schemes were lawfully tax deductible and that each of the schemes was approved by the Australian Taxation Office. The plaintiffs sought to admit evidence which suggested that similar representations had been made to each plaintiff. At [84] – [86], Mackenzie J made the following observations:

> "[84] It was common ground that in a civil matter evidence that similar representations were made to others is admissible (see *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23, 30-31; *Gates v City Mutual Life Society Ltd* (1982) 43 ALR 313, 327; *D.F. Lyons Pty Ltd v Commonwealth Bank of Australia* (1991) 28 FCR 597, 603-7). It was accepted that such evidence was relevant as having a bearing on the issue of whether the probability that particular representations were made to a particular plaintiff was increased and, ultimately, whether they were proved to a satisfactory level.
>
> [85] However, it was submitted by the fourth and eighth defendants that different plaintiffs had significantly different recollections of what was said to them and there was therefore a risk that using evidence of what was said to others to buttress the credibility of individual plaintiffs may too readily lead to an erroneous conclusion (cf *Sheldon v Sun Alliance Australia Ltd* (1988) 50 SASR 236). While that risk is accepted, such concern is not a reason for excluding such evidence in a civil trial by judge alone. It is correct that automatic extrapolation of evidence from one witness into another's case does not pay due regard to other individual credibility issues arising from the plaintiff's evidence in the case then under consideration.
>
> [86] It may be observed, too, that evidence of this kind may not only be useful in favour of a plaintiff. In this kind of case, it may suggest that the particular plaintiff misconstrued a particular document or event if there is a considerable body of evidence from other plaintiffs placing a different construction on it or describing it differently. However, that issue has in each case to be considered in conjunction

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15 [2003] QSC 112.

> with other aspects of credibility of the particular plaintiff, and the circumstances of the particular transaction."

[65] Mr Watson's evidence was useful in determining whether or not the real estate agents marketing the units for sale on behalf of the first defendant made misleading, deceptive and false representations and what those representations were.

[66] Mr Watson gave evidence that he met Mr Forsyth from Laguna Real Estate when Laguna Real Estate sponsored a tennis tournament with which Mr Watson was involved. Mr Forsyth told Mr Watson that he was going to be selling the property at Number One Park and it would be a very good investment in Sunshine Beach. He said there was an opportunity to buy it off the plan. He said it would be a good opportunity because of the high capital gains at Sunshine Beach and also because it was one of the best streets in Sunshine Beach and the way the building was designed it would have outstanding views of the beach and the ocean.

[67] Mr Forsyth guaranteed to Mr Watson that the views were as shown in photographs that he provided to Mr Watson. One of the major aspects of the project would be its outstanding ocean views. He said the photographs had been taken from a cherry picker which had been put on the site with a photographer at the same height and aspect as the finished unit that he would be able to purchase.

[68] The brochure which was tendered in evidence as exhibit 8 had numerous photos showing unobstructed ocean and white water views. The views were described in words as "outstanding ocean views". The brochure also said that the units were "positioned to capture magnificent views of the Pacific Ocean".

[69] Mr Watson gave evidence that subsequent to that, Splash was built between Number One Park and the ocean with its construction having a detrimental effect on the views of Number One Park. Mr Watson had contracted to purchase two penthouse units, 9 and 10, together with two colleagues of his. However the construction of Splash took away most of the views from those units.

[70] Mr Watson noticed Splash being constructed and a sign on it saying it was being marketed by Laguna Real Estate. He contacted Mr Forsyth and asked him what was the situation with regard to Splash and where was it going to finish in relation to Number One Park and if there was going to be any impact on the views from Number One Park. Mr Forsyth told him that due to there being a downward slope from Number One Park to Splash and in view of the council regulations imposing strict height limits, the views from Number One Park would not be impacted upon adversely.

[71] Mr Watson arranged to meet Mr Forsyth on the site. They went there in May 2004. They went to the level of the balconies of units 9 and 10 and observed the views they believed they were going to receive. Mr Watson asked Mr Forsyth to indicate where Splash was going to finish and where the views from Number One Park would be left in relation to that. Mr Forsyth said that they would lose their view of Park Crescent but the views of the beach and of the ocean would be unaffected.

[72] Mr Watson said he returned to the site before the contracts were due to settle and at that stage there was already a major problem with the deterioration of the views of Number One Park from the construction of Splash. He complained to Mr Forsyth. Mr Forsyth said that he believed it was due to circumstances beyond his control and

that Splash had exceeded its building height. Mr Watson started investigations of his own and had a valuation done which showed a downgrading in value of the units.

[73] Mr Watson said they were not prepared to go ahead and fulfil the contracts and did not complete them. Mark Bain Constructions sued Mr Watson and the other two purchasers but the purchasers were successful in defending that claim because the warning statements required at that time by s 366(1) of the *Property Agents and Motor Dealers Act 2000* (Qld) were not attached to the contracts: see *Mark Bain Constructions Pty Ltd v Tim Barling, Alex Watson and Timothy Scott* [2006] QSC 48.

[74] Evidence given by Paul Caspers, a registered valuer, showed that unit 10 was sold on 15 April 2005 and unit 9 was sold on 30 April 2005. The sale price of each was $900,000.

The Barnscape contract

[75] On Monday, 23 June 2003 Mrs Brecht sent an email to Mr Conolly thanking him for showing her the site on the weekend. She raised a number of questions prior to finalising the exchange of contracts. The first was about the removal of the antenna at the property known as Sunshine Place so as not to detract from the view from the unit they wished to purchase at Number One Park.

[76] On Wednesday 25 June 2003 Mr Conolly forwarded to Mr and Mrs Brecht an email from Richard Forsyth from Laguna Real Estate which said that the developer would move the TV antenna at his own cost.

[77] On 2 July 2003 Barnscape signed a contract to purchase unit 7 for $1,200,000 (the "Barnscape contract") and forwarded it and a bank guarantee for the deposit of $120,000 to Mr Conolly. The contract contained, *inter alia*, the following standard terms:

> "14.1.7 that the Buyer has not relied on any representations by or from the Seller, the Seller's agent or any other person or corporation, other than those representations specified in this Contract about the Lot, Scheme Land, Schedule of Finishes, Chattels, Common Property, Building Works, proposed management operation, achievable occupancies, financial returns or tax benefits.
>
> 14.1.8 that in entering into this Contract the Buyer confirms and agrees that all representations made by or on behalf of the Seller are as set out in this Contract and that the terms, covenants and conditions of this Contract constitute the only agreement between the Buyer and the Seller to the exclusion of all other representations to the fullest extent permitted by law. The Buyer waives any claim or right inconsistent with this acknowledgment and agrees to indemnify the Seller from any claim brought by the Buyer in breach of this clause and the Seller's costs of resisting any such claim calculated on a solicitor and own client basis."

[78] The Barnscape contract also then contained the following relevant special conditions written in Mrs Brecht's handwriting:

> "34.1 This contract is subject to the purchaser satisfying itself within 21 days from the date hereof that the view from the subject property will be as it anticipates. If it is not the Purchaser shall notify the Vendors solicitors in writing and all deposit monies shall be refunded in full to the Purchaser.
>
> …
>
> 34.3 At their cost the developer will relocate the TV antenna from the roof of the building in front of the balcony to Unit 7, so as not to interfere with the view or outlook from the balcony of unit 7."

[79] The contract was concluded on 3 July 2003 when it was signed and dated by Mark Bain on behalf of Mark Bain Constructions. Clause 34.1 was crossed out and initialled by Mr Bain. It was no longer part of the contract that the first defendant signed.

[80] Mrs Brecht had consulted with her solicitor before inserting clause 34 and relied on her advice as to the standard and special terms of the contract. However, as pleaded in paragraph 10 of the statement of claim, when signing the contract on behalf of Barnscape Mr and Mrs Brecht relied on the representations made to them referred to in paragraphs 7, 9 and 9A of the statement of claim about the views. Mrs Brecht informed Mr Brecht of the representations made to her by Mr Conolly on her visit to Sunshine Beach when he was not present. Mrs Brecht said in her evidence:

> "If those views weren't there we weren't buying that property. If those views weren't as we were told they were going to be, we were not buying that property."

[81] Her response to a question by counsel for Barnscape showed her state of mind:

> "If back in 2003 when you signed the contract, when you had the contract in front of you, if you had known that Splash would in fact be built as high as it was, would you have agreed to sign the contract and go ahead with the purchase?"

Mrs Brecht answered, "Absolutely no way."

[82] I accept that had Mr Conolly not made the representations pleaded in paragraphs 7, 9, 9A, 12 and 13 of the statement of claim, Barnscape would not have entered into any agreement to purchase unit 7 of Number One Park. The contract was entered into in reliance on the representations in paragraphs 7, 9 and 9A of the statement of claim and allowed to become unconditional because of those representations and the representations in paragraphs 12 and 13 of the statement of claim. As the unit was bought off the plan, the Brechts in fact relied upon the detailed representations made to them by Mr Conolly. They had no reason to suspect that the representations were false. At no time did he act as agent for Barnscape or the Brechts.

[83] The standard terms found in clauses 14.1.7 and 14.1.8 could not, without more, exclude the operation of the TPA.[16] As Steytler P held in *Warwick Entertainment Centre Pty Ltd v Alpine Holdings Pty Ltd* [2005] WASCA 174 at [59]:

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[16] *Demagogue v Ramensky* (1992) 39 FCR 31 at 46 per Gummow J; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546 at 561 per Lockhart J; *Downey v Carlson Hotels Asia Pacific P/L* [2005] QCA 199 at [82].

> "In the case of a claim arising out of a contravention of s 52 of the Act the relevant question, in this context at least, is always one of reliance or inducement. If, as a result of misleading conduct, a person is induced to enter into a contract and suffers loss, the right to a remedy will subsist whatever the parties may provide in their agreement: *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987) 71 ALR 367 at 371, per Sheppard J with whom Fox J and, relevantly, Jackson J were in agreement; *Petera Pty Ltd v EAJ Pty Ltd* (1985) 7 FCR 375 at 378, per Wilcox J; and *Oraka Pty Ltd v Leda Holdings Ltd* (1997) ATPR 41-558 at 43, 717. Exclusion clauses in a contract will only preclude a remedy under the Act when those clauses demonstrate that the party in question did not, in fact, rely on the conduct or where the conduct could not, as a whole, have been seen to be misleading: *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535 at 557; *Kewside Pty Ltd v Warman International Ltd* (1990) ATPR 41-012."

[84] It is a question of fact whether those clauses erased the effect of the representation in the minds of Mr and Mrs Brecht on behalf of Barnscape.[17] Those clauses did not have that effect in this case. They relied on the representations made as to what would be the view from unit 7, Number One Park and their reliance induced them to enter into the Barnscape contract.

[85] After the Brechts signed the contract as directors of Barnscape they had many telephone calls from Mr Conolly, about every month or six weeks, telling how the development was going and that they would be "very, very happy" with the views and the building. He told them he had spoken to the builder on many occasions and everything was going wonderfully well.

[86] In December 2003 – January 2004, Mrs Brecht went to Sunshine Beach and saw that the Splash building had been commenced. She returned on 3 March 2004 and noticed that the Splash building was quite high and thought that it was "absolutely plain and obvious" that there was going to be a problem. The Splash building had not been completed but it was obvious to Mrs Brecht that it was not going to be at the height that Mr Conolly had represented. She visited again later in March 2004. Mrs Brecht told Mr Conolly on one of her visits in March 2004 that she did not think that the height of Splash was what he had represented it would be. He reassured her that they would still be able to see over the top of Splash once it was finished. By then, Number One Park had been built and they were able to stand on the balcony. They also had a long discussion about Sunshine Place. Mr Conolly assured Mrs Brecht that the views could never be built out. He told her that he had checked with the council and the Brechts would still be able to have the views he had told them over the top of Splash when it was completed.

[87] When Mrs Brecht expressed further concern after a site visit in early June just before settlement, Mr Conolly told her that the problem was with Splash, that it had been built too high. He made the same statement to Mr Brecht by telephone. When Mrs Brecht asked if settlement could be delayed, she was told by Mr Conolly that Mr Bain had said that if they did not settle on the date due for settlement, they

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[17] See *Re Benlist Pty Limited v Olivetti Australia Pty Limited* [1990] FCA 289 at [24]-[25]; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [130].

would lose their deposit. She said, on cross-examination, that if she had been able to terminate the contract at that time without financial penalty, she would have done so. The Brechts took legal advice and decided they had to settle on the Barnscape contract. The legal advice was however based on the representations made to the plaintiff and so tainted by that. The Barnscape contract settled on 9 June 2004. The representations made on behalf of the first defendant before the entry into, and prior to the settlement of, the Barnscape contract were relied upon by the plaintiff and so caused whatever recoverable loss it suffered. The decision to settle was reasonable in the circumstances and did not break the chain of causation.[18]

[88] After settlement, Mr and Mrs Brecht (and Mrs Avis) engaged a surveyor to investigate whether Splash was in breach of council limits on its height. By letter dated 15 September 2004, they were informed by the council that the council took the view that Splash was not built above the permitted height. This advice was queried by their surveyor but confirmed by letters of 8 October 2004 and 23 November 2004. They then took legal advice from the solicitors acting for them in these proceedings.

The Avis purchase

[89] The plaintiff in the Avis matter is Carol Lynette Avis, usually known as Lyn, as she was the purchaser of unit 8 at Number One Park. However both she and her husband Gary Leonard Avis were involved in the negotiations for the purchase. In the case of Mr and Mrs Avis, it was Mr Avis who was more actively involved in their financial matters. Although he is now semi-retired he is financially astute having been the head of a major financial advisory company and then appointed to the Board of a private equity firm.

[90] In 2003, the main residence of Mr and Mrs Avis was in Mosman in Sydney and they had a holiday house at Avoca Beach in New South Wales. They had purchased the house in Mosman because of its proximity to the city but also because it had "exceptional water views". It had in Mr Avis's words "about 270 degree uninterrupted water views of Sydney Harbour over Balmoral." His description was matched by photographs found in exhibit 2 at p 493. It is an expansive view unobstructed by buildings or other structures. The holiday house at Avoca Beach also had expansive ocean and beach views as demonstrated by the photographs in exhibit 2 at p 492.

[91] From about 2001, Mr and Mrs Avis started looking for a home outside Sydney where they could spend six months a year. Eventually they restricted their search to Noosa and Sunshine Beach. They discussed their desire to buy in the area with Christopher Shannon, who was a friend of friends of theirs and apparently knowledgeable about real estate. He had moved to Sunshine Beach from Melbourne many years earlier. He was, in fact, an experienced real estate agent.

[92] Mr Avis said he had a list of desirable characteristics for a property which he always used when buying and selling property. The first requirement was for the property to have a north to north-easterly aspect and the second was that it had views. Mr Avis told Mr Shannon of the views that they had from their homes in Sydney and Avoca Beach and said that as nearly as possible they wanted to get that sort of view otherwise they were not interested in buying a property. At that time they were

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18 See *MacCormick v Nowland* [1988] FCA 53 at [11].

thinking of spending about $1,500,000. Mr Shannon drove Mr and Mrs Avis through Noosaville, Noosa Waters and Noosa and then Sunshine Beach. He took them to the site of Number One Park and said, based on Mark Bain's reputation as a builder and what was going to be constructed, he thought that the apartments which were to be built there would cover all of Mr Avis's criteria. Mr and Mrs Avis told Mr Shannon that the main two on their list were aspect and uninterrupted water views. Those two criteria would have to be satisfied first before they would continue to look at it.

[93] Mr Shannon suggested that they meet with the real estate agency handling Number One Park, Laguna Real Estate. Mr Shannon rang Richard Forsyth from Laguna Real Estate, the principal agent marketing Number One Park, who told Mr Shannon that the unit was in one of the positions in Sunshine Beach which has an uninterrupted view of the ocean. Mr Shannon arranged for Mr and Mrs Avis to meet Mr Forsyth, the principal of Laguna Real Estate, in Mr Forsyth's office. That meeting occurred in June 2003. Mr Forsyth told Mr Avis that he was the senior person at Laguna Real Estate. Mark Bain Constructions admitted in its defence that it engaged Laguna Real Estate to market the units in Number One Park for sale.

[94] Mr Forsyth showed Mr and Mrs Avis some of his marketing material including a fit out board which had the colour of the carpets, paint and tiles.

[95] Mr Avis said the main focus of their conversation with Mr Forsyth was to confirm the views that would be enjoyed by the penthouse units. Mr Forsyth said that they would be "spectacular, magnificent." Mr Avis told him about the views they had from their Sydney home and their holiday home and asked in more detail about the views from Number One Park. Mr Forsyth said to him the view would be "white water breaking onto the beach and uninterrupted views." Mrs Avis remembers Mr Forsyth telling them that they would have spectacular uninterrupted white water views. She also remembers her husband carefully questioning him about the expected views. They talked about the prospect of the building which was to be or being built between Number One Park and the ocean and Mr Forsyth said that, because of the contour sloping away from Number One Park and the height regulations of the council, they would have uninterrupted white water views across the top of that building.

[96] Mr Forsyth gave Mr and Mrs Avis a marketing brochure with his business card stapled to the front of it. The marketing brochure is exhibit 4. Mr Avis said that when Mr Forsyth said that they would be able to see waves breaking on the beach, he questioned him with regard to the photograph which showed white water waves and said that he would call that "white water" not "waves breaking on the beach". Mr Forsyth conceded Mr Avis was correct. Mr Avis noted that the artist's impression on the front of the brochure showed sky and ocean between the two buildings of Number One Park. Mr Forsyth told Mr Avis that they would be able to see over the roof of the building which was to be constructed, Splash, because of the contours and the height limit of 12 metres for a building in that area.

[97] Mr Shannon said that Mr and Mrs Avis were also shown a number of photographs in a brochure which was exhibit 8. The numerous photographs showed unobstructed white water views to the north, north-east and east.

[98] The photographs in exhibit 5 which were taken from the balcony of the unit which Mrs Avis purchased clearly shows that, contrary to that representation, the view was interrupted by the Splash building. What was depicted in photographs in exhibit 5 conformed more or less precisely to a view which I was invited to have with the legal representatives on the first day of the trial. Mrs Avis said that if she had known what the view from the unit was actually going to be like, she would not have bought the unit.

[99] I accept that the pre-contractual representations pleaded in paragraph 5 of the statement of claim were made by Mr Forsyth during the course of his meeting with Mr and Mrs Avis and Mr Shannon at Laguna Real Estate in June 2003. They were:

> "(a) Number One Park would be a premium quality development with spectacular uninterrupted surf views from the penthouses (oral representation);
>
> (b) the views from the penthouses would not be built out because of local council height restrictions and the contours of the surrounding land (oral representation);
>
> (c) another development (the Splash Development) would be commencing shortly but that the Splash Development would have no impact on the views available from the penthouse at Number One Park and, in particular, there would be a view over the roof of the Splash Development to permit continuous surf views along the whole horizon (oral representation); and
>
> (d) that the penthouses at Number One Park were planned to and would:
>
> (i) be 'Spectacular White Water Apartments';
>
> (ii) be 'Positioned to capture magnificent views of the waves crashing onto the sand at Sunshine Beach'; and
>
> (iii) have views similar to those in a photograph that showed an uninterrupted view of the ocean, of waves breaking and the white water from them, but in which the beach was obscured by buildings and trees in the foreground (representations (d)(i) to (iii) were written, being contained in a colour photocopy of an advertisement (similar to one which appeared in the 'Noosa News' in or about January 2004) that Mr Forsyth gave to Mr & Mrs Avis);
>
> (e) that the view in the photograph (namely the photograph referred to in subparagraph (d)(iii) herein) is the view that will be available from the penthouses at Number One Park (oral representation)."

[100] Neither Mr nor Mrs Avis spoke to Mr Forsyth again after the meeting in his office before settling the contract. Mr Avis did however speak to Mr Shannon on several occasions. Mr Shannon conveyed to Mr Avis what was said to him by Mr Forsyth about the views from unit 8.

[101] In about July 2003, Mr Shannon and Mr Forsyth went to the site of Number One Park. Mr Shannon suggested they hire a cherry picker to determine precisely the comparative levels of unit 8 of Number One Park and the top of Splash. Mr Forsyth

declined, saying he had checked the levels from the building next to Number One Park and that the views were going to be as they had been shown to Mr and Mrs Avis. Mr Shannon said that Mr Forsyth "again" qualified that by saying that the foreground view would be obstructed. Mr Monks, counsel for the plaintiffs, asked Mr Shannon to explain what he meant by foreground. He referred to trees and buildings down to the beach but not the ocean itself. He understood it to mean that while the foreground view would be affected, the view of the ocean would not be affected.

[102] I am consequently satisfied that the plaintiff has proved the allegations made in paragraphs 6 to 8A of the statement of claim, namely:

> "6. In about July 2003, Mr Shannon on behalf of Mrs Avis attended at the site of the property with Mr Forsyth in order to assess the views from the penthouses of Number One Park. Mr Forsyth and Mr Shannon had a conversation in words to the following effect:
>
> Mr Shannon: 'I need to ascertain that the aspect will be what you say. We should hire a cherry picker so I can check out the views from the level of Unit 8.'
>
> Mr Forsyth: 'We don't need that. I have made an observation from the penthouse of 3 Park Crescent. The views are terrific. Splash will be in front, but you'll see over the top of it to the sea.'
>
> Mr Shannon: 'Look, the aspect is very important to Gary and Lynette [viz, Mrs Avis and her husband]. We need to see it is what you claim it to be.'
>
> Mr Forsyth: 'It's fine. I've checked it out. Splash will be off to the right. All of the foreground will be taken out, but you will be able to see waves breaking over the top. I've checked the levels.'
>
> 7. The natural meaning of the words spoken by Mr Forsyth described in paragraph 6 above was that on completion of both the Number One Park and Splash developments, there would be clearly visible surf views from the veranda of Unit 8, Number One Park, over the roof of the Splash development.
>
> 8. That day, Mr Shannon duly conveyed the results of the site visit, including Mr Forsyth's representations described at paragraphs 5 and 6 above, to Mrs Avis.
>
> 8A. The conduct of Mr Forsyth pleaded and particularised in paragraphs 5 and 6 above amounted to representations that the first and second defendants each:
>
> (a) had the means, ability, skill and experience to conduct appropriate searches of local or State government records, make enquiries of relevant local or State government authorities, and otherwise determine (whether themselves or by engaging appropriately qualified experts) whether the views

from the penthouse at Number One Park could be built out, and if so the extent to which those views would be built out or impeded by the Splash Development;

(b) had undertaken the said searches and enquiries and made the said determination; and

(c) had exercised due care and diligence in undertaking the said searches and enquiries and making the said determination."

[103] The contract of sale of unit 8, Number One Park from Mark Bain Constructions to Mrs Avis was dated 15 September 2003 ("the Avis contract"). The purchase price was $1,225,000 and the deposit $122,500. The seller's agent was Laguna Real Estate. The buyer's solicitor was Freestone & Kumnick at Surfers Paradise. However Mr and Mrs Avis also took advice from a solicitor in Sydney, David Jackson. He is a partner of Bray Jackson & Co, a firm of solicitors in Double Bay. I am satisfied that Mrs Avis entered into the Avis contract in reliance on the representations pleaded in paragraphs 5, 6 and 8A of the statement of claim.

[104] The contract contained, *inter alia*, the following terms:

"14.1 The Buyer acknowledges and agrees:

…

14.1.7 that the Buyer has not relied on any representations by or from the Seller, the Seller's agent or any other person or corporation, other than those representations specified in this Contract about the Lot, Scheme Land, Schedule of Finishes, Chattels, Common Property, Building Works, proposed management operation, achievable occupancies, financial returns or tax benefits.

14.1.8 that in entering into this Contract the Buyer confirms and agrees that all representations made by or on behalf of the Seller are as set out in this Contract and that the terms, covenants and conditions of this Contract constitute the only agreement between the Buyer and the Seller to the exclusion of all other representations to the fullest extent permitted by law. The Buyer waives any claim or right inconsistent with this acknowledgement and agrees to indemnify the Seller from any claim brought by the Buyer in breach of this clause and the Seller's costs of resisting any such claim calculated on a solicitor and own client basis."

[105] These clauses did not exclude the operation of the TPA because the clauses did not erase the effect of the representations in the mind of Mrs Avis. Notwithstanding those clauses Mrs Avis relied upon the representations made to her about the view from unit 8.

[106] In the period between November 2003 and January 2004, after Mrs Avis had signed the contract but before settlement, Mr and Mrs Avis visited Sunshine Beach on a number of occasions. They went to the Number One Park building and took some photographs. Some of the photographs they took were tendered as exhibit 6. They took photographs of the facade of the building facing Park Crescent, an internal shot of their unit and also a photograph from the balcony of the unit facing north-east.

That photograph shows an unobstructed view of white water waves breaking. It is that view that is now obstructed by the Splash building. That can clearly be seen by comparing the television antennae which appear in the photograph taken by Mr and Mrs Avis in exhibit 6 with the television antennae that can been seen in photos 2 and 4 of exhibit 5. In the photograph in exhibit 6 there is an unobstructed view between the television antennae to white water waves or surf breaking at the edge of the ocean. Photograph 3 in exhibit 5 shows that the view between two of the television antennae is now taken up entirely by the Splash building. There is no view of the ocean over the Splash building at all.

[107] In May 2004, Mr Avis had a conversation with Mr Shannon where Mr Shannon told him that it was then his opinion that the Splash building would intrude on the views considerably and the representation they were given by Laguna Real Estate and Mr Forsyth was not going to be the reality. Mr Shannon again spoke to Mr Forsyth on behalf of Mr and Mrs Avis. Mr Shannon told them that Mr Forsyth reassured him that "it was going to be okay". Eventually Mr Forsyth admitted to Mr Shannon that there was a problem. He said he did not know whether it was because Splash had been built a metre too high or Number One Park built a metre too low.

[108] On 16 May 2004, Mrs Avis wrote to the council referring to rumours that Splash was being built above approved height levels and requesting a copy of a report of the council's investigation of the matter which was expected to be available in the following week. She said her decision to purchase unit 8 of Number One Park "was based on retention of views taking into account the 'Splash' building."

[109] Mr and Mrs Avis returned to visit the site a few days before settlement and they saw how high Splash was at that stage. Mr Avis said it was becoming very obvious that it was much higher than it had been represented it would be. He said it was obvious that the view would no longer be anything like the view that Mr Forsyth had represented the unit would have. He told Mr Shannon that Splash was higher than it had been represented to be and affected the views that they would have from unit 8.

[110] Finally Mr Avis rang Mr Bain just prior to settlement in June 2004. Mr Avis said to Mr Bain:

> "Mark, I'm very concerned about what's happening with the Splash building and conversations that Mr Shannon has had with, I believe, Mr Forsyth, and the actual effect of the building itself and I don't want to settle on the property."

[111] Mr Avis agreed in cross-examination that it was absolutely his view that immediately prior to settlement the imposition of Splash on the view had affected the value of the property. Mr Avis said to Mr Bain that he believed the property was now not worth what they had paid for it and asked if he would consider any reduction in price. Mr Bain replied:

> "Absolutely not, I'll not consider any reduction in price. You must settle. The problem's not my problem, the problem is that the Splash building has been built above the height limit. If you have any issue you need to take it up with the owner, the developer, the builder of the Splash building."

[112] The evidence given by Lloyd Laing, a licensed surveyor, however, showed that it would have been apparent to a licensed person in the building and construction

industry who looked at the plan of Number One Park and the plan of Splash, which was lodged with the council on 31 January 2002 and approved on 26 June 2002, that the views of the units in Number One Park would have been severely impacted upon by the construction of Splash. The plans in development approvals given by the council show that the Finished Floor Level ("FFL") of units 7 and 8 of Number One Park was to be 42.8 metres above mean sea level;[19] and that the FFL of Level 3 of Splash was to be 42.95 metres above mean sea level.[20] The floor level of the top studio unit in Splash was therefore obviously going to be higher than the floor level of units 7 and 8 in Number One Park. Splash was situated between Number One Park and the ocean and it would therefore obscure the view from Number One Park to the ocean.

[113] Mr Bain told Mr Avis that if he refused to settle Mr Bain would take legal action against them. Mr Avis then rang his solicitor, David Jackson, told him what Mr Bain had said, took legal advice and settled on the contract on 9 June 2004. He discussed the matter with Mr Shannon but his evidence was that he took the advice of his lawyer that he should settle. He said in evidence, "in cases like this, there is – there is one advice you take, and that's from a lawyer." Mr Avis told Mr Jackson that the view from the unit they had contracted to purchase was blocked by an adjoining building and that his understanding was that building was built higher than it should have been. Mr Jackson advised him that in those circumstances he should settle. Mr Jackson's advice was predicated on the misrepresentation made by Mr Bain to Mr Avis that any obstructions to the view by Splash was the result of Splash being constructed above the legal limit.

[114] The effect of Mr Jackson's advice and the conversation with Mr Bain were relayed by Mr Avis to Mrs Avis and they decided that they had to settle the contract. In settling, they relied upon the representation made by Mr Bain that the problem was that the Splash building had been built above the allowed height limit.

[115] In paragraph 13(b) of the statement of claim the plaintiff alleged and I accept that to the extent that the representations were representations as to future matters, they fell within s 51A of the TPA.

[116] The plaintiff alleged that the representations were false. In paragraph 14 of the statement of claim she alleged:

> "14. The representations referred to in paragraph 5 were false in that:
>
> (a) the surf views from the property were not going to be and were not uninterrupted views, spectacular views, magnificent views or views identical or similar to those in the picture referred to in paragraph 5(d)(iii) above because they would be and were in fact substantially impeded by the roofline of the Splash development which was then under construction; and
>
> (b) the views from Number One Park as planned and built could in fact be built out if a building was built on the site of the Splash development to within the

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19 Exhibit 2 p 94.

20 Exhibit 2 p 131.

maximum legal height, that such a building (namely the Splash development) had already been approved by Noosa Council and was then under construction, and the views were built out by the Splash development.

15. The representations referred to in paragraph 6 were false in that:
    (a) the views from 3 Park Crescent were not fairly representative of the views that would be and were available from the property once constructed because they did not account for the interruption that would be and was caused by the Splash development that was then under construction; and
    (b) surf views would not be and are not available from the property over the roof of the Splash development once it was constructed.

15A. In the premises pleaded in paragraphs 14 and 15 above, the representations by the first and second defendants that are pleaded in paragraph 8A were false in that the first and second defendants:
    (a) lacked the means, ability, skill and experience to conduct appropriate searches of local or State government records, make enquiries of relevant local or State government authorities, and otherwise determine (whether themselves or by engaging appropriately qualified experts) whether the views from the penthouses at Number One Park could be built out, and if so the extent to which those views would be built out or impeded by the Splash Development;
    (b) had failed to undertake the said searches and enquiries and make the said determination; or
    (c) had failed to exercise due care and diligence in undertaking the said searches and enquiries and make the said determination.

16. The representations referred to in paragraph 11 were false in that:
    (a) despite the contours of the land in front of Number One Park and Council's height restrictions, it was and is possible to build a development of such a height that whilst it complies with the height restrictions, it blocks views of the surf and the sea from the penthouses in Number One Park;
    (b) the height of the Splash development as it was planned, approved by the Noosa Shire Council, and constructed was within the maximum permitted by the Noosa Shire Council."

[117] I am satisfied that the representations were false for the reasons pleaded. There was no real attempt at the trial to suggest otherwise. The near equivalence of the top floors of Number One Park and Splash in height in the plans approved by the

council, meant that there was never going to be uninterrupted white water views from the penthouse units in Number One Park once Splash was constructed. I am also satisfied that the representations made, were made in trade or commerce in connection with the sale of land concerning the characteristics of the land and were false, misleading and deceptive in breach of s 52 and s 53A of the TPA.

[118] I am satisfied that had Mr Forsyth not made the representations to Mrs Avis and Mr Shannon on her behalf, Mrs Avis would not have entered into the agreement to purchase unit 8 Number One Park. She relied, as she was entitled to, on the representations made to her. A plaintiff is not denied a remedy under the TPA just because she failed to check the accuracy of a representation.[21] The representations made on behalf of the first defendant before entry into the Avis contract and before settlement and by the first defendant before settlement were relied upon by the plaintiff and therefore caused whatever recoverable loss she suffered. The evidence of both Mr and Mrs Avis was that if they had been told the truth about the impact on the view from unit 8 of the construction of Splash, Mrs Avis would not have purchased the unit. If they had been shown another property which did meet their criteria, she would have purchased that.

[119] After settlement, Mr Avis investigated the legality of the Splash building. On 15 June 2004, Mrs Avis wrote to the council and again asked to be given a copy of a report of the council's investigations of the height of Splash which was expected to be available shortly. She reiterated that her decision to purchase unit 8 was based on retention of views taking into account the Splash building. She asserted that it appeared that Splash was above the height allowed by council. Mr and Mrs Avis found in a chance meeting that the Brechts had the same problem so Mr Bain, the Brechts and the Avises put together a fund to investigate the lawfulness of the height of the Splash building.

[120] On 9 September 2005 Mr Avis sent an email to Mr Shannon saying that he and Mrs Avis were further pursuing their investigations in relation to the intrusion of the Splash development on Number One Park. He said that they had been advised to seek his input and refer back to the comments made by Mr Forsyth regarding the Avis's purchase of unit 8 and the question regarding the level of intrusion by Splash. He said to Mr Shannon that he would recall encouraging Mr and Mrs Avis to settle the sale and to consider their options after that point in time and that they did so at his request. In spite of this being slightly at odds with his evidence, I am more inclined to accept Mr Avis's oral evidence that in fact it was on the advice of their solicitor that they settled. They knew that Mr Shannon was of the same opinion as their solicitor but they did not rely upon what Mr Shannon told them about the desirability of settling the sale. They did not at that time realise that Mr Shannon stood to benefit financially if they settled by receiving the whole of the commission on the sale. Nevertheless I view the email as a contemporaneous attempt to enlist Mr Shannon's assistance with a case that they wished to mount about misrepresentation rather than a complete statement of their reasons for settling on the contract.

Agency

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[21] *QCoal P/L & Anor v Cliffs Australia Coal P/L & Anor* [2009] QCA 358 at [33]; *Henville v Walker* (2001) 206 CLR 459 at 468-469.

[121] Having been satisfied that the representations pleaded were made by Mr Forsyth in the Avis matter and by Mr Conolly in the Barnscape matter and that they were false, misleading and deceptive, and that the plaintiffs entered into the contracts in reliance upon them and settled those contracts relying on the misrepresentations made to them, the next question is whether the first defendant is liable for those representations.

[122] The plaintiff in each case relied on s 84(2) of the TPA which provides:

> "Any conduct engaged in on behalf of a body corporate:
>
> (a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;
>
> shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate."

[123] Mrs Avis alleged in paragraph 13(a) of the statement of claim that the representations alleged in paragraphs 5, 6 and 8A of the statement of claim were made by the second defendant as the duly authorised agent of the first defendant and with the first defendant's knowledge and approval. That the second defendant acted as a real estate agent duly authorised to act on behalf of and to bind the first defendant was pleaded in paragraphs 2(c) and 2(d) of the statement of claim. The first defendant admitted that it engaged the second defendant to market the proposed units at Number One Park for sale but said the extent of the second defendant's authority was limited to marketing those units for sale. The first defendant denied that the representations were made and said, if they were made, they were not made by the real estate agent as its duly authorised agent or with its knowledge and approval.

[124] In paragraph 13(a) of the amended statement of claim Mrs Avis added the following unambiguous pleading of apparent authority, that the representations alleged in paragraphs 5, 6 and 8A:

> "… or were made as the duly authorised agent within the scope of the second defendant's apparent authority within the meaning of section 84 of the TPA;
>
> …
>
> **Particulars of Apparent Authority**
>
> (i) being engaged by the first defendant to market the property for sale;
>
> (ii) marketing the property for sale;
>
> (iii) placing the following advertisements in the press that refer to the views that would be available from the property:
>
> (A) Noosa Journal Property Review 6 March 2003 page 8, by Laguna, which refers to views;

(B) Noosa Journal Property Review 13 March 2003 page 2, by Laguna, which refers to views;

(C) Noosa Journal Property Review 20 March 2003 page 9, by Laguna, which refers to views;

(D) Noosa Journal Property Review 17 April 2003 page 18, by Laguna, which refers to views;

(E) Noosa Journal Property Review 24 April 2003 page 2, by Laguna, which refers to views;

(F) Noosa Journal Property Review 1 May 2003 page 10, by Laguna, which refers to views;

(G) Noosa Journal Property Review 15 May 2003 page 9, by Laguna, which refers to views;

(H) Noosa Journal Property Review 22 May 2003 page 6, by Laguna, which refers to views;

(I) Sunshine Coast Daily Property Saturday 17 January 2004 page 73, by Laguna, which refers to views;

(J) Sunshine Coast Daily Property, Friday 13 February 2004, page 15, by Laguna, which refers to views;

(iv) speaking with Mr Shannon and with Mr and Mrs Avis about the property on the occasion particularised in paragraph 5 above;

(v) giving Mr and Mrs Avis a photograph as particularised in paragraph 5(d)(iii) above;

(vi) meeting with Mr Shannon at the site of the property and speaking with Mr Shannon about the property, on the occasion particularised in paragraph 6 above;

(vii) the property was being sold 'off-the-plan' and thus the plaintiff was unable to conduct a physical inspection of the actual property herself in order to view the characteristics for herself;

(viii) views and potential impediments to views are one of the core characteristics that defines and distinguishes different real property offered for sale in Sunshine Beach where the second defendant carried on business as a real estate agent."

[125] The first defendant consequently amended paragraph 13 of its defence to add sub-paragraph (c):

"(c) says further that if the representations were made (which is denied), the Second Defendant did not have the apparent authority [as that term is referred to in section 84 of the *Trade Practices Act 1974* ('TPA')] on behalf of the First Defendant to make representations as alleged, nor were the alleged representations within the apparent authority of a

real estate agent retained to market units of that type being marketed in the Sunshine Beach area."

[126] Barnscape alleged in paragraph 16(a) of the statement of claim that the representations alleged in paragraphs 7, 9, 9A, 12 and 13 of the statement of claim were made by the second defendant as the duly authorised agent of the first defendant and with the first defendant's knowledge and approval. That the second defendant acted as a real estate agent duly authorised to act on behalf of and to bind the first defendant was pleaded in paragraphs 3(c) and 3(d) of the statement of claim. The first defendant admitted that it engaged the second defendant to market the proposed units at Number One Park for sale but said the extent of the second defendant's authority was limited to marketing those units for sale. The first defendant denied that the representations were made and said, if they were made, they were not made by the real estate agent as its duly authorised agent or with its knowledge and approval.

[127] In paragraph 16(a) of the amended statement of claim Barnscape added the following unambiguous pleading of apparent authority, that the representations alleged in paragraphs 7, 9, 9A, 12 and 13:

"(a1) were made as the duly authorised agent within the scope of the second defendant's apparent authority within the meaning of section 84 of the TPA; or further or alternatively

(a2) were conduct engaged in at the direction, or with the consent or agreement (express or implied) of Roombridge Pty Ltd trading as Laguna Real Estate, where the giving of such direction, consent or agreement was within the scope of Laguna Real Estate's apparent authority (per section 84(2)(b) of the TPA).

Particulars of Apparent Authority (second defendant)

(i) being engaged by the first defendant to market the property for sale;

(ii) marketing the property for sale;

(iii) the publication of the following advertisements in the press that refer to the view that would be available from the property:

(A) Noosa Journal Property Review 6 March 2003 page 8, by Laguna, which refers to views;

(B) Noosa Journal Property Review 13 March 2003 page 2, by Laguna, which refers to views;

(C) Noosa Journal Property Review 20 March 2003 page 9, by Laguna, which refers to views;

(D) Noosa Journal Property Review 17 April 2003 page 18, by Laguna, which refers to views;

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(I) Sunshine Coast Daily Property Saturday 17 January 2004 page 73, by Laguna, which refers to views;

(J) Sunshine Coast Daily Property, Friday 13 February 2004, page 15, by Laguna, which refers to views;

(iv) speaking with Mr and Mrs Brecht about the property on the occasion particularised in paragraphs 4 to 7 above;

(v) speaking with Mrs Brecht about the property on the occasion particularised in paragraphs 8, 11, 12 and 13 above;

(vi) the property was being sold 'off-the-plan' and thus the plaintiff through its directors Mr and Mrs Brecht was unable to conduct a physical inspection of the actual property itself in order to view its characteristics for itself;

(vii) views and potential impediments to views are one of the core characteristics that defines and distinguishes different, real property offered for sale in Sunshine Beach where the second defendant carried on business as a real estate agent;

(viii) email sent by David Conolly to Grant Brecht on 12 June 2003 at 11.40am stating inter alia that 'I was advised by Mr Forsyth the floor level for No 1 Park Crescent penthouses are to be 1 metre higher than the top floor of the adjacent Moroccan building. Both Mr Forsyth & Mr Bain have assured me the views as such will be outstanding.'

Particulars of Apparent Authority (Laguna Real Estate)

(i) being engaged by the first defendant to market the property for sale;

(ii) marketing the property for sale;

(iii) placing the following advertisements in the press that refer to the views that would be available from the property:

(A) Noosa Journal Property Review 6 March 2003 page 8, by Laguna, which refers to views;

(B) Noosa Journal Property Review 13 March 2003 page 2, by Laguna, which refers to views;

(C) Noosa Journal Property Review 20 March 2003 page 9, by Laguna, which refers to views;

(D) Noosa Journal Property Review 17 April 2003 page 18, by Laguna, which refers to views;

(E) Noosa Journal Property Review 24 April 2003 page 2, by Laguna, which refers to views;

(F) Noosa Journal Property Review 1 May 2003 page 10, by Laguna, which refers to views;

(G) Noosa Journal Property Review 15 May 2003 page 9, by Laguna, which refers to views;

(H) Noosa Journal Property Review 22 May 2003 page 6, by Laguna, which refers to views;

(I) Sunshine Coast Daily Property Saturday 17 January 2004 page 73, by Laguna, which refers to views;

(J) Sunshine Coast Daily Property, Friday 13 February 2004, page 15, by Laguna, which refers to views;

(iv) speaking with Mr Shannon and with Mr and Mrs Avis about the property in or about June 2003;

(v) giving Mr and Mrs Avis a copy photograph during the meeting referred to in subparagraph (iv) above;

(vi) meeting with Mr Shannon at the site of the property and speaking with Mr Shannon about the property, in about July 2003;

(vii) the property was being sold 'off-the-plan' and thus any prospective purchasers were unable to conduct a physical inspection of the actual property themselves in order to view the characteristics for themselves;

(viii) views and potential impediments to views are one of the core characteristics that defines and distinguishes different real property offered for sale in Sunshine Beach where the second defendant carried on business as a real estate agent."

[128] The first defendant consequently amended paragraph 14 of its defence to add a new sub-paragraph (c) in similar terms to paragraph 13(c) of the amended defence in the Avis matter.

[129] The evidence showed, and the defence admitted, that the court could safely infer the real estate agent in each case was engaged to act on behalf of Mark Bain Constructions to market the units in Number One Park purchased by the plaintiffs. If the representations were made by the real estate agents within the course of that retainer, ie within the scope of their authority, then s 84(2) of the TPA ensures that those representations are deemed to have been made by the principal, Mark Bain Constructions.

[130] As was submitted by the plaintiffs, having authority to market must include authority to make representations about the views that would be available from these off-the-plan penthouse units before they were built, this being a core characteristic of the properties that would have had a critical impact on their value. The significance of the views is shown by the advertisements placed in newspapers about the properties referring to their views. The valuation evidence confirms the obvious, that the existence and quality of ocean views in a seaside area affects the value of the property. The representations were therefore made within the scope of the agents' actual authority. That actual authority gave them apparent authority to make the representations made.

[131] The authority of a real estate agent was described by Bacon V-C in *Mullens v Miller*[22] at 199 as follows:

> "A man employs an agent to let a house for him; that authority, in my opinion, contains also an authority to describe the property truly, to represent its actual situation, and, if he thinks fit, to represent its value. That is within the scope of the agent's authority; and when the authority is changed, and instead of being an authority to let it becomes an authority to find a purchaser, I think the authority is just the same. I think the principal does thereby authorise his agent to describe, and binds him to describe truly, the property which is to be the subject disposed of; he authorises the agent to state any fact or

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22 (1882) 22 Ch Div 194.

> circumstances which may relate to the value of the property. That, I take it, is clearly laid down in the cases referred to. It would be very dangerous, in my opinion, to limit the authority of an agent in the way in which the argument before me has proposed to limit, namely, that the duty of Mr Dean simply was to go out into the world and find a man likely to buy, and to bring him to the Plaintiff, the vendor, and to say, 'Here is a man who is willing to buy.'"

[132] Further by allowing Laguna Real Estate and Dolphin Bay Real Estate, whether directly or through Laguna Real Estate, to market the property on its behalf, Mark Bain Constructions gave them apparent authority to make representations to potential purchasers on its behalf. If their actual or apparent authority was restricted in some unexpected way, one would have expected the first defendant to lead evidence of that restriction. However, no such evidence was led by the first defendant. Mr Bain did not give evidence at the trial.

[133] I am satisfied that the first defendant is liable to the plaintiff in each case for the representations made by the second defendant.

Damages

[134] Section 82(1) of the TPA provides that:

> "a person who suffers loss or damage by conduct of another person that was done in contravention of Part … V … may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

[135] As Gummow J held in *Marks v GIO Australia Holdings*,[23] s 82 has at least five discrete elements:

(1) it identifies the legal norms for contravention of which the action under the section is given;
(2) it identifies those against whom the action lies;
(3) it specifies the injury for which the action lies as the suffering of loss or damage;
(4) it stipulates a causal requirement that the plaintiff's injury must be sustained by the contravention; and
(5) it provides the measure of compensation is the amount of the loss or damage sustained.

[136] His Honour referred at [99] to the TPA's being a "fundamental piece of remedial and protective legislation" which gives effect to what Lockhart J in *ICI Australia Operations Pty Limited v Trade Practices Commission*[24] referred to as "matters of high public policy". Accordingly, it is to be construed so as "to give the fullest relief which the fair meaning of its language will allow."[25]

[137] In *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, Gaudron, Gummow and Hayne JJ set out at [42] – [46] some basic propositions with regards to the remedies found in Part VI of the TPA:

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23 (1998) 196 CLR 494 at [95].

24 (1992) 38 FCR 248 at [32].

25 *Bull v Attorney-General for New South Wales* (1913) 17 CLR 370 at 384; *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 44*; Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41.

> "42. It is necessary to approach the principal issue in this case with some basic propositions well in mind. First, Pt VI of the Act, and, in particular, ss 82 and 87(1), have operation in many different kinds of case. Section 82 entitles a person who suffers loss or damage by conduct of another that was done in a contravention of any of a very large number of provisions – ranging from contravention of any of the restrictive trade practices provisions of Pt IV to the so-called consumer protection provisions of Pt V – to recover the amount of that loss and damage. Section 82 can, therefore, be engaged in cases in which the contravener's conduct is intentional or even directed at harming the person who suffers loss and damage. It can be engaged in cases, like the present, in which the contravener can be said to have fallen short of a standard of reasonable care as well as contravene the Act, and in cases in which there was neither want of care nor intention to harm, but still a contravention of the Act.
>
> 43. Secondly, s 82 entitles a person who suffers loss or damage by conduct done in contravention of a relevant provision, to recover not only from the contravener but also from any person involved in the contravention. Persons involved may have acted intentionally or carelessly; they may have acted with or without intention to harm.
>
> …
>
> 45. Fourthly, s 82 is concerned only with the position of a person who *has suffered* loss or damage and only that person may rely on the section." [footnotes omitted]

Damages - Barnscape

[138] Barnscape alleged in paragraph 23 of the statement of claim that as a result of the misleading and deceptive conduct it suffered loss and damage. In its defence Mark Bain Constructions pleaded at paragraph 21 that :

> "(ii) the price paid by the Plaintiff was at least equivalent the [*sic*] market value of unit 7 at the material time alleged by the Plaintiff;
>
> (iii) the Plaintiff with full knowledge of the facts elected to affirm the contract."

[139] Further the first defendant pleaded in paragraph 22 of the defence that none of the representations were contained in the Barnscape contract, the contract contained clauses 14.1.7 and 14.1.8 (as previously set out) and that therefore:

> "(a) the Plaintiff is estopped from asserting that she [*sic*] relied on the representations or any of them in entering into the contract to purchase unit 8; and
>
> (b) in the event the Plaintiff is entitled to recover any loss or damage from the First Defendant (which is denied) the First Defendant is entitled to an indemnity from the Plaintiff for the full amount thereof together with the costs referred to in clause 14.1.8 of the contract."

[140] For the reasons set out previously these exclusion clauses did not have the effect claimed by the first defendant.

[141] In paragraph 24 Barnscape alleged that if Mr Conolly had not made the representations, it would not have entered into any agreement to purchase unit 7 Number One Park and:

> " …
>
> (b) Mr and Mrs Brecht would, on behalf of the plaintiff, have searched for a penthouse or other type of apartment or a house in the Sunshine Beach area (i.e. somewhere between Coolum and Noosa) that had uninterrupted surf views (alternative property);
>
> (c) Mr and Mrs Brecht would have found an alternative property sometime in the middle of 2003; and
>
> (d) the plaintiff would have succeeded in purchasing that alternative property for a price within its budget, namely between $1.0 and $2.2million.
>
> Particulars of alternative property
>
> (i) Unit 1 'Splash' 25 Park Crescent, Sunshine Beach;
>
> (ii) Unit 2 'Splash' 25 Park Crescent, Sunshine Beach;
>
> (iii) Unit 4 'Splash' 25 Park Crescent, Sunshine Beach;
>
> (iv) Unit 1 'Domani' 8 Park Crescent, Sunshine Beach;
>
> (v) Unit 2 'Monserrat' 3 Park Crescent, Sunshine Beach;
>
> (vi) Unit 1 'Casablanca' 16 Henderson Street, Sunshine Beach;
>
> (vii) 34 Park Crescent, Sunshine Beach (a house)
>
> (e) Further or alternatively to sub-paragraphs (c) and (d) herein, the plaintiff would not have purchase [*sic*] any property, having failed to find or purchase an alternative property having uninterrupted surf views.
>
> 25. The alternative property would have increased in value in line with the general appreciation in values in the Sunshine Beach area and thus (if purchased for $1.2million) be worth approximately $1,608,000 at May 2008.
>
> **Particulars**
>
> (a) Value of $1,200,000 increasing by approximately 34% between the middle of 2003 and May 2007.
>
> (b) Value remaining stagnant between May 2007 and May 2008.
>
> 26. The plaintiff sold the property on 29 May 2007 for $1,035,000.
>
> 27. In the premises pleaded in paragraphs 24 to 26 above, by the making of the representations pleaded in paragraphs 7, 9,

9A, 12 and 13 above, the plaintiff lost the opportunity to acquire an alternative property and profit from its increase in value since the middle of 2003, the quantum thereof being the difference between the value of the property at the time of the plaintiff sold it ($1,035,000), and the contemporaneous value of an alternative property ($1,608,000), namely $573,000.

28. Further or alternatively to paragraph 27 above, in the premises pleaded in paragraph 24(e) above, by the making of the representations pleaded in paragraphs 7, 9, 9A, 12 and 13 above, the plaintiff purchased a property that it would otherwise not have purchased, and as a result of that transaction suffered loss and damage, namely:

(a) interest of $156,220 paid on approximately $600,000 borrowed to settle the purchase of the property from settlement on 9 June 2004 until the property was sold on 29 May 2007;

(b) lost investment opportunities for the approximately $600,000 cash that the plaintiff put towards the purchase price of the property.

Particulars

(i) capital gain from the purchase of a vacant lot at Kangaroo Island, South Australia, near to the land at Lot 2, Decaudie [*sic*] Drive, Island Beach, Kangaroo Island that was purchased by the plaintiff on 27 February 2004; or

(ii) interest that could have been earned from investing the said cash in interest bearing deposits or bonds.

(c) loss on capital, being the purchase price of $1,200,000 minus the sale price of $1,035,000, totalling $165,000; and

(d) transaction costs such as bank fees and conveyancing charges."

[142] The amendment sought on 16 April 2010 was to add to paragraph 28(c) of the amended statement of claim the words "or alternatively to those particulars and sub-paragraphs (a) and (b) herein, loss on capital, being the purchase price of $1,200,000 minus the value at the date of settlement, being approximately $860,000 totalling approximately $340,000."

[143] In the prayer for relief, the plaintiff claimed damages pursuant to s 82 of the TPA in the estimated amount of $450,000.

[144] To these allegations, the first defendant said in paragraph 23(ii)(b) of the defence:

"(b) Mr and Mrs Brecht would not found [*sic*] and the plaintiff would not have purchased an alternative property as alleged for between $1million - $2.2million;

PARTICULARS

(1) If, which is denied, Mr and Mrs Brecht were interested in purchasing an investment property

having uninterrupted surf views (as alleged in paragraph 5 of the third further amended statement of claim) then none of the following alleged alternative properties had those characteristics:-

- Unit 1 'Splash' 25 Park Crescent, Sunshine Beach;
- Unit 2 'Splash' 25 Park Crescent, Sunshine Beach;
- Unit 4 'Splash' 25 Park Crescent, Sunshine Beach;
- Unit 2 'Monserrat' 3 Park Crescent, Sunshine Beach;
- Unit 1 'Casablanca' 16 Henderson Street, Sunshine Beach;
- Unit 1 'Domani' 8 Park Crescent, Sunshine Beach."

(2) Despite reasonable enquiries the First Defendant remains uncertain of the truth or otherwise of the allegation that the house property at 34 Park Crescent, Sunshine Beach has uninterrupted surf views but says in any event that the property was advertised for sale for a price well beyond the plaintiff's alleged budget, namely $2.75million.

(3) Further there were no other properties for sale which possessed characteristics which the Plaintiff required before the Plaintiff would contemplate purchasing such a property.

(c) The First Defendant says further that:-

(1) it does not admit that any of the alternative properties alleged were in fact available to be purchased in the middle of 2003 by the plaintiff. The First Defendant has made reasonable enquiries and remains uncertain of the truth or otherwise of the allegation and is unable to admit it for that reason;

(2) at no time was the First Defendant or Mr Conolly advised by the plaintiff that the plaintiff's budget was between $1million - $2.2million.

(d) The First Defendant admits the plaintiff would have failed to find and purchase any an [*sic*] alternative property having uninterrupted surf views, as alleged in sub-paragraph (e) of the third further amended statement of claim; but denies the allegations otherwise made in sub-paragraph (e) because they are untrue for the reasons set out in paragraph 23(i) and (ii) hereof."

[145] Paragraphs 25 to 28 of the statement of claim were partly admitted and otherwise denied.

[146] In addition to the relief specifically sought the court has power pursuant to r 156 of the UCPR to grant general relief or relief other than that specified in the pleadings

irrespective of whether general or other relief is expressly claimed in the proceedings. This rule is supplemented by r 658 of the UCPR which provides:

> "(1) The court may, at any stage of a proceeding, on the application of a party, make any order, including a judgment, that the nature of the case requires.
>
> (2) The court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim, counterclaim or similar document."

[147] These rules were referred to by the Court of Appeal in *Coppo v Banalasta Oil Plantation Ltd; Borg v Pawski* [2005] QCA 96. At [30] McMurdo P held:

> "The relief sought at trial against Plantation Equity included a declaration that each loan agreement was void. Mr H Fraser QC, for the appellants, concedes that remedy cannot be granted because the only remedy for a breach of s 851 of the *Law* is damages. Under UCPR r 658(2) a judge may grant relief beyond that specifically claimed where there is appropriate. This is such a case. If the appellants are entitled to damages for the amounts outstanding under the loan agreements they should be awarded those damages even though they originally claimed an entitlement to set aside the loan agreements rather than damages. The appellants are entitled to be placed in the position they would have been in had they not acted on Mr Horner's recommendation and taken part in the scheme: *Manwelland Pty Ltd v Dames & Moore Pty Ltd* [2001] QCA 436."

[148] Chesterman J (as his Honour then was) noted at [82] that:

> "The only obstacle in giving judgment for the appellants against the second respondent for the same amounts for which judgment was given against them on the counterclaim is that no such specific relief was sought in the prayer for relief."

[149] His Honour then referred to r 156 and r 658 and observed at [83]:

> "The present is a case where the power should be exercised. The relief given to the appellants following the trial was limited because of the misconception as to agency with which I have been dealing in these reasons. But for that misconception, for which the inadvertence of counsel for the respondents was responsible, there would have been findings that the respondents were vicariously responsible for Horner's contravention of s 851. The financial consequences were obvious. They were the losses suffered by each appellant as well as the amounts for which they were liable under the loan agreements. They had claimed the former amounts, but not the latter, but the rules provided a ready means by which they could recover both established heads of damages."

[150] This was not a case where there was any departure at the trial from the pleaded cause of action.[26] It is therefore appropriate to grant relief on the pleaded cause of action which is justified on the evidence. It is not in my opinion necessary in this case to amend the statement of claim to obtain that relief.

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[26] viz *Dare v Pulham* (1982) 148 CLR 658 at 664.

[151] The first defendant's arguments as to prejudice are not maintainable in view of the rules which enable the court to give the appropriate relief on the pleaded cause of action notwithstanding the failure to specifically plead that relief. It was perilous to settle on the basis, if it did, that the plaintiffs would be limited to the pleaded relief.

[152] It is necessary to refer in detail to the evidence to determine what damage was suffered by the plaintiffs which should be reflected in the compensation awarded pursuant to s 82 of the TPA.

[153] The evidence establishes that had Mr and Mrs Brecht known that the view from the unit which Barnscape purchased would not have been as represented, it would not have purchased the property. They would have searched for another property which had the views that the unit was represented to have. The plaintiffs must prove on the balance of probabilities that they suffered some loss or damage for the loss of that opportunity: *Sellars v Adelaide Petroleum*.[27] In the first instance the plaintiff must prove that it suffered some loss in that the property it purchased was worth less than it actually paid for it. The valuation evidence confirms the obvious, referred to earlier, that a unit with an unimpeded view of the ocean is worth more than the same unit with an impeded view.

[154] The plaintiff relied on valuation evidence by Mr Caspers, of Propell National Valuers, a registered valuer, experienced in providing valuations of properties in the Sunshine Coast area. Mr Caspers' evidence was supported by direct comparison with sales of comparable properties in the area of Sunshine Beach. Mr Caspers valued unit 7 with its impeded view as being worth $800,000 as at 1 July 2003. If the property had had an unimpeded view, it would have been worth $925,000. In an updated valuation dated 30 April 2010, Mr Caspers valued unit 7 as at 9 June 2004, the date of settlement of the Barnscape contract, at $820,000.

[155] Barnscape purchased a property which had a value, although not what it paid for it. Its true value at the date of settlement of the Barnscape contract, in the sense used in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*,[28] was $820,000. The value at the date of settlement is the appropriate figure as it was at that time that the plaintiff received the property and paid the balance of the contract price and thus suffered a loss.

[156] The plaintiff has put the calculation of the quantum of damages on a number of different bases, all of which were arguable: if the property had not been purchased it could have purchased an alternative property at Sunshine Beach or elsewhere or otherwise invested the money, and it lost the opportunity to profit from an alternative investment and/or suffered loss by borrowing to make this purchase. All of those alternatives depend on the basic proposition which I find to be true as a matter of fact: Barnscape would not have purchased the property had the misleading and deceptive conduct not occurred.

[157] In order for Barnscape to settle, the company borrowed $600,000 and used $600,000 of its own funds. Mrs Brecht said that if they had not used the $600,000 to purchase unit 7 at Number One Park, they would have otherwise invested the funds. They were unable to take up an opportunity to purchase a beach front block of land for $540,000 later in 2005 on Kangaroo Island (Lot 256 on De Coudie

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27 (1994) 179 CLR 332 at [20]-[21].

28 (2004) 217 CLR 640 at [36] – [37].

Drive) because the funds had been spent on Number One Park. The rest of their funds were invested elsewhere, and so were not available to purchase Lot 256. An RP Data Property Search showed that Lot 256 sold on 17 May 2005 for $540,000 and then on 27 March 2006 for $755,000.

[158] Barnscape now owns property on the beach front on Kangaroo Island. It purchased Lot 2, De Coudie Drive, Island Beach in February 2004 as a vacant block for about $390,000 and constructed a house on it for $800,000. The house had unobstructed beach and ocean views as shown in Exhibit 3 pp 494-498. In January – February 2009, Mr and Mrs Brecht acquired Lot 1, De Coudie Drive jointly with their neighbours in order to protect their view. It is therefore quite possible that they would have taken the opportunity to purchase Lot 256 on De Coudie Drive on Kangaroo Island.

[159] If Barnscape had not purchased a unit in Number One Park, then there were properties which they could have bought on the Sunshine Coast between Coolum and Noosa with uninterrupted surf views. Of the alternative properties particularised, however, only unit 4, Splash appears to have become available during the relevant period and have the type of ocean view sought by the Brechts. Unit 4 Splash sold on 7 October 2003 for $1,950,000 and Unit 2 (rather than Unit 1), 16 Henderson Street sold on 18 October 2003 for $1,725,000. Those units were larger in size than either Unit 7 or Unit 8 Number One Park; Splash is closer to the ocean and has fewer units. Those factors made the units more expensive to purchase than unit 7 or unit 8, even if units 7 and 8 had shared the expansive views enjoyed by the units in Splash and 16 Henderson Street. Barnscape had access to an additional $1,000,000 at the time of settlement if more monies had been required to purchase a more expensive property. So those are opportunities that Barnscape missed as a result of the purchase of unit 7.

[160] As the unit at Number One Park had been bought as an investment property, it was let as a holiday rental property. It was also used from time to time by Mr and Mrs Brecht personally. The rental was designed to provide some income while steps were put in place to work out what the cause of the problem with the view was and then to sell the property. The net rental received by Barnscape was as follows:

01/07/04 – 30/06/05	Dolphin Bay Real Estate	$17,361.99
	Laguna Noosa Holidays	$1,005.18
01/07/05 – 30/06/06	Dolphin Bay Real Estate	$20,112.58
	Zinc Realty	$4,267.73
01/07/06 – 30/06/07	Dolphin Bay Real Estate	$15,978.80
	Zinc Realty	$11,495.64

[161] In addition, Barnscape had other expenses, including interest paid on the $600,000 loan. However, had they bought an alternative property at Sunshine Beach, they would have received rental income and most likely paid interest on borrowings. They would probably have received more income but paid more interest so it is very difficult to say they made a net loss on rental income and interest payments.

[162] Unfortunately units 9 and 10 were for sale when the Barnscape contract settled and the Brechts took the view that the Barnscape unit would not attract a good price if it was put on the market at the same time as two other penthouse units. On 12 May 2006, Barnscape appointed Zinc Real Estate to sell unit 7 for $1,375,000. Once it was offered for sale it took 12 months to sell. Barnscape signed a contract to sell unit 7 on 29 May 2007 for $1,035,000.

[163] So far as potential profit on the sale of the unit is concerned, Mr Caspers valued the unit if it had an unimpeded view at 30 May 2007 at $1,210,000. That was an increase of 34.4 per cent from the value of $925,000 which he attributed to it as at 1 July 2003, if it had an unimpeded view. He based this increase on evidence of sales of apartments at Sunshine Beach during that period. There was no compelling evidence to suggest that a higher or lower rate of increase in value would have applied to this unit. Mr Cox's evidence was to the contrary; but I found his evidence less persuasive in view of his less extensive experience of Sunshine Beach, the use of comparatives for the whole of the Sunshine Coast rather than the discrete market at Sunshine Beach and his rather surprising view, with which I disagree, that the Splash building had "a minor impact on the field of view of the ocean."

[164] Mr Caspers agreed in cross-examination that the real estate market in the Sunshine Beach area was at or near its peak in 2004. His evidence was that the boom in the market commenced at the beginning of 2002 and reached its peak in mid-2003. It rose slightly but was more or less stagnant during 2004 and 2005 and then rose again during 2006. Prices plateaued during 2007 and 2008. The volume of sales varied during the period depending on the prices being obtained. There was, however, an overall increase in prices between 2003 and 2008. He was extensively and skilfully cross-examined by Mr Collins for the first defendant but, whilst making appropriate concessions, was unshaken in his testimony. I am prepared to accept the correctness of his evidence and therefore accept the valuations he has given of units 7 and 8 of Number One Park and of the relative increase in value in units at Sunshine Beach between the date of the contract and date of sale.

[165] Mr Cox on the other hand was adamant in cross-examination that prices for real estate on the Sunshine Coast had only deteriorated between 2003 and 2007 and yet that was contradicted by the sales evidence with regard to properties in Sunshine Beach he provided in his first report. He did however concede that Sunshine Beach was a discrete market with much more limited area than the rest of the Sunshine Coast. A further problem with his methodology was revealed when he asserted that he could not reach any conclusions about true value unless there was the volume of sales only achieved when the market was at its peak. In my view, I could not safely rely on his conclusion that the market value and true value of units 7 and 8 coincided at the date of settlement of the Barnscape contract and the Avis contract.

[166] It would be possible to award compensation on the basis pleaded in paragraphs 24 to 27 or paragraph 28 of the amended statement of claim. Both are sustainable on the evidence. The money Barnscape spent on unit 7 could have been put towards an alternative unit which had the view that unit 7 was represented to have. In such a case, Barnscape would have profited from the capital gain achieved in Sunshine Beach. On Mr Caspers' evidence Barnscape lost the opportunity to gain $285,000 being the difference between the true value of the unit with an unimpeded view on 1 July 2003, when Barnscape contracted to purchase it, and $1,210,000, when

Barnscape sold it. The purchase of a more expensive unit would have involved more borrowing costs or more lost opportunity to invest other moneys, and in my view, the assessment of such loss is attended with too much uncertainty to be the preferred method of measuring compensation under s 82 of the TPA in this case.

[167] Barnscape also lost the real opportunity to purchase and profit from the land that became available at Kangaroo Island, which would not have required it to borrow $600,000 and so saved it the interest and other borrowing costs. There was large potential profit in the Kangaroo Island land but no income producing rent from that property.

[168] There are uncertainties involved in valuing the loss of opportunity to purchase an alternative property or engage in another investment. What is however clear is that Barnscape suffered loss by purchasing a property that it would not have purchased had it not been for the misleading and deceptive conduct of the defendants. What is the measure of damages that would most fairly compensate it for the loss suffered?

[169] In *Wardley Australia Ltd v Western Australia*[29] Mason CJ, Dawson, Gaudron and McHugh JJ observed at [21] citing *Potts v Miller* (1940) 64 CLR 282 at 297-299, *Toteff v Antonas* (1952) 87 CLR 647 at 650-651, *South Australia v Johnson* (1982) 42 ALR 161 at 170 and *Gates v City Mutual Life Assurance Society Ltd* (1985) 160 CLR 1 at 12, that in the case of a fraudulent or negligent misrepresentation which induces the plaintiff to enter into a contract to purchase property, the plaintiff's loss, apart from any question of consequential damage, is measured by the difference between the price paid or payable under the contract and the value of the property at that date. Although compensation under s 52 of the TPA is not constrained by the damages available under the common law, this is a quantifiable loss sustained and should, in my view, be the measure of compensation.[30]

[170] Barnscape purchased an asset which had an ascertainable true value different from what it paid for it. The true value at the time of purchase is ascertainable. The proper measure of damages is the difference between the price paid for the unit and its true value at the time of entering into the contract: $380,000, ie $1,200,000 less $820,000. I am satisfied that had the misrepresentations not been made, Barnscape would not have purchased the property. Because of the misleading and deceptive conduct Barnscape purchased a property for $1,200,000 when its true value at the time of settlement was $820,000. This was the loss it suffered.

[171] There were consequential benefits and detriments. The asset appreciated and was able to generate income as it would have done if purchased for its true value. The Brechts were able to make personal use of the unit. On the other hand, they suffered the cost of borrowing to purchase the property and the cost of maintenance and upkeep of the property and made a capital loss when they sold it. The difference between the consequential benefits and detriments does not in my view result in any quantifiable loss in addition to the compensation assessed.

Damages - Avis

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29 (1992) 175 CLR 514.

30 See *Marks v GIO Australia Holdings* at [95].

[172] In paragraph 20 of the statement of claim, Mrs Avis alleged that she suffered loss and damage as particularised in paragraph 25. In response to this, the first defendant denied that she suffered any loss or damage because:

> "(ii) the price paid by the Plaintiff for unit 8 was at least equivalent to its market value at the times for assessment alleged by the Plaintiff or at any other relevant time;
>
> (iii) the Plaintiff with full knowledge of the facts elected to affirm the contract to purchase unit 8;
>
> (iv) any actual impediment to the view from unit 8 caused by the 'Splash' complex does not and did not affect the value of unit 8."

[173] The first defendant then referred to clauses 14.1.7 and 14.1.8 of the statement of claim to allege in paragraph 21 of the defence:

> "(ii) None of the representations referred to in the further amended Statement of Claim are contained in the contract;
>
> (iii) In the premises:-
>
> (a) the Plaintiff is estopped from asserting that she relied on the representations or any of them in entering into the contract to purchase unit 8; and
>
> (b) in the event the Plaintiff is entitled to recover any loss or damage from the First Defendant (which is denied) the First Defendant is entitled to an indemnity from the Plaintiff for the full amount thereof together with the costs referred to in clause 14.1.8 of the contract."

For the reasons already referred to, the exclusion clause does not have those effects.

[174] Mrs Avis alleged in paragraph 21 of her statement of claim that if the representations had not been made, she would not have entered into any agreement to purchase unit 8, Number One Park and:

> " …
>
> (b) Mrs Avis would have searched for a penthouse or other type of apartment or a house in the Noosa or Sunshine Beach area (i.e. somewhere between Coolum and Noosa, that had uninterrupted surf views (alternative property);
>
> (c) Mrs Avis would have found an alternative property sometime in the middle of 2003; and
>
> (d) Mrs Avis would have succeeded in purchasing that alternative property for a price within her budget, namely between $1.0 and $1.45 million.
>
> <u>Particulars of alternative property</u>
>
> (i) Unit 1, 'Splash' 25 Park Crescent, Sunshine Beach
>
> (ii) Unit 2, 'Splash' 25 Park Crescent, Sunshine Beach
>
> (e) Further or alternatively to sub-paragraphs (c) and (d) herein, Mrs Avis would not have purchased any property, having failed to fine [*sic*] or purchased

[*sic*] an alternative property having uninterrupted surf views.

22. Further or alternatively to paragraph 21 above, despite the making of the representations pleaded in paragraphs 5, 6 and 8A above, had Mr Bain not made the representations referred to in paragraph 11 above:
    (a) Mrs Avis would refused [*sic*] to settle the contract for the purchase of the property on the basis of the misleading or deceptive conduct pleaded in paragraph 17 above; and
    (b) Mrs Avis would have acted as pleaded at paragraphs 21(b) to 21(e) above.

23. The alternative property would have increased in value in line with the general appreciation in values in the Sunshine Beach area of approximately 34% between the middle of 2003 and May 2008 and thus (if purchased for $1,225,000) be worth at May 2008 approximately $1,646,400.

24A. The plaintiff sold the property in January 2009 for $890,000.

25. In the premises pleaded in paragraphs 21 to 24A above, by the making of the representations pleaded in paragraphs 5, 6, 8A and 11 above, the plaintiff lost the opportunity to acquire an alternative property and profit from its increase in value since the middle of 2003, the quantum thereof being the difference between the present value of an alternative property ($1,646,400) and the value of the property at the time the plaintiff sold it ($890,000), namely $756,400.

26. Further or alternatively to paragraph 25 above, in the premises pleaded in paragraph 21(e) above, by the making of the representations pleaded in paragraphs 5, 6, 8A and 11 above, the plaintiff purchased a property that she would otherwise not have purchased, and as a result of that transaction suffered loss and damage, namely:
    (a) interest paid on the purchase price of $1,225,000 that was borrowed from Westpac Banking Corporation from 9 June 2004 until 24 February 2009, totalling $409,221;
    (b) loss on capital, being the purchase price of $1,225,000 minus sale price of $890,000, totalling $335,000; and
    (c) transaction costs such as bank fees and conveyancing charges."

[175] The amendment sought on 16 April 2010 was to add to paragraph 26(b) the words "or alternatively to those particulars and sub-paragraph (a) herein, loss on capital, being the purchase price of $1,225,000 minus the value at the date of settlement, being approximately $810,000, totalling approximately $415,000." For the same

reasons as articulated with regard to Barnscape, I do not regard it as necessary for the plaintiff to amend its pleading in order to claim that relief.

[176] In the prayer for relief, the plaintiff then claimed damages pursuant to s 82 of the TPA in the estimated amount of $450,000.

[177] In response, the first defendant pleaded in paragraph 22(ii) of the amended defence that:

> "(a) Mrs Avis did not enter the contract to purchase the property on the basis of any false representations or misleading and deceptive conduct on the part of Mr Forsyth and/or the First Defendant as alleged because no such representations were made and no such conduct existed;
>
> (b) Mrs Avis would not have found and purchased an alternative property as alleged for between $1 million - $1.45 million.
>
> Particulars
>
> If, which is denied, Mrs Avis was interested in purchasing a penthouse having uninterrupted surf views (as alleged in paragraph 4 of the third further amended statement of claim) then neither of the alternative properties would have been purchased by her as they did not have any or all of those characteristics.
>
> Further there were no other properties for sale which possessed the characteristics which the Plaintiff required a property to have before the Plaintiff would contemplate purchasing that property.
>
> (c) The First Defendant says further:-
>
> (i) that it does not admit that either of the alleged alternative properties were in fact available to be purchased in the middle of 2003 by the plaintiff. The First Defendant has made reasonable enquiries and remains uncertain of the truth or otherwise of the allegation and is unable to admit it for that reason;
>
> (ii) at no time was the First Defendant or Mr Forsyth advised by the plaintiff that her budget was between $1 million - $1.45 million.
>
> (d) The First Defendant admits that the plaintiff would have failed to find and purchase an alternative property having uninterrupted surf views, as alleged in sub-paragraph (e) of the second further amended statement of claim, but denies the allegations otherwise made in sub-paragraph (e) because they are untrue for the reasons set out in paragraph 22(i) and (ii) hereof."

[178] Paragraphs 22 to 26 of the statement of claim were partly admitted and otherwise denied.

[179] As in the Barnscape case, it is necessary to refer in detail to the evidence to determine what damage was suffered by Mrs Avis and therefore the appropriate measure of compensation.

[180] Mrs Avis's evidence was that if she had not purchased the unit at Number One Park, they would either have bought another unit or house somewhere on the east coast or not have purchased at all. She had access to an additional $250,000 should those moneys have been required. However, it is in my view, unlikely that she would have purchased unit 1 or unit 2 in Splash as neither had the required surf views. It is therefore more likely that they would not have purchased a property at Sunshine Beach. It could not therefore be said that they lost the opportunity to achieve the 34 per cent increase in value of units in that area. This is a case where, put simply, Mrs Avis bought a property which she would not otherwise have bought if it had not been for the misleading and deceptive conduct.

[181] After settlement, Mr and Mrs Avis furnished the unit and used it for themselves and their family for holidays. The fitout had been completed before they found out in September 2004 that Splash was not in breach of the height limits of the council.

[182] The funds used to purchase unit 8 were borrowed from Westpac. The Avises borrowed 100 per cent of the purchase price. Although the unit was purchased for capital growth, the unit was not used for income producing purposes, so the interest on the loan used to purchase the property was not tax deductible.

[183] Mr Avis said that they did not attempt to sell the unit until they had resolved the question of whether Splash was above the regulated height or not. Once they took legal proceedings they were uncertain whether or not to sell. Other reasons for selling were more personal. An additional reason for selling was the Avises' daughters had moved overseas and one had given birth so they started travelling to visit them rather than just visiting one holiday site in Australia. Mr Avis also needed to travel overseas because of a new position that he had taken up.

[184] On 1 August 2008 Mr and Mrs Avis decided to sell unit 8 and appointed Ray White Real Estate and Dowling & Neylan Real Estate to sell the unit for $1,035,000. The contract settled on 23 February 2009 for $890,000. The marketing brochure by Ray White Real Estate correctly referred to the unit having "ocean views".

[185] There is no dispute that the price obtained by Mrs Avis when she sold the unit was the market price and it was sold after a proper marketing campaign.

[186] In his evidence Mr Caspers valued unit 8 with its impeded view as being worth $755,000.00 as at 1 September 2003 and as at 9 June 2004 as $775,000. If the property had had an unimpeded view, as represented, its value would have been $875,000.00.

[187] Mr Caspers valued unit 8 as at 18 February 2008 at $985,000. Had it had an unimpeded view, it would have been valued at $1,145,000.

[188] If it had not been for the misrepresentations Mrs Avis would not have purchased unit 8. She would not then have suffered the capital loss of $335,000 pleaded in paragraphs 26(b); she would not have had to pay the interest on the capital borrowed of $409,221 and she would have saved on bank fees and conveyancing charges. However, Mr and Mrs Avis would not have enjoyed the personal use of the property. Their sale of the property was influenced by personal factors not related to the representations which induced its purchase. Those matters are particularly difficult to quantify.

[189] For similar reasons to those set out with regard to the calculation of the loss suffered by Barnscape, I would value the loss suffered by Mrs Avis as the difference between the price paid for the unit and its true value at the time of settlement of the Avis contract, $450,000, ie $1,225,000 less $775,000.

Effect on quantum of the compromise between plaintiffs and second defendant

[190] The first defendant submitted that in this instance the loss claimed by the plaintiffs is a single loss said to be occasioned by the first and second defendants. Agency, they submitted, is said to arise by virtue of s 84(2) of the TPA which has a deeming effect whereby the conduct of the agent is said to be conduct of the principal. In other words, the conduct of the second defendants is said to be exactly the same as the conduct of the first defendant. It was submitted that this is not a matter where there are joint tortfeasors and the plaintiff has the benefit of the provisions of the *Law Reform Act 1995* (Qld) in respect of joint liability and being able to compromise with one of the defendants and pursue the other.[31] The first defendant submitted that in this instance, as it is exactly the same liability and loss and in circumstances where the plaintiffs compromise with one defendant in respect of exactly the same loss, it operates as a compromise of the entirety of the proceedings. The position would not be any different to that which exists at common law which was only abrogated in respect of tortious claims of and relating to joint liabilities. In the absence of an express provision abrogating it, where there is a compromise with the agent for the same loss, there is a compromise with the principal.

[191] The first defendant argued that where there are alternative claims between an agent and principal, judgment against one amounts to an election which precludes pursuit of the other.[32] In this instance, the first defendant submitted that there was one loss and no evidence to suggest that the loss sustained by the plaintiffs exceeded that for which the plaintiffs compromised the entire action by each accepting the payment of $200,000 from the second defendant. In the absence of proof that the loss was greater than the payment made, there should be no damages awarded.

[192] The first defendant also argued that the plaintiffs, if they were entitled to pursue their claim against the first defendant, were not entitled to double recovery. That is not disputed by the plaintiffs.

[193] The plaintiff raised four issues in response. The first was that when the Avis contract and the Barnscape contract settled on 9 June 2004 there was no provision for proportionate liability between the first defendant and the second defendant under Part VIA of the TPA. Part VIA which received Royal assent on 30 June 2004 does not apply to causes of action which arose before that date.[33]

[194] With regard to the question of election, the plaintiffs referred to the ratio of *Petersen v Moloney* at [19]. In *Petersen v Moloney* the plaintiff, who was the vendor of the property, sued the purchaser for recovery of the purchase price. The purchaser pleaded that he had paid the estate agent who was the vendor's agent with authority to receive the purchase money. The estate agent was thereupon joined as a defendant and as against him the vendor claimed, in the alternative, the purchase

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31 See *Thompson v Australian Capital Territory Television* (1996) 186 CLR 574.

32 *Petersen v Moloney* (1951) 84 CLR 91.

33 See *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) s 2, Schedule 3 and s 1466 of the *Corporations Act 2001* (Cth).

price as money received by him for her use. In such a case judgment entered against one defendant precluded judgment being entered against the other defendant since they were sued in the alternative.

[195] Dixon, Fullagar and Kitto JJ discussed the role of a real estate agent at 94-95:

> "In connection with sales and purchases of property the word 'agent' is apt to be used in a misleading way. The legal conception of agency is expressed in the maxim '*Qui facit per alium facit per se*', and an 'agent' is a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties. When a person is employed to find a buyer of property, he is commonly said to be employed as an agent, and the term 'estate agent' is a common description of a class of persons whose business is to find buyers for owners who wish to sell property. But the mere employment of such a person under the designation of agent does not, apart from the general rule that the employer will be responsible for misrepresentations made by him, necessarily create any authority to do anything which will affect the legal position of his employer."

[196] In that case the purchaser paid the whole of the purchase price to the real estate agent who failed to pass it on to the vendor. The vendor took action in the alternative against the real estate agent or the purchaser. The High Court held that the real estate agent did not have authority to receive the purchase moneys on behalf of the vendor and that the vendor should not have succeeded therefore against the real estate agent but rather against the purchaser. The High Court held at 102:

> "The case is clearly one of alternative liability. Either Maloney [the purchaser] or Pulbrook [the real estate agent] might be liable to the plaintiff, but both could not be. In such a case a final election to treat either as liable would preclude the plaintiff from proceeding against the other, and it is a well-settled general principle that, while the commencement of action against one of two persons alternatively liable *does not*, the entry of judgment against one of them *does*, constitute a final and irrevocable election: See *Morel Bros & Co Ltd v Earl of Westmoreland*.[34] In the present case the plaintiff (as she was clearly entitled to do) proceeded against both of the persons possibly liable, claiming alternatively as against each. After [the trial judge] had pronounced his decision she entered judgment against [the real estate agent]. Did this amount to a final election to treat [the real estate agent] as liable to the exclusion of [the purchaser]? Apart from appeal, clearly it would amount to such an election."

[197] That was a case in which "one but not both might have been liable". Their Honours referred to the rule stated by Atkin LJ (as he then was) in *Moore v Flanagan*[35] that:

> "A plaintiff cannot sue an agent to judgment and then sue the principal".

[198] Their Honours held that the plaintiff in *Petersen v Moloney* did not offend against that rule. They observed at 103:

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34 (1903) 1 KB 64; (1904) AC 11.

35 (1920) 1 KB 919 at 928.

> "It is to be noted that, although the rule is often stated in terms which would seem to make it depend on election, Vaughan Williams J (as he then was) in *Hammond v Schofield*[36] said:
>
> > 'The basis of this defence is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract.'
>
> This passage is quoted by Scrutton LJ in *Moore v Flanagan* [1902] I KB 919 at 925. *Moore v Flanagan* was not, and this case is not, a case of 'co-contractors', but the same rule is applicable, and it must rest on the same basis. There must not be more than one judgment where there is only one antecedent obligation."

[199] The principle was referred to by Gibbs and Mason JJ in *Marginson v Ian Potter & Co*[37] as follows:

> "… once a third party has sued the agent to judgment he cannot thereafter, without setting aside that judgment, sue the undisclosed principal even if the existence of the principal was [not] known to the third party at the time when the judgment was obtained. This proposition rests not on the doctrine of election which depends in general upon knowledge of relevant facts but on another principle, namely that when judgment is obtained on a cause of action the cause of action merges in the judgment. Thus the liability of an undisclosed principal merges in a judgment obtained against the agent by the third party [*Priestly v Fernie* (1863) 3 H&C 977; 159 ER 820*; Kendall v Hamilton* (1879) 4 App Cas 504 at 514-515; *Petersen v Moloney*]."

[200] The plaintiffs argued that those cases do not apply here because the liability is not alternate as it is with third party contracts with an agent on behalf of the principal, it is joint.

[201] The principal in this case is jointly liable with the agents for the misrepresentations. It can offset the amount paid in the action by the agent but that does not in my view extinguish the principal's liability.

[202] The third issue dealt with by the plaintiffs in their submissions was the matter raised by the first defendant's submission that the compromise with the real estate agent was in respect of the same joint liability and therefore it amounted to a compromise of the entire proceedings. The plaintiffs conceded that if the settlement agreement be construed as a release, it would release all others who were jointly liable for the same conduct. However if the settlement agreement be construed merely as a covenant not to sue, it would not release the other debtors. Even if a settlement agreement purports to be a release, if it discloses an intention to reserve rights against the other joint tortfeasor, or can be construed such that the intention was that

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36 (1891) 1 QB 453 at 457.

37 (1976) 136 CLR 161 at 169.

the other jointly liable parties were to remain liable, it will be treated as a mere covenant not to sue.

[203] The correspondence between the solicitors for the real estate agents and the solicitors for the plaintiffs clearly show that the offer to settle made by the second defendant real estate agents was made with the clear understanding that the plaintiffs could pursue their action against the first defendant. The settlement agreement between the plaintiffs and the second defendants was a contract between the plaintiff and the second defendant which compromised the action between them but did not affect the liabilities of the first defendant to the plaintiffs. It clearly disclosed an intention to reserve rights against the first defendant and as such is to be construed as a covenant not to sue the second defendant rather than a release of the whole action: see *Pollak v National Australia Bank Limited*.[38]

[204] The fourth matter raised by the plaintiffs was that they accepted that they must bring into account the settlement moneys they received from the second defendant in the assessment of any award of damages against the first defendant. The settlement sum in each case was an all-up figure inclusive of costs.

Conclusion

[205] In the Barnscape matter the all-up payment by the second defendant was $200,000. By that stage the plaintiff had incurred costs of $121,610.16. One can assume that those costs were apportioned equally between the two defendants and so one half of the costs, $60,805, was attributable to the case against the first defendant. The plaintiff submitted, and there is no reason to dispute, that that figure would be likely to be discounted by some 40 per cent in a costs assessment leaving an amount payable for costs of $36,483. The rest of the settlement of $200,000, that is $163,517, can be taken to be the damages part of that settlement and should be deducted from the damages awarded against the first defendant in this judgment. I would therefore order the first defendant to pay Barnscape the sum of $216,483 (being $380,000 less $163,517) together with interest.

[206] So far as the Avis matter is concerned the payment made by the second defendant was a payment of $200,000 inclusive of the claim, interest and costs. Exhibit 1 in that matter shows that the actual costs incurred by the plaintiff to that time were $113,057.16. One can assume that those costs were incurred equally by the plaintiff between the two defendants and so the amount of $56,528.58 was attributable to the legal costs involving the claim against the first defendant. As the plaintiff conceded in submissions, that should be reduced by another 40 per cent to take account of the amount that would be allowed on taxation bringing the amount to $33,917. The rest of the settlement i.e. $166,083 can be taken to be the damages part of that settlement and should be deducted against the damages awarded against the first defendant in this judgment. I would therefore order the first defendant to pay Mrs Avis the sum of $283,917 (being $450,000 less $166,083) together with interest.

[207] I shall hear submissions as to the precise form of the orders and costs.

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38 [2002] FCA 237 at [15] – [17].