SUPREME COURT OF QUEENSLAND

CITATION:	*White v Douglas Ian Stewart Financial Services Pty Ltd & Anor* [2011] QSC 81
PARTIES:	**WARREN HOWARD WHITE** (plaintiff) **v** **DOUGLAS IAN STEWART FINANCIAL SERVICES PTY LTD** (first defendant) **DOUGLAS IAN STEWART** (second defendant)
FILE NO/S:	BS2183 of 2007
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	13, 14, 15, 16 December 2010
JUDGE:	Martin J
ORDER:	**I GIVE JUDGMENT FOR THE PLAINTIFF AGAINST BOTH DEFENDANTS IN THE SUM OF $297,336.89**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION OF NEGLIGENCE – WHERE ECONOMIC OR FINANCIAL – CARELESS ADVICE. STATEMENTS AND NON-DISCLOSURE – where plaintiff entered into number of loan agreements arranged by the second defendant – where plaintiff relied upon misrepresentations made by that defendant – where agreement contains warnings of risk – where agreement contains exclusion clauses – where defendant made representations that properties would increase in value without basis - whether the second defendant engaged in negligent misrepresentation with respect to the plaintiff – whether the second defendant should be liable for damages with respect to the plaintiff TRADE AND COMMERCE – TRADE PRACTICES AND RELATED MATTERS – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – where plaintiff seeks damages for breach of s 52 and s 53A of the *Trade Practices Act* 1974 -

where plaintiff entered into number of loan agreements arranged by the second defendant – where plaintiff relied upon misrepresentations made by that defendant – where defendants made representations that properties would increase in value without basis – where s 51A of the *Trade Practices Act* 1974 places onus on defendant to demonstrate reasonable grounds for representations – where no evidence was adduced establishing reasonable grounds for representation - where defendants argue damages should not be awarded because of failure of plaintiff to mitigate loss - whether the first defendant has breached the *Trade Practices Act* 1974 by engaging in misleading or deceptive conduct – whether the first defendant is liable for damages with respect to the plaintiff

TRADE AND COMMERCE – TRADE PRACTICES AND RELATED MATTERS – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATION – where plaintiff seeks damages for breach of s 52 and s 53A of the *Trade Practices Act* 1974 - where plaintiff seeks to make second defendant liable pursuant to s 75B of the *Trade Practices Act* - where second defendant is sole director and secretary of first defendant company - where second defendant used letterhead of first defendant in correspondence with plaintiff – where first defendant was not a party to the agreement – where conduct of the second defendant was conduct in the course of business of the first defendant – where defendants argue damages should not be awarded because of failure of plaintiff to mitigate loss - whether there was a relationship of agency between the first and second defendant - whether the second defendant as agent of the first defendant is liable under the *Trade Practices Act* 1974 – whether the second defendant is liable for damages with respect to the plaintiff

Trade Practices Act 1974, s51A, s 52, s 53A, s 75B, s 84

Burns v MAN Automotive (Aust) Pty Ltd (1986) 161 CLR 653
Canada Steamship Lines Limited v R [1952] AC 192
Cameron v Campbell & Worthington Ltd [1930] SASR 402
Downey v Carlson Hotels [2005] QCA 199
E G Falco v James McCune & Co Pty Ltd [1977] VR 447
Gull v Saunders (1913) 17 CLR 82
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465
Jones v Dunkel (1959) 101 CLR 298
L Shaddock & Associates Pty Ltd v Parramatta City Council (1981) 150 CLR 225
NFMM Property Pty Ltd v Citibank Ltd (No 10) (2000) 107 FRC 270
Private Parking Services (Vic) Pty Ltd & Ors v Huggard (1996) Aust Torts Rep. 81-397

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

COUNSEL: C Wilson for the plaintiff
G Dempsey for the defendants

SOLICITORS: Cogill Woods Legal Services Pty Ltd for the plaintiff
Morgan Conley for the defendants

[1] In early 2004 the plaintiff ("Mr White") purchased three house and land "packages". He borrowed approximately 80 per cent of the purchase and construction costs for each of the packages. Mr White says that he entered into those agreements in reliance upon a number of representations made by the second defendant ("Mr Stewart") including a representation that each of the properties would realise a profit of $100,000 if sold in 12 months time. The properties were not sold until May 2005 and Mr White claims to have incurred a loss of $297,336.89.

The plaintiff's claim

[2] The plaintiff seeks damages for negligent misrepresentation against both the first defendant ("the company") and Mr Stewart. Alternatively, damages are sought for a breach of s 52 and s 53A of the *Trade Practices Act* 1974 ("the TPA claim").[1] The TPA claim is made against the company and Mr Stewart. The claim against Mr Stewart is based upon his being knowingly concerned in the alleged contravention – s 75B of the TPA.

The defendants

[3] Mr Stewart is the sole director and secretary of the company.

History of the matter

[4] In 2002 Mr White was the owner and manager of a small marine upholstery and boat building business at Noosaville. In March of that year, as a result of a mutual interest in motor cars, Mr White became acquainted with Mr Stewart. Mr Stewart told the plaintiff that he was a mortgage broker and Mr White noticed that when he was sent faxes by Mr Stewart they carried the header: "Douglas Ian Stewart Financial Services".

[5] Later in 2002 Mr White and another acquaintance wanted to purchase a block of commercial land at Noosaville and erect some sheds. He needed finance and contacted Mr Stewart to seek assistance with obtaining a suitable loan. The commercial property was purchased using money borrowed by Mr White pursuant to a loan organised by Mr Stewart.

[6] In order to obtain that loan Mr White was required to provide personal and financial details to the lender. He says that he told Mr Stewart that his income was about $35,000 and that the turnover of his business was about $300,000. Mr White maintained that that was all he told Mr Stewart. According to his own evidence, Mr White was willing to, and did, sign a number of other application documents for loans and insurance in blank, that is, he says that when he signed the documents

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1 In relation to acts or omissions that occurred before the commencement of the *Competition and Consumer Act* 2010 (1 January 2011) the *Trade Practices Act* 1974 continues to apply.

none of the information had been inserted into it. He says that he trusted Mr Stewart and that he did not concern himself with that. He did that on eight separate occasions between December 2002 and March 2004. On each occasion the document which he signed represented to the recipient that his income was $300,000 (except for the last two documents in which the income was stated as $400,000).

[7] There was no dispute at trial that Mr White's income was ever of that order or anywhere near it. In 2001/2002 his gross income was approximately $14,000 and in the following financial year it was approximately $6,000.

[8] Between December 2002 and September 2003 Mr Stewart assisted Mr White with five applications for finance or extensions of facilities and, according to Mr White, on none of those occasions did he sign a completed document.

[9] In about October 2003 part of Mr White's boat building business was not progressing as he had hoped it would. He sought out Mr Stewart and asked him if he had anything he could recommend or suggest in the sense of something which would make money. Mr Stewart told him of the Pacific Pines development. It was a development in which a person could purchase parcels of land upon which houses would be built and which could then be on-sold with a view to making a profit. He says that Mr Stewart told him that it was "a fantastic opportunity". He says that Mr Stewart told him that he would "realise a great profit and that at that stage he was really only offering this to close friends, clients".

[10] Mr Stewart says that he was telephoned by Mr White at that time and described receiving the call from the plaintiff "by accident". He says that Mr White asked him if he was still involved in doing joint venture agreements. Mr Stewart says that he told Mr White about joint ventures when he had the idea for them in December 2002. It was not put to Mr White that this was the conversation that took place. I do not accept that that was the conversation that took place. Mr White's recollection of the terms of the conversation was not challenged in cross-examination.

[11] I accept that Mr White's recollection is more reliable. I will, for reasons I set out below, proceed on the basis that I do not accept Mr Stewart's evidence unless there is other, credible evidence to support it.

[12] Mr White gave evidence that Mr Stewart made representations in the following broad terms about the proposal to purchase the properties:

- It was a fantastic opportunity.
- He would realise a great profit.
- The properties had already been selected and he would be told which were to be his.
- Mr Stewart was only offering this to his closest clients and friends at that time.
- To realise a good profit he would have to purchase three properties.
- There would be a return in the vicinity of $100,000 per property.
- The profit would be realised within 12 months.
- The loans that Mr Stewart would arrange would not require early settlement fees.
- He would make 50 per cent of the profit, that is, $150,000.

[13] At a meeting with the plaintiff Mr Stewart wrote out a short note on a single page of paper in which he set out a number of financial details. This became an important document during the trial because of the assumption made within it as to the increase in value of the properties. The document sets out the purchase price of each of the three lots, and calculates the holding costs for six months. The document is entirely in Mr Stewart's handwriting, and about half way down the document appear the words "Assume $300,000 increase". Mr White recalls that Mr Stewart told him at the time that that represented a $300,000 profit. Mr Stewart said that it was merely a figure he plucked out of the air in order to calculate capital gains tax. The document does not contain a capital gains tax calculation. There is a reference to the goods and services tax but no more than that.

[14] Mr Stewart's evidence of how this document came into existence and the meanings of the entries on it was unacceptable. He made various attempts to explain why he had included an assumption of a $300,000 increase. In cross-examination he said that he did not mean "GST", he meant "CGT". When asked why that figure was included he said it was for purposes of a rough calculation. He went on to say that he told Mr White that each party would be responsible for their own capital gains tax. That was, in my view, a fabrication. I will deal with the joint venture agreement later in these reasons but there could have been no capital gain for Mr Stewart because he did not own any part of the properties the subject of this calculation. He withdrew his assertion but it was indicative of his answers on this area of evidence and Mr Wilson's description of it as "complete hogwash" was not inaccurate.

[15] The representation made about the plaintiff needing to purchase three properties was corroborated as was the representation with respect to the increase he could except of $100,000 for each property. Lenard Lovell, who was called by the plaintiff, was an employee of the company Orbit Homes Pty Ltd, which was the entity which constructed the houses on the three properties. His evidence was impressive. He had no interest in the matter and appeared to have a good memory of the events. His evidence was consistent with respect to the evidence of the plaintiff concerning the represented increase in value and that the plaintiff could afford to purchase three properties.

[16] Evidence was also given by Christina Adams who was Mr White's partner at the relevant time. She recalls an evening in late 2003 when Mr Stewart visited the house in which she and Mr White lived. She said she heard Mr White express some concern to Mr Stewart about the proposal and Mr Stewart's response was to the effect that there was really no point in doing one house; to make a decent profit he had to do at least three.

Mr White and Mr Stewart – Credibility

[17] Mr White's action in signing documents in blank was an indication of his gullibility. It seems that he was content, having provided Mr Stewart with financial information earlier in their relationship, for Mr Stewart to fill out documents after Mr White had signed them. Most of these documents were prepared by Mr Stewart. There were some, though, which were prepared by Michael Astill, who was a party to the joint venture agreement. He was engaged by Mr Stewart to obtain finance for Mr White. Neither party called Mr Astill and neither party submitted that I should draw any *Jones v Dunkel*[2] type inferences.

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2 (1959) 101 CLR 298.

[18] Mr Stewart, on the other hand, was not someone I would describe as gullible. He was responsible for drawing the joint venture agreement to which reference will be made.

[19] His explanation of the calculations contained on the handwritten sheet, to which I have already referred, was unsatisfactory. To my mind, his explanation betrayed all the hallmarks of an attempt to "reinvent" the rationale for the document and that reflected badly on him.

[20] He said that the reason he inserted into the various documents the figure of $300,000 as the income for the plaintiff was that Mr White had told him that his income was $300,000 but that he only drew $30,000 a year. I do not accept that. I accept that Mr White told him that his income was of the order of $30,000 a year and that the turnover of his business was $300,000 a year. That turnover figure is broadly consistent with the financial accounts for the business. Mr White had been told by his accountant that his income for the relevant year was $31,270.

[21] The evidence is such that it leads me to the conclusion that it is most likely that Mr Stewart, who was anxious to engage in the Pacific Pines development, inserted the figure of $300,000 as the income of Mr White in order that sufficient finance might be obtained. It would have been clear to anyone that an annual income of only $30,000 could not possibly support a viable claim for the type of finance that Mr White needed.

[22] One of the reasons advanced by Mr Stewart as the basis for Mr Astill and him obtaining a share of any profit on the sale of the house and land packages was that there had been a reduction in the original price of those packages because he and Mr Astill were not taking any commission. That was important evidence and was a significant element of the case for Mr Stewart. But none of that was put to the witness to whom it should have been put, namely, Mr Lovell. Mr Lovell said that there was no negotiation on price by Mr Stewart at all. He said that, "This is the part that amazed me. No, there was no – no negotiation whatsoever. Just took it as it was." He went on to say that he expected that a discount would be sought but that none was. The evidence from Mr Stewart about the supposed reduction in price, in the absence of such an important aspect being put to a relevant witness, smacks of invention.

[23] A further element relates to the joint venture. The evidence that a joint venture was "floated" by Mr Astill in December 2002 was not put to the plaintiff. Further evidence that was called, but not put to the plaintiff, included that Mr Lovell visited the plaintiff's business premises on 10 November 2003, that Mr Lovell spent time alone with Mr White at the workshop on 10 November 2003, and that Mr White signed further documents with Mr Lovell. None of that was put to the plaintiff, nor were any such documents disclosed or tendered.

[24] I have found that Mr Stewart was an unreliable historian. I do not accept his account of what occurred, except where it is consistent with the plaintiff's evidence and, in particular, I reject his evidence that he did not tell the plaintiff that there would be a return in the vicinity of $100,000 per property.

Reliance

[25] In order to establish his claim, the plaintiff must, whether in the common law action or the TPA claim establish that he relied upon the representations made by the second defendant in proceeding with the contracts for the purchase of the house and land packages and the subsequent construction of those houses. The plaintiff did not give evidence, in terms that he did rely upon those representations but the history of the matter from the time he sought advice from Mr Stewart about an income-making venture through the period where, having expressed some reluctance, he agreed to purchase three packages, to his entry into the contracts and the joint venture agreement satisfies me that he was relying upon those representations.

Risk

[26] When Mr White first sought assistance from Mr Stewart to obtain a loan for the purchase a block of commercial land, referred to above, Mr Stewart provided him with a letter in which certain warnings of a general nature were given. Mr White signed that letter signifying that he had received it. Included in the letter were the following warnings.

- "The strategy recommended involves refinancing your home mortgage. … The main risk you expose yourself to in taking up this strategy is that the value of the investment will actually fall and that ultimately you may have to sell that investment at a loss. If this occurs, you may lose the equity in your home. You may even lose you [sic] home."
- "Investment strategies involving the use of borrowing fund:-

  Geared investments are generally designed to increase overall returns while increasing the potential for tax deductible expenses (such as prepaid interest). The ultimate goal of this strategy is usually for the value of the assets purchased with borrowed money to increase and create a profit upon sale, after repayment of borrowed funds plus expenses.

  The main risk associated with such a strategy is that the asset you purchase with borrowed funds will actually fall in value, even to the point where selling doesn't completely satisfy the underlying debt. This will mean that, although you might receive extra tax deductions over time, you might actually lose capital (and carry over a significant debt) when you eventually sell the asset.

  The potential to make a higher gain by borrowing exists only because of the added risk you take in using borrowed funds in the first place."
- "The main risk when investing in direct property is a lack of liquidity (or market depth). Should it become necessary to sell a direct property there may not be buyers available who are prepared to meet your selling price. You may therefore have to hold on to your property or sell it at a lower price."

[27] These warnings were given in a letter provided well before the representations complained of were made. They also were given in relation to the purchase of a block of land which had been chosen by the plaintiff for a venture decided on by the plaintiff. They were not repeated when the representations were made. In any case, the nature of the representations, the way in which they were made, and the strength of the assurances given would have overwhelmed the earlier warning.

[28] There were further warnings of risk contained in the joint venture agreement.

[29] On 16 March 2004 the joint venture agreement was entered into by the plaintiff, Mr Stewart and Mr Astill. It is a document which was drawn by Mr Stewart and imposes substantial and onerous obligations on Mr Smith but almost none on Messrs Stewart and Astill. The plaintiff pleads that he is not bound by that JVA for a number of reasons:

(a) It was signed by the plaintiff without an opportunity for him to obtain proper advice as to its terms and meaning;
(b) It was signed by the plaintiff in reliance upon the recommendations and representations made by Mr Stewart; and
(c) That it was not supported by consideration.

[30] The JVA is in the form of a deed and therefore consideration is unnecessary. The fact that the plaintiff signed it without obtaining proper advice as to its terms and meaning does not assist. He does not fall into any category where such advice would be a necessity before the JVA could be valid. The plaintiff does not seek to have the JVA either set aside or rectified or subjected to any statutory relief. As such, the general rule set out *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*[3] applies:

> "[57] …where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document."

[31] While it was pleaded that Mr Stewart had told Mr White that the JVA was merely confirmation of what had previously been discussed between them, when asked about that in evidence-in-chief, Mr White could not recall whether Mr Stewart told him anything about what it contained, including whether it related to matters which had previously been discussed by them.

[32] The JVA is not the subject of any claim for relief and the plaintiff has not established any basis upon which the second defendant should be estopped from relying upon it.

[33] So far as the issue of Mr White's being alerted to the risks involved in the undertaking being proposed, the second defendant points to a number of clauses in the JVA including the following:

> "5.5 the parties acknowledge that in the event that the property market drops and the sale of the completed property may not cover the costs of the Venture or the profit is not mutually acceptable to all parties, that is all costs involved with the purchase of the land and the construction of the house ("the Venture costs"), then the Client is entitled to rent the property to a third party until such time as the property market recovers or there is sufficient equity in the completed property for the Venture to be profitable...
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> 5.8 In the event that the property market does not recover and the completed property is:

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[3] (2004) 219 CLR 165.

> (a) sold for a loss and the Venture costs are not completely recovered; or
> (b) has a value, by the date that is 3 years from the date of this agreement, that is not sufficient to cover the Venture costs
>
> then the Client does not have any recourse to Stewart or Astill for the failure of the Venture.
>
> 5.9 The parties acknowledge that Stewart and Astill are not liable for any loss of profit from the venture...
>
> 7.1 The parties all acknowledge that this is a commercial Venture and that they are aware of the risk that is involved in the Venture. The Client acknowledges that it has satisfied itself as to the viability of the Venture and was not induced or coerced into signing this agreement.
> 7.2 The Client undertakes that it freely entered into the Venture on its own will and having made an informed decision on the viability of the Venture...
>
> 9.1 This agreement contains the entire agreement between the parties and no earlier representation or agreement, whether oral or in writing, in relation to any matter dealt with in this agreement will have any effect from the date of this agreement and will not be changed in any way except with the written agreement of the parties."

[34] The effect of the JVA was to impose upon Mr White all the risk of ventures and the prospect of recovering, after sale, only 50 per cent of the net profit, should there be any profit at all.

[35] Mr Stewart relied upon the exclusion clauses referred to above – clauses 5.8 and 5.9.

[36] Whether an exclusion clause works to protect a party from liability is a question to be determined after construing the whole document.

[37] The authorities dealing with terms in contracts purporting to exclude liability do not displace a rigid consistency. It can be said, though, that there are some general principles to which resort may be had in the construction of the contract containing the alleged exclusion clause. Before going to those, though, it is instructive to consider the words used in clauses 5.8 and 5.9 which are those relied upon by the second defendant.

[38] Clause 5.8 provides that the client (Mr White) does not have any recourse to Mr Stewart or Mr Astill for the failure of the venture where the completed property is sold for a loss and the venture costs are not completely recovered or by a date that is three years from the date of the agreement has a value that is not sufficient to cover the venture costs. The prerequisite that the completed property be sold for a loss with the venture costs not being completely recovered is satisfied. But, the exclusion is expressed extremely broadly and refers to the failure of the venture, and not to any negligence on the part of any of the participants preceding the creation of the venture.

[39] Similarly, while cl 5.9 purports to exclude Mr Stewart and Mr Astill from any liability for loss of profit from the venture (I note that Mr White is not so excluded) it does not refer to a breach of duty which led to the creation of the venture itself.

[40] Where there is an express reference to liability for negligence being excluded, then that will generally be sufficient.[4]

[41] In this case, the concentration of exclusion is on the working of the venture itself and does not purport to extend to a breach of duty which occurred prior to entering into the contract.

[42] The second defendant also relies upon cl 9.1 (above) but that clause is concerned with the construction of the agreement and how it might work, rather than an attempt to exclude from consideration any breach of duty which might have occurred prior to the creation of the JVA.

[43] The terms of the JVA do not work to exclude any liability which might exist in the second defendant for any breach of duty which he committed prior to entering into the JVA.

Was there a duty?

[44] Did the second defendant owe the plaintiff a duty of care? The duty of care asserted by the plaintiff in this case is that the defendants owed a duty to take reasonable care not to cause purely economic loss by giving misleading information or advice. Such a duty exists.[5] In order for such a duty to exist one must be able to draw from the circumstances a conclusion that it was reasonable for the plaintiff to rely on the information or the advice or the representations given or provided by the second defendant.[6] Whether it is reasonable for a plaintiff receiving such information to rely on it is to be considered against a number of factors including the expertise or apparent expertise of the defendant and whether the representation was made following a request for information by the plaintiff.

[45] In this case Mr White had used the services of Mr Stewart before the events the subject of this trial and had made known to him the purposes for which he sought the advice. They were, in effect, that Mr White needed to engage in a money making activity. He received advice from Mr Stewart about an investment associated closely with real estate which was an area in which Mr Stewart was experienced and in which he had practised for a substantial period of time to the plaintiff's knowledge. In the circumstances of this case the second defendant did owe the plaintiff a duty of care.

Was there a breach?

[46] The plaintiff pleads five separate matters as breaches of the duty of care.[7] They were:

(a) A failure to obtain valuations of the properties or evidence of comparable sales of similar properties;

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4 *Canada Steamship Lines Limited v R* [1952] AC 192.
5 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
6 *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225.
7 Amended statement of claim para 29.

(b) Having no reasonable basis for representation that the properties would increase by a value of $100,000 within 12 months;
(c) Knowing that the plaintiff would be unable to enter into loans with an early repayment penalty;
(d) Failing to warn the plaintiff of risk of loss;
(e) Failing to explain to the plaintiff the effect of the JVA.

[47] Some of those may be dealt with briefly. The duty owed by Mr Stewart did not encompass the requirement to explain in detail the effect of any document the plaintiff was entering into. The plaintiff was not under any legal disadvantage and could both understand and inform himself as he saw fit. It was not alleged that the second defendant misrepresented the effect of any document.

[48] The second defendant did not obtain valuations of the properties or evidence of comparable sales but there was no dispute as to the contract price. It was not contended by the plaintiff that the properties were purchased for anything other than market price and, indeed, Mr Lovell's evidence was that he sold them at market price.

[49] The representation which is of importance relates to the increase in value. There was no evidence to support in any way the representation made by Mr Stewart as to the increase in value. In making that representation, Mr Stewart breached the duty which he owed to Mr White.

The TPA claim

[50] This claim rests upon allegations that the representations, which I have found were made by the second defendant, were made as agent for the first defendant and in circumstances which engage the provisions of the *Trade Practices Act* 1974. The relevant provisions of that Act are:

> "**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."
>
> **"52 Misleading or deceptive conduct**

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1)."

"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 or grant, or the possible sale or grant, of an interest in land or in connexion with the promotion by any means of the sale or grant of an interest in land:

(a) represent that the corporation has a sponsorship, approval or affiliation it does not have;

(b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land; or

(c) offer gifts, prizes or other free items with the intention of not providing them or of not providing them as offered.

(2) A corporation shall not use physical force or undue harassment or coercion in connection with the sale or grant, or the possible sale or grant, of an interest in land or the payment for an interest in land."

[51] The issue which took up a significant part of the argument in this case related to whether or not there was the relationship of agency between the first and second defendant.

[52] With very few exceptions, every document provided by the second defendant to the plaintiff was on the letterhead of the first defendant. That included authorities sought by the second defendant and approvals gained, and an invoice which was issued on two occasions to the plaintiff, first in November 2003 and secondly in March 2004. When payment was made of that invoice, the payment was banked into the first defendant's bank account.

[53] The second defendant gave evidence that the invoices were issued in error in the name of his company. Yet, as I have noted above, the payment was banked into the company's account.

[54] Section 84(2) of the *Trade Practices Act* provides:

"84 Conduct by directors, servants or agents

…

(2) Any conduct engaged in on behalf of a body corporate:

(a) by a director, servant 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, servant 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, servant or agent;

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate."

[55] The company was not, though, a party to the JVA. That does not preclude a conclusion of agency. The duty and breach the subject of this action are those which were owed by the second defendant as agent for the first defendant and which was breached by the second defendant as agent for the first defendant. There are many reasons why Mr Stewart might not have wanted his company to be involved in the JVA. There could have been taxation ramifications for him or any number of other financial considerations. The business of the first defendant was that of a mortgage broker and provider of real estate agency services. The conduct engaged in by the second defendant was conduct in the course of that company's business. As such what was done by Mr Stewart was done on behalf of the first defendant.[8]

[56] The charge levied on the plaintiff of $8,800 as an "implementation fee" was charged for, among other things, "the investigating of a suitable property for the client to acquire". Such a task is consistent with that of the work of a real estate adviser or agent.

[57] The conduct of the second defendant was that of the first defendant. It is not surprising for that conclusion to be reached when the sole director of the first defendant was Mr Stewart and that is supported by consistent use of the company's letterhead throughout the relationship with Mr White.

Breach of the *Trade Practices Act*

[58] Section 51A of the *Trade Practices Act* places an onus upon the first defendant to demonstrate that it (through the state of mind of the second defendant) had reasonable grounds to make the representation concerning the increase in value of the house and land packages. In the absence of any reasonable grounds for making the representation it is taken to be misleading. No evidence was adduced to the contrary and so, as it was a prediction as to a future matter, it is deemed not to have had reasonable grounds to make the representation.

[59] The plaintiff has established that the first defendant has breached the provisions of the *Trade Practices Act* by engaging in misleading or deceptive conduct.

Is Mr Stewart caught by the *Trade Practices Act*?

[60] Section 75B of the *Trade Practices Act* provides:

"75B Interpretation

(1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB, V or VC,

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[8] See *Downey v Carlson Hotels* [2005] QCA 199 at [55], where reference is made to *NFMM Property Pty Ltd v Citibank Ltd (No 10)* (2000) 107 FCR 270.

> or of section 75AU or 75AYA, shall be read as a reference to a person who:
>
> (a) has aided, abetted, counselled or procured the contravention;
>
> (b) has induced, whether by threats or promises or otherwise, the contravention;
>
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
>
> (d) has conspired with others to effect the contravention.
>
> (2) In this Part, unless the contrary intention appears:
>
> (a) a reference to the Court in relation to a matter is a reference to any court having jurisdiction in the matter;
>
> (b) a reference to the Federal Court is a reference to the Federal Court of Australia; and
>
> (c) a reference to a judgment is a reference to a judgment, decree or order, whether final or interlocutory."

[61] The plaintiff seeks to make the second defendant liable under the *Trade Practices Act* pursuant to this provision. In the circumstances where the only spokesperson for the company and the only person who was acting on its behalf at the time is the second defendant, and where he, obviously, had actual knowledge of the actions of the company through him as its agent, I am satisfied that s 75B is applicable in this case. Mr Stewart was directly and knowingly concerned in the contravention by the company of s 52.

Mitigation

[62] It was agreed between the parties that the loss incurred by Mr White with respect to the three properties was $297,336.89. That agreement was subject to the issue of causation and the issue of mitigation. I have considered and decided the question of causation above. I now turn to mitigation.

[63] This will involve, to some extent a reconsideration of some of the issues above as the TPA claim must be considered in light of all the issues of factual causation. I did not deal with it in the earlier part of these reasons because it was convenient to deal with it with respect to both the claim in tort and the claim under the *Trade Practices Act*. The case for the defendants is that the plaintiff has failed entirely to mitigate his loss in circumstances where he could have. Thus, the defendants argue that, notwithstanding my findings of both a breach of the duty of care and a breach of the *Trade Practice Act*, there should be no award of damages because of this failure to mitigate. It must be borne in mind that the defendants are arguing that the plaintiff's conduct in selling the properties when he did was the cause of his loss and not the breach of the *Trade Practices Act.*

[64] It was not contested that Mr White had a duty to take all reasonable steps to mitigate the losses resulting from the breach of duty and that he could not claim any part of the damages which resulted from any failure to mitigate the loss.[9]

[65] The onus of proof, of course, is on the defendants and they must satisfy the court that the mitigating steps which might have been taken would have effected a real

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9 *E G Falco v James McCune & Co Pty Ltd* [1977] VR 447.

reduction in the plaintiff's loss, not merely an apparent one.[10] Whether the conduct of the plaintiff has been reasonable is a question of fact to be assessed in all the circumstances.[11] In some circumstances, a plaintiff may be expected to expend some money in order to mitigate its own losses.[12] But a plaintiff who refuses to expend more money may be acting reasonably depending upon all the circumstances.

[66] No evidence was adduced as to what might be the appropriate measure for the mitigation which the defendants alleged could have taken place. It is important, bearing in mind that the onus is on the defendants, to examine what they propose as the appropriate means and measure of mitigation. The defendants argued that the failure to mitigate by the plaintiff was constituted by his failure to continue renting out the properties in accordance with the JVA. The defendants' argument was that the plaintiff should have continued to expend moneys in the hope that the market would improve notwithstanding that the loans were interest only and so no capital was being reduced during the time that the plaintiff owned the properties. Thus, on the defendants' case, the plaintiff should have continued to pay interest for at least three years while receiving rent which was less than the amount he was expending in the hope that market conditions would change and a profit could be realised. It was agreed by counsel for the defendants that there was not a skerrick of evidence that the market changed.

[67] The defendants have failed to discharge the onus they bear in this case. They called no evidence to suggest that, had the plaintiff retained ownership and continued to pay interest and receive rent, his loss would have been reduced at all.

Order

[68] I give judgment for the plaintiff against both defendants in the sum of $297,336.89.

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10 *Cameron v Campbell & Worthington Ltd* [1930] SASR 402; *Private Parking Services (Vic) Pty Ltd & Ors v Huggard* (1996) Aust Torts Rep. 81-397.

11 *Gull v Saunders* (1913) 17 CLR 82.

12 *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653.