SUPREME COURT OF QUEENSLAND

CITATION:	*Gough & Anor v South Sky Investments Pty Ltd* [2011] QSC 361 *Wicks v South Sky Investments Pty Ltd* [2011] QSC 361 *NOA 8338 Pty Ltd & Anor v South Sky Investments Pty Ltd* [2011] QSC 361 *Ryan v South Sky Investments Pty Ltd* [2011] QSC 361 *Linemint Pty Ltd & Anor v South Sky Investments Pty Ltd* [2011] QSC 361 *Walsh & Anor v South Sky Investments Pty Ltd* [2011] QSC 361 *Taylor & Anor v South Sky Investments Pty Ltd* [2011] QSC 361 *Parsons & Anor v South Sky Investments Pty Ltd* [2011] QSC 361
PARTIES:	**JOHN MACLAINE GOUGH AND NORMA PATRICIA GROVES** (plaintiffs) **v** **SOUTH SKY INVESTMENTS PTY LTD (ACN 097 092 709) (RECEIVERS AND MANAGERS APPOINTED)** (defendant) and **JEFFREY AIDEN WICKS AND JULIE KATHRYN WICKS** (plaintiffs) **v** **SOUTH SKY INVESTMENTS PTY LTD (ACN 097 092 709) (RECEIVERS AND MANAGERS APPOINTED)** (defendant) and **NOA 8338 PTY LTD** (first plaintiff) and **PAUL ANTHONY FORD** (second plaintiff) **v** **SOUTH SKY INVESTMENTS PTY LTD (ACN 097 092 709) (RECEIVERS AND MANAGERS APPOINTED)** (defendant) and **PATRICIA GAYE RYAN** (plaintiff) **v** **SOUTH SKY INVESTMENTS PTY LTD (ACN 097 092 709) (RECEIVERS AND MANAGERS APPOINTED)** (defendant) and

LINEMINT PTY LTD
(first plaintiff)
and
DERICK BRISLEY AND DEBBIE BRISLEY
(second plaintiffs)
v
SOUTH SKY INVESTMENTS PTY LTD (ACN 097 092 709) (RECEIVERS AND MANAGERS APPOINTED)
(defendant)
and
MICHAEL SHANE WALSH AND DAMIAN ROBERT HUTCHINS
(plaintiffs)
v
SOUTH SKY INVESTMENTS PTY LTD (ACN 097 092 709) (RECEIVERS AND MANAGERS APPOINTED)
(plaintiff)
and
VICKI ANNE TAYLOR AND JENNIFER MAY FERGUSON
(plaintiffs)
v
SOUTH SKY INVESTMENTS PTY LTD (ACN 097 092 709) (RECEIVERS AND MANAGERS APPOINTED)
(defendant)
and
JOHN CLIFTON PARSONS AND DOROTHY ANNE PARSONS
(plaintiffs)
v
SOUTH SKY INVESTMENTS PTY LTD (ACN 097 092 709) (RECEIVERS AND MANAGERS APPOINTED)
(defendant)

FILE NOS:	12179 of 2010, 13323 of 2010, 13578 of 2010, 13613 of 2010, 13615 of 2010, 13614 of 2010, 3091 of 2011, 3092 of 2011
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 December 2011
DELIVERED AT:	Brisbane

HEARING DATES:	8, 9, 10, 11 and 12 August, 3, 6 and 7 October 2011
JUDGE:	Applegarth J
ORDERS:	**In each proceeding there will be:** **1. Judgment for the defendant.** **2. A decree of specific performance and other orders on the defendant's counterclaim.** **3. A direction that the defendant submit proposed minutes of order within seven days.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – WHAT AMOUNTS TO REPUDIATION – where plaintiffs contracted to purchase apartments "off the plan" in a development described as *The Oracle* – where seller provided disclosure statements under ss 213 and 214 of the *Body Corporate and Community Management Act* 1997 (Qld) – where provision for an on-site manager to conduct a letting business and provide services associated with the letting of apartments – where letting agent focused on short-term stays and provided certain hotel-like services to guests – where plaintiffs claim that the tower was no longer a residential tower but was a hotel/resort branded *Peppers Broadbeach* – whether tower had ceased to be a residential tower – whether tower had been branded *Peppers Broadbeach* – whether seller had repudiated contracts CONVEYANCING – STATUTORY OBLIGATIONS OR RESTRICTIONS RELATING TO CONTRACT FOR SALE – PROTECTION OF PURCHASERS – OBLIGATIONS ON VENDOR: DISCLOSURE, WARNINGS AND LIKE MATTERS – where certain plaintiffs claim that disclosure statements had become inaccurate and any such inaccuracy would cause buyers material prejudice if compelled to complete – where certain plaintiffs seek to avoid the contracts under ss 214 and 217 of the *BCCM Act* – whether disclosure statements became inaccurate – whether inaccuracy in the name of the tower would cause material prejudice to the plaintiffs if compelled to complete the contracts *Body Corporate and Community Management Act* 1997 (Qld), s 213, s 214, s 215, s 217 *HG v The Queen* (1999) 197 CLR 414; [1999] HCA 2 cited *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115; [2007] HCA 61 discussed

Latitude Developments Pty Ltd v Haswell [2010] QSC 346 cited
Lee v Surfers Paradise Beach Resort Pty Ltd [2008] 2 Qd R 249; [2008] QCA 29 cited
Mirvac Queensland Pty Ltd v Horne [2009] QSC 269 cited
Mirvac Queensland Pty Ltd v Wilson [2010] QCA 322 discussed
Osland v R (1998) 197 CLR 316; [1998] HCA 75 cited
R v Bonython (1984) 38 SASR 45 cited
South Sky Investments Pty Ltd v Prins [2010] QSC 438 discussed
Transport Publishing Co Pty Ltd v Literature Board of Review (1956) 99 CLR 111; [1956] HCA 73 cited
Vennard v Delorain Pty Ltd as Trustee for the Delorain Trust [2010] QCA 309 cited
Wilson v Mirvac Queensland Pty Ltd [2010] QSC 87 discussed

COUNSEL: R G Bain QC and C C Heyworth-Smith for the plaintiffs
S L Doyle SC and D G Clothier for the defendant

SOLICITORS: Johnsons Lawyers for the plaintiffs
Allens Arthur Robinson for the defendant

[1] These eight proceedings, which were heard together, relate to "off the plan" contracts to purchase proposed lots in Tower One of a development described as *The Oracle* at Broadbeach on the Gold Coast. The development was undertaken by the defendant ("SSI"), and consists of two high rise apartment towers and other low rise buildings that contain retail, restaurant and commercial premises.

[2] SSI was incorporated in 2001 for the purpose of carrying out the development. The apartments in Tower One were released for sale in 2005. The construction of the development commenced in about October 2007. The construction of Tower One was completed in October 2010.

[3] The plaintiffs in each proceeding, with the exception of the plaintiffs in proceeding 12179/10 (Mr Gough and Ms Groves), entered into contracts in late 2005 or early 2006 ("the original contracts") with SSI. In June 2006 SSI obtained approval under s 29 of the *Land Sales Act* 1984 to extend from three and a half years to five and a half years the period of time in which it was required to provide a registrable instrument of transfer. As a result, the plaintiffs who had entered into the original contracts entered into new contracts in the second half of 2006. Mr Gough and Ms Groves entered into their contract with SSI on 17 October 2006.

[4] At various times the plaintiffs were given disclosure statements. In general terms, the disclosure statements explained that the development's residential component to be known as *The Oracle* would be subdivided to create a community titles scheme, and that it was proposed to appoint a caretaker who could provide letting services for the owners of lots in the scheme, could carry on a business of letting lots in the scheme and would occupy identified parts of the common property.

[5] Each plaintiff gave evidence of the type of development that they expected to be created, and about their intentions in relation to the particular apartment that they contracted to purchase. The personal circumstances of the various plaintiffs differed, as did their intentions in relation to their particular apartment. Some intended to occupy the apartment they agreed to buy. For example, Mr and Mrs Wicks intended to retire to the apartment they agreed to buy once Mr Wicks retired from his career as an airline pilot and they returned to Australia from their home in Hong Kong. Others hoped to on-sell the apartment before the date for settlement in order to make a profit. For example, Ms Ryan, a teacher's aide, who had limited assets, intended to on-sell proposed Lot 902 in order to be able to settle her contract contemporaneously with the contract she hoped to enter with another buyer. Her limited financial resources did not enable her to settle the contract otherwise, and she hoped to make a profit by on-selling the proposed lot. Other buyers intended to find a long-term tenant. For example, Mr Walsh and his business partner, Mr Hutchins, intended to find a long-term tenant for the apartment they contracted to buy, and Mr Hutchins thought that eventually he might live in the apartment with his family.

[6] In general terms, the plaintiffs in each proceeding gave evidence that they expected to purchase an apartment in a residential tower known as *The Oracle*, and that the tower was to be an iconic, luxurious, up-market residence, providing a sense of community and a high level of amenity to its residents. These features were to give it an "exclusivity" or a quality that distinguished it from other high rise apartment buildings on the Gold Coast. The advertisements, sales brochures, sales agents' representations or other sources of information that gave rise to the expectations of individual buyers are not the subject of detailed or precise evidence. That is because this is not a case that relies on express or implied representations that were made by representatives of SSI or others in marketing *The Oracle* as the basis of the claim that has been brought by each plaintiff. Instead, it is a contract case.

[7] Each plaintiff relies on the terms of a written contract. They also rely upon disclosure statements, and annexures to them, which are said to form part of the provisions of the contract by virtue of s 215 of the *Body Corporate and Community Management Act* 1997 (Qld) ("the *BCCM Act*" or "the Act"). On this basis, SSI is alleged to have promised that:

(a) the relevant lot would be, and would be sold to the buyer as, an apartment in a residential tower in *The Oracle*; and

(b) any authorisation of a person as letting agent would be in the terms of the Caretaking and Letting Agreement annexed to the disclosure statement.

[8] In about July or August 2010 the plaintiffs received communications that announced that the letting rights had been acquired by Peppers Retreats, Resorts and Hotels. Material sent by Peppers on 12 August 2010 included a brochure that advised, among other things, that *Peppers Broadbeach* would be the "ultimate all encompassing hotel experience" and that *Peppers Broadbeach* would be "a great hotel opposite the beach".

[9] The plaintiffs claim that the disclosure statement made under the Act, as amended by further statements, would not be accurate if now given as a disclosure statement because of numerous matters. In very general terms, the allegations are that each

plaintiff contracted to purchase an apartment in a residential tower known as *The Oracle*, and the disclosure statements described the lot to be purchased as a lot in such a residential tower, whereas the apartment in question is one in a hotel/resort branded *Peppers Broadbeach*. Certain plaintiffs claim that they would be materially prejudiced, as that expression is used in s 214(4)(b) and s 217(c) of the Act, if compelled to complete the contract by reason of the extent to which the disclosure statement, as amended, has become inaccurate because of a number of matters. The plaintiffs in three of the proceedings (Mr and Mrs Wicks, Mr Gough and Ms Groves, and Ms Ryan) purported to cancel their respective contracts pursuant to rights given to them under the Act within the time allowed by the Act. In all of the proceedings the plaintiffs claim that SSI evinced an intention not to be bound by the terms of the contract (and thereby repudiated the contract) in that:

(a) SSI no longer intended to provide at settlement an apartment in a residential tower in *The Oracle* but rather an apartment in a hotel/resort to be known as *Peppers Broadbeach* with the features, attributes, uses and consequences alleged by them in their pleadings; and

(b) any authorisation of a person as letting agent would not be in the terms of the Caretaking and Letting Agreement annexed to the disclosure statements.

[10] The plaintiffs seek declarations either that they were entitled to treat the contract as discharged and that the contract has been discharged, or that they validly cancelled the contract pursuant to s 214 or s 217 of the Act.

[11] SSI denies that the plaintiffs in each proceeding were entitled to terminate the contract. By counterclaim in each proceeding it seeks specific performance of the contract, interest on the purchase price since the date for completion and damages.

[12] At the risk of excessively simplifying the numerous allegations of repudiation, inaccuracy in disclosure statements and material prejudice that appear in the statements of claim in the proceedings, the essential complaint of each plaintiff is in two parts. First, they contracted to purchase an apartment in a residential tower, whereas on settlement they were proffered a lot in a development that had become a hotel or resort. The second is that *The Oracle* has been re-branded *Peppers Broadbeach*.

The statutory context

[13] The evidence concerning the original disclosure statement given pursuant to s 213 of the *BCCM Act* and the further disclosure statements given from time to time, their alleged inaccuracy, and the prejudice that the plaintiffs say they would suffer if compelled to complete the contract make it appropriate to summarise the relevant provisions of the Act[1] concerning disclosure statements about a proposed lot. Section 213(1) of the Act provides that before a contract is entered into by a seller for the sale of a proposed lot, the seller must give the buyer a disclosure statement. A proposed lot is a lot that is intended to come into existence as a lot included in a community title scheme when the scheme is established or changed. Section 213(2)

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[1] For the purposes of this case, the plaintiffs submitted that Reprint 3D was the applicable reprint and the defendants did not contest that point. All references to the *BCCM Act* are therefore references to Reprint 3D, which was effective from 15 March 2006 to 30 June 2007.

prescribes what the disclosure statement must state, include and be accompanied by. The disclosure statement must be "substantially complete".

[14] Section 214 relates to the variation of a disclosure statement by a further statement. It applies if the contract has not been settled and:

> "(a) the seller becomes aware that information contained in the disclosure statement was inaccurate as at the day the contract was entered into; or
>
> (b) the disclosure statement would not be accurate if now given as a disclosure statement."

If s 214 applies, then the seller must, within 14 days (or a longer period agreed between the buyer and seller) after the section starts to apply, give the buyer a further statement rectifying the inaccuracies in the disclosure statement. Section 214(4) provides:

> "The buyer may cancel the contract if—
>
> (a) it has not already been settled; and
>
> (b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate; and
>
> (c) the cancellation is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the further statement."

The provisions of s 214 continue to apply after the further statement is given, on the basis that the disclosure statement is taken to be constituted by the disclosure statement and any further statement, and the disclosure statement date is taken to be the most recent further statement date.[2]

[15] Section 215(1) provides that the disclosure statement, and any material accompanying the disclosure statement, and each further statement and any material accompanying each further statement, form part of the provisions of the contract. Section 216 states that the buyer may rely on information in the disclosure statement and each further statement as if the seller had warranted its accuracy.

[16] Section 217 provides that the buyer may cancel the contract if:

(a) it has not already been settled; and

(b) at least one of the matters stated in sub-paragraph (b) applies; and

(c) because of the difference or inaccuracy under paragraph (b), the buyer would be materially prejudiced if compelled to complete the contract; and

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2 *BCCM Act*, s 214(5).

(d) the cancellation is effected by written notice given to the seller by the buyer not later than the latest of the following—

(i) 3 days before the buyer is otherwise required to complete the contract;

(ii) 14 days after the buyer is given notice that the scheme is established or changed;

(iii) another day agreed between the buyer and the seller.

The relevant sub-paragraph of s 217(b) in this matter is:

"(iv) information disclosed in the disclosure statement, as rectified by any further statement, is inaccurate".

[17] If the buyer cancels a contract under the provisions of the Act in relation to proposed lots, then the seller must repay to the buyer any amount paid to the seller (including the seller's agent) towards the purchase of the lot the subject of the contract.[3]

[18] The entitlement to cancel under s 214 arises in the context of a case in which a further statement is provided.[4] The entitlement to cancel under s 217 may arise where the disclosure statement is inaccurate and no further statement is provided. The entitlement to cancel under s 217 arises if, because of an inaccuracy in the information disclosed in the disclosure statement, as rectified by any further statement, the buyer would be "materially prejudiced" if compelled to complete the contract. The entitlement to cancel under s 214(4) arises if, among other things, the buyer would be "materially prejudiced" if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate. The meaning of "materially prejudiced" in this context was discussed by Margaret Wilson J in *Wilson v Mirvac Queensland Pty Ltd*.[5] The Court of Appeal considered the concept of "material prejudice" in *Mirvac Queensland Pty Ltd v Wilson*[6] and approved the analysis and conclusions reached by her Honour. Her Honour had said that the following matters are clear:

"(a) The focus is on ***the*** buyer. This suggests that the test is objective having regard to the particular buyer's circumstances: would someone in those circumstances be materially prejudiced?

(b) Given that the buyer has only 14 days in which to cancel the contract, and the completion date may still be some months away..., material prejudice must be assessed in the light of the

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3 *BCCM Act*, s 218.

4 *Lee v Surfers Paradise Beach Resort Pty Ltd* [2008] 2 Qd R 249 at 259 and 268, [2008] QCA 29 at [4] and [41].

5 [2010] QSC 87. See *also Latitude Developments Pty Ltd v Haswell* [2010] QSC 346 at [55]-[65] where P Lyons J also discussed the concept and concluded that material prejudice is not to be judged by reference to facts not known to the buyer at the time when it gives a notice of termination.

6 [2010] QCA 322.

> buyer's circumstances when the Further Statement is received or at the latest at the expiration of 14 days from its receipt.
>
> (c) There must be a causal relationship between the inaccuracy and the prejudice.
>
> (d) There must be proportionality between the inaccuracy and the prejudice.
>
> (e) Because this is consumer protection legislation, it should be construed beneficially."[7]

Justice Jones (with whom McMurdo P and Fraser JA agreed) stated that, in the context of s 214 (and also s 217), the question of prejudice depends upon the information which has come to the buyer's actual knowledge and whether the information on an objective basis is inaccurate. The prejudice for the purpose of the section flowing from the inaccuracy arises from some detriment or disadvantage to the buyer.[8] A person would be "materially prejudiced" if disadvantaged "substantially" or "to an important extent".[9] Justice Jones cited *Vennard v Delorain Pty Ltd as Trustee for the Delorain Trust*[10] which suggested, in a similar context, that the phrase "materially prejudiced" meant "disadvantaged in a way which is substantial or of much consequence."[11] The concept that the buyer would be "materially prejudiced" requires a consideration of "the personal circumstances of the buyer in what is otherwise a determination to be made objectively."[12] Justice Jones concluded that material prejudice for the purpose of s 214 (and s 217):

> "has to be assessed in the context of the buyer's personal circumstances being required to complete the contract on its changed terms. The evaluation of whether any disadvantage or detriment reaches the level of material prejudice such as to warrant cancellation of the contract, must be objectively determined in accordance with community standards."[13]

The President, who agreed with these reasons, made reference to the apparently harsh result to the seller in the circumstances of that case, but stated that such a result was consistent with the scheme of the Act and its objects, which relevantly included the secondary object of providing "an appropriate level of consumer protection for... intending buyers of lots included in community title schemes".[14]

The Oracle

[19] SSI was incorporated in 2001 as a special purpose vehicle to undertake the development of the project known as *The Oracle*. It was associated with Niecon Developments Pty Ltd ("Niecon") and Niecon provided staff and services to

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7 [2010] QSC 87 at [32].
8 [2010] QCA 322 at [58].
9 Ibid at [59].
10 [2010] QCA 309.
11 [2010] QCA 322 at [59], citing [2010] QCA 309 at [27].
12 [2010] QCA 322 at [59].
13 Ibid.
14 Ibid at [3].

manage the development. The development is on about 12,336 square metres of land located at Charles and Elizabeth Avenues, Broadbeach. It is in a tourist precinct. It comprises two residential towers, with Tower One being 51 levels containing 265 apartments and Tower Two being 41 levels containing 242 apartments. Tower One is closest to the beach. There are about 70 different apartment configurations. There are more than 200 two or three bedroom apartments. There is a much smaller number of one and two bedroom plus study apartments. In addition, there are a small number of three bedroom plus media apartments and three bedroom plus study and media apartments. There are three penthouses. Apartment living areas range from 81 square metres to over 318 square metres. The apartments contain separate kitchens. The average sale price for the apartments at the time of their release exceeded $1,200,000. Niecon and SSI's Chief Operating Officer, Mr Mark Johnson, who oversaw the development, described it in his affidavit as a "substantial 5 star development, with very high quality finishes, spectacular aspect and position and extensive luxury facilities throughout the common areas." The development also includes, in a gallery below the towers, four three-level buildings housing boutiques, retail stores, restaurants, cafes and licensed premises.

[20] The apartments in Tower One were first released for sale in late 2005. Each of the plaintiffs in the separate proceedings gave evidence concerning their expectations, and not all of them descended to great detail in relation to the information that they relied upon in deciding to buy an apartment in *The Oracle*. However, the marketing of the development focused on its unparalleled status as a high-quality, residential apartment tower. For example, the first plaintiff to give oral evidence, Mr Wicks, said that he was told about *The Oracle* in late 2005 when he told sales representatives of his and his wife's plan to retire to the Gold Coast. He said that he and his wife were attracted to *The Oracle* "by what was proposed by way of luxurious, sophisticated residential living." Another plaintiff, Ms Ryan was told by a sales representative in late 2005 that *The Oracle* was to be "an iconic residential project with permanent and long-term residents only", and that the development was designed to attract "baby boomers" looking to downsize and move from homes into a luxuriously-appointed development with quality facilities and also to attract high-end, discerning owners looking for executive standard residences. She received promotional materials about *The Oracle*, including a large, glossy brochure with a foreword written by demographer Bernard Salt, and a DVD which focused on the "iconic sophisticated residential nature of the development designed to attract owner/occupiers". The glossy blue brochure about *The Oracle* opens with a statement by Mr Salt about the "evolving preference by Australians for a lifestyle location in a warm climate." Mr Salt observes:

> "What had been lacking was a measure of city sophistication in these places to attract and hold the interests of aging, city-based baby boomers."

The brochure emphasised the lifestyle that *The Oracle* offered. One of its first pages stated:

> "LIVE, WORK, INDULGE IN YOUR VERY OWN FULLY INTEGRATED LIFESTYLE DEVELOPMENT".

The exclusive nature of *The Oracle* was conveyed on a page headed "WORLD CLASS LIFESPACES" which stated:

> "Every one of the residences at this landmark address will indulge its owners with world class lifespaces. The Niecon vision is to create rooms that enhance your life."

One of the stated advantages of living at such a "landmark address" was membership of what was described as "YOUR VERY OWN EXCLUSIVE CLUB". This page of the brochure stated:

> "Acquiring a residence in The Oracle is equivalent to achieving membership in a supremely private club. Owners will enjoy the privilege of access to the Niecon Executive Lounge, a space where you can socialise with like minded neighbours over a quiet game of billiards or retreat to the ultimate tranquillity and privacy of the Zen garden. Entertain guests with a selection from your personal temperate wine locker, enjoy quiet space for reflection in the library, or treat your family and friends to a screening in the private cinema. Exclusive features that make The Oracle a truly individual environment for our residents."

As to its location, the brochure posed a question:

> "Could you locate a more strategic address to live, work and relax?"

[21] As previously noted, Ms Ryan and each of the other plaintiffs do not rely upon these representations as the foundation for a contractual term, or for any cause of action based upon a representation such as a contravention of the *Trade Practices Act* 1974 (Cth), s 52. Instead, these representations and the expectations they generated are relevant to the personal circumstances of each plaintiff in considering the issue of prejudice.

[22] The promotion of *The Oracle* prompted a strong reaction when apartments in Tower One were released for sale in late 2005. Prospective buyers were able to sign expressions of interest. Mr Johnson describes the release of Tower One as very successful and says that there was "a frenzy to purchase *The Oracle* apartments off the plan." It was the first launch of quality apartments in Broadbeach for a long time. Whilst the popularity of the development was not surprising to him, the extent to which people were keen to purchase was higher than had been anticipated and people were "practically lining up to buy the apartments." He and other Niecon staff could not keep up with the pace at which people wanted to buy the apartments. Contract administrators were appointed to process the execution and return of contracts.

[23] The process was for the contracts administrator to prepare a letter to the buyer or the buyer's solicitor, under cover of which the following documents requiring execution by the buyer would be sent:

(a) the contract and associated forms required by the Act and the *Property Agents and Motor Dealers Act* 2000 (Qld) ("PAMDA");

(b) a Contract Disclosure Statement which contained a Developer Product Disclosure Statement, and another Disclosure Statement which itself included:

(i) a single page entitled "INFORMATION ABOUT THE DEVELOPMENT";

(ii) a Disclosure Statement given under the *BCCM Act*; and

(iii) a PAMDA Form 27c.

(c) an Operator Product Disclosure Statement.

[24] The original contracts were executed by the buyers. In late May 2006 SSI obtained approval under s 28 of the *Land Sales Act* 1984 to extend the period of time within which it was required to provide buyers with a registrable instrument of transfer. Following that approval, SSI began preparing and issuing new contracts to buyers. As a result, the original contracts were replaced and discharged by new contracts. The reissuing and execution of new contracts did not involve the provision of an Operator Product Disclosure Statement to the buyers. However, new Disclosure Statements in the form described in (b) above were given. From time to time further statements were sent to buyers pursuant to s 214 of the Act.

Relevant provisions of the contract

[25] After the pages consisting of statutory warning statements and the like, the first page of the contract is headed:

"Contract of Sale
The Oracle"

and bears the logo for *The Oracle* below which appears the name:

"The Oracle
Central Broadbeach"

The contract includes a number of plans, including the site plan, a matrix plan showing levels/floors and a draft building format plan. Each of the relevant plans is headed "The Oracle". The contract included various definitions, including the "Scheme" (being the community titles scheme to be created under the Act by SSI and comprising the Scheme Land and the Community Management Statement). Provision was made for the payment of a deposit and for SSI, at its discretion, to accept in lieu of a deposit a Security in favour of the deposit holder. Clause 3 related to the development and its subdivision. Clause 5 provided for settlement to occur on the "Settlement Date" and this was to be 14 days after SSI's lawyers gave notice to the buyer or its lawyers that the Scheme had been established, or changed, to create the Lot. The contract provided for time to be of the essence and for default interest. In Clause 16 the buyer acknowledged having received from the seller, before it signed the contract:

(a) a Product Disclosure Statement under the *Corporations Act*; and

(b) a Disclosure Statement under the *BCCM Act*.

[26] Clause 18 of the contract described the development of "the Land" as comprising:

(a) the Retail Lot; and

(b) the Scheme.

In Clause 18.2 the buyer acknowledged that the Retail Lot would be used for commercial activities and would generate noise, pedestrian and vehicle traffic and related activities incidental to the commercial activities. Clause 18.3(a) related to commercial activities in the Scheme Buildings. By clause 18.3(a) the buyer acknowledged:

> "that the Scheme may contain up to two levels in the Scheme Buildings which are used for Commercial Purposes."

The clause defined "Commercial Purposes" to mean "any lawful purpose that is non-residential."

The Disclosure Statements

[27] Those buyers who entered into the original contracts were sent a disclosure statement which is referred to in the pleadings as "the original disclosure statement". Another disclosure statement was given to these buyers pursuant to s 213 of the Act before they entered into the replacement contracts. The original disclosure statement and the new disclosure statement were in materially identical terms. One of its first pages was titled "INFORMATION ABOUT THE DEVELOPMENT". The information page purported to give "a general outline of the development being undertaken by the Seller". It stated that:

> "The Seller intends to construct a residential and retail development.
>
> Land on which the Development will be constructed is proposed to be initially subdivided to create 2 lots (being a residential lot and a retail lot). The residential component, to be known as The Oracle, will be further subdivided by a building format plan to create a community titles scheme in respect of which there will be one body corporate. The Seller has not yet decided whether the retail component of the Development will be subdivided to create a community titles scheme. The retail component may also, at the Seller's discretion, be subdivided to create land from which another residential community titles scheme will be derived."

[28] The disclosure statement given pursuant to s 213 of the Act stated that details of the terms of any proposed authorisation of a person as a letting agent for the Scheme proposed to be given after the establishment of the Scheme appeared in the Caretaking and Letting Agreement in Annexure 2. Annexure 2 consisted of a number of documents including the Caretaking and Letting Agreement.

[29] Clause 3 of the Caretaking and Letting Agreement made provision for the remuneration of the Caretaker. Clause 3.6 provided that no part of the remuneration paid under cl 3 would be for carrying out any letting functions, providing any letting

services or operating a letting business. Clause 4 defined the duties of the Caretaker.

[30] Clause 6 of that agreement related to the Letting Business. It provided:

> "6.1 The Caretaker may carry on from the Caretaker's Unit the business of:
>
> (a) letting lots in the Scheme;
>
> (b) all associated services commonly rendered in connection with letting lots in developments similar to that comprising the Scheme; and
>
> (c) any other lawful activity.
>
> 6.2 The Caretaker may provide such letting service for such owners of lots in the Scheme as require that service. However the owners are free to choose whether or not to use the letting services of the Caretaker to be provided under this Agreement.
>
> 6.3 If the Caretaker decides to provide the services referred to in this clause, then it will supervise the standard of tenants of all such lettings arranged by it and ensure, so far as practicable, that no nuisance is created on the Scheme Land and that the Scheme and lots in it are not brought into disrepute.
>
> 6.4 In so far as it is lawful, the Caretaker may erect signs reasonably necessary in or about the Scheme Land for the purpose of promoting and fostering the letting business. Such signs must be temporary and moveable.
>
> 6.5 The Caretaker must comply with all laws in conducting the letting business."

[31] Clause 16 of the Caretaking and Letting Agreement provided for the Caretaker's Unit to be used by the Caretaker for the purpose of management of the property, conducting the letting business and any other lawful purpose.

[32] Clause 20 was headed "Occupation Authority". Its various sub-clauses gave the Caretaker the authority to occupy identified parts of the Common Property on certain conditions. These areas were identified as OA1, OA2, OA3 and OA4. In each case the Caretaker was authorised to use the area in question to perform its duties under the agreement "and for any other lawful purpose". Areas OA1, OA2 and OA4 were for the exclusive occupation of the Caretaker. In the case of OA3 the caretaker was authorised to use it "for special events, functions, presentations or any other lawful use" (which together were called an Event). Clause 20.3 permitted the Caretaker to charge a fee for persons attending an Event and to retain that fee as its property. The clause went on to make provision in relation to the prior booking or reservation of OA3 by an owner. Clause 20.3(e) entitled the Caretaker to serve alcohol, other beverages and food on OA3 but only if all appropriate licences were held and laws were complied with to allow such service.

[33] Clause 20.5 authorised the Caretaker to place signage and other items. It provided:

> "20.5 The Body Corporate gives the Caretaker the authority to place (and, where appropriate, have manned) a tour desk, brochure stands, signage, vending machines and other similar things **(*Structures*)** (for example, without limitation, marketing activities and sale of products) on any part of the Common Property on the following conditions:-
>
> (a) the Caretaker must keep any Structures in good condition and repair and to a standard commensurate with the surroundings in which they are located (namely a high quality and standard);
>
> (b) the Structures must not materially inhibit the flow of persons on the Common Property;
>
> (c) the Caretaker does not have the exclusive use of the area in which the Structures are located.
>
> (d) if the erection and use of a Structure causes any damage to the Common Property (except for fair wear and tear), the Caretaker must promptly make good such damage."

[34] The separate document entitled "Developer Product Disclosure Statement" had the purpose of informing buyers of apartments about the opportunity to make their apartments available to the Operator for letting purposes. Buyers were not obliged to appoint the Operator to let their apartments. This Developer Product Disclosure Statement ("PDS") was required by the Australian Securities and Investments Commission ("ASIC") as a condition of a class order given by it under the *Corporations Act* in respect of "managed investment schemes". The Developer PDS gave an overview of the development and indicated that a further document called an "Operator PDS" would be issued in relation to the management rights scheme known as the "Oracle MR Scheme". Part 7 of the Developer PDS identified the benefits of participating in the Oracle MR Scheme as follows:

> "(a) all services such as cleaning/servicing of rooms are on-site, and done in a timely manner to suit Guests' arrivals and departures;
>
> (b) on-site reception facilities to meet and check in Guests;
>
> (c) telephone connection to the main reception, and through the CTS central system;
>
> (d) ability to utilise all guest services such as room service, restaurants, tours, etc which can all be charged to the room;
>
> (e) the on-site building manager can make available any specials or promotions that may exist at that time;

(f) the on-site building manager is readily able to deal with Guests' needs;

(g) wholesale accommodation operators requiring accommodation for on-sale to retail customers often prefer to deal with on-site building managers rather than off-site letting agents. This is because of the convenience to wholesale operators of dealing with just a few on-site building managers rather than many individual agents;

(h) Guests wanting to let apartments in particular resorts or buildings frequently make inquiries with on-site building managers rather than approaching off-site letting agents."

[35] Part 10 of the Developer PDS was headed "Returns to Participating Apartment Owners". Part 16 related to the returns that might be expected from participation in the Oracle MR Scheme. It advised that the income that a participating apartment owner receives from participation is uncertain and may vary. Ultimately, "occupancy levels and room rates will determine the gross income" from letting an apartment. This part of the document identified a number of factors that affected occupancy levels, including demand, the Australian economy, different seasons and the Operator. As to the Operator, it stated:

> "The demand for rooms may be influenced by the contacts that the Operator has in the industry and the Operator's experience in operating similar properties. An Operator that is unknown in the accommodation industry may have more difficulty attracting Guests."

[36] The Operator PDS was to like effect. The version that was provided to Mr and Mrs Wicks was dated 16 December 2005. It identified its purpose as offering apartment owners the opportunity to make apartments available to Sky Asset Management Pty Ltd (SAM) "for short term, holiday and medium term letting purposes." It also gave an overview of the Oracle development and the benefits of participating in the Oracle MR Scheme. Clause 9 stated that the Operator would have "certain rights over part of the common property of the CTS, for example, rights to erect signage." These rights were said to be outlined in the proposed Community Management Statement. Clause 10 addressed returns to participating apartment owners. It defined apartment revenue as income received by the Operator for occupation only of the relevant apartment less "frequent flyer commissions, fees and other money payable to travel wholesalers and booking agents". Sub-clause 10(d) provided:

> "(d) Any fees, charges or other income received by SAM or any Manager which are not Apartment Revenue will not form part of the revenue paid to Participating Apartment Owners. For example, income from food and beverages, laundry and dry cleaning income and extra room servicing is not Apartment Revenue. That income will not be included in Apartment Revenue."

[37] The Operator PDS contained provisions similar to the Developer PDS in relation to returns from participation in the Oracle MR Scheme including the factors that would influence demand for rooms. Clause 22 of the Operator PDS identified the main documents relating to the Oracle MR Scheme to be an application form, the appointment (PADMA Form 20a) and the Caretaking and Letting Agreement. It sought to summarise the key terms of the appointment as including the fact that the apartment owner appointed SAM "exclusively as agent for the Apartment Owner to let the Apartment for short term, holiday and medium term lettings." It enabled SAM to engage a manager to carry out its day to day activities. The definitions in cl 24 of the document included a definition of Apartment Revenue. Apartment Revenue was said not to include money that SAM received for selling goods and services to Guests or any other person. These goods and services were defined to include, without limitation:

> "(a) food and beverages;
>
> (b) laundry and dry cleaning;
>
> (c) extra room servicing;
>
> (d) entertainment, pay television, video hire and in-room movies;
>
> (e) telephone, facsimile or other communications services;
>
> (f) valet parking, arranging and providing transport;
>
> (g) gift shop and tour sales;
>
> (h) foreign exchange;
>
> (i) recreational facilities; and
>
> (j) conference room use and conference, office and business services and equipment use."

[38] The Operator Product Disclosure Statement concluded with advice as to what an apartment owner who wanted to make an apartment available to SAM "for short term and holiday letting" must do.

[39] The proposed Letting Appointment Agreement annexed to the Operator PDS referred to the agent's duties. The services that the agent was to provide included:

> "advise and promote the Property and The Oracle generally to travel agents, tourism operators and the public as a quality Guest accommodation".

The Further Disclosure Statements

[40] SSI issued further disclosure statements from time to time. Again, adopting the further disclosure statements provided to Mr and Mrs Wicks as a convenient point of reference, on 27 September 2006 SSI provided a further disclosure statement pursuant to s 214 of the Act. It advised, among other things, that a Facility Sharing

Agreement allowing the owners and occupiers of lots in the proposed Oracle Tower Two to use the facilities in The Oracle Community Titles Scheme had been varied, and that the facility sharing agreement for owners and occupiers of lots in *The Oracle* to use the facility in The Oracle Tower Two had been varied. It advised of variations in relation to the Facility Sharing Agreement benefiting the retail lot. It also advised that the proposed Caretaking and Letting Agreement to be entered into with the body corporate for *The Oracle* had been varied. The main changes to the documents that had previously been supplied were highlighted on attached documents. The single page further statement dated 27 September 2006 and the attached documents run to almost 200 pages.

[41] A document described in the pleadings as the second s 214 further statement was provided by SSI on 16 January 2007. It related to changes to the Community Management Statement and to the Body Corporate budget and levies, which are not presently relevant. The third s 214 further statement was provided on 22 December 2008. Among other things, it annexed an amended Caretaking and Letting Agreement.

[42] On 28 May 2010 SSI provided the "fourth section 214 further statement". It advised that the occupation authority plans, attached to the Caretaking and Letting Agreement, had been updated and attached a copy of them. It also advised that the Caretaking and Letting Agreement had been amended and attached a copy of the amended document. The amended document identified South Sky Assets Pty Ltd as the Caretaker. The fourth s 214 further statement also advised, among other things, that the Product Disclosure Statement for The Oracle Community Titles Scheme that had been previously distributed had been withdrawn, and a copy of the withdrawal notification was attached. The withdrawal notice dated 28 May 2010 stated that Sky Asset Management Pty Ltd (SAM) had previously proposed operating letting schemes for apartment owners and that the buyer may have received a PDS about the letting schemes. SAM advised that the Product Disclosure Statements that it had previously issued had been withdrawn and that ASIC had been notified of the withdrawal. The reason for the withdrawal was that the ASIC class order provided that where the minimum purchase price exceeded $500,000 a PDS was not required, and SAM was withdrawing the PDS because minimum purchase prices at The Oracle and The Oracle Tower Two exceeded $500,000. The statement went on to advise that despite the withdrawal of the PDS, the seller advised that it still expected that buyers and owners would be able to participate in letting schemes at The Oracle and The Oracle Tower Two, and that updated details about the new proposed letting schemes would be sent to the buyer shortly.

[43] It is unnecessary to detail for present purposes minor changes made to the Caretaking and Letting Agreements by the first, third and fourth s 214 further statements. The plaintiffs rely upon the fact that the amendments to the Caretaking and Letting Agreement for *The Oracle* did not change the terms of the Letting Business described in cl 6 of that agreement. SSI relies on the fact that the Caretaking and Letting Agreements annexed to the Disclosure Statement given under s 213 of the Act and to the first, third and fourth s 214 further statements provided, among other things:

(a) for the Caretaker to provide letting services and to operate a letting business;

(b) for the Caretaker's unit to be used for the purposes of the management of the property and conducting the letting business (and any other lawful purpose);

(c) that the letting business involved the letting of lots, all associated services and any other lawful activity;

(d) that the body corporate gave the Caretaker the authority to occupy part of the common property for special events, functions and presentations or any other lawful use and that the Caretaker might serve alcohol, other beverages and food in that area if all appropriate licences were held and laws complied with to allow such service;

(e) that the body corporate gave the Caretaker the authority to place (and, where appropriate, have manned) a tour desk, brochure stands, signage, vending machines and other similar things on any part of the common property on certain conditions.

The plaintiffs' cases in relation to the disclosure statements

[44] The plaintiffs rely upon the fact that the disclosure statement and the first, second, third and fourth s 214 further statements (and related material) were expressed to relate to *The Oracle* and/or The Oracle CTS. SSI admits this. There is no contest that the disclosure statement given under the Act, as varied by the first, second, third and fourth s 214 further statements, formed part of the contract by virtue of s 215 of the Act. The plaintiffs plead that, in the premises, there were further terms of the contract that:

(a) SSI would sell to the plaintiff a specified lot "in a residential tower in *The Oracle*"; and

(b) any authorisation of a person as letting agent would be in the terms of the Caretaking and Letting Agreement annexed to the Disclosure Statement and as described in the Developer PDS and the Operator PDS.

The plaintiffs invoke s 216 of the Act and plead that they are entitled to rely on the information in the disclosure statement, the first, second, third, fourth (and, in one case, fifth) further statements, and the respective annexures to those as if SSI had warranted their accuracy. On that basis, the plaintiffs plead that SSI warranted to them that:

(a) the relevant lot would be, and would be sold to the relevant plaintiff as, an apartment in a residential tower in *The Oracle*; and

(b) any authorisation of a person as letting agent would be in the terms of the Caretaking and Letting Agreement annexed to the disclosure statement.

[45] SSI admits that it was a term of the contract that, subject to the terms and conditions of the contract, it would sell to the plaintiffs the relevant lot in Tower One of *The Oracle* development, but otherwise denies that it was a term of the contract that any authorisation of a person as letting agent would be in the terms of the Caretaking and Letting Agreement, as pleaded by the plaintiffs. The denial is based upon, among other things, the additional terms pleaded by it in its defence and the

fact that any authorisation by the body corporate for a person to be the on-site letting agent was to be on the terms of the Caretaking and Letting Agreement annexed to the fourth s 214 further statement.

The appointment of Peppers

[46] Peppers was established in 1984 when Peppers Guest House opened in the Hunter Valley. According to its website, the "short break market" was then in its infancy. Its website states:

> "Today you will find the Peppers collection of Retreats and Resorts in the most extraordinary places throughout Australia and New Zealand. You will find us set amongst rainforests, vineyards and cities, as stately homes, on cattle stations, mountain ranges, golf courses, beaches and tropical islands, each property boasting its own individual charm and character."

Its web page titled "Escapes and Experiences" states:

> "At Peppers, our exquisite collection of Resorts and Retreats present a plethora of specialised escapes. Our romantic escapes offer the chance to reconnect while our indulgence escapes allow you to relish in life's luxuries. For blissful pampering try one of our renowned spas or for the ultimate in serene seclusion our beach or island escapes are perfect."

The website and other promotional material from Peppers is badged under the logo:

PEPPERS

RETREATS.RESORTS.HOTELS

[47] Peppers forms part of the Mantra Group of companies. Mantra operates three divisions or brands—Peppers, Mantra and Break Free—which offer hotels, resorts, retreats and self-contained accommodation on a short-term or holiday basis. Each brand is positioned in different markets.

[48] In about early 2009 SSI started to give serious thought to selling the management rights at *The Oracle*. In mid-2009 meetings were held with representatives of different groups who had expressed interest, including the Mantra group of companies. Any entity which was appointed to undertake caretaking/letting/ management at *The Oracle* required substantial capacity since, with more than 500 apartments, the caretaking and letting activity was a substantial enterprise. After discussions, SSI decided that Mantra's top brand, Peppers, should be appointed because it was a "premium brand and because Mantra was prepared to offer a better price for the management rights." SSI thought that the Peppers brand would bring the level of professionalism and quality to *The Oracle* that was required. As part of the negotiations, Mantra requested that a liquor licence be obtained in the name of South Sky Assets Pty Ltd ("SSA"), and application was made by SSA with SSI's consent. Discussions between SSI and Mantra turned to how Mantra could provide guests who stayed in *The Oracle* with services, including mini-bars.

[49] A Share Sale Agreement relating to the sale of the shares in SSA, a company then in the Niecon group of companies, was entered into on 14 July 2010. All the issued shares in SSA which were owned at the time by South Sky Enterprises Pty Ltd, another Niecon company, were sold to Peppers Leisure Pty Ltd, conditional upon certain events.

[50] The amount payable under the Share Sale Agreement was the subject of detailed provisions. There were to be various payments, including a "Key Payment" for each qualifying lot in excess of 150 qualifying lots during the initial period ending on 30 November 2012. The payment of the purchase price was subject to, among other things, the Tower One body corporate consenting to an application by SSA for a liquor licence in respect of the relevant part of the land in the tower that SSA could occupy and the body corporate of Tower Two consenting to a similar application in respect of relevant land in that tower. The Share Sale Agreement contemplated "Restaurant Works" as part of the "Buyer's Fitout". The works are set out in Annexure L to the Share Sale Agreement and involve the creation of a restaurant and kitchen in Lot 101 (the Caretaker's Unit) on the ground floor of Tower One. In addition to the provision for SSA to obtain a liquor licence over the areas it was entitled to occupy, the Share Sale Agreement provided for SSA to apply for a liquor licence in respect of the restaurant and bar, and areas adjoining them, the lots and the "Authorised Common Property" (being the Occupation Areas). These provisions were to facilitate the service of liquor in the planned restaurant and bar, at events, in mini-bars and by room service. They were important to Peppers in delivering the services that were necessary to achieve the standards required of one of its resorts.

[51] The Share Sale Agreement addressed the issue of signage and required SSI within 14 days of the establishment of the Tower One Scheme to cause the Tower One body corporate to approve the signage referred to in Annexure I. A similar obligation arose in respect of signage on Tower Two.

[52] The result of the carrying into effect of this agreement has been the establishment of large neon Peppers signage on the top of each building. Other Peppers signage appears in and around the residential tower.

[53] On or about 14 September 2010, the Community Management Statement for The Oracle Community Titles Scheme was registered. On 4 October 2010 the body corporate for The Oracle CTS entered into a Caretaking and Letting Agreement with SSA. On and from 7 November 2010 Peppers Leisure Pty Ltd caused SSA to operate its on-site letting business in respect of Tower One and Tower Two in accordance with the Caretaking and Letting Agreement. Although SSA was still a Niecon company, Peppers Leisure Pty Ltd assumed control of its activities under the Share Sale Agreement. The Share Sale Agreement settled on Monday, 28 February 2011. However, before this date Peppers signage had been installed and *Peppers Broadbeach* had been launched.

[54] Shortly after the Share Sale Agreement was entered into, the appointment of Peppers was announced in a letter to buyers and also in a joint press release made on or about 23 July 2010. The letter stated that:

> "The Oracle will be branded Peppers Broadbeach and will be the flagship Peppers hotel."

The joint SSI/Peppers press release was titled:

> "Peppers to launch the Gold Coast's first five star hotel in a decade".

The press release, which was approved by SSI prior to its release, made a number of references to "hotel". The news of Peppers' appointment apparently attracted attention. Mr and Mrs Wicks received a letter dated 6 August 2010 from Noble House Design which stated:

> "We were delighted to hear of the appointment of Peppers as Residential Managers to The Oracle which will be branded 'Peppers Broadbeach'".

[55] In late July, after the joint press release had been issued, Mr Mark Johnson, the Chief Operating Officer for both Niecon and SSI, says that he formed the view that it was not correct to call the development a hotel and he issued instructions to Niecon employees to request that Mantra not describe it as a hotel.

[56] By this time, and despite the fact that the Share Sale Agreement was still conditional, Mantra had been provided with information about buyers to enable it to convey information to them.

[57] By 12 August 2010, Mantra had prepared an "Owners Pack" and other material for distribution to buyers. Mr Johnson learned that the material had been printed for distribution that day, when he was told that Mantra had "boxes and boxes of documents printed and that it was too late for SSI to review it because they were being sent." Mr Johnson says that he asked Mantra's representatives to hold off sending information until SSI had had a proper chance to review it. However, the packs were sent without any review or approval by SSI. The material was sent under cover of a letter dated 12 August 2010 signed by Ms Simms of the Owner Relations Department of Peppers Retreats, Resorts and Hotels. It was on letterhead styled Peppers Broadbeach and referred to the appointment of Peppers as "onsite Hotel Managers". It referred to the opportunity for holiday letting, furniture packages and other matters. It enclosed forms that would facilitate its appointment by an owner as a letting agent. It attached a brochure that described *Peppers Broadbeach* as a hotel.

[58] The material was sent by Mantra to buyers before SSI had an opportunity to review its contents properly and obtain legal advice about its implications for contracts with buyers. I accept Mr Johnson's evidence that SSI did not authorise or approve references in the packs to the development as a hotel.

[59] On 24 August 2010 SSI sent a pro forma letter to owners advising that *The Oracle* precinct was nearing completion and that it was estimated that completion of the residential buildings (and settlements) should occur in early to mid October. It informed owners about the opportunity to undertake an inspection and provided contact details for various inquiries, including inquiries about the holiday or permanent letting program.

[60] On 30 August 2010, Ms Simms from Peppers Broadbeach sent a letter to owners which stated:

> "By now you would have received Owners Packs outlining the letting program to be operated from The Oracle and The Oracle Tower 2. As you know, South Sky Assets Pty Ltd is to be the Caretaker of each tower in line with the disclosed Caretaking and Letting Agreements. The Caretaker will be operating the holiday letting pool under the *Peppers Broadbeach* brand."

The letter went on to advise that *Peppers Broadbeach* had a guest program that was "developed to not only provide you as an owner with great 'hotel style' services and management, but offers many services not available to any other apartment owner or guest on the Gold Coast."

[61] Despite requests from SSI to Mantra/Peppers' representatives not to refer to the development as a hotel in the marketing, Ms Simms sent an email to a buyer in September 2010 which again referred to the development as a hotel. Ultimately, SSI instructed its solicitors to write to Mantra demanding that they cease referring to the development as a hotel in any marketing. Mantra eventually agreed to cease referring to the development as a hotel and made amendments to its website. However, it continued to communicate with owners and others by referring to *Peppers Broadbeach* rather than *The Oracle*. For example, a letter dated 24 September 2010 from Ms Simms of Peppers Retreats, Resorts and Hotels was sent on Peppers Broadbeach letterhead and referred to Peppers holiday letting packs. It stated: "In the 4 weeks since we commenced taking bookings for Peppers Broadbeach, bookings have been incredibly strong and we have already oversold on various room nights."

[62] These communications were apt to alert buyers who had contracted to purchase an apartment in Oracle Tower One that the letting agent intended to engage in the business of short-term and holiday letting. This would not have come as a surprise to a buyer who had read the various disclosure statements and other documents that had been sent to them over the previous years. Earlier in 2010 SSI had written to buyers from time to time about the letting program. A pro forma letter dated 22 February 2010 advised owners that SSI had been "busy finalising our in-house Oracle Management and Letting Program." This letter advised that SSI could "dove-tail an ideal holiday letting program that will work with your own requirements for using your apartment". Other letters sent to buyers before the announcement of Peppers' appointment also informed buyers about a holiday letting program. For example, a letter dated 31 May 2010 to Mr and Mrs Wicks stated that the advantage of using the in-house management team included "walk-in bookings", convenient on-site check-in and other services guests would expect from a facility of such stature.

[63] In short, after the Share Sale Agreement was entered into, and prior to the date for settlement of the buyers' contracts, the fact that the letting business would be operated by Peppers was communicated to buyers. Certain correspondence continued to refer to "The Oracle and The Oracle Tower 2". SSI did not give a further disclosure statement relating to the implications of the Share Sale Agreement. However, the Share Sale Agreement related to the sale by the developer of management rights, and a disclosure statement given under the Act is not required to disclose the terms of such a sale. If, however, such an agreement alters the terms of a Caretaking and Letting Agreement which has previously been

disclosed pursuant to s 213 or s 214, so that the disclosure statement has become inaccurate, then this will attract the provisions of s 214 and s 217.

[64] The Share Sale Agreement, in effect, stated the terms upon which South Sky Enterprises Pty Ltd (SSE) would sell the management rights business to Mantra/Peppers. The mechanism for the sale was the sale of SSE's shares in South Sky Assets Pty Ltd (SSA) to Peppers Leisure Pty Ltd (Peppers). The agreement was conditional upon a number of matters, including entry by the body corporates of the Tower One and Tower Two schemes into Caretaking and Letting Agreements in the form that had been disclosed to buyers. It was also conditional upon:

(a) the body corporate consenting to applications for liquor licences over areas it was entitled to occupy;

(b) the body corporate approving the alterations required for a restaurant and bar to be constructed in Lot 101;

(c) the body corporate approving certain signage in accordance with the Caretaking and Letting Agreements.

The signage for which the Share Sale Agreement provided included Peppers "hero signs" atop each building and signs at the lobby entrance to each building.

[65] The conditions of the Share Sale Agreement were implemented over time. The hero sign on Tower Two was installed in December 2010 and the one on Tower One in March 2011. On 1 October 2010 the first meeting of the body corporate for The Oracle was held, and the South Sky interests procured resolutions to enter the Caretaking and Letting Agreement with SSA, to consent to applications by SSA for a liquor licence over the lots and certain areas of common property and for the erection of signage in accordance with a signage plan.

[66] A liquor licence was granted on 8 December 2010. The licence is a Subsidiary On Premises licence relating to The Oracle, which means that alcohol can only be served whilst SSA adheres to its primary function of providing accommodation. Since the liquor licence was granted, some apartments have been excluded from it, reflecting the fact that owners who do not wish to have it apply to their apartments can choose not to do so.

[67] An application was made to the Gold Coast City Council for confirmation that the proposed restaurant and bar is generally in accordance with the existing approval. The restaurant and bar are yet to be built within Lot 101, but their establishment is important to Peppers in ensuring it achieves its desired rating, and this apparently requires an in-house restaurant and bar for its guests to access. In support of the application the Mantra Group's Director of Acquisitions wrote to the Chief Executive Officer of the Gold Coast City Council on 6 April 2010 and advised that, without a restaurant and kitchen, Mantra could not brand *The Oracle* as a "Peppers Resort" and that a "restaurant facility and room service is something that is expected in a 4.5 – 5 star strata titled resort." The letter concluded:

> "Although it is hoped that the restaurant will obtain a good reputation for its quality of service, it is not intended to be advertised

> for the general public. It is understood that it will be of such a capacity to service in-house guests and residents.
>
> It is critical for the resort branding for Peppers at the Oracle to have a restaurant facility. A restaurant and room service facility is ancillary to its management rights business."

[68] In the months immediately preceding the date for settlement of their contracts the plaintiffs knew of the appointment of Peppers as Caretaking and Letting Agent, and they received a variety of communications from both SSI and Peppers. Initially SSI stated that: "The Oracle will be branded Peppers Broadbeach and will be the flagship Peppers hotel." This was said by SSI on or about 23 July 2010. SSI and Peppers jointly announced the same thing. Peppers continued to describe *Peppers Broadbeach* as a hotel, despite SSI's requests that it not do so.

[69] On 29 November 2010, which was after the date for settlement fixed by the contracts, SSI's Group Operations Manager wrote to purchasers noting that SSI's earlier advice that "The Oracle/Peppers Broadbeach would be the flagship Peppers hotel" had caused some confusion. The letter advised:

> "While the 'Peppers Broadbeach' brand features prominently, the precinct includes the same luxury residential buildings and facilities which we started constructing in 2006. The Peppers group will be offering hotel-like services for the precinct, but The Oracle/Peppers Broadbeach is not a hotel. The two towers (called The Oracle Tower 1 and The Oracle Tower 2) are not hotel buildings. The Oracle/Peppers Broadbeach comprises two luxury residential buildings, with all the facilities and services you'd expect to find in a hotel."

[70] SSI's caution after July 2010 in not wanting *The Oracle* described as a hotel is understandable. As Mr Johnson explained in his evidence, the building had not been approved by Council for use as a hotel. At least one buyer had complained following the announcement about Peppers, and Mr Johnson was concerned that some buyers would use the description of *Peppers Broadbeach* as a hotel to avoid their contracts.

[71] SSI had permitted the development to be described as a hotel in the joint press release of 23 July 2010, despite knowing that the development approval did not allow the building to be described as a hotel. Shortly afterwards Mr Johnson reflected on the matter and issued a standing instruction to his staff to request that Mantra not describe the development as a hotel. Part of the concern was that the building did not have a certificate of classification for hotel use, and an associated concern was that inaccurate descriptions of the building might prejudice contracts of sale. SSI sought to review documents, such as the material sent by Peppers to owners on or about 12 August 2010, because of a requirement of its financiers not to put any of the contracts of sale under threat.

[72] After the 23 July 2010 joint press release, SSI received at least one protest from a buyer of a proposed lot. A question asked of Mr Johnson during his cross-examination tended to suggest that there were protests from more than one buyer, but Mr Johnson's answer referred to a "query from a buyer". There is no

evidence that there was a large number of protests, and on the evidence there may have been only one, it having been made shortly after the 23 July 2010 joint press release.

[73] The plaintiffs in these proceedings did not complain to SSI prior to the date originally set for settlement about the appointment of Peppers, save for Mr Gough and Ms Groves who purported to terminate in a solicitor's letter dated 13 October 2010, some six days before the settlement date. The letter complained about the promotion of the development by Peppers as a "hotel" and an increase in letting fees over those previously estimated. Ms Ryan gave her reasons for not complaining earlier than her solicitor's letter of 4 November 2010. She was hoping to be employed by Niecon and did not want to sound like she "hated the building". One plaintiff, NOA 8338 Pty Ltd, by its director, Mr Ford, communicated with Peppers in October 2010 about possible arrangements for leasing the apartment it had contracted to purchase. It is possible that the plaintiffs did not know the extent to which Peppers intended to brand the building as *Peppers Broadbeach*, and they were not told about the terms of the Share Sale Agreement that facilitated this by signage. They were not told about plans for a liquor licence of the kind contemplated by the Share Sale Agreement or of the plan to have a ground floor restaurant and bar so as to facilitate Peppers' plans. Still, the plaintiffs were aware after July/August 2010 of the appointment of Peppers, and of its plans to use the *Peppers Broadbeach* brand and to promote short stays and holiday lettings. The plaintiffs did not complain to SSI about these things soon after becoming aware of them, or complain about the services that they expected Peppers would supply to its guests.

Purported terminations

[74] After The Oracle CTS was established, SSI's solicitors sent letters to buyers nominating settlement dates. Some of the plaintiffs negotiated short extensions of time within which to settle. The first settlements were set for 19 October 2010. In various forms, and on various dates, the plaintiffs in each of these proceedings purported to cancel the contract.

Common issues

[75] The pleadings in each proceeding are in a generally similar form. In each proceeding the same essential allegation is made, namely that the plaintiff contracted to purchase an apartment in a residential tower in *The Oracle* when in fact the apartment purportedly offered in performance by SSI is an apartment in a hotel/resort branded *Peppers Broadbeach*.[15]

[76] The statements of claim in each proceeding continue with allegations along the same lines. For example, it is alleged that the plaintiff contracted to purchase an apartment the resale value of which would be determined by reference to it being an apartment in a residential tower in *The Oracle* and not an apartment which is an element in a hotel/resort branded *Peppers Broadbeach*. Additional allegations along these lines are made in respect of the rental value of an apartment in a residential tower in *The Oracle* rather than an apartment in such a hotel/resort branded Peppers Broadbeach. Further allegations are made in relation to the ability to advertise and let through an off-site agent and the ability to obtain on-site

15 See for example Wicks proceeding para 32.

caretaker and letting services in accordance with the disclosed letting agreements, which are pleaded to have been more favourable to an owner than that available through Peppers. The plaintiffs plead that the practical consequence of the apartment being in a hotel/resort branded *Peppers Broadbeach* rather than an apartment in *The Oracle* will include:

(a) an increase in the extent and intensity of use of common areas because of the increased number of persons (hotel/resort guests and hotel/resort staff) using it;

(b) an increase in the public access and use of the development resulting in a reduction of privacy and security;

(c) a compromise of the plaintiffs' use and enjoyment of the apartment and common areas;

(d) accelerated deterioration of common areas;

(e) preventing the plaintiffs from attracting persons who do not wish to stay in a hotel/resort; and

(f) preventing the plaintiffs from attracting persons who do not wish to stay in a premises the subject of a liquor licence.

[77] By reason of the date upon which they purported to cancel, only some of the plaintiffs are able to seek to invoke the statutory right to cancel under s 214(4)(b) and s 217(b)(iv). However, each plaintiff alleges that the final disclosure statement has become inaccurate on a number of grounds. These include the fact that the disclosure statement describes the lot as a lot in a residential tower, whereas the disclosure statement if now given would state that the lot was an apartment in a hotel/resort, and also would state that the lot is in a hotel/resort branded "*Peppers Broadbeach*".

[78] Reliance is placed upon the fact that the Caretaking and Letting Agreement, if given now, would have to disclose that the plaintiffs would have no practical ability to let the lot through an off-site agent or privately because:

(a) the development is branded as *Peppers Broadbeach* and as a hotel/resort rather than apartments available for holiday letting in the normal course;

(b) The plaintiffs would not be able to use the name and mark *Peppers Broadbeach* in order to advertise the apartment; and

(c) The plaintiffs would not be able to use the name and mark *The Oracle* in order to advertise the apartments.

[79] Another ground of alleged inaccuracy is that the Caretaking and Letting Agreement, by cl 6, enabled the caretaker to erect temporary and moveable signs for the purpose of promoting and fostering the letting business whereas the disclosure statements if given now would disclose that the caretaker would be entitled to affix signage to and above the scheme property, including signs erected on the exterior of Oracle Tower One and Oracle Tower Two identifying each tower as "Peppers".

[80] The plaintiffs place reliance upon the terms of the Share Sale Agreement as part of their respective cases. Particular reliance is placed upon the provision of the Share Sale Agreement in relation to a liquor licence, the restaurant and bar to be established in the caretaker's lot and the provision for Peppers signage.

[81] The various pleaded features of the tower as a result of the appointment of Peppers are alleged to have resulted in a substantial difference between acquiring an apartment in a residential tower known as *The Oracle* and an apartment in a hotel/resort branded *Peppers Broadbeach*.

[82] The common issues in each proceeding may be broadly summarised as follows:

1. What was promised by the terms of the written contract and the disclosure statements that formed part of it by virtue of s 215 of the *BCCM Act*? In particular, did the plaintiff in each proceeding contract to purchase an apartment in a residential tower known as *The Oracle*?

2. Was the plaintiff offered in performance of the contract something substantially different to what the plaintiff contracted to purchase, namely an apartment in a hotel/resort branded *Peppers Broadbeach*?

3. If so, was the plaintiff entitled to terminate the contract because SSI evinced an intention not to be bound by the terms of the contract in that:

   (a) SSI no longer intended to provide to the plaintiff at settlement an apartment in a residential tower known as *The Oracle* but rather an apartment in a hotel/resort to be known as *Peppers Broadbeach* with the features alleged in the statement of claim; and

   (b) any authorisation of a person as letting agent would not be in the terms of the Caretaking and Letting Agreement annexed to the final disclosure statement, and as described in the Developer PDS and the Operator PDS.

4. In the alternative, were certain plaintiffs (Mr and Mrs Wicks, Mr Gough and Ms Groves, and Ms Ryan) entitled to cancel the contract pursuant to s 214 or s 217 of the Act?

[83] If a plaintiff was entitled to terminate or cancel the contract, then there will be declarations to that effect and consequential orders for the delivery up of bank guarantees/deposits. If, however, the plaintiff was not so entitled, then it is accepted that SSI should obtain orders for specific performance and other relief on its counterclaim by way of damages for costs that it has incurred as a result of the plaintiff's failure to settle. The basis for the calculation of such damages has been agreed and the parties proposed that an updated calculation be produced up to the date of judgment.

What documents comprised the contract by virtue of s 215 of the Act?

[84] There is no issue on the pleadings that it was a term of the contract that, subject to its terms and conditions, SSI would sell to the plaintiff or plaintiffs in each proceeding the specified lot in Tower One of *The Oracle*. Nor is there any issue

that by virtue of s 215 of the Act it was a further term of the contract that any authorisation by the body corporate for a person to be the letting agent would be on the terms of a Caretaking and Letting Agreement annexed to the disclosure statement given under the Act. The first issue between the parties as to the terms of the contract relates to the documents that form part of the provisions of the contract by virtue of s 215 of the Act.

[85] The plaintiffs submit that by operation of s 215 of the Act the contract comprised the following documents:

(a) The Contract of Sale;

(b) The Disclosure Statement title page;

(c) The Developer PDS;

(d) The Disclosure Statement given pursuant to s 213 of the Act and the 13 documents annexed to it; and

(e) The Operator PDS.

SSI submits that the Operator PDS is not a contractual document and has no effect under the Act. It also submits that the Developer PDS does not contain contractual warranties and the mere fact that it was provided at the same time as the BCCM Disclosure Statement does not make it "accompanying material" for the purposes of s 215 of the Act.

The Operator PDS

[86] The Operator PDS was provided with the original contracts. It was not provided again to the buyers who entered the original contracts before they entered into the replacement contracts. Mr Gough and Ms Groves received an Operator PDS prior to executing contracts to purchase Lots 2905 and 2907 in October 2006.

[87] The Operator PDS was issued by Sky Asset Management Pty Ltd (SAM), not SSI. It explained that it was issued by SAM to comply with the requirements of the *Corporations Act* in relation to managed investment schemes. Under a managed rights scheme class order, ASIC granted exemption from certain registration requirements subject to compliance with conditions. One of the conditions of the ASIC class order was that a Product Disclosure Statement be given to a buyer of an apartment before entry into a contract. The purpose of the Operator PDS was to provide information about the Oracle MR Scheme to enable owners to decide, once they had received it, whether or not to participate in arrangements to make their apartment available for letting.

[88] The Operator PDS was provided as a separate bound document. The covering letter that was sent to the buyers who entered into an original contract identified it as a separate and distinct document from the disclosure statements which included the Developer PDS under the *Corporations Act* and the disclosure statement under the BCCM Act. Both the covering letter and the terms of the Operator PDS distinguished it from the disclosure statement given under the *BCCM Act*.

[89] The contract itself did not refer to the Operator PDS, let alone give it contractual force. Clause 16 of the contract included an acknowledgment by the buyer of having received from the seller, before it signed the contract, a Product Disclosure Statement under the *Corporations Act* and a disclosure statement under the *BCCM Act*. In the case of the replacement contract this was referrable to the Developer PDS and the BCCM Disclosure Statement respectively since no new Operator PDS was provided to these buyers.

[90] The contract did not incorporate the Developer PDS as a term of the contract. The Developer PDS contemplated that the operator would issue an Operator PDS. However, it did not purport to incorporate any Operator PDS. It contemplated that a detailed PDS about the Oracle MR Scheme would be issued by the Operator. The Developer PDS made no promise about what its terms would be, and stated that "no warranty can [sic] or is given by South Sky as to what conditions the Appointment will contain. Those conditions will be decided by the Operator."

[91] The Operator PDS was not given any contractual force by the contract. Accordingly, the issue is whether s 215 of the Act operated so that it formed part of the contract. I have earlier summarised s 215. Section 215 provides:

> "**215 Statements and information sheet form part of contract**
>
> (1) The disclosure statement, and any material accompanying the disclosure statement, and each further statement and any material accompanying each further statement, form part of the provisions of the contract.
>
> (2) The information sheet does not form part of the provisions of the contract."

[92] An Operator PDS was not provided at the time the disclosure statement required by s 213 was given in relation to the replacement contracts. However, Mr Gough and Ms Groves received an Operator PDS at the same time as they received the BCCM Disclosure Statement.

[93] The word "accompanying" in s 215 must be construed in its statutory context. Section 213 of the Act provides that the disclosure statement that the seller must give pursuant to s 213(1) must "state", "include", "be accompanied by" or "identify" certain things. For example, s 213(2)(e) provides that the disclosure statement "must be accompanied by" the proposed community management statement.

[94] The reference in s 215 to "material accompanying the disclosure statement" should be interpreted to refer to material that is required to accompany the disclosure statement and material that accompanies it because, for example, it is intended to form part of the disclosure statement, not simply material that happens to be provided at the same time as the disclosure statement. It is apt to refer to documents that are incorporated by reference into the disclosure statement and that accompany it, or to documents which are annexed to it.

[95] I was referred to passages in *Mirvac Queensland Pty Ltd v Horne*[16] which considered the provisions of s 21 and s 22 of the *Land Sales Act* 1984 (Qld), but these passages do not particularly assist in deciding the meaning of "accompanying material" in s 215(1) of the *BCCM Act*.

[96] I do not accept the plaintiffs' principal submission that the statutory purpose of the Act in which s 215 is contained is served by a literal interpretation of "any material accompanying" since the language is "of the widest import". Such an interpretation would extend the operation of s 215 and give contractual force to any material, for example, a document that had nothing to do with the requirements of the Act, such as a tourist brochure, or a statutory notice required by some other legislation, which happened to be sent together with the disclosure statement required by s 213 of the Act. An interpretation that extends the operation of s 215 to everything that is sent in the same envelope as the BCCM Disclosure Statement has little to commend it. An interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.[17] An interpretation which gives contractual force to documents unrelated to the requirements of the Act does not achieve the purpose of the Act, and would have apparently unintended consequences. A seller would need to avoid including in the same envelope in which the s 213 disclosure statement was sent any other document, for fear that it would be treated as "material accompanying" the disclosure statement and form part of the contract by virtue of s 215.

[97] It would also be an odd and apparently unintended consequence if the parties' contractual obligations depended on whether an Operator PDS required by the *Corporations Act*, or some other document not required by the *BCCM Act*, was sent in the same or a separate envelope to the disclosure statement required by s 213.

[98] It is unnecessary to consider the variety of possible circumstances in which a document may constitute "material accompanying" the disclosure statement. It is sufficient to conclude that the separate provision of the Operator PDS did not mean that it was "material accompanying" the disclosure statement given under the *BCCM Act* for the purposes of s 215. It follows that the Operator PDS did not form part of the provisions of the contract by virtue of s 215.

[99] In summary, the contract did not include the Operator PDS.

The Developer PDS

[100] When the original contracts were sent to the buyers they were sent under cover of a letter which separately listed what were described as:

(a) Disclosure Statements;

(b) the Contract of Sale;

(c) the Operator PDS.

The Disclosure Statements were pre-bound under a title page "Disclosure Statement" and consisted of:

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16 [2009] QSC 269 at [28]-[30].

17 *Acts Interpretation Act* 1954 (Qld) s 14A(1).

(a) the Developer PDS;

(b) the Disclosure Statement given under the *BCCM Act* which consisted of a covering page, an index and:

(i) a single page titled "INFORMATION ABOUT THE DEVELOPMENT";
(ii) a document styled Disclosure Statement (Section 213 of the *Body Corporate and Community Management Act* 1997 and Section 21 of the *Land Sales Act* 1984);
(iii) a PAMDA Form 27c and several annexures.

The Disclosure Statements were pre-bound. The Operator PDS was also sent to the buyers under the original contracts under cover of the same letter and was in a separate pre-bound form.

[101] The original contracts were replaced and discharged by new contracts. The re-issuing and execution of the new contracts did not include the provision of an Operator PDS. However, it involved the sending of a new set of documents for execution by the buyers. The new contract of sale was sent along with disclosure statements in the form that I have already described, namely the Developer PDS, the disclosure statement given pursuant to s 213 of the *BCCM Act* and accompanying materials.

[102] The Developer PDS was issued under the managed investment scheme provisions of the *Corporations Act*, not pursuant to any requirement of the *BCCM Act*. It explained that it was issued so as to satisfy one of the conditions of the ASIC class order. Its contents distinguished it from the disclosure statement required by the *BCCM Act*.

[103] The contract did not give the Developer PDS contractual force. The document itself did not purport to be of contractual force. The fact that it was given at the same time and in the same bound document as the *BCCM Act* disclosure statement does not mean that it constituted "material accompanying" the disclosure statement for the purposes of s 215. It was in a different form to the documents which were annexed to the disclosure statement given under the *BCCM Act*. It was not required to be given by s 213 of the Act, and s 213 did not require it to accompany the *BCCM Act* disclosure statement. It was given so as to comply with the requirements of the *Corporations Act*. The disclosure statement given under the *BCCM Act* did not incorporate it by reference. It was not "material accompanying" the BCCM disclosure statement for the purposes of s 215 of the Act. The fact that, as a matter of convenience to both the buyer and seller, it was sent at the same time as a disclosure statement given under the *BCCM Act* does not mean that it formed part of the contract by virtue of s 215.

[104] In summary, the Developer PDS was not incorporated by the terms of the contract, and it did not form part of the contract by virtue of s 215.

The information page

[105] As previously noted, the Disclosure Statement given in compliance with s 213 of the *BCCM Act* included a single page titled "INFORMATION ABOUT THE DEVELOPMENT". The index of documents contained in that Disclosure

Statement referred to it, and to other documents including numerous annexures, as being "documents contained in this Disclosure Statement". I find that the information page formed part of the BCCM Disclosure Statement in that it was physically bound up with it. If, however, it did not form part of it, like the annexures, it was "material accompanying" the Disclosure Statement since it was part of a single "pre-bound" Disclosure Statement that was given in order to comply with obligations under s 213 of the Act. Apart from being physically bound up with other parts of the Disclosure Statement, it was "material accompanying" the Disclosure Statement since it gave a general outline of the development more specifically described in the following pages of the document. Because it either formed part of the BCCM Disclosure Statement, or was "material accompanying" it within the meaning of s 215 of the Act, the information page forms part of the provisions of the contract by virtue of s 215.

The annexures included in the Disclosure Statement

[106] For similar reasons, the annexures to the disclosure statement, including the Caretaking and Letting Agreement, form part of the provisions of the contract.

What did SSI promise in the contract?

[107] The plaintiffs submit that in each case they contracted to buy an "off-the-plan" unit—a "proposed lot"—in a development to be known as *The Oracle*. They rely upon the terms of the contract (which was titled "Contract of Sale: The Oracle") and location plans that formed part of it. Each plan is headed The Oracle. They also rely upon the Disclosure Statement including the first document contained in it headed "INFORMATION ABOUT THE DEVELOPMENT". I have earlier quoted the contents of this document at paragraph [27] of these reasons. The plaintiffs place particular reliance upon the following statement:

> "Land on which the Development will be constructed is proposed to be initially subdivided to create 2 lots (being a residential lot and a retail lot). The residential component, to be known as The Oracle...".

The plaintiffs also rely upon the contents of the Disclosure Statement which refer to the proposed lot being purchased in The Oracle development as identified on the location plan contained in the contract of sale.

[108] The plaintiffs submit that, whether taken individually or together, the contract of sale and these other documents (which form part of the provisions of the contract by virtue of s 215) provide that SSI "would sell to the Plaintiff the particular lot in a residential tower in The Oracle development."

[109] In response, SSI notes that there are potentially two components to this allegation: firstly, that the tower was to be a residential tower; and, secondly, that the tower was to be in *The Oracle*. It relies upon the fact that there is no allegation in the pleadings that a reference to *The Oracle* had a particular meaning at the time of the contracts, so that such a meaning was somehow incorporated into them. Evidence from the plaintiffs about marketing material and conversations was not relevant to what was contractually promised about *The Oracle* because the plaintiffs did not plead that the contracts comprised anything other than certain documents referred to in the pleadings. The meaning of *The Oracle* is to be derived from the contractual documents, and the plaintiffs' various understandings of what was meant by

The Oracle is irrelevant in determining the terms of the contract. SSI submits, and I accept, that in deciding what was contractually promised by it, I refer to the contract documents, not to some abstract concept derived from matters outside of them.

[110] The plaintiffs do not plead that *The Oracle* had a particular meaning at the time the contracts were negotiated, and that this meaning is incorporated into them. The plaintiffs plead, and SSI admits, that SSI developed two high rise apartment towers on land at Broadbeach known as *The Oracle*. SSI also admits the pleaded allegation that the plaintiffs entered into an "off the plan" contract to purchase a lot in Tower 1 of the development described as *Oracle*. SSI pleaded that its development known as *The Oracle* also incorporated other buildings, retail stores, restaurants, licensed premises and commercial premises and that its development is "a substantial, five star, resort development." These pleaded contentions about the nature of the development do not alter the fact that the plaintiffs do not plead that a reference to *The Oracle* had a particular meaning at the time the contracts were made, and that such a meaning was incorporated into them. The plaintiffs do not plead that *The Oracle* had a meaning that the parties adopted in using that term in their contractual documents. For example, they do not plead that they contracted on the basis that *The Oracle* meant a residential tower that was predominantly occupied by owners or long-term tenants.

[111] I accept the plaintiffs' submissions that a relevant term of the contract was that SSI promised to sell a particular lot in a residential tower in *The Oracle* development, and that by virtue of the contents of the contract and the information sheet which formed part of it, the contract provided that the residential component of the development was to be known as *The Oracle*. However, in providing for the lot to be in a residential tower known as *The Oracle*, the contract did not additionally provide to the effect that the residential tower was to be of a particular kind (for example, occupied predominantly by owner-residents or for long-term residential purposes). The reference to the "residential component" to be known as *The Oracle* must be viewed in its context, where there was a distinction between residential and retail components of the development.

[112] Moreover, the Caretaking and Letting Agreement that was an annexure to the Disclosure Statement did not indicate that the letting business was confined to long-term tenancies. For example, it gave the entity conducting the letting business authority to have and staff a tour desk.

[113] The paragraph of each plaintiff's pleading that alleges that it was a term of the contract that SSI would sell to the plaintiff a specified lot in a residential tower in *The Oracle* does not plead in terms that the residential tower itself would be known as *The Oracle*. However, this paragraph[18] refers to an earlier sub-paragraph which relevantly pleads that the residential component was to be known as *The Oracle*. The plaintiffs' cases were conducted on the basis that the documents that had contractual force provided that the residential component would be known as *The Oracle*. The plaintiffs allege that they were promised a lot in a residential tower known as *The Oracle* which is part of a development also known as *The Oracle*. Each plaintiff's case is that SSI has changed the substratum of the bargain in two related respects. First, the development has been altered from a

[18] Paragraph 24(a) of the Fourth Further Amended Statement of Claim in the Wicks proceeding, there being identical allegations in each of the other pleadings.

residential tower to a hotel (or resort). Secondly, the residential tower is not known as *The Oracle*, but has become known as (and branded as) *Peppers Broadbeach*.

[114] The essential promise in the contract was to sell "the Property" on the terms of the contract. The "Property" was identified in the contract particulars as a proposed lot number on a specified level "identified on the Location Plan...". The Location Plan consists of several pages showing site plans, other plans and building format plans, each headed *The Oracle*.

[115] Senior Counsel for SSI submitted that the words "*The Oracle"* on the Location Plans were simply words, and that there was no promise that the building would have that name. He submitted that the identification of what the purchaser was to get was a proposed lot on a certain level, identified on the Location Plan. There was said to be no promise that the building would have the name *The Oracle*.

[116] I consider that this takes an artificially narrow view of the documents that constitute the contract, and what SSI promised to sell.

[117] The purchase of a lot in a community titles scheme does not only provide ownership of the lot itself, but also of the common property of the scheme with all other owners as "tenants in common, in shares proportionate to the interest schedule lot entitlements of their respective lots."[19] An owner's interest in a lot is inseparable from the owner's interest in the common property.[20]

[118] The contract itself was titled "Contract of Sale: The Oracle". The Location Plans confirmed that the building was named The Oracle. The disclosure statement, and the material accompanying it which formed part of the provisions of the contract, was titled "Disclosure Statement: The Oracle". Annexures in the disclosure statement refer to The Oracle. For example, the Caretaking and Letting Agreement was styled "Caretaking and Letting Agreement: The Oracle". The information sheet which also formed part of the contract by force of s 215 stated that the residential component of the development was to be known as The Oracle.

[119] The subject matter of the contract was a proposed lot in a residential tower to be known as *The Oracle*.

[120] The next contentious issue concerning the terms of the contract relates to what SSI promised in relation to the letting business. As previously noted, the plaintiffs plead that SSI promised that any authorisation of a person as a letting agent would be in the terms of the Caretaking and Letting Agreement annexed to the Disclosure Statement, and as described in the Developer PDS and the Operator PDS. For the reasons that I have given, I accept that by reason of s 215(1) of the *BCCM Act* it was a term of the contract that any authorisation of a person as a letting agent would be in the terms of the Caretaking and Letting Agreement annexed to the BCCM Disclosure Statement. The Developer PDS and the Operator PDS were not part of the contract.

[121] I have earlier quoted relevant provisions of the Caretaking and Letting Agreement, particularly cl 6 of that agreement which related to the letting business, and cl 20 which authorised the Caretaker to occupy certain identified parts of the common

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19 *BCCM Act*, s 35.

20 *BCCM Act*, s 35(3).

property. From time to time further statements given under s 214 of the Act made changes to certain identified Occupation Authority areas. Nothing turns on these changes. These areas were to be used for certain identified purposes. Some of these areas include external landscaped areas which might be used for special events, functions, presentations or any other lawful use. Another change resulted in the renumbering of cl 20.5. It became cl 20.4. The parties' submissions refer to cl 20.5 and I shall do the same. No issue was raised in the pleadings about the validity of cl 20.

[122] Clause 6.4 of the Caretaking and Letting Agreement authorised the Caretaker to erect signs reasonably necessary in or about the Scheme Land for the purpose of promoting and fostering the letting business. Such signs "must be temporary and moveable".

[123] Clause 20.5 dealt with different subject matter, including signs. I have quoted it in paragraph [33]. It relates to various items collectively titled "Structures" that the Caretaker was given authority to place (and where appropriate, have manned) on any part of the common property subject to certain conditions. The items were a tour desk, brochure stands, signage, vending machines and other similar things. Nothing in the terms of cl 20.5, or in its context, confines the type of signs to signs that are temporary and moveable. The limitation in cl 6.4 in that regard cannot be read into cl 20.5.

[124] The essential contractual promise of SSI to each plaintiff was to sell an identified lot in a residential tower. The tower was to be known as *The Oracle*. The residential tower was to be one having the physical attributes described in the contract, and there is no dispute in these proceedings that the building, as constructed, has those physical attributes. There was no contractual promise that the residential tower be occupied predominantly, let alone exclusively, by owner-occupiers or long-term tenants.

[125] The contract provided that any authorisation of a person as a letting agent would be in the terms of the Caretaking and Letting Agreement annexed to the Disclosure Statement. That agreement provided for the entity appointed by the body corporate to operate a letting business, and to use certain common property for specified purposes. The letting business was not limited to long-term tenancies. Nothing in the Caretaking and Letting Agreement provided that the letting agent could not conduct its letting business so as to attract short-term tenants and holiday-makers. The letting business involved associated services commonly rendered in connection with letting lots in similar developments and "any other lawful activity." This authorised the provision of services to guests occupying apartments, including guests staying for a short time who might require room service, a mini-bar and other "hotel-like services".

Did SSI's proffered performance amount to a repudiation?

[126] The plaintiffs submit that they are discharged from completing the contract because SSI evinced an intention not to provide at settlement the subject of the contract and, instead, intended to provide a particular lot in a development which has become a Peppers hotel or resort. It submits that by altering the development from a residential tower to a hotel or resort, and by permitting its name to be changed, SSI has changed the substratum of the bargain.

[127] The plaintiffs' submissions developed this point in two separate, but related, parts. The first was that SSI's proffered performance was of "a different product". The second is that the tower is not known as *The Oracle* because it has been branded as *Peppers Broadbeach.*

[128] The plaintiffs point to the use by Peppers and other parties of the term "hotel" to describe the tower in which the plaintiffs contracted to purchase a lot. They also point to SSI's use of this description for some time. While relying upon the fact that the tower is still described by many as a Peppers hotel, the plaintiffs submit that, in any event, regardless of the label, the point remains that the lots are not lots in a residential tower *The Oracle* but are lots in a Peppers hotel or hotel-like resort. This submission reflects the plaintiffs' pleas that the apartments purportedly offered in performance by SSI are apartments in a hotel/resort branded *Peppers Broadbeach*. Although the plaintiffs' case relating to SSI's proffered performance and its alleged repudiation has this composite aspect, the parties' submissions separately addressed two related aspects, and I will do the same. The first is whether the lot is in a residential tower. The second is whether the tower is known as *The Oracle* and whether it is branded *Peppers Broadbeach*.

Is the lot proffered by SSI in a residential tower?

[129] Following the appointment of Peppers and the opening of the building for guests, apartments in it were let for short term and holiday letting. There is nothing in the contracts concluded between the various plaintiffs and SSI to say that this would not be the case. There was no contractual promise that lots in the building would be occupied exclusively or predominantly by owners or long-term residents.

[130] SSA (as a wholly owned Peppers subsidiary) provides guests with a variety of "hotel-style services" including room service. It has procured liquor licences to permit the installation of mini-bars and the service of alcohol. It proposes to develop Lot 101 in the tower (referred to in the contract documents as the Caretaker's unit) as a restaurant and bar. Many other residential towers on the Gold Coast have such a facility for residents and their guests.

[131] The fact that SSA provides guests with certain "hotel-style services" does not mean that the tower has ceased to be a "residential tower" in the sense earlier described. The fact that some of the occupants are there for a short term does not mean that the tower is not a residential tower. The contractual promise of a lot in a residential tower relates to a tower used for residential purposes. The relevant provision distinguished the residential component from the retail component of the development. In its contractual context, a residential tower does not mean simply a tower for owners who are residents or long-term tenants.

[132] Clause 20 of the Caretaking and Letting Agreement gave certain authorities to occupy parts of the common property and, among other things, to operate a tour desk. This serves to confirm that the residential tower was one that might house short-term guests and persons on holiday.

[133] If, contrary to my earlier finding, the Developer PDS did form part of the contract, then my conclusion that the residential tower was one that permitted the Caretaker to provide services to holiday makers and other short-term guests would have been reinforced. The Developer PDS indicated that the on-site letting agent would

conduct a business that included short-term and holiday letting, with associated hotel-style services.

[134] I conclude that the lots proffered by SSI in performance of the contracts are in a residential tower.

Is the residential tower known as *The Oracle* and is it a hotel/resort branded *Peppers Broadbeach*?

[135] The proceedings raise two related, but slightly different factual issues. One is whether the residential tower is known as *The Oracle*. The second is whether it is a hotel/resort branded *Peppers Broadbeach*. It is not part of the plaintiffs' pleaded cases that SSI promised to the plaintiffs that it would continue to invest in *The Oracle* brand, or ensure that there would be a certain level of signage, branding or marketing of *The Oracle*. The contractual promise was a simple one, namely that the residential tower would be known as *The Oracle* (and be part of a development also known as *The Oracle*). I shall address in turn:

(a) Is the residential tower a hotel/resort?

(b) Whether described as a hotel or a resort (or the amalgam in the plaintiffs' pleading, "hotel/resort"), is it branded *Peppers Broadbeach*?

(c) Is it known as *The Oracle*?

Is the residential tower a hotel/resort?

[136] Definitions of a hotel vary, and whether or not this particular building is described as a hotel is largely dependent on the perspective of the beholder. It will be recalled that SSI initially was content to join in a press release with Peppers in July 2010 that announced that Peppers was to launch the Gold Coast's "first five star hotel in a decade", but that later SSI requested Peppers not to describe the development as a hotel in its marketing material. Mr Johnson, in an affidavit first sworn on 14 May 2011, stated that he would describe the development as "an extremely high quality residential apartment complex, at which guests may expect many of the sort of services that a five star hotel would offer."

[137] He noted that their stay will differ from a hotel in that the physical size of the rooms/space that guests occupy is substantially greater, the accommodation is completely self-contained and the duration of the average stay is usually longer than at a hotel. In this regard he observes:

(a) the physical sizes of the apartments are much larger than a hotel, ranging from about 81 square metres to over 318 square metres, whereas hotel rooms are generally 30 to 40 square metres;

(b) each apartment contains one, two or three bedrooms, save for the penthouses, which contain four bedrooms;

(c) all apartments, save for one-bedroom apartments, contain multiple bathrooms;

(d) each apartment contains a fully operational kitchen;

(e) each apartment contains a laundry;

(f) each apartment contains significant balcony space;

(g) the development contains a cinema which is not something to be found in a hotel;

(h) wine lockers are provided in respect of each apartment, which would not be found in a hotel;

(i) there is a significantly larger number of car spaces provided than would be found at a hotel;

(j) there are no dedicated rooms for hotel use;

(k) there are no major back-of-house facilities, for example, kitchens and laundries;

(l) there is a mix of owner-occupiers and guests on any given floor (at the time of swearing his affidavit there were 97 apartments "signed with SSA");

(m) the apartments "signed with SSA" are randomly located throughout the towers. Accordingly, a guest who books an apartment through SSA/Peppers may be located next to an owner-resident or an owner-holiday-user or a long- term tenant or a guest who booked through an off-site letting agent;

(n) there is a body corporate responsible for all apartments and the facilities, which has effective control of the development.

Mr Johnson's reference to apartments that are "signed with SSA" should be taken to mean apartments that, in effect, are in the pool of apartments that Peppers lets.

[138] I accept on the basis of this evidence that the building does not have all of the features that would be expected of a typical, large, luxury hotel. However, the description of the building in which the plaintiffs contracted to purchase an apartment as a "hotel" is not governed entirely by whether it has all of the features of a five star hotel such as ballrooms, large conference centres and the like, or the fact that it possesses certain features that most hotels lack. As Mr Johnson notes, guests may expect many of the sort of services that a five star hotel would offer. These include being met upon their arrival and the impression that they are entering a hotel. That impression depends upon, among other things, on-site signage and presentation, and off-site marketing. I shall address these issues in connection with the alleged branding of the building as *Peppers Broadbeach*. For present purposes, it is sufficient to conclude that the description "hotel" does not completely describe the type of apartment complex in question for the reasons given in Mr Johnson's affidavit. However, many individuals would describe it as a hotel, as SSI was initially content for it to be described.

[139] It has the features of a resort, and the description of it as a resort would not be inaccurate. If the description "hotel" does not adequately describe its features, then

it would be adequately described as consisting of self-contained apartments with access to many of the services that a hotel would offer. Incidentally, the website of the on-line travel service Expedia.com.au describes *Peppers Broadbeach* as "Broadbeach aparthotel with an outdoor pool". The following summary appears as a result of a hotel search for the city of the Gold Coast:

> "**Peppers Broadbeach**
>
> Corner Elizabeth Ave & Surf Parade Broadbeach, QLD 4218 Australia
>
> **Broadbeach aparthotel with an outdoor pool**
> **Airport nearby**
> Situated by the sea, this aparthotel is close to Oasis Shopping Centre, Broadbeach Mall, and Kurrawa Beach. Area attractions also include Gold Coast Convention and Exhibition Centre and Pacific Fair Shopping Centre.
> **Pool, fitness facility**
> At Peppers Broadbeach recreational amenities include an outdoor pool and a sauna. The aparthotel also features self parking and a porter/bellhop.
> **DVD players/iPod docks**
> In addition to kitchens and balconies, guestrooms feature washers/dryers along with iPod docking stations and microwaves."

[140] It is sufficient to resolve the issues in these proceedings to find that the residential tower in which the plaintiffs contracted to purchase an apartment is either a hotel or a resort. If it is not adequately described as a hotel, it certainly is a resort in which guests may expect many of the services that a luxury hotel would offer.

Is it branded *Peppers Broadbeach?*

[141] I turn to the issue of whether the tower, whether described as a hotel/resort or by some other description, has been branded *Peppers Broadbeach*. Shortly before the trial I undertook a view of Oracle Tower One, Oracle Tower Two and the Oracle Boulevard precinct. This view in the company of counsel and solicitors was to enable me better to understand the evidence of witnesses and exhibits, which include photographs and signage plans. The issue of branding was also addressed by expert reports and two experts who gave oral evidence. The plaintiffs relied upon a joint report of Professor Bill Merrilees and Associate Professor/Senior Lecturer Richard Jones. Dr Jones was the principal author of the report and gave oral evidence. SSI relied upon the expert report of Dr Larry Neale, who is a senior lecturer in marketing at the Queensland University of Technology. In accordance with pre-trial directions, Dr Jones and Dr Neale met and produced a joint report that highlighted areas of agreement and disagreement between them. I found their evidence of assistance in determining the branding issue. However, that issue is not one to be determined by experts. It is a question of fact to be decided by me on the basis of all of the evidence, which is assessed with the benefit of the view that I undertook. I shall first address certain evidence which is relevant to whether the building is branded *Peppers Broadbeach* before addressing the evidence of the experts.

[142] From a distance and on closer inspection, the subject building, the other tower and the precinct in general present as a well-designed development which is visually impressive, and built to a high standard. For present purposes, namely the branding issue, a striking feature is the rooftop signage. Tower One has a large illuminated Peppers sign that faces west. Tower Two has a similar sign. At ground level, the entrance to Tower One is dominated by a Peppers sign. A photograph of it is the

first photograph in Exhibit 76. Its large black lettering is featured against the white background of the main entrance to the building. On a facia inside the entrance is a sign for "Oracle Tower 1" and the Oracle logo. The Oracle logo is also tiled into the footpath immediately outside the entrance. The "Oracle Tower 1" sign on the facia inside the entrance and the Oracle logos to which I have referred do not significantly detract from the impression given by the large Peppers signage at the entrance to the building.

[143] There are many signs and icons throughout the general precinct that refer to The Oracle, Oracle Boulevard or a particular part of the development such as Oracle North, Oracle South, Oracle East or Oracle West. There is a portable Peppers Concierge stand outside Tower 2, which houses the main reception for Peppers guests. There is also a Peppers sign above the entrance to this reception, a Peppers mat leading into it and a Peppers sign above the reception desk. There also is a surfboard with 'Peppers' on it.

[144] There are Oracle logos in the paving outside the reception of each tower. Oracle logos are built into glass as a safety feature. Oracle logos also appear in corridors and rooms within the towers.

[145] Peppers signage dominates Oracle signage on entering Tower One. The large entrance mat is marked *Peppers Broadbeach*.

[146] Signage is, of course, only one component of branding. Dr Jones, in his joint report with Professor Merrilees, offers the following definition of a brand:

> "A brand is widely defined as 'A name, term, sign, symbol, or design, or a combination of them which is intended to identify the goods or services of one seller or a group of sellers and to differentiate them from those of competitors' (American Marketing Association). Thus, the brand is that intangible object that manifests itself through tangible communication elements that indicate, first the source or ownership of the brand, i.e. that it is different from competing products and services, and secondly, the differential value of the brand, i.e. how it is different from competing products and services."

[147] Dr Jones's report examines, in the case of the Peppers brand and the Oracle brand, three elements: the appearance of the brand, the behaviours associated with the brand and the service offered by the brand. These three elements make up what is often referred to as "the brand promise". There is no disagreement between the experts concerning these matters of definition or in relation to the concepts of brand meaning, brand signification and brand architecture, as outlined in Dr Jones's report. The experts also agree on the following points:

> "1. That Peppers is positioned as offering short-break residential accommodation at the luxury end of the market.
>
> 2. That both brands, The Oracle and Peppers, are positioned as luxury brands in their respective markets, and share many of the same brand promises.

3. Regarding the scope of the presence of the two brands on site:

    a. Peppers signage is present in and on the residential buildings: (rooftop signage, main entrances). Peppers' presence is focused around the residential elements of the precinct.
    b. Oracle signage and branding icons are also present also [sic] in and around the buildings – often built into the precinct.

4. That the Peppers brand is highly activated through marketing communications and that there is little evidence of Oracle branding outside the Oracle precinct; Peppers undertake a large and sophisticated integrated marketing campaign of promotions and cross-promotions, advertising, direct marketing, PR, social media and others, which has been focused in the last year disproportionally on Peppers Broadbeach.

5. Of the role of the Peppers brand, as expressed through their brand promise, for delivering high quality services. We agree that the brand promise, expressed through key touchpoints of communication, services and products, plays an important part in helping consumers evaluate the brand. We note that both brands have many similarities in their brand promises; namely luxury and high quality."

[148] The evidence, including the opinions of these experts, establishes that the Peppers brand is positioned as offering short-break residential accommodation at the luxury end of the market. The Peppers brand signifies short breaks with an emphasis on luxury and is often associated with locations that offer consumers short-term "escapes". Peppers seeks to differentiate its services from other accommodation providers by promoting its "relaxing resorts" and "couples retreats".

[149] Peppers has heavily promoted its brand in connection with the residential components of the development. In addition to signage and on-site services, it has promoted *Peppers Broadbeach* through a broad range of marketing material.

[150] The precinct in general, and the residential towers in particular, are not so heavily promoted as *The Oracle* as to overcome the domination of the Peppers brand in respect of the residential component of the site. As to marketing, Mr Johnson's first affidavit (sworn 14 May 2011) states:

> "After the Share Sale Agreement was entered into, the Development continued to be marketed by SSI as The Oracle. There were still a number of apartments available for sale in the Development, particularly in Tower 2, that were not sold off the plan.
>
> After the appointment to SSI of the Receivers & Managers, however, there has been little active marketing of the Development. However, The Oracle sales office has continued to operate, predominantly to make available for sale the remaining apartments in the Development."

This limited marketing, compared to Peppers' on-site signage, on-site presence and extensive advertising of *Peppers Broadbeach* means that Tower One effectively has been branded as *Peppers Broadbeach*. The same applies to Tower Two. This branding (or re-branding) began with the announcement of Peppers' appointment, and was achieved by, among other things, the Peppers signage on the site and the extensive promotion of the Peppers brand.

[151] This branding goes beyond the letting agent promoting *its business* (as the Caretaking and Letting Agreement envisaged it could) to a branding of the apartment tower. The existence of signs for "Oracle Tower 1" and the Oracle icon on glass and other features does not lead to the conclusion that the building is branded as *The Oracle* or not branded as *Peppers Broadbeach*. Whereas some residents, retail owners and others would take these signs and icons as indicating that the building is in the Oracle precinct, and has a connection with the brand/sub-brand Oracle Boulevard, these features do not brand the building. The Peppers signage and other features signifying the presence of Peppers do. The Peppers brand dominates the building from top to bottom. From the illuminated signs at the top of the tower to the welcoming doormat at the entrance, the dominant brand is Peppers. The building would be likely to be referred to as Peppers or Peppers Broadbeach, not only by short-term visitors who booked accommodation in it through Peppers, but by members of the general public who are in its vicinity, either on foot or in a vehicle.

[152] The dominance of the Peppers brand in respect of the residential elements of the site is set to continue.

[153] Brands are said to require "continual investment in their promotion and renewal" in order to achieve sustained levels of awareness. At the time the plaintiffs entered their contracts there was extensive marketing of *The Oracle*. It signified a high quality luxury precinct that included apartment towers carrying that brand. The appointment of Peppers, the dominant presence of the Peppers brand in both towers (exemplified by the illuminated signs that surmount and virtually brand them), the active promotion of *Peppers Broadbeach* and the limited promotion of *The Oracle* in connection with the residential component of the development leads to the conclusion that the tower in which the plaintiffs contracted to purchase an apartment is branded as *Peppers Broadbeach*.

[154] Separate but related issues arise about the branding of the entire development. SSI submits that the whole development can be described as "The Oracle". It submits that "The Oracle is the entire development rather than any particular component part of it." There is scope for debate about whether the entire development is described as "The Oracle" or "Oracle". Accepting, however, the submission made by SSI on this point, the fact remains that particular components of the development have been branded. The retail component has been branded *Oracle Boulevard*. The residential component has been branded *Peppers Broadbeach*.

[155] The branding of the residential component as *Peppers Broadbeach* may have been reinforced by the erection of hero signs atop the buildings since the date for settlement under the plaintiffs' contracts. But this simply carried into effect the branding to which the South Sky entities committed as part of the Share Sale Agreement's provisions in relation to signage, and the body corporate's resolution of 1 October 2010 that carried this into effect. The process of branding the tower as

Peppers Broadbeach began as early as the joint media release to which SSI was a party, and it has continued. Reference in correspondence sent to buyers in 2010 to *The Oracle* does not alter the fact that Mantra/Peppers was intent on branding the building as *Peppers Broadbeach*.

[156] Mantra/Peppers is a successful, large organisation that devoted substantial resources to marketing and otherwise branding the apartment towers as *Peppers Broadbeach*. It has succeeded in its stated intention of branding Tower One as *Peppers Broadbeach*. Its success has been achieved in part by the absence of any real attempt by SSI or anyone else to brand the residential component by a different name. However, the success of Mantra/Peppers has been in large measure the result of its own promotion of the *Peppers* and *Peppers Broadbeach* brands in connection with the residential component of the development, aided by the signage that the Share Sale Agreement contemplated.

[157] I conclude that the residential tower in which the plaintiffs contracted to purchase an apartment is branded *Peppers Broadbeach*. There is no prospect that this branding will change prior to the settlement of contracts pursuant to any decree of specific performance.

The expert evidence on branding

[158] I have reached the conclusion that the building is branded *Peppers Broadbeach* without reference to contentious aspects of the evidence of experts, and I would have reached the same conclusion without the benefit of their evidence.

[159] Because of the branding issues raised in the pleadings, the parties sought and obtained pre-trial directions for expert reports and for the experts to confer. The experts' respective reports and their joint report addressed "The Oracle" brand and Dr Jones's report devoted a section to the signification of "The Oracle" brand in 2005 and 2006. Evidence about the branding of the building (and also the whole development) as "The Oracle" has some relevance to the issue of whether the building has become branded (or re-branded) as *Peppers Broadbeach*.

[160] SSI criticised Dr Jones's view that in 2005 and 2006 *The Oracle* held a brand promise of "entirely owner occupied apartment towers" as:

(a) being based upon unpleaded marketing material, including material that post-dated 2005-2006 which is not specifically related to the evidence of the plaintiffs about the material they received or considered; and

(b) not taking account of "core documents" (the contract, disclosure statements and so on) with which Dr Jones was not briefed.

I accept that Dr Jones's evidence about the Oracle "brand promise" is not relevant to the contractual promise made by SSI to the plaintiffs. It is, however, relevant to the branding issues in the case. The evidence of Dr Jones (and Dr Neale) about branding issues is legitimately based on sources that include marketing material, and did not need to be limited to marketing material read by the plaintiffs. I discount the weight of Dr Jones's opinions about the Oracle brand in 2005 and 2006 to the extent that it relies on material that post-dates that period. Provision to Dr Jones of the "core documents" would have given a more complete account of material that relates to the branding of *The Oracle* to a particular section of the general public,

specifically buyers. I accept SSI's submission that reference to the core documents would have shown a conflict between the content of those documents and the view that *The Oracle* brand signified exclusive owner occupied residences and the creation of an exclusive club of owners. That view was expressed by Dr Jones based on marketing and other material and without reference to the "core documents" that were sent to the plaintiffs since the latter were not briefed to him.

[161] I accept SSI's point that someone who received and read the "core documents" would not have found in them a promise that *The Oracle* was to consist exclusively of owner occupied residences, given references in them to short-term and holiday letting. Accordingly, I do not rely upon Dr Jones's opinion relating to what *The Oracle* signified in 2005-2006 (or at other times) as relevant to the contractual promise made to the plaintiffs. Dr Jones's evidence is relevant to the branding of *The Oracle* to persons who received the kind of marketing materials that were considered by him and Dr Neale.

[162] I shall first address the experts' evidence in relation to *The Oracle* brand, and then other matters about which they had differences of opinion. Before doing so I shall give my reasons for ruling on objections to certain parts of Dr Jones's report. SSI's objections were argued just before Dr Jones gave his oral evidence and the parties indicated that I might give my reasons later. I do so now.

[163] The first objection, described as "an overarching objection", is that the opinions and conclusions stated in the expert reports are no more than the experts' views on what is conveyed by various communications to the mind of an ordinary person and is not something which is the proper subject of expert evidence. In deciding whether the field is one in which expert evidence can be called, two principles apply according to the learned authors of the Australian edition of *Cross on Evidence*:

> "One seeks to exclude evidence on the ground that the ordinary person is as capable of forming a correct view on the question as anyone else. The second seeks to exclude evidence which, since it is not based on an organised body of sound knowledge or experience, is insufficiently reliable."[21]

SSI's objection is on the first ground. There is no objection on the basis that there is not an organised body of knowledge or experience in relation to branding. As to the first aspect, the relevant question is:

> "whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area".[22]

[164] The expert evidence to which objection is taken does not relate to how an ordinary person would be likely to be influenced by a particular communication. In that

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21 J D Heydon, *Cross on Evidence*, 8th Aust. Ed (Chatswood: LexisNexis Butterworths, 2010) at 1010, [29050].

22 *R v Bonython* (1984) 38 SASR 45 at 46-47 per King CJ, cited with approval in *Osland v R* (1998) 197 CLR 316 at 336, [1998] HCA 75 at [53] and *HG v The Queen* (1999) 197 CLR 414 at 432, [1999] HCA 2 at [58].

regard, ordinary human nature is not the subject of proof by expert evidence.[23] The reports relate to the meaning of "branding" and the process by which branding occurs. They relate to the relationship between relevant brands, and aspects of branding which is outside ordinary knowledge and experience. Although some aspects of the reports may relate to matters in respect of which expert opinion is not essential to form a correct view, this cannot be said in respect of the reports as a whole. The experts' opinions are of substantial assistance in relation to branding issues, and I do not accept the overarching objection to them.

[165] The next objection relates to parts of Dr Jones's report which relate to what the Oracle brand meant or signified between December 2005 and October 2006. The objection was on the grounds of relevance. For the reasons canvassed during the hearing of this objection, I consider that the evidence is relevant to the issues raised in the pleadings concerning the difference between a building known as *The Oracle* and one branded *Peppers Broadbeach*, and also to the issue of "material prejudice" under the *BCCM Act*. In this latter regard, although the marketing and other materials upon which individual plaintiffs' expectations were based were not pleaded, evidence was given in that regard. The evidence of Dr Jones is relevant to the issue of "material prejudice", and admissible on that basis. The issue of "material prejudice" is assessed objectively, having regard to the particular buyer's circumstances. The evidence of branding is relevant to the pleaded issues of material prejudice. Whether the claimed material prejudice was caused by an inaccuracy in a disclosure statement, or some other cause, is a separate issue that does not go to the admissibility of the evidence. The evidence is relevant to issues on the pleadings.

The Oracle brand

[166] Dr Neale's report states that: "The Oracle brand signifies a high quality luxury precinct comprising apartment towers, restaurants, cafes and retail boutiques." His site visit revealed "a great deal of Oracle branding throughout" the precinct, including "on the street, street signs, retail shops and common areas". This branding included the large Oracle logos that were part of the footpath. Dr Neale also reported:

> "Outside the Oracle precinct, however, there is little evidence of Oracle's marketing and branding activities. My information search did not reveal much in the way of brand activation. Oracle have a web site, but not much else for people who are searching for the brand. There was no search marketing campaign evident, and I could find no examples of Oracle advertising."

[167] Dr Jones distinguished between the brand "The Oracle", other signs and things containing references to "Oracle" (such as the "Oracle Tower 1" inside the main entrances to the residential towers and signs containing references to "Oracle Boulevard"). As to the brand "The Oracle", he concluded that it was positioned "as a unique residential development at the absolute top end of the apartment market." He explained his reasons for this more fully in his report and under cross-examination. He notes that there are a number of brand names associated

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[23] *Transport Publishing Co Pty Ltd v Literature Board of Review* (1956) 99 CLR 111 at 118-119, [1956] HCA 73 at [13] per Dixon CJ, Kitto and Taylor JJ.

with Oracle, and that it is necessary to define the brands and sub-brands. The development at the site is branded as "The Oracle, Central Broadbeach". This refers to the development on the relevant block which includes the two towers. "Oracle Boulevard" refers to the shopping precinct at the ground level running through the site. Dr Jones is of the opinion that, as originally launched, "The Oracle" was the core brand for the whole development and that "Oracle Boulevard" was a sub-brand referring only to the retail elements of the development. His report describes the various value propositions contained in the Oracle brand. The brand "The Oracle" is said to have significant emotional elements that make up its brand promise. These were emphasised in the description of The Oracle as a "landmark address" and "the unchallenged centre of Gold Coast sophistication". Drawing upon these elements and the appeal to exclusivity (such as the promise that "Acquiring a residence in The Oracle is equivalent to achieving membership in a supremely private club"), his report concludes that The Oracle is defined by its residents being owners of the properties they reside in. The "hedonic value proposition" of The Oracle brand is conveyed in propositions such as: "Every one of the residences at this landmark address will indulge its owners with world class life spaces".

[168] Dr Neale does not agree with Dr Jones about the brand promise offered by The Oracle in 2005/2006. The differences in the opinions of the experts is summarised in their joint report dated 25 July 2011:

> "Dr Neale does not agree that the Oracle brand promise from 2005/2006 was that of entirely owner occupied apartments. He forms this opinion because purchasers would rely on all information received, not just brochures. For example, the Operator Product Disclosure Statement contained information about: the choice available to owners to let out their apartment, three different ways for an owner to let out their apartment, the provisions of on-site services for letting out an apartment including room service and an on-site reception desk, and apartment owners being able to use their letting pool apartments for 21 days per year. As purchasers would have had all this information before purchasing the apartment, Dr Neale contends the brand promise of Oracle in 2005/2006 was not of an owner-occupied building but rather a precinct that offered apartments that could be occupied by the owners, or occupied by long or short-term renters.
>
> Dr Neale also does not agree that the private element drives the emotional value proposition of the Oracle brand. He maintains that all purchasers would have been aware that there are in excess of 500 apartments across the two Oracle towers, and that the Oracle precinct is located in one of the busiest tourist locations in Australia.
>
> Prof Merrilees and Dr Jones maintain their view that a significant driver of the brand promise of The Oracle brand lies is [sic] in its emotional and hedonic elements. Key drivers in the emotional value proposition are those of luxury, well-being and exclusivity. Exclusivity is articulated in several ways that emphasises [sic] the private element of the brand The Oracle. As pointed out in their report, notwithstanding functional similarities between the brands:

> for example, the quality of the finishes, the facilities and the ability to rent apartments, the distinction between the brands lies in the emotional promise of exclusivity directed towards owner-occupiers and the creation of an exclusive club of owners. The perception of this distinction is an important value driver for the brand "The Oracle". Prof Merrilees and Dr Jones maintain their opinion that exclusivity is a driving force of the brand "The Oracle".

[169] For the reasons given by Dr Neale, I find that any purchaser who relied on the information contained in disclosure statements would not have understood that *The Oracle* would have been entirely owner occupied apartments. Someone who received, read and relied on these documents would not have gained that impression.

[170] Persons who read and relied only upon marketing material may have derived an impression of the residential component of *The Oracle* as being directed towards owner occupiers, including club-like facilities for owners. Still, it is unlikely that such persons would have understood *The Oracle* as consisting entirely of owner occupiers.

[171] It is unnecessary to dwell on this aspect, since it involves an element of uncertainty about the type of persons reading marketing material, the precise material and the other information they relied upon, and the extent to which they reflected upon how a high proportion of owner-occupiers was to be achieved and what would prevent an owner from renting an apartment for short terms.

[172] The differences between the expert opinions should not detract from the substantial area of agreement between them about *The Oracle* brand from time to time. They agreed about the matters that I have earlier identified, and that *The Oracle* brand (like the Peppers brand) is positioned at the luxury, premium end of the market.

The signification of the illuminated signage of Peppers mounted on the Oracle complex

[173] The experts did not agree about the signification of the signage and branding on the site. After describing the illuminated signs that are mounted on the top of each tower Dr Jones's report states:

> "Such signs are important indicators of the brand as reflected in the definition of a brand ... In this case the Peppers signage surmounting both towers indicates the dominant presence of the brand in both towers."

His report continues to the effect that in order to determine the signification of the illuminated signage of Peppers surmounting both towers, the illuminated signage must be seen in the context of other signage on the site. He discusses that signage in his report. On the basis of his observations he assesses that there are "two dominant brand names on the site: Peppers and Oracle Boulevard." He explains:

> "There are only two references to the brand The Oracle on insignificant signage (an evacuation sheet and roadwork sheeting). In the absence of significant signage for the brand The Oracle, references to Oracle (as in "Oracle Tower" and "Oracle North") have

> in our opinion a very weak symbolic link to the brand The Oracle. In our opinion and based on or [sic] site visits, the signs Oracle Tower 1 and Oracle North, Oracle West, Oracle South and Oracle East do not refer significantly (semiotically) to the brand The Oracle. Brands need reinforcing through visual identity systems and marketing communication. We see little evidence of the reinforcement of the brand The Oracle on site.
>
> The Peppers brand is dominant for the residential elements of the site and the Oracle Boulevard for the retail elements. This dominance reinforces the significance of the rooftop-mounted signage. Given the lack of other residential signage to indicate the presence of other brands (notably The Oracle), we conclude that Peppers is the dominant brand for the residential elements. The signification of this is that the residential elements of this site are a Peppers resort, retreat or hotel."

[174] By contrast, Dr Neale's report expresses a different view of the signification of the illuminated signage of Peppers mounted on The Oracle complex. It says that, in general, rooftop signage has two main functions: direction and promotion. For visitors to the Broadbeach area, the illuminated Peppers signs atop the residential towers are said to be "primarily directional in function." The report states that "[l]ocals would also use the rooftop signs to help them navigate to the precinct, and Peppers would derive some awareness and branding benefits from their visibility." Dr Neale notes that, for Peppers, signage is only a part of their overall promotional campaign, and that Peppers undertakes a large and sophisticated integrated marketing campaign. I accept the proposition advanced by Dr Neale that because most Peppers customers who visit the site will already have made their booking decision, and have already committed to paying for the accommodation, the rooftop signs have a directional function for them. However, I do not consider that this proposition detracts from the essential point made by Dr Jones that the Peppers signage surmounting both towers indicates the dominant presence of the Peppers brand in both towers. I accept Dr Jones's evidence that whilst the rooftop and roof-level signage is not an indicator of 100 per cent brand ownership of the building it surmounts, it is used to reflect the dominant brand of the site.

The signification of advertising rental accommodation in the Oracle complex as Peppers accommodation

[175] The experts also addressed the signification of advertising rental accommodation in the Oracle complex as Peppers accommodation. In that regard Dr Jones had regard to advertisements and internet peer review sites such as Trip Advisor, Expedia and Hotels.com. These are said to be important brand touch points for accommodation brands and important sources of advertising. He notes that the sustainability of brands relies on their reinforcement through communication. Having noted that the on-site communication of the brand "The Oracle" is poor, he notes that this increases the significance of the role of rental advertising. Dr Neale agrees that the Peppers brand is highly activated through marketing communications and that there is little evidence of Oracle branding outside the Oracle precinct. As to the significance of the advertising of rental accommodation in the complex as Peppers accommodation, he states:

> "From a consumer behaviour and branding perspective, it is in the interests of investors in the Oracle towers to have a well recognised and trusted brand, like Peppers, to offer short-term rental accommodation. The Peppers brand is already known for luxury accommodation with high quality services, and this is the advantage of branding the short-term rentals as Peppers accommodation rather than Oracle."

Brand relationship

[176] Dr Neale's report describes the current relationship between the two brands as follows:

> "From walking through the precinct, there is evidence of Oracle and Peppers branding throughout. Customers and visitors currently see the brands side-by-side in and around Tower 2. This is also the case in and around Tower 1, but the Peppers branding is less predominant than Tower 2. For the remainder of the precinct (retail boutiques, café district, streets, car parks), the conspicuous branding is mostly Oracle, while Peppers branding is sparse.
>
> Given the ubiquitous Oracle branding throughout the entire precinct, in my opinion it is reasonable to expect that some residents, retail owners and local customers think of and refer to the precinct as Oracle, whereas short-term visitors may be more likely to refer to the complex as Peppers."

[177] It is correct to refer to "the ubiquitous Oracle branding throughout the entire precinct". However, I accept the distinction made by Dr Jones between references to Oracle and The Oracle, and that Oracle Boulevard is a separate brand or sub-brand that should be distinguished from The Oracle. The O-shaped icon that is used around the site has a relationship to both. However, the brand "The Oracle" is not strongly present on the residential component of the site, in part because of the dominance of the Peppers brand. I accept the conclusion of Dr Jones:

> "Signage is a visual identifier of the brand. The dominant positioning of the two Peppers illuminated signs surmounting both Tower 1 and Tower 2 on the site identify the source of the site's brand as being Peppers. Examination of on-site signage in its entirety sees this dominance compounded. Three conclusions are made. Firstly, that Peppers is the dominant brand name for the residential elements of the site. Signage is located above both main entrances and in the reception foyers. Secondly, that whilst there remains extensive use of The Oracle logo, this can be regarded as signifying The Oracle Boulevard brand (rather than its original signified [t]he brand The Oracle) referring to the shopping areas and not the residential elements of the site. Thirdly, [t]he brand The Oracle is not significantly present on the site. The signification of this is that the residential elements of this site are a Peppers resort, retreat or hotel."

[178] This conclusion requires qualification in the light of what Mr Doyle SC described as a small thing in his cross-examination of Dr Jones—the Peppers signage described at page 13 of the Jones/Merrilees report as being "above the reception clearly visible from outside" relates to the reception in Tower Two, not Tower One. Dr Jones acknowledged this in his evidence, and it was not suggested that this misdescription alters his opinion. In his report he referred to a doormat in the entrance to Tower Two "emblazoned Peppers Broadbeach", and in his oral evidence (but not in his report) he gave evidence of such a large doormat just inside the reception of Tower One. It was described by Dr Jones to have the Peppers logo woven into it and to have a "very high impact" because one "has to tread over it to go into the building." This oral evidence tends to reinforce the conclusion drawn in Dr Jones's report about the significance of signage and the fact that Peppers is the dominant brand name for the residential elements of the site.

[179] Dr Jones's report and oral evidence about branding were not based simply on signage on Tower One. They related to signage elsewhere and the extent of marketing activities. His views on signage were not based on an inspection of the extent of internal signage in rooms and corridors and the like and I take this into account in assessing the weight of his opinions.

[180] Dr Jones's report states, and Dr Neale does not contest, that the Peppers brand is currently the dominant brand for the residential elements of the site. The fact that, as Dr Neale says, some residents, retail owners and local customers think of and refer to the *precinct* as Oracle, does not alter the fact that Peppers is the dominant brand for the residential elements of the site. And, as Dr Neale says in his report, short-term visitors may be more likely to refer to the precinct/complex as Peppers.

The oral evidence of the experts

[181] Dr Jones made the point that the presence in the precinct of signs relating to The Oracle (such as evacuation diagrams inside services entrances and on roadworks sheeting), Oracle (such as Oracle Tower 1) and the Oracle icon (on windows, pavements and directory signs) are not linked in a significant way to the brand *The Oracle*. The icons around the site were said to have lost their function as signifiers of the brand, and had become way markers or indicators of physical areas. For example, Oracle South is used to denote the location of part of the precinct, and contributes to a brand Oracle, not the brand *The Oracle* which was promoted in 2005/2006. The signs referring to "Oracle" and to logos around the site had limited significance to the brand *The Oracle*. This was because of "very little marketing and promotion of the brand". If there had been "more robust" branding of *The Oracle* or *Oracle*, then those signs would have had gained more signification. By contrast, the promotion of the retail precinct as *Oracle Boulevard*, including its own web page, leads to the conclusion that *Oracle Boulevard* has its own brand.

[182] Dr Neale, in oral evidence, accepted that the "Hero Sign" atop each tower denotes a building name. Like other equally large neon signs on other buildings, such as the Sofitel, the Peppers sign gave the building a name and this was reinforced by other Peppers signage that was the subject of signage applications. The signage for Oracle Boulevard denoted a street name and the retail and commercial precincts on lower levels.

[183] Dr Neale did not see any difference between the use of "Oracle" and "The Oracle" from a consumer behaviour or branding perspective. Consumers would see "Oracle", "Oracle Tower 1", "Oracle Boulevard" and the Oracle logo around the precinct, and that would confirm that they were in the Oracle precinct. If they were looking for something more specific, like Oracle Boulevard, they would know they were in a certain part of the precinct, such as the retail or commercial sector.

[184] As to the extensive Peppers signage, Dr Neale accepted that it was the dominant signage on the building and that, whilst "some locals would think it was still Oracle", most people would call the towers Peppers.

Summary of expert evidence on the branding issue

[185] Despite some differences in relation to matters such as the signification of illuminated signage, there was a level of agreement between the experts about the branding of the tower as *Peppers* or *Peppers Broadbeach*. They agree that the Peppers brand is the dominant brand for the residential component of the development. I accept this view.

Conclusion on the branding issue

[186] Leaving aside the opinion evidence of the expert witnesses on the issue of branding, I conclude that, at the time the various plaintiffs contracted to purchase their apartments, the development as a whole, and the residential tower that was promoted to them in particular, were branded as *The Oracle*. Buyers who read the disclosure statements carefully, or who reflected on the fact that their standard contract did not prevent them from letting their apartment for short-term or holiday letting, would have appreciated that the occupants of the tower would not only be owner-occupants or long-term tenants. Still, in its marketing to the general public, the apartment tower was promoted as a place of residence, and an exclusive one at that. As the blue brochure said "Every one of the residences at this landmark address will indulge its owners with world class lifespaces." This kind of representation is not alleged to have contractual force. Instead, the promotion of *The Oracle* at that time is relevant to the branding of the apartment tower, and to the alleged re-branding of it after the arrival of Peppers. Prior to the advent of Peppers the apartment tower was branded as *The Oracle*. That brand signified, in the case of the apartment towers (as distinct from the retail precinct), a luxurious residence. The signage and advertising of *Peppers* and *Peppers Broadbeach* on the site, and the active promotion of *Peppers Broadbeach* by Mantra/Peppers in other ways, effectively has branded the apartment towers as a Peppers retreat, resort or hotel. The Peppers brand is positioned as offering short-break accommodation.

[187] Tower One is branded as Peppers by the large neon "hero" sign that effectively names the building. The dominance of the Peppers brand is reinforced by other Peppers signage and the activation of the names Peppers and Peppers Broadbeach in a variety of forms. By contrast, the brand *The Oracle* has a diminished presence in and about the apartment tower by reason of the dominance of Peppers, and the absence of investment in and promotion of the brand *The Oracle* in connection with the occupation of the apartment tower. As a result, its impact is low.

[188] Mantra presumably had good reason to negotiate the terms which it did in the Share Sale Agreement to promote its Peppers brand. As appears from its April 2010 correspondence to the Gold Coast City Council in support of the application to

allow a restaurant to operate on the ground floor of Tower One, it intended to "brand" the building as Peppers, and I find that it achieved that result. By branding the building as Peppers and by its active promotion of *Peppers Broadbeach* by signage, doormats and marketing of the hotel/resort by that name, it has done more than promote the letting business of the company it acquired. It effectively has rebranded the apartment tower in which the plaintiffs contracted to buy an apartment as *Peppers Broadbeach*.

Is the tower known as *The Oracle*?

[189] A finding that the tower has been branded *Peppers Broadbeach* does not necessarily determine the related issue of whether it is known as *The Oracle* since, theoretically at least, a building might be widely known by two names. However, in the circumstances of this matter the branding of the tower as *Peppers Broadbeach* means that it is not generally known as *The Oracle*. It is possible that some individuals would describe the tower, as distinct form the development as a whole, as *The Oracle*. However there was no acceptable evidence that the tower is generally known as *The Oracle*.

[190] SSI submits that the plaintiffs' expert, Dr Jones, did not express the view that Tower One is no longer known as a tower in *The Oracle*. They also note that Dr Jones also expressed the view that signs such as "Oracle Tower 1" and "Oracle Tower 2" are way marks or indicators of physical areas, and are used to identify each building, rather than signify the brand *The Oracle*. This oral evidence was directed to the issue of branding, but it has a relevance to the issue of whether the building is known as *The Oracle*. I accept that Dr Jones has not expressed the view that Tower One is no longer in *The Oracle*. His evidence was directed to a different issue, namely branding.

[191] I also accept that the use of the Oracle name and icon throughout the precinct, including the presence of signs such as "Oracle Tower 1" and "Oracle Tower 2" as depicted in photographs that became exhibits or parts of expert reports, leads to the conclusion that the development as a whole is known as *The Oracle* or *Oracle*. Certain signs may lead some people to describe Tower One, as well as the development as a whole, as *The Oracle*. Others to whom the building was once marketed as *The Oracle* may also know it by this name. However, the effect of the branding of the building as *Peppers Broadbeach* does not support the conclusion that it is generally known as *The Oracle*. I agree with Dr Neale that most people would call the towers Peppers.

[192] The development as a whole may be known as *Oracle* or *The Oracle*. However, the residential component is known as *Peppers Broadbeach*, just as its retail component is known as *Oracle Boulevard*.

[193] I find that the tower itself is not known as *The Oracle*. It is known as *Peppers Broadbeach* as a result of the branding of it by that name. The finding that the tower itself is not known as *The Oracle* is made in the context of the contractual promise that the tower was to be known as *The Oracle*. That contractual promise should not be taken to refer to the name by which the building was to be known by only some individuals, who had some special knowledge, but to the name by which it was known more generally. The evidence does not support the conclusion that the tower itself is generally known as *The Oracle*.

Repudiation

[194] The plaintiffs contend that SSI evinced an intention not to provide at settlement the subject matter of their contract, and instead proposed to provide an apartment in a hotel/resort to be known as *Peppers Broadbeach*. They contend that the relevant apartments are substantially different from what they contracted for, SSI evinced an intention not to be bound by the relevant contract and thereby repudiated it.

[195] The form of alleged repudiation is conduct which "evinces an unwillingness or an inability to render substantial performance of the contract".[24] It is sometimes described as conduct "which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations", and may be termed renunciation.[25] The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.[26] The plaintiffs' case on repudiation does not allege the breach of a term, any breach of which justifies termination. In the joint judgment of Gleeson CJ, Gummow, Heydon and Crennan JJ in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* their Honours stated:

> "There may be cases where a failure to perform, even if not a breach of an essential term ... manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words."[27]

[196] In determining whether SSI has repudiated each contract, the point of reference is the promised contractual performance, not expectations built on representations that are not pleaded or proven to have had contractual force.

[197] The plaintiffs' pleaded case on repudiation in respect of SSI's proffered performance of "an apartment in a hotel to be known as *Peppers Broadbeach*" referred to a variety of "features, attributes, uses and consequences" referred to in earlier paragraphs of the pleading.[28] They also pleaded in support of their case on repudiation that any authorisation of a person as letting agent would not be in the terms of the Caretaking and Letting Agreement annexed to the final disclosure statement.

[198] The plaintiffs' submissions on repudiation did not invoke each of the pleaded "features, attributes, uses and consequences" but were of the more general kind that I have earlier identified, namely that the apartment purportedly offered in

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24 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 135, [2007] HCA 61 at [44].

25 Ibid.

26 Ibid.

27 Ibid at 136, [44].

28 See, for example, Wicks proceeding, paragraph 45 of the Fourth Amended Statement of Claim.

performance is in a hotel (or resort) or hotel/resort branded *Peppers Broadbeach*. Some of the specific matters that are pleaded in support of repudiation are relied upon in the plaintiffs' submissions on cancellation pursuant to the *BCCM Act*, which raise different issues compared to repudiation under the general law.

[199] In relation to the plaintiffs' case on repudiation as advanced in their submissions, I have found that SSI's purported performance of each relevant contract did not meet its contractual obligations in that the tower is not known as *The Oracle* and has been branded as *Peppers Broadbeach*. In short, the departure from the promised contractual performance relates to the name of the tower.

[200] The inability or unwillingness of SSI to provide an apartment in a tower known as *The Oracle* and the proffered performance by providing an apartment in a tower branded *Peppers Broadbeach* is not submitted by the plaintiffs in their submissions on repudiation to have had certain consequences in relation to "the product" being sold. The plaintiffs' case on the name aspect, as distinct from their case that the tower is a hotel, does not assert that the proffered performance is of "a different product". Their submissions headed "A different product" are to the effect that the development is a hotel or resort, rather than a residential tower. To quote the plaintiffs' written submissions:

> "Whilst the change of name is important (and addressed below), by altering the development from a residential tower to an hotel or resort, the Defendant has changed the substratum of the bargain."

[201] I have declined to find that the tower is something other than a residential tower, whether described as a hotel, resort, hotel/resort or some other term. In the light of that conclusion, the plaintiffs' case on repudiation, as argued, turns upon whether the proffered provision of an apartment in a tower that is not known as *The Oracle* and that is branded as *Peppers Broadbeach* constitutes a repudiation.

[202] The issue then is whether the failure to provide an apartment in a tower that has the name provided for in the contract, and the proffering instead of an apartment in a tower with a different name, indicates an intention "not to provide at settlement the subject matter of the contract" because the relevant units are "substantially different from that contracted for" (to quote the plaintiffs' submissions). To use the similar language of the High Court in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*, the issue is whether the different name of the tower entitles the plaintiffs "to conclude that the contract will not be performed substantially according to its requirements" or amounts to a renunciation either of the contract as a whole or of a fundamental obligation under it.

[203] The relevant departure from the promised contractual performance relates to the name of the tower, not the fact that the business conducted under the name *Peppers Broadbeach* attracts short-stay guests and holiday-makers, and would be described by many as a kind of hotel or a hotel/resort. The name of the tower is not pleaded or argued to be an essential term in the sense discussed in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*[29]. The name of the tower and the promise that it was to be known as *The Oracle* are provisions of the contract for the reasons I have earlier canvassed. The name of the tower appears on the contract,

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[29] (2007) 233 CLR 115 at 136-7, [2007] HCA 61 at [47].

including the plans that are included in it, and on documents that form part of the contract by virtue of s 215. One of these documents, the information sheet, stated that the residential component was to be known as *The Oracle*. But these provisions are not pleaded or submitted to have been an essential term.

[204] The subject matter of the contract is a proposed lot in a residential tower. The failure to provide the relevant lot in a tower known as *The Oracle* does not indicate an intention not to provide at settlement the subject matter of the contract or something substantially different from that for which the plaintiffs contracted. The unwillingness or inability to perform the term that provided for the tower itself to be known as *The Oracle* (as well as being part of a development described as *The Oracle*) would not convey to a reasonable person, in the situation of the plaintiffs, renunciation either of the contract as a whole or of a fundamental obligation under it.

Conclusion – alleged repudiation in relation to the name of the tower

[205] The plaintiffs have not proven that the unwillingness or inability to perform the contractual provision in relation to the name of the tower constitutes a renunciation of the contract or a fundamental obligation under it so as to amount to a repudiation.

[206] I have declined to find that the tower is not a residential tower, such that a description of it as a hotel/resort means that SSI "has changed the substratum of the bargain" or that the relevant apartment is substantially different from, or a "different product" from, the subject matter of the contract, namely an apartment in a residential tower. I have declined to find repudiation in relation to the name of the tower. These conclusions determine the issue of repudiation on the bases that it was argued.

[207] In case it becomes relevant I will make findings in relation to certain other matters which were pleaded in relation to the issue of repudiation, but not urged in submissions.

The Caretaking and Letting Agreement

[208] As noted, one element of the plaintiffs' pleaded case on repudiation is that by entering into the Share Sale Agreement SSI evinced an intention not to be bound by "the disclosure statement terms" of the contract, particularly that any authorisation as letting agent would be in terms of the Caretaking and Letting Agreement annexed to the final disclosure statement. However, the Caretaking and Letting Agreement entered into by the body corporate and SSA is in that form.

[209] The Share Sale Agreement did not alter those terms. Instead, it addressed matters such as signage, obtaining the body corporate's consent to a liquor licence and the fit-out of Lot 101 as a restaurant and bar. These were aspects of a commercial negotiation for the sale of management rights by a developer to the purchaser of those rights. The Caretaking and Letting Agreement is a different kind of agreement, namely one between a body corporate and the entity appointed by it to the role of caretaker and letting agent.

[210] In any event, the Caretaking and Letting Agreement contemplated signage being authorised by cl 20, the provision of services by the letting agent, and the use of Lot 101 and certain "Occupation Areas" for certain purposes. The service of

alcohol to guests, the holding of events at which alcohol is served and the use of Lot 101 as a restaurant and bar are not beyond the matters contemplated by the Caretaking and Letting Agreement. If, however, there has been an authorisation beyond the terms of the Caretaking and Letting Agreement, it does not amount to a repudiation of the contracts entered into by the plaintiffs.

Short-term and holiday letting and the provision of hotel-like services

[211] The provision of short-term and holiday letting was not pleaded to be a departure from a contractual term, save perhaps insofar as it and the provision of "hotel-like services" are subsumed in the allegation that the tower was not a residential tower and was a hotel/resort. If the tower is to be described as a hotel or a hotel/resort, then this does not amount to a repudiation. The provision of hotel-like services to short-term guests and holiday makers is not inconsistent with any contractual promise. The tower is designed to be in the nature of a resort, particularly for short-term guests. If it is described as a hotel, rather than a resort or apartment tower with access to hotel-like services including room service, then there is no departure from promised contractual performance, or any departure is not repudiatory. The type of "hotel" is of a particular kind, namely self-contained apartments with access, if required, to certain hotel-like services. It does not have a ballroom or a large conference centre. The proposed restaurant and bar is a feature of similar high-rise apartment blocks on the Gold Coast that attract short-term stays and holiday makers. The provision of alcohol in such a tower, at certain events, in mini-bars and by room service, is not inconsistent with any contractual promise to the plaintiffs.

[212] If the conduct of the letting business, the provision of certain hotel-like services and the proposed establishment of a restaurant/bar has made the tower a hotel/resort, and if (contrary to my findings) this involves a departure from the promise that the tower would be a residential tower, then any departure does not amount to a repudiation. One reason is that the kind of residential tower contemplated by the contract was one in which residents might be on short-stays or be holiday makers who sought and received services from the letting agent of the kind in fact provided by Peppers. Expressed differently, the contract did not provide that the residential tower was to be of a character that restricted it to owner-occupiers or long-term tenants, or that it would not be in the nature of a resort at which residents received certain hotel-like services.

The consequence of the tower not being known as *The Oracle*

[213] The consequences of the tower not being known as *The Oracle*, as distinct from being known as *The Oracle* and being a place at which Peppers conducted a letting business under the name *Peppers Broadbeach* and provided certain hotel-like services in doing so, is not pleaded or proven. The plaintiffs' case on repudiation was of the dual or composite kind earlier described, with the "branding" or "change of name" aspect being somewhat secondary to its "different product" aspect. The "branding" or "change of name" aspect was not explored separately as to its consequences on the subject matter of the contract or its value. The following discussion of the valuation evidence should be read in that context. Moreover, any assessment of the consequences of the tower itself not being known as *The Oracle*, while still being in a precinct or development known as *The Oracle* or *Oracle*, would need to take account of the provision in the relevant documents about the

conduct of the letting business. Nothing stopped the letting agent from promoting its own brand and using signs to do so. It would also need to take account of the fact that the promise that the tower was to be known as *The Oracle* did not entail any promise about a particular level of promotion of that name, by signage or marketing, or that the tower would retain that name for a particular period after settlement.

The valuation evidence

[214] The plaintiffs each plead that they contracted to purchase an apartment "the resale value of which would be determined by reference to its being an apartment in a residential tower in *The Oracle* and not an apartment which is an element in a hotel/resort branded *Peppers Broadbeach*". This was not a plea that the resale value would decline or had declined as a result of the residential towers being a hotel/resort branded *Peppers Broadbeach*. By an amendment shortly before trial to a different section of the pleading in relation to "material prejudice" in terms of ss 214(4)(b) and 217(c) of the Act, it was alleged that the apartment purportedly offered in performance by SSI:

> "...is, and was at all material times since the appointment or engagement of Peppers as aforesaid, of lesser value in consequence of such appointment or engagement, the uses to which Peppers intends to put (or is putting) apartments and other facilities and areas in the development and branding as '*Peppers Broadbeach*' as aforesaid than if [the] apartment... was an apartment in a residential tower in the '*Oracle*' without any (and all) of such appointment or engagement of Peppers, uses by Peppers and branding as '*Peppers Broadbeach*'."

[215] Two valuers gave evidence at the trial: Mr Muchall for the plaintiffs and Mr Hamilton for the defendant. They also prepared a joint report to the Court. The joint report recorded the following points of agreement:

(a) The subject property is an iconic twin high rise tower development with in excess of 500 apartments.

(b) The apartments are finished to a high standard and the fitting and fixtures are considered to be of a high standard. They are self contained with separate bedroom, bathrooms and living areas.

(c) The communal facilities provided in the development are extensive and present to a very high standard.

(d) Broadbeach, where the development is located, is a suburb which caters for both tourists and permanent residents.

(e) Large high rise residential developments on the Gold Coast have been previously by a mix of owner occupiers (resident or lock up) and investors (permanent and, where permitted, short term holiday let).

(f) Purchasers of a unit in the subject development have the option to reside in the apartment, or theoretically utilise an onsite letting agent or an offsite letting agent to manage it privately.

[216] Mr Hamilton in his report considered that the correct approach to the valuation of the apartments is as an apartment in a residential tower in *The Oracle*, although it should be valued with the full knowledge that Peppers is the operator. Mr Hamilton's view is that Peppers as part of the Mantra Group has the necessary expertise and resources to conduct the duties of the caretaker and on-site letting agent to a high standard, and that the commission and management fees charges are in line with comparable on-site letting agreements and that the commission fees would be regulated by market forces. The provision of hotel-like services (such as concierge, room service and 24 hour reception) did not alter the valuation approach. Mr Hamilton did not agree with the contention that the relevant apartments are of a lesser value due to the appointment of Peppers and the branding of the development. He considers that the appointment of Peppers would be favourably received by the market.

[217] By comparison, Mr Muchall expressed the opinion that Peppers is seen "more as a boutique smaller scale of up-market short stay accommodation resorts". Other than the Peppers Resort at Kingscliff in New South Wales, he was not aware of any other metropolitan resorts managed by "Peppers" of the nature and scale of *Peppers Broadbeach.* As a result, Mr Muchall stated in the joint report that he was "not able to comment on the expertise or resources of Peppers to undertake the caretaking and letting duties for Peppers Broadbeach to a high standard." In addition, Mr Muchall was of the opinion that the appointment of Peppers Broadbeach provided a greater emphasis on the overall development as a hotel/resort providing short stay accommodation, and that this would not be attractive to the owner-occupier market, given the high turnover of accommodation and greater use of communal facilities and common areas. He also expressed the view that the approval of a liquor licence for the provision of mini-bars in rooms and in a restaurant/bar would place a greater focus on the development being a hotel, reducing "the prestige residential amenity".

[218] In his report Mr Muchall said that potential purchasers of an apartment in such a development generally fall into one of three categories: those who intend to buy for immediate or near term permanent owner occupation; for use as a holiday unit for themselves and their family on a casual basis; or as investment for capital appreciation or a rental return. Each had a different perspective in making a decision to purchase. Owner occupiers preferred to not live in buildings utilised for short stay accommodation. The same could be said for "part-time" owner occupiers who utilise the units for their own holiday use. With investors, the main concern was either for a short/medium term capital gain or a good rental return.

[219] As to the difference in value of an apartment in a "Peppers" brand of hotel and/or resort against one in *The Oracle* as a residential complex where apartments can be let by owners if they choose, Mr Muchall's report expressed the opinion that a potential purchaser would not look as favourably on a Peppers apartment as against an Oracle apartment. His report said that he had not been asked to quantify the difference in value between the two scenarios and he considered that this was "both difficult and fraught with too many unknowns". He said that any difference would also be dependent on the type, size and nature of the accommodation and the purchaser's requirements, which will vary.

[220] On a separate question, Mr Muchall's report said that there would not be any perceived difference in value between the Peppers letting business being:

(a) a Peppers luxury five star hotel (or the like); or

(b) a Peppers accommodation resort as part of which Peppers provides hotel-like services.

[221] In his cross-examination Mr Muchall accepted that the building was never going to be wholly occupied by owners and long-term or medium-terms tenants, and that there was no exclusion of holiday letting. He accepted that if there had been an attempt to exclude owners from putting their apartment into a letting pool for holiday letting there would be a lot of people who would not be interested in buying an apartment in the building. One such category would be a purchaser who was interested in maximizing their return. Another would be purchasers who wanted to keep their options open. It would also exclude potential purchasers who wished to occupy the apartment for a few weeks themselves per year but otherwise rent it on a holiday basis. When asked whether the exclusion of those people would drive the apartment's value down Mr Muchall responded that this was not a simple question to answer. A restriction on short term accommodation would have an impact, but "on the flip side" it might make the owner-occupier or more prestigious residential areas more valuable. Ultimately, Mr Muchall acknowledged that one could not really tell what impact, if any, the appointment of Peppers had on value because of the absence of sales evidence.

[222] Mr Muchall was the joint author of a valuation report produced in June 2008 in relation to *The Oracle* for first mortgage security purposes. That report addressed, among other things, the value of management rights and was based on a letting pool projection of 100 units in Tower One and 130 in Tower Two which equates to 38 per cent of the total units in Tower One and 54 per cent of the units in Tower Two, or 45 per cent of the total units in the development. The income to be derived by the manager included tour and ticket sales. The 2008 report did not suggest that the letting pool would not consist of short-term accommodation and holiday makers. It tended to indicate that it would. The report's analysis was based upon competition that was considered "to emanate from 4½-star to 5-star resorts and hotels located throughout the Gold Coast." Calculations were made on the basis of expected occupancy rates and regard was had to occupancy rates for hotels, motels and serviced apartments. The 2008 report is consistent with an assessment of *The Oracle* as a building that would be conducted as a luxury resort attracting, among others, short-term letting and holiday makers. To the extent that Mr Muchall's 2011 report for the purpose of these proceedings and his oral evidence sought to distinguish between a "prestigious residential apartment complex" and a hotel/resort, this is not a distinction made in the 2008 report. Further, reference to the disclosure statements given to purchasers, as distinct from material which initially marketed *The Oracle*, did not indicate that the tower would be predominantly occupied by owner-occupiers or long-term tenants. On the contrary, it indicated short-term letting and holiday-making and the provision of hotel-like services. To the extent that the questions asked of Mr Muchall for the purpose of preparing his 2011 report are based on assumptions about the extent of short-term letting, these assumptions are not reflected in contractual documents. He was briefed, and relied upon, the plaintiffs' affidavits, but was not briefed with the relevant contract and disclosure statements. Any shift from a prestigious residential apartment complex without short-term letting to one that focuses on short-term hotel/resort style accommodation relates to a supposed shift from something that buyers were not contractually promised. The building was always going to compete

in the luxury short-term accommodation market, and the Landmark White valuation report of 2008 assumes this to be the case.

[223] In the joint expert report Mr Muchall said that he was not able to comment on the expertise or resources of Peppers to undertake the caretaking and letting duties of *Peppers Broadbeach* to a high standard. However, the evidence, including Mr Hamilton's evidence, is that it is able to do so.

[224] Mr Hamilton rejected the proposition that the value of the apartments had gone down as a result of the appointment and presence of Peppers. He saw it as an advantage to have an experienced, well-reputed manager. In connection with the plaintiffs' pleading that the resale value of an apartment will fluctuate in line with the value of the Peppers brand and "not as an individual, independently owned residential apartment", the plaintiffs point to the following evidence given by Mr Hamilton under cross-examination:

> "…if you looked at it on the basis that it wasn't being well managed—and it appears that it is being very well managed—and it was being managed poorly, it could have an adverse [effect] on the lifestyle elements for those people, if guests were unruly or things weren't maintained properly, but I would think that as a buyer I would take better – greater confidence having the Peppers as manager and take confidence that they would be able to control their guests' behaviour, maintain the property in a suitable way beyond its call, so I would think they would be positive things."

The plaintiffs submit that the proposition that if the apartments are well managed by Peppers then the value of lots will be affected positively, carries the corollary that if the apartments are managed poorly by Peppers their value will decrease. They submit that the apartments are "indexed" to the value of the Peppers brand and they have no control over how well or poorly Peppers will perform. These propositions are not really to the point in proving material prejudice. It may be accepted that the value of an apartment will be affected by the value of the Peppers brand and the value of the *Peppers Broadbeach* brand in particular. However, the value of the apartment would be affected by the brand and performance of any caretaker and letting agent. So too would the rental that it could command.

[225] Mr Muchall did not suggest that the appointment of Peppers and the branding undertaken by it had a greater impact on value than if a different and possibly less well-known operator had been appointed and branded the resort with its name. Interestingly, the plaintiffs' submissions on valuation pointed to a recent magazine article as exemplifying the practical effect of the appointment of Peppers Broadbeach. The article claimed:

> "The number one reason to holiday at home: the Gold Coast boasts Australia's best hotel, Peppers Broadbeach."

But this and other descriptions of *Peppers Broadbeach* as a five star hotel or luxury resort tend to prove that it is being operated successfully.

[226] There is no evidence that the management of the tower by Peppers and its promotion as a hotel/resort branded *Peppers Broadbeach* has attracted undesirable

elements and guests who are disorderly and adversely affect the amenity of residents. The evidence indicated that the tower has a mix of occupants with less than half the apartments being in the Peppers letting pool. This was the kind of proportion anticipated by Landmark White in its 2008 report. I take account of the practical problems that might confront the plaintiffs in proving bad behaviour by Peppers' guests or other adverse impacts that have arisen as a result of Peppers appointment. Current owners might be unlikely to give evidence of such negative matters for fear that it would reduce the value of their apartment. However, there was no evidence of these adverse impacts. Not only were the plaintiffs unable to call such evidence in their cases, the issue was not explored in the cross-examination of the defendants' witnesses, particularly Mr Johnson who is very familiar with the operation of the development. There is nothing to detract from the evidence, including Mr Hamilton's evidence, that the building appears to be very well managed. In addition, it is in Peppers' interest to control guests and maintain standards. It is contractually obliged to do so.

[227] In arriving at his opinions concerning value, and the consequences of the appointment of Peppers, Mr Hamilton had regard to different sectors of the market, including investors and owner-occupiers. He did not consider that the appointment of Peppers as manager would adversely impact on the lifestyle of someone living at the property, and it gave them the opportunity if their circumstances changed to take advantage of Peppers expertise. Mr Hamilton did not consider that a newspaper description of the property as a hotel called for a completely different valuation exercise because one was not concerned with a hotel room. Instead what was being valued was an apartment with a particular number of bedrooms. Certain hotel-like services might be available via Peppers to short stay visitors who rented the apartment.

[228] The essence of the plaintiffs' submission on valuation was that the plaintiffs contracted for what were to be "first-class, indeed 'iconic', units, probably the best units in the Broadbeach residential unit market" and that what were tendered in performance are apartments which focus on short-term hotel/resort style accommodation identifiable as *Peppers Broadbeach*. However, the correct valuation analysis for the purpose of the deciding whether there has been a diminution in value is to value what the plaintiffs' contracted for, namely an apartment in a tower in which the apartment and other apartments in the tower might be let for short-stays and to holiday makers. The apartment contracted for was one which the owner might use as a permanent residence or let to long-term tenants, but also was available for short-term letting, as were all other apartments in the building. The apartment contracted for was one in a tower with an on-site letting agent who could conduct the business of letting and provide services to residents and their guests. Mr Hamilton had appropriate regard to this mix. In response to a question about the advertising of hotel/like services and an "increased focus on short-stay accommodation", Mr Hamilton responded that he did not think that the building had changed its focus at all, because it was always going to have a mix of end users. Mr Hamilton did not regard the provision of a restaurant and bar on the ground floor of Tower One as adversely affecting the value of an apartment in it. In fact, in his opinion it had a positive impact. High rise apartments on the Gold Coast that had been built from 1970 onwards often included a restaurant/bar on the ground floor and the presence of such a facility was relevant to how star ratings were assessed. A restaurant was regarded as a positive attribute that would lift the star rating.

[229] There was some debate and submissions were made as to whether Mr Hamilton had inappropriate regard to comparable buildings at Main Beach and Surfers Paradise. The plaintiffs' submissions contend that he approached the valuation on the basis that the apartment formed part of a broader market on the Gold Coast for high rise residential towers. I do not consider that the criticism is justified. Mr Hamilton referred to a "prestige sector of the apartment market" and to a "Broadbeach Highrise Market Sector". He paid appropriate regard to other high rise residential towers, as did Mr Muchall. Both had appropriate regard to high rise apartments at Broadbeach and elsewhere on the Gold Coast. Both had regard to the tower's high quality and its locality.

[230] The valuation witnesses were cross-examined about whether an apartment might have had a higher value if a greater proportion of apartments in the tower were occupied by owners and the tower was not operated by Peppers. Such a tower would have greater appeal to certain categories of investors. But its greater appeal to a certain category of buyers needs to be balanced against its reduced appeal to other categories of buyer. A tower that could not be operated as it currently is by *Peppers*, and which focused upon permanent residents, would appeal to some sectors of the market, but not to others. I do not consider that either expert was in a position to say reliably whether an apartment in such a tower would be worth more or less than its present value.

[231] No contractual provision indicated that the tower was going to be occupied entirely, or even predominantly, by owner-occupiers, even if some buyers were led to believe that owner-occupiers were its target market. Mr Muchall in 2008 assumed that 38 per cent of the units in Tower One would be in the letting pool that was managed by the entity that acquired management rights. It is doubtful whether each apartment would have had a higher value if there had been a contractual provision in all of the contracts for the tower to be occupied exclusively by owner-occupiers and long-term tenants. Mr Hamilton's evidence was to the effect that such an apartment would probably have less value because of its reduced appeal to the largest part of the investor market. Mr Muchall said that such arrangements would have a negative impact upon investors who wish or might wish to let the apartment on a short-term basis, but would increase its appeal to owner-occupiers. Under cross-examination he did not say what the net effect would be.

[232] The first valuation issue on the pleadings relates to the fluctuation in value of an apartment in line with the value of the Peppers brand and/or the *Peppers Broadbeach* brand. This point seems to go no where. The resale value of an apartment might fluctuate in line with the value of these brands and those, in turn, might be linked to the performance of Peppers and *Peppers Broadbeach* in particular. An apartment is to be valued as a "residential apartment", but as one in a residential tower that will be occupied by a variety of residents, including persons occupying an apartment for a short term or on holiday. The apartment is to be valued as an apartment in a residential tower, but knowing that the tower has a caretaker and letting agent whose letting business seeks to service consumers wanting to occupy the apartment on holidays or for a short term. There is no evidence that the value of an apartment would fluctuate any more if the letting business was conducted by Peppers as opposed to any other manager. The plaintiffs have failed to establish the material prejudice pleaded in sub-paragraphs 40(b) and (c) in the Wicks proceeding in relation to fluctuation in value.

[233] As to the issue of alleged reduction in value, as pleaded in paragraph 40(m) and hinted at in paragraph 33 of the Wicks pleading, the plaintiffs have not proven their pleaded case. They have not proven that the apartment that Mr and Mrs Wicks agreed to purchase, or any other relevant apartment in these proceedings, is of lesser value in consequence of the appointment of Peppers, the conduct of Peppers and the tower's branding as *Peppers Broadbeach*. This addresses the matters earlier raised in paragraphs 33 and 34 of the Wicks pleading in relation to the "resale value" and the "rental value" of the apartment. The plaintiffs have not proven that the value of an apartment is any less than it would have been if a different operator had been appointed to conduct the letting business under a different brand, or under no brand at all. What can be said is that the apartment would be worth less if a less competent and experienced manager, who lacked the experience and competence of Peppers, had been appointed.

[234] In conclusion, the plaintiffs have not proven their pleaded case in relation to an alleged reduction in the value of the relevant apartments in consequence of the appointment of Peppers, its operation of the apartment tower and the branding of the building as *Peppers Broadbeach*.

[235] It follows that the plaintiffs have not proven that any departure from promised contractual performance in respect of the appointment of a letting agent in accordance with the Caretaking and Letting Agreement, and in particular the appointment of Peppers and the branding of the tower as *Peppers Broadbeach*, has had an adverse effect on the market value of any of the apartments which they contracted to purchase.

[236] This issue of value, of course, is a different issue to the subjective value that a particular purchaser might place upon the consequences of the appointment of Peppers and the branding of the tower as *Peppers Broadbeach*. It is also an issue different from the effect upon the residential amenity of owner-occupiers of the appointment of Peppers, the branding of the tower as *Peppers Broadbeach* and the apparent success of *Peppers Broadbeach* in its operation. Those issues of residential amenity will be later addressed in the context of claims that rely upon the *BCCM Act*.

[237] I have addressed the valuation evidence and certain pleaded issues of material prejudice at this point because the plaintiff's submissions were that "[v]aluation considerations run commonly as regards both repudiation and BCCMA Operation". To the extent that valuation considerations and the valuation evidence bear upon issues of repudiation rather than pleaded issues of material prejudice under the *BCCM Act*, I conclude that the plaintiffs have not proven that the appointment of Peppers, Peppers' operation or the branding of the tower as *Peppers Broadbeach* has had an adverse effect upon the value of apartments. There is no evidence that the branding of the towers as such has had an adverse effect upon the value of individual apartments. The evidence is that Peppers is an experienced and competent operator, and there is no evidence that the resort is not well managed by it. The evidence is to the effect that it is well managed. The plaintiffs' contracts always contemplated the appointment of a manager and letting agent. There was no contractual promise that the management rights would be given to a company that had access to the management systems and experience possessed by Mantra/Peppers. To the extent that there was an expectation that the management rights would be sold to such an entity, the expectation has not been disappointed.

Relevantly, the appointment of Peppers has not been shown to have reduced the value of the apartments compared to the value which they would have had if a different entity had been appointed. To the extent that valuation considerations are relevant to issues of repudiation, the plaintiffs have not proven their case.

Conclusion – repudiation

[238] The plaintiffs have not established that SSI repudiated the contracts and that they were discharged from their contracts under the general law.

Purported termination under the *BCCM Act*

[239] I have earlier outlined relevant sections of the *BCCM Act* and the principles that emerge from authorities in respect of them. The entitlement to terminate under the Act is invoked by Mr and Mrs Wicks, Mr Gough and Ms Groves, and Ms Ryan. These plaintiffs plead that the final disclosure statement had become inaccurate as that term is used in ss 214(4)(b) and 217(b)(iv) of the Act on certain grounds. They also pleaded that they would be "materially prejudiced", as that expression is used in the Act, if compelled to complete the contract, by reason of the extent to which the final disclosure statement has become inaccurate by reason of any or a combination of various matters. Fourteen sub-paragraphs of paragraph 40 of the Wicks pleading allege material prejudice by reason of the extent to which the final disclosure statement had become inaccurate. These sub-paragraphs also appear in the pleadings of Mr Gough and Ms Groves, and Ms Ryan, with one sub-paragraph in the Wicks proceeding being in a slightly different form since it contains specific reference to their retirement.

[240] As to the issue of inaccuracy, the Court of Appeal judgment in *Mirvac Queensland Pty Ltd v Wilson*[30] states that the inaccuracy "must be 'real or of substance as distinct from ephemeral or nominal' such as to impact on the bargain." The inaccuracy by which the buyer would be "materially prejudiced" if compelled to complete the contract is an inaccuracy in the disclosure statement given under the Act, not an inaccuracy in some extraneous material. I will address each of the points of alleged material prejudice that were pressed by the relevant plaintiffs in final submissions under the relevant headings that appear in those submissions and which are pleaded in paragraph 40 of the Wicks pleading, paragraph 39 of the Gough and Groves pleading and paragraph 41 of the Ryan pleading.

Sub-paragraph (a): The apartment purportedly offered in performance by the defendant is not an apartment in a residential tower in *The Oracle* but rather an apartment in a hotel/resort branded "*Peppers Broadbeach*" with the features, attributes, uses and consequences pleaded in earlier paragraphs

[241] The disclosure statement described the lot as being in a residential tower. This is not inaccurate. Matters extraneous to the disclosure statement (such as brochures and representations by sales staff) may have led some buyers to expect that the tower would be occupied predominantly by owner-occupiers or long-term tenants. However, the disclosure statement did not represent this to be the case. For the reasons given earlier, if the tower is described as a hotel/resort then it is still a residential tower. The final disclosure statement has not become inaccurate because some would describe the tower as a hotel/resort. A further disclosure statement

30 [2010] QCA 322 at [24], quoting *Tillmans Butcheries Pty Ltd v AMIEU* (1979) 42 FLR 331 at 348.

which described it as a hotel might be inaccurate, at least according to some definitions of what constitutes a hotel. The relevant alleged inaccuracy relates to the fact that the lot was described as being a lot in a residential tower. This description has not become inaccurate since the tower is still a residential tower. A further disclosure statement describing it as a "hotel/resort" or by some other term was not necessary to prevent the disclosure statement from becoming inaccurate.

[242] The next alleged inaccuracy relates to the fact that the final disclosure statement described the lot as being in a residential tower in *The Oracle* whereas the disclosure statement, if now given, would state that it is in a lot in a hotel/resort branded *Peppers Broadbeach*. The lot is in a residential tower in *The Oracle*, being the name of the development as a whole. Accordingly, the ground of inaccuracy pleaded in paragraph 39(b) of the Wicks pleading is not established. The alleged inaccuracy and the associated plea of material prejudice appear to relate to an inaccuracy because the disclosure statement, if now given, would need to state that the lot is in a hotel/resort branded *Peppers Broadbeach*. I do not consider that the final disclosure statement has become inaccurate because it does not describe the residential tower as being in a "hotel/resort". The tower contemplated by the disclosure statement was a residential tower with in excess of 260 apartments, managed by a caretaker and letting agent and having the features of a resort. The disclosure statement had not become inaccurate in any of these respects. The fact that some persons might label the building as a hotel does not mean that the final disclosure statement becomes inaccurate. Many would label it a hotel if a different letting agent had been appointed on the basis that it would be an apartment/hotel in which short-term guests, holiday makers and others would reside and receive certain hotel-style services.

[243] The remaining issue then becomes one in relation to the branding of the hotel/resort as *Peppers Broadbeach*. The disclosure statement indicated that the tower was to be known as *The Oracle*. Its branding as *Peppers Broadbeach* means that this is not the case and the disclosure statement has become inaccurate in that regard. Incidentally, sub-paragraph 39(b) of the Wicks pleading in relation to the branding issue and sub-paragraph 40(a) dealing with the related matter of material prejudice do not specifically plead that the tower itself was to be known as *The Oracle*. In any case, I will proceed on the basis that the final disclosure statement has become inaccurate in respect of the name of the tower itself. The plaintiffs do not plead that the different name in itself is a ground of material prejudice. Some of their evidence touched on this aspect. I address it below. A beneficial construction of what is meant by "materially prejudiced" should be adopted in accordance with *Mirvac Queensland Pty Ltd v Wilson*.[31] However, it has not been demonstrated that the relevant plaintiffs have been disadvantaged substantially or to an important extent by an inaccuracy in the name of the tower. The tower remains one in a development known as *The Oracle*.

Sub-paragraphs (b), (c) and (m): Valuation issues

[244] I have addressed above the issue pleaded in sub-paragraph 40(b) of the Wicks pleading in relation to fluctuation in the resale value of the apartment. Similar considerations apply in relation to the rental value of the apartment being a matter pleaded in sub-paragraph 40(c). The same conclusions reached in relation to

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31 Ibid.

fluctuation in the resale value apply to fluctuations in the rental value. I have found that the diminution in value alleged in sub-paragraph 40(m) has not been proven.

Sub-paragraph (d): The fees for caretaking and letting

[245] The matter pleaded in sub-paragraph 40(d) of the Wicks pleading is not pressed.

Sub-paragraph (e): The ability, in practical terms, to use an off-site agent to let the apartment and/or to let it privately

[246] The plaintiffs pleaded as a ground of inaccuracy that the Caretaking and Letting Agreement enabled them to advertise and arrange for the letting of the lot through an off-site agent or privately, whereas the disclosure statement if given now would be required to disclose that they "would have no practical ability to let the lot through an off-site agent or privately" because they would not be able to use the name and marks of *Peppers Broadbeach* in order to advertise the apartment, nor would they able to use the name and mark *The Oracle*. The plaintiffs did not specifically plead that any such practical inability was the result of what is described as the "Oracle Brand Licence" addressed in clause 45 of the Share Sale Agreement and the "Trade Mark Licence" in Annexure D to that agreement. The terms and effect of these licences were not specifically pleaded. SSI complained about the late emergence of any issue in relation to the licence granted by clause 45 of the Share Sale Agreement. I allowed certain cross-examination of Mr Johnson over objection. However, the plaintiffs established few, if any, facts in relation to the licensing of the marks and the practical effect that such licensing has upon the opportunity to advertise or let an apartment through an off-site agent or privately.

[247] An important preliminary point in terms of the accuracy or inaccuracy of the disclosure statement is the fact that the disclosure statement made no statements about intellectual property in *The Oracle*. In particular, it did not represent that SSI, the body corporate or any other entity owned the relevant trade marks and would license them to individuals.

[248] Clause 45 of the Share Sale Agreement requires South Sky Enterprises Pty Ltd to procure entry into a licence. The licence is between Niecon Developments Pty Ltd as licensor and Mantra IP Pty Ltd as licensee. This clause of the Share Sale Agreement relates to the licensing of certain marks in connection with Peppers' letting business in respect of the two apartment buildings.

[249] The plaintiffs did not plead or prove that they had any rights in respect of those marks before the Share Sale Agreement was entered into or that entry into the Share Sale Agreement affected those rights. The disclosure statement simply did not address entitlement to any trade marks, let alone promise that buyers would have ownership or licences to use any such trade marks. Incidentally, the *BCCM Act* does not require a disclosure statement to address such matters.

[250] The plaintiffs have not produced evidence, let alone proven, that the granting of the licences referred to in the Share Sale Agreement has caused them, or is likely to cause them, any harm. In particular, they have not shown that the relevant licences mean that they have no practical opportunity to advertise or let their apartment through an off-site agent or privately. There was no evidence that the licence impacts upon the practical ability of an owner to advertise or let their apartments through an off-site agent. The only evidence given on the topic tended to indicate

that there was no apparent problem. No owner of an apartment gave evidence of any difficulty in using an off-site agent or in letting their apartment privately. No off-site agent was called to say that the licence did, or would, adversely affect their ability to let an apartment in *The Oracle*. The valuers who gave evidence did not suggest any practical problem in relation to off-site letting in general or licensing of names in particular. Mr Johnson was not aware of any difficulty experienced by owners who use off-site letting agents in using the word *Oracle* or *The Oracle*.

[251] In any event, the licence referred to in clause 45 of the Share Sale Agreement does not appear to preclude the relevant plaintiffs from advertising the fact that they wish to let an apartment in *The Oracle*. A registered trade mark would not prevent the use of the word *The Oracle* to describe either the development or the tower in which the apartment is located.

[252] The plaintiffs sought to rely upon the decision in the *South Sky Investments Pty Ltd v Prins*.[32] That decision involved an application by SSI (the plaintiff in that case) for summary judgment against purchasers. The argument advanced in opposition to summary judgment by the defendants in that case was that they intended to let two apartments by their own marketing and that the effect of registration of certain trademarks would be to make them uncompetitive with the on-site agency. Their case was that they should have been told this by SSI and that they were thereby misled or deceived in contravention of s 52 of the *Trade Practices Act* 1974 (Cth). A particular allegation was that registration of certain trademarks would make it impossible for any competitor, such as the defendants, to use the word "Oracle" as part of a domain name, and that there were other effects upon search results on the internet.

[253] After referring to relevant authority, McMurdo J stated:

> "If the defendants here mean to say that *any* use of the expression 'The Oracle', in the promotion of their apartments if they must purchase them, would be an infringement of these marks, if registered, they are misstating the effect of that judgment. So far as the *Trade Marks Act* is concerned, the defendants would be able to use the name of this building (Oracle) or any similar name to identify and describe the apartments being offered for rental, as long as they did not use the words *as a trade mark*, ie use them to distinguish their business services from others offering apartments in this building."[33] (italics in original)

His Honour continued:

> "Nevertheless, on the state of the present evidence, it cannot be concluded now, in the plaintiff's favour, that the registration of the trade marks could have no substantial impact upon competitors of the on-site manager, such as the defendants if they are ordered to complete their contracts. There are two propositions in respect of trade mark infringements which are relevant at this point. The first is that although the use of a trade mark as a trade mark is often

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32 [2010] QSC 438.

33 Ibid at [15].

> distinguished from a use which is merely descriptive of the product or service, a use might constitute an infringement, by its being used as a trade mark, although the mark also serves at the same time a descriptive function. Secondly, a party might infringe a trade mark although not intending to use the mark as a trade mark. The path for the intended user of the relevant words, in order to avoid an infringement, might not be so clearly marked that the user would not be forced to err on the side of caution to avoid an infringing use. **Thus for the present, the claims by the defendants that they would be significantly affected in their use of the name of the building, specifically within their internet marketing, cannot be readily dismissed. Instead, all of this requires a factual inquiry at a trial**. In particular, there are necessary inquiries as to what form of internet material is necessary to effectively compete with the on-site operator and as to what use of the relevant words might be necessary to that end. There would then be questions as to whether such material, at least arguably, would constitute an infringement. Even a serious prospect of infringement might be a sufficient deterrent to the use of the subject words that it would present a substantial impediment to persons such as the defendants in competing with the on-site operator."[34] (emphasis added)

These observations were made in the context of an application for summary judgment and served to identify the importance of undertaking a factual inquiry at trial of the issues raised in that proceeding. In these proceedings the plaintiffs did not call evidence that supported the relevant pleaded allegation or the unpleaded allegation concerning the effect of the licence on their practical ability to let the lot through an off-site agent or privately. The plaintiffs in this case did not call evidence or undertake the kind of factual inquiry at trial alluded to by McMurdo J.

[254] The plaintiffs submit that the issue is whether they will be materially prejudiced if compelled to complete the contracts because of the extent to which the disclosure statement has become inaccurate and, as with the *Prins* case, the disclosure statement material did not refer to an intention to apply for registration of trademarks, nor to an intention to licence them. I note that the plaintiffs in this case did not plead or particularise an inaccuracy or material prejudice in that particular respect. However, leaving aside the absence of a specific pleading in this respect, the plaintiffs' case in relation to inaccuracy and material prejudice fails because the plaintiffs did not call evidence so as to permit a factual inquiry into the issue of whether trademark licences have deprived them of the ability, in practical terms, to let the apartment privately or by using an off-site agent.

[255] In summary, I am not satisfied that the disclosure statement is inaccurate in the respect alleged or that any such inaccuracy would materially prejudice the relevant plaintiffs if they were compelled to complete their contracts.

Sub-paragraphs (f), (g) and (h): Tenants who do not wish to stay in a hotel/resort

[256] Mr and Mrs Wicks plead as grounds of material prejudice:

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[34] Ibid at [16].

"(f) If the Plaintiffs do not include apartment 1803 in the letting pool for *'Peppers Broadbeach'*, they will be deprived of the ability to market apartment 1803 to, or to attract to apartment 1803, tenants who do not wish to stay in an hotel/resort.

(g) If the Plaintiffs do include apartment 1803 in the letting pool for *'Peppers Broadbeach'* they will be:

(i) restricted to receiving less than 50% of the income from the apartment; and

(ii) will not own a lot marketable to people who do not wish to stay in an hotel/resort.

(h) If the Plaintiffs do not include apartment 1803 in the letting pool for *'Peppers Broadbeach'* they will nonetheless be deprived of the ability to market apartment 1803 to or to attract to apartment 1803:

(i) persons who do not wish to stay in an hotel/resort; and

(ii) persons who do not with to stay in premises the subject of a liquor licence;

with diminished return from attempted letting accordingly."

[257] The plaintiffs submit that the particular prejudice attaching as a result of these points is that the market sectors available to the plaintiffs if compelled to complete the contracts will reduce. In oral submissions the plaintiffs acknowledged that there was no promise of receiving 50 per cent of the income from the apartment, and that the evidence did not support a finding that they would be restricted to receiving less than 50 per cent of the income from the apartment. Accordingly, I disregard sub-paragraph (g)(i).

[258] None of the plaintiffs who rely upon an asserted entitlement to cancel pursuant to the Act originally intended to let their apartments. However, as a result of the global financial crisis, Mr Wicks changed his retirement plans, and Mr Gough and Ms Groves changed their plans to sell their home and move into the apartment. To the extent that there always was a possibility that their plans might change and they might decide to let their respective apartments for some time before either occupying them or selling them, it is appropriate to address the alleged point of material prejudice in relation to tenants who do not wish to stay in a hotel/resort. The plaintiffs submit that they will be deprived of the ability to market the units to:

"(a) people who do not wish to stay in an apartment the subject of a liquor licence. The largest sector particularly affected would be the Islamic market, bearing in mind the populations of tourists and purchasers from the Middle East and the Islamic countries of South East Asia.

(b) people who do not with [sic: wish] to stay in or own an apartment in an hotel/resort – persons with the same views on the point as the Plaintiffs."

There was no evidence about the extent of the sectors of the market referred to in these submissions.

[259] It is unnecessary to repeat matters that have been addressed in respect of other grounds of material prejudice, particularly those in relation to the description of the tower as a hotel/resort. The present point relates to sectors of the market who do not wish to stay in a hotel/resort. The threshold point relates to an inaccuracy in the disclosure statement or the fact that the final disclosure statement has become inaccurate as that term is used in sub-paragraphs 214(4)(b) and 217(b)(iv) of the Act. I have addressed that point in a related context. In the present context, the disclosure statement did not make any statement about the expected mix of tenants or their priorities. It was consistent with owners letting their apartments to a range of persons, including persons who would occupy the apartment for a short stay or on holiday and would receive certain hotel-like services supplied by the entity appointed as Caretaker and Letting Agent. Such services might include room service, which in turn might involve the service of alcohol. The other disclosure statements, namely the Operator PDS and the Developer PDS, clearly contemplated the provision of hotel-like services.

[260] The present point arises because the provision of certain hotel-like services by Peppers and the marketing of *Peppers Broadbeach* leads to the tower being described by some as a hotel/resort. There is no direct evidence about the categories of people who would not wish to stay at such a resort. I am prepared to assume that there would be some individuals who would not wish to stay there because they do not wish to stay in a hotel/resort or do not wish to stay in premises that are the subject of a liquor licence. This point needs to be taken into account, along with the fact that the conduct of Peppers and the services it supplies (including room service and a mini-bar), are presumably attractive to many people, including those who do wish to stay in a hotel/resort and who would value the convenience of not having to go outside to purchase liquor. These might include individuals who are influenced by magazine articles and other marketing. For example, a magazine article tendered by the plaintiffs (Exhibit 105) effusively describes *Peppers Broadbeach* as Australia's best hotel, based upon feedback from guests who posted on the Trip Advisor website. The article refers to the services offered at reception and by porters. It refers to many aspects of the tower, to a day spa and to the hotel's position "without peer". These and other communications are apt to attract people who wish to stay in a hotel/resort.

[261] If the appointment of Peppers means that the plaintiffs are deprived of their ability to market their apartment to persons who do not wish to stay in a hotel/resort, this needs to be counterbalanced against their ability to market the apartment to persons who do wish to stay in a hotel/resort, and a luxury one at that.

[262] It should be recalled that the disclosure statement did not label the tower as a hotel/resort. The information sheet that formed part of it simply described it as the residential component of the development. Some would say that the residential component was always going to be in the nature of a resort or a hotel/resort for persons living there during short stays and on holidays. Its evolution into a tower in

which a substantial number of apartments are in a letting pool of apartments to be used by holiday makers and others wishing to stay at a hotel/resort is not a development that makes the disclosure statement inaccurate. If, however, the disclosure statement was inaccurate or has become inaccurate because of this development, then it is not a development which has been shown materially to prejudice the plaintiffs because they have been deprived of the ability to market the apartment to persons who do not wish to stay in a hotel/resort. The plaintiffs have not persuaded me that they have been prejudiced materially in the respects alleged.

Sub-paragraphs (i) and (l): Residential amenity and increased use

[263] Mr and Mrs Wicks plead:

> "(i) The Plaintiffs entered into the contract with the intention of retiring to Broadbeach to live in apartment 1803 as an apartment in a residential tower in *"The Oracle"* and have no desire, and will be prejudiced if compelled to, live for the duration of their retirement in an hotel/resort with the features attributes uses and consequences referred to in paragraphs 32-37."

They and the other plaintiffs plead:

> "(l) The conduct of the development as an hotel/resort will:
>
> (i) compromise owners' enjoyment of the common property of the Scheme by reason of the use of a substantial part of that property for a restaurant and/or bar conducted for *"Peppers Broadbeach"* with associated adverse effect on the amenity of the Scheme and individual apartments.
>
> (ii) accelerate the deterioration of the common property of the Scheme giving rise to a consequential increase in cost to the owners of apartments by the increase in levies to fund more frequent maintenance, repair and replacement than would otherwise be the case;
>
> (iii) increase the damage to and destruction of common property of the Scheme due to the increased number of persons (hotel/resort guests and hotel/resort staff) using the same (especially in light of sales of liquor) giving rise to consequential increase in cost to the owners of apartments by the increase in levies to fund repair and replacement of such common property;
>
> (iv) increase the cost of insurance of the development with consequential increases in levies to the owners of apartments;
>
> (v) have an adverse effect upon the residential amenity of both the common property and individual apartments."

[264] The plaintiffs do not press the points made in sub-paragraphs (j) and (k) in relation to material prejudice. It is convenient to deal with sub-paragraphs (i) and (l) together because they both involve the issue of residential amenity. Sub-paragraph (i) relates to alleged prejudice in being compelled to live during retirement in a hotel/resort with the features of *Peppers Broadbeach*. This allegation is pleaded only in the Wicks matters. I will address their personal circumstances later. Sub-paragraph 40(l) in the Wicks proceeding and the equivalent paragraphs in the pleadings in the Gough and Groves and Ryan proceedings raise the issue of residential amenity and it is convenient to deal with that issue, including the particular prejudice that is alleged in respect of the amenity of Mr and Mrs Wicks during their retirement. The issue of residential amenity is relevant to each of the plaintiffs both in respect of any period in which they might reside in the apartment and also in respect of the amenity of the apartment to an individual who might use their apartment as a permanent residence. At one stage Mr Gough and Ms Groves intended to use their apartment as a residence. Ms Ryan, on the other hand, contracted to purchase an apartment expecting to re-sell it. She was told by a real estate agent that *The Oracle* was to be an iconic residential project with permanent and long-term residents only, and was designed to attract "baby boomers" looking to downsize and move from homes into a luxuriously-appointed development. Accordingly, the residential amenity of the tower to such potential purchasers is relevant to Ms Ryan's circumstances. It will be necessary to consider the personal circumstances of each of the plaintiffs who assert an entitlement to cancel under the Act in determining the issue of material prejudice. Before doing so, it is necessary to identify the alleged inaccuracy in the disclosure statement and the extent to which the disclosure statement has become inaccurate.

[265] The *BCCM Act* is not concerned with material prejudice in some general sense but with material prejudice to the buyer if compelled to complete the contract "given the extent to which the disclosure statement was, or has become, inaccurate"[35], or from the fact that the buyer would be materially prejudiced if compelled to complete the contract "because of" an inaccuracy under s 217(b), in this case because information disclosed in the disclosure statement, as rectified by any further statement, is inaccurate.

[266] The relevant inaccuracy that is causally linked to the material prejudice that I am presently considering is not apparent on the pleadings. I may have already dealt with some alleged inaccuracies in dealing with earlier grounds of material prejudice. Without unnecessarily repeating matters, the apartment being offered in performance is an apartment in a residential tower in the development known as *The Oracle*. The plaintiffs currently under consideration (and others) may have expected the contracted apartment to be in a particular kind of residential tower, namely one predominantly occupied by permanent and long-term residents. This expectation was not based upon the contents of the disclosure statement. The final disclosure statement has not become inaccurate as that term is used in relevant provisions of the Act because it describes the apartment as being a lot in a residential tower.

[267] Sub-paragraph 39(a) of the Wicks pleading says that a disclosure statement "if given now would and must state that Lot 1803 would be an apartment in an hotel/resort." I am not persuaded that the requirements of the Act require a

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35 The Act, s 214(4)(b).

disclosure statement to give such a short-form description, or that the final disclosure statement has become inaccurate because it does not include such a description. As previously noted, although some would describe the tower as a hotel, that simple description is, at best, incomplete and possibly misleading. The tower has many features that a hotel does not possess and lacks features that many hotels possess. It is not occupied only by hotel guests and hotel staff. Although the current mix of occupants is not clear from the evidence, SSI submits, and the plaintiffs' submissions do not contest, that it has a mix of occupants with less than half having decided to appoint Peppers to manage their apartments.

[268] The BCCM Disclosure Statement and the "material accompanying" it did not make any statement about the expected mix of occupants. Apart from the information sheet which effectively described the tower as a residential tower, it did not give a general description of it. It did not state that the tower would be occupied predominantly by permanent and long-term residents. It did not state that the services to be provided by the letting agent, the features of the building and the facilities and services enjoyed by short-term tenants and holiday makers would lead to it being described in some particular way, or not being described as a hotel or resort, particularly by persons occupying apartments managed by the letting agent.

[269] The fact that the tower is described as a hotel or resort, and in the opinion of many has become a hotel or resort, is a matter of particular concern to someone like Mr Wicks. As an airline pilot, much of his life has been spent in hotels, and he says in his affidavit that the thought of retiring to a hotel/resort development is abhorrent. This evidence is relevant to the issue of material prejudice in the case of Mr and Mrs Wicks. It bears upon their personal circumstances and upon their residential amenity.

[270] In relation to issues of residential amenity that are specifically pleaded in sub-paragraph 40(l) of the Wicks pleading and in comparable paragraphs of the pleadings in the Gough and Groves and the Ryan proceedings, it is necessary to identify the relevant inaccuracy before turning to the extent to which any such inaccuracy would cause material prejudice if the plaintiffs were required to complete their contract. No specific allegation of inaccuracy in respect of residential amenity is made in paragraph 39 of the Wicks pleading. Instead, it is apparently subsumed in the general contentions that the lot was to be in a residential tower, whereas a disclosure statement if now given would have to state that it is an apartment in a hotel/resort branded *Peppers Broadbeach*. The starting point for an assessment of alleged inaccuracy bearing upon residential amenity is the content of the disclosure statement that was given in respect of the contract, and each further statement and any material accompanying it. This includes the Caretaking and Letting Agreement in respect of a tower which was to have more than 250 apartments. The annexures to the disclosure statement also included Facility Sharing Agreements which contemplated use of facilities in Tower One by occupants of Tower Two and owners of lots and employees in the retail component of the development. The Caretaking and Letting Agreement was consistent with the letting agent seeking to attract short-term tenants and holiday makers. It contemplated the conduct of events in occupation areas and the use of the caretaker's lot on the ground floor of Tower One for services commonly rendered in connection with letting lots in such a development and for any lawful activity. The contract itself contemplated that two levels in the Scheme Buildings might be used for "Commercial Purposes", being any lawful purpose that was non-residential.

[271] The occupation of the tower by short-term tenants and holiday makers and the provision of services to them by the letting agent was contemplated by the disclosure statement. It was more clearly indicated by the Operator PDS and the Developer PDS which the plaintiffs contend form part of the contract. Incidentally, very few of the plaintiffs read the disclosure statements in any detail. In any event, the disclosure statement given under the *BCCM Act* made no explicit statement about residential amenity. The plaintiffs plead no such statement. The disclosure statement did not indicate that the amenity of residents would not be affected by the movement of persons occupying the more than 250 apartments in the tower or the provision of services to them by the letting agent that was to be appointed to manage the tower.

[272] The relevant inaccuracy in the disclosure statement is ill-defined by the plaintiffs' pleadings. Instead, the essence of their cases on inaccuracy and material prejudice relate to the appointment of Peppers, its operation of the letting business, and the provisions of the Share Sale Agreement that facilitate the conduct of that business. These and other matters are alleged to have resulted in the tower becoming a hotel/resort that attracts more people than the plaintiffs had expected. Those expectations, however, are not based on the *BCCM Act* disclosure statement. They arise because of statements made outside of it, including statements made by sales representatives. These expectations were not deflated or adjusted by reading the *BCCM Act* disclosure statement, its annexures, or the other disclosure statements provided to the plaintiffs.

[273] Save in the respects that I have previously addressed, namely the name of the tower itself, I am not satisfied that the final disclosure statement is inaccurate or has become inaccurate on any of the bases pleaded and pressed by the plaintiffs.

[274] The plaintiffs' written submissions anticipate the contention that the contract and the disclosure statements suggested that there would be a great deal of foot traffic in the premises. They submit that Peppers is a hotel/resort providing services in addition to those of a letting agent under the terms of the Caretaking and Letting Agreement annexed to the disclosure statement, and that this will involve an increase in the number of people able to access Tower One. Particular reliance is placed upon the proposed restaurant and bar on the ground floor as being open to the public and attracting members of the public to the foyer area. This is said to increase the number of people present, increase the number of inebriated people present and decrease the security of those residents wanting security. More generally, the "short-stay" nature of Peppers business is said to cause a substantial increase in both the number and turnover of short-stay tenants/patrons, who will be distributed throughout the two towers.

[275] As to the restaurant and bar pleaded in paragraph 40(l)(i), the proposed restaurant and bar is limited to the area described as Lot 101. By reason of its ownership of Lot 101, and the terms of relevant documents, the on-site letting agent (SSA) is entitled to use Lot 101 for the provision of certain services to residents and guests and other lawful activity. The use of Lot 101 as a restaurant and bar is authorised by the permission granted by the Caretaking and Letting Agreement to use it for the provision of services associated with the letting business. The letting business is one that provides services to residents and guests. It services apartments that are to be occupied by persons expecting to occupy an apartment warranting a star rating of four-and-a-half to five stars. The provision of an in-house restaurant and bar is

necessary for Peppers to achieve its desired rating. The existence of a ground-floor restaurant and bar in such an apartment complex is common on the Gold Coast. In any event, the establishment of kitchen facilities would be necessary to operate room service. The plaintiffs do not allege that the proposed use of Lot 101 as a restaurant and bar would be unlawful.

[276] The *BCCM Act* disclosure statement did not state that Lot 101 would be used as a restaurant and bar. However, this does not mean that the statement has become inaccurate. The use of Lot 101 as a restaurant and bar appears to be authorised by the Caretaking and Letting Agreement annexed to the disclosure statement. The fact that a different letting agent might have put Lot 101 to a different use, for example a retail shop directed at tourists or a tour office, does not mean that the appointed letting agent is not authorised to use it as a restaurant and bar. Peppers intends to use the restaurant and bar to provide services to residents and guests. The proposed restaurant and bar is targeted at residents and guests. There is no evidence that it is targeted at members of the general public. The area of the proposed restaurant and bar is fairly small. The proposal to use Lot 101 as a restaurant and bar does not make the disclosure statement inaccurate.

[277] Its establishment may increase foot traffic in the foyer area. The possibility exists that persons using the restaurant and bar will become inebriated. There is no evidence that Peppers will knowingly permit this to occur or will not address the problem if and when it occurs. There is no evidence of a present problem in relation to inebriated residents and guests returning to the premises from bars and restaurants in its vicinity. However, the possibility of this occurring must be present in a tower with more than 250 apartments situated in a tourist area with restaurants and bars. It has not been shown that the proposed in-house restaurant and bar will have any significant adverse effect on residential amenity. The use of Lot 101 for such a purpose is authorised. No inaccuracy in the disclosure statement in this regard has been proven.

[278] The broader issue of residential amenity relates to the increase in the number of people present on the premises and the amount of foot traffic as a result of the focus by Peppers on short-stay tenants, compared to the situation that might have obtained if a letting agent did not have that focus. It is indisputable that a focus on short-term tenants will increase the turnover of tenants. Holiday makers coming and going from their apartments may use lifts several times a day, more than permanent and long-term residents who travel to and from their place of employment and depart the building less frequently. An increase in the number and turnover of short-stay tenants has the potential to affect the residential amenity of the relevant plaintiffs if and when they take up permanent residence in the building, and upon the residential amenity of potential purchasers who might seek an apartment in which to reside permanently or frequently. The extent of any reduction in residential amenity is relevant to the issue of material prejudice. The relevant complaint is the focus of the letting business operated by Peppers. Yet the plaintiffs do not point to any statement in the *BCCM Act* disclosure statement to the effect that a letting agent would not have such a focus. Accordingly, any reduction in residential amenity is not because of any inaccuracy in the information disclosed in the disclosure statement.

[279] The specific matters pleaded in sub-paragraph 40(l)(ii), (iii) and (iv) of the Wicks pleading relate to the consequences of increased use of the premises on common

property and increases in the cost of insurance, which the plaintiffs submit are likely to be borne by the body corporate and passed on to members of the body corporate. There is no evidence that the conduct of the letting business as a "hotel/resort" has had these consequences compared to the position that would have applied had it not focused upon short-stay tenants and not attracted the description "hotel/resort". There is no evidence that insurance companies have reclassified the nature of the premises or increased insurance premiums because the premises have become a "hotel/resort". The plaintiff submits that these matters may be inferred. I am prepared to infer that the conduct of the letting business as a "hotel/resort" that focuses upon short-stay tenants is likely to involve greater use of common property and accelerate the deterioration of common property compared to usage in circumstances in which the letting pool had a greater number of long-term tenants. I am not prepared to infer that insurance premiums have increased. If they have, the extent of any increase is unproven.

[280] Moreover, the extent of any accelerated deterioration in common property, any increase in damage to common property and any increase in the cost of insurance must be by reference to the extent to which these are a result of the development being conducted differently to the manner described in the disclosure statement. The disclosure statement did not preclude the letting of apartments on a short-stay basis. The cost to the body corporate and members of the body corporate by any increase in levies as a result of accelerated deterioration, increased damage and increased insurance premiums is unproven. Whatever its extent, it would need to be off-set by possible improvements in rental income because apartments are able to be let to persons who wish to stay at a hotel/resort that provides facilities including the sale of liquor in mini-bars by way of room service and in the yet-to-be established restaurant/bar. Regard would also need to be had to the possible increase in the capital value of the apartment because of its potential to be let to such short-stay tenants. The provision of certain hotel-style services to short-stay tenants is likely to attract more short-stay tenants and increase the amount for which an apartment may be rented on that basis. It may improve occupancy rates compared to the occupancy rates that would prevail if these services were not available. Any increase in occupancy rates may be a mixed blessing to some owners. It may increase the potential rental income of the apartment or maintain and improve its capital value compared to an apartment that did not offer these services and that had a lower occupancy rate. Those potential improvements, with their positive financial benefits, need to be balanced against the cost of providing such services, including increased levies. I am not persuaded that any financial consequences by way of increased levies by reason of the matters pleaded in paragraph 40(l)(ii), (iii) and (iv) exceed the financial benefits to an owner of Peppers conducting the development as a "hotel/resort".

Summary in relation to alleged inaccuracy of the final disclosure statement

[281] I am not satisfied that the final disclosure statement has become inaccurate because it describes the lot as being in a residential tower. The tower remains a residential tower. I am not persuaded that a disclosure statement if given now would have to describe the apartment as a "hotel/resort". It might simply refer to it as a residential tower and not attempt to describe it as a hotel, apartment/hotel, self-contained apartments with access to hotel-like services, a resort or in some other way.

[282] The final disclosure statement has not become inaccurate because it describes the lot as being a lot in a residential tower in *The Oracle*. It has, however, become inaccurate insofar as it said that the residential tower itself was to be known as *The Oracle*, when the residential tower has become branded *Peppers Broadbeach*. The name of the tower itself is not pleaded as an inaccuracy and the change in the name of the tower itself is not alleged to have caused the plaintiffs material prejudice. The relevant plaintiffs' pleading in relation to inaccuracy and material prejudice does not relate to the name of the tower, as such. The grounds that were pressed in final submissions relate instead to the conduct of the development as a hotel/resort branded *Peppers Broadbeach* with its focus on short-stays.

[283] The conduct of the letting business so as to focus on short-stay tenants is likely to diminish the residential amenity of persons who reside in apartments that they own or who reside there as long-term residents, compared to a letting business that did not have that focus. However, any such adverse effect upon residential amenity and resultant prejudice to the plaintiffs if compelled to complete a contract would not be because of an inaccuracy in the information disclosed in the BCCM Disclosure Statement, as rectified by any further statement made under the *BCCM Act*. It would be because a particular letting agent chose to focus upon short-stay letting, as it was entitled to do under the Caretaking and Letting Agreement annexed to the BCCM Disclosure Statement.

[284] Accordingly I am not satisfied that the final disclosure statement has become inaccurate in any of the pleaded respects, or that the respect in which it has become inaccurate (the name of the tower itself) is an inaccuracy which would result in a buyer being materially prejudiced if compelled to complete the contract because of that inaccuracy. In terms of s 214(4)(b), the plaintiffs have not proven that they would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate. In terms of s 217(b)(iv) the plaintiffs have not proven that because of an inaccuracy in the information disclosed in the disclosure statement, as rectified by any further disclosure statement, they would be materially prejudiced if compelled to complete the contract.

[285] In short, the plaintiffs have not established their pleaded case of inaccuracy, and the inaccuracy that I have found is not shown to have been causative of material prejudice.

Material prejudice – the particular circumstances of the relevant plaintiffs

[286] I shall address separately the position of each of the plaintiffs who rely upon an entitlement to cancel under the *BCCM Act*.

Mr and Mrs Wicks

[287] Mr Wicks is an airline pilot. He and his wife have resided in Hong Kong for 25 years, have visited the Gold Coast for 20 years and intended to retire there. On 27 January 2006 they executed a contract to purchase "off the plan" a lot on the eighteenth floor of Oracle Tower One. Mr and Mrs Wicks planned to live in this apartment in their retirement years. After SSI obtained approval to extend the period of time in which it was required to provide the plaintiffs with a registrable instrument of transfer, they executed a second contract to replace the original. This was on 25 July 2006.

[288] They received a series of disclosure documents concerning their purchase. On 23 January 2006, prior to signing their first contract, they received an original disclosure statement pursuant to s 213 of the *BCCM Act*, a Developer PDS and an Operator PDS. On 24 July 2006, they received another disclosure statement (consisting of a Developer PDS and a *BCCM Act* disclosure statement) in terms materially the same as the original one.

[289] On 27 September 2006 the defendant provided a further disclosure statement pursuant to s 214 of the *BCCM Act*. A second further disclosure statement followed on 16 January 2007, and a third on 22 December 2008. This third further disclosure statement contained an amended Caretaking and Letting Agreement, as did a fourth further disclosure statement on 28 May 2010.

[290] From February 2010 Mr and Mrs Wicks received information about the holiday letting program to be conducted.

[291] On 6 August 2010, a letter was sent to Mr and Mrs Wicks by Noble House Design. It referred to the appointment of Peppers as residential manager for the Oracle, and to the branding of the Oracle as *Peppers Broadbeach*. This was the first indication to them of Peppers' involvement with the Oracle. On 12 August 2010, *Peppers Broadbeach* sent to Mr and Mrs Wicks a bundle of documents known as an Owners Information Pack. Among these documents was a letter announcing that the Oracle had recently joined the Peppers portfolio of retreats, resorts and hotels, a brochure promoting *Peppers Broadbeach*, a furniture package brochure, and various forms.

[292] The initial settlement date for the contract was 19 October 2010. On 7 October 2010, newly-appointed solicitors sought an extension of the settlement date to 19 November 2010 on behalf of Mr and Mrs Wicks. The reason given for the extension was that the Wickses resided overseas and needed more time to make arrangements for settlement. Settlement was extended by agreement to 9 November 2010 on certain terms.

[293] On 18 October 2010, Mr Wicks emailed Mr Stone of SSI. He stated that their retirement plans had changed, that they were to remain in Hong Kong and that they would no longer be making use of the apartment. He stated that there seemed to be two choices—complete the purchase and immediately put the apartment up for sale or seek to come to a commercial arrangement with SSI to terminate the contract. He stated that the apartment was exceptionally well positioned in the development but that the market was depressed. Mr Wicks sought to initiate a discussion about SSI re-marketing the apartment for sale with compensation being paid by Mr and Mrs Wicks. There was no reference to any concern about Peppers having been appointed.

[294] Mr and Mrs Wicks changed solicitors again and appointed their present solicitors. On 1 November 2010 their new solicitors wrote purporting to terminate the contract. This letter focused on what was said to be the conversion of the development to a Peppers hotel, the effect that this would have on their letting options and a concern about an increase in letting fees. The letter of termination was essentially in the same terms as that sent on behalf of Mr Gough and Ms Groves on 13 October and on behalf of Ms Ryan on 4 November 2010.

[295] Mr and Mrs Wicks's pleading sets out six grounds upon which the final disclosure statement is alleged to have become inaccurate, and also thirteen grounds on which

they would be materially prejudiced if compelled to complete their contract. I have dealt with the matters that were pressed in this regard in final submissions. Mr and Mrs Wicks, like the other plaintiffs who gave evidence, relied upon affidavits which were read and stood as their evidence-in-chief.

[296] Because of his occupation as an airline pilot, Mr Wicks has spent, and continues to spend, a lot of time staying in hotels. His affidavit says that he would never want to retire to a building that is a hotel or is run like a hotel. The essence of his complaint is that his retirement plans have been ruined by a switch from a sophisticated, upmarket residential development called *The Oracle* to a hotel called *Peppers Broadbeach*. He says he is now being an offered an apartment in one of a chain of hotels and resorts that cater to the short-term holiday market, and in which hotel-like services such as pay-for-use car parking, convention facilities, and the service of food and alcohol are offered. I note that, contrary to his affidavit, residential visitors do not pay for car parking, and there are no convention facilities. Mrs Wicks reiterates another of her husband's concerns, namely that the security and privacy of their complex has been compromised. She expresses concern that they have lost the secure, quiet retirement which they were expecting.

[297] When and precisely why their retirement plans changed is not clear from the evidence. Mr Wicks accepted that the impression that he wished to give in his affidavit was that his retirement plans were ruined because of the appointment of Peppers. However, his email of 18 October 2010 (which was not disclosed by him) indicated that their retirement plans had changed and made no reference to the fact that this was a result of Peppers having been appointed. Mr Wicks's oral evidence was that his retirement plans are entirely flexible and that three months planning was all that he needs to retire. The first complaint made about Peppers was when Mr and Mrs Wicks engaged their present solicitor. This was long after they received documents announcing its appointment.

[298] Mr Wicks appreciated after receiving disclosure statements in early 2006 that an owner could appoint a letting agent to arrange short-term holiday and medium-term lettings, and that other prospective purchasers could do the same. He did not pay much attention to these matters because, at the time, he and his wife intended to retire to rather than let their apartment. Mr Wicks's affidavit says that on and after 12 August 2010, after receiving the Owner's Information Pack from Peppers (and subsequently from other information received) he became aware of the appointment of Peppers and of the proposal for the development to become "a short-term holiday resort/hotel", and that his retirement plans were ruined. His affidavit asserts that he contracted to buy an apartment in a complex that was to provide "a secure and private environment for the benefit principally of the owner-occupiers with exclusive use of the upmarket private facilities." This last statement, of course, relates not to the contract's actual terms but to Mr Wicks's understanding of what he contracted to buy and the grounds of material prejudice asserted in his affidavit.

[299] Under cross-examination, Mr Wicks was unable to explain the absence of complaint about the appointment of Peppers shortly after he learned of its appointment in August 2010. He accepted in his oral evidence that, when he entered into the contract in 2006, what was contemplated was a letting arrangement which would permit short-term occupation of apartments that were put into the letting pool. He thought, however, that the opportunity for short-term letting would not be taken up by many owners. He "imagined" that the sort of tenants would be the sort of people

who come typically from Victoria or New Zealand and spend a couple of weeks or longer at Broadbeach. This was based upon his own experience of the type of people who holiday at Broadbeach. On this basis he expected short-term letting to be "relatively minor on the scale of things." He also thought that owner-occupiers would find it very hard to justify letting for less than three or four days because cleaning and other costs would eat into the net return. As a result of these considerations, he assumed that short-term letting would be relatively minor.

[300] Mrs Wicks gave oral evidence that a letter of 12 August 2010 announcing the appointment of Peppers was a "warning bell". However no complaint was made about it at the time. Her evidence was that she and her husband were "fairly insulated" from the effects of the global financial crisis, although the airline industry suffered a severe downturn and he took some unpaid leave which allowed them to travel. She was aware that the apartment would be worth less as a result of the impact of the global financial crisis, but said that was "of no material importance to us." I find it hard to accept that this is the case. In any event, the relevant issue is whether the matters relied upon by Mr and Mrs Wicks as constituting material prejudice should be accepted.

[301] Under cross-examination, Mrs Wicks clarified that her objection was not to short-term letting (which she defined as anything less than a week) as such. She explained that it was not to do with the length of the stay, but the fact that "it was a hotel and it was offering hotel services." Even then, it was not the fact that hotel-like services such a concierge, valet parking and room service were a concern. Rather, she explained that it "increases the business and the number of staff and the dynamics of the building. It's a completely different animal to a residential complex." The concerns expressed by Mrs Wicks in her oral evidence did not precisely coincide with those articulated in her affidavit and she said that she was not absolutely certain what she meant in the affidavit where it states: "There will be increased foot traffic and noise with the types of persons who will be attracted to holiday at The Oracle." She clarified that her concern was with the numbers that would be attracted, not the type of people, and her concern with foot traffic was with traffic on the eighteenth floor where there are six apartments. The concern she expressed over foot traffic was not in relation to people checking in and out, or people coming in and out of the foyer. Her concern was with traffic in the rooms adjacent to where the apartment was. In re-examination, Mrs Wicks was led back to her affidavit and prompted with questions about the restaurant and bar. She said in this regard that she had a concern for lack of security, lack of privacy and the ability for people to come off the street and use those services when they were not residents and not staying at the premises.

[302] I place limited reliance upon the contents of the affidavits filed by Mr and Mrs Wicks. I place greater reliance upon the evidence given by them under cross-examination. They appreciated from an early stage that the building would include short-term letting. They did not give the matter much thought because of their own intentions to retire to the apartment, rather than let it, and because, based on their past experience, they expected the extent of short-term letting to be minor. I am not persuaded that the announcement of the appointment of Peppers was a matter of great concern because they expected short-term letting to be relatively minor. If the announcement of Peppers sounded any "warning bells", they were not of a kind that prompted any inquiry or complaint.

[303] Ultimately, the point to emerge from the evidence given by Mr and Mrs Wicks, as tested under cross-examination, is a concern that the number of short-term tenants will be more than they expected, and Mrs Wicks's particular concern was with the movement of people on the eighteenth floor, rather than through other areas.

[304] I accept that Mr Wicks genuinely does not want to live permanently in a hotel/resort, and did not expect to do so when he and his wife contracted to purchase Lot 1803 for $1.13million. If the extent of short-term letting undertaken by Peppers in respect of the apartments that are in its pool makes the residential tower a "hotel/resort", then short-term letting to that extent was not something which the relevant disclosure statement, and other disclosure statements, either predicted or excluded. Mr Wicks may not have contemplated short-term letting to such an extent, based upon his own experience. Given his personal circumstances, including his resistance to the idea of spending his retirement in a hotel-like environment, I consider that Mr Wicks will be prejudiced in a significant way by living in a tower that is described by many as a hotel and which has a greater number of short-term guests than he expected.

[305] However, any prejudice to the expectations of Mr and Mrs Wicks and their residential amenity is not because of an inaccuracy in the disclosure statement. It is because, as matters have transpired, the extent of short-term letting is greater than they expected.

[306] Their residential amenity and their retirement plans have been affected by a greater number of short-term tenants and the provision by Peppers of services to those tenants, but that prejudice is not causally-related to any inaccuracy in the BCCM Disclosure Statement.

Mr Gough and Ms Groves

[307] Mr Gough is a jeweller on the Gold Coast. He and his partner, Ms Groves, contracted to purchase two lots on level 29 of Tower One. Mr Gough negotiated the purchase directly with Mr Nikiforides, the developer. The apartments he was shown were too small for his residential requirements, and he sought to amalgamate three units. Eventually it was agreed that two units would be amalgamated into one, with a connection via the laundry. Mr Gough and Ms Groves intended to live in the larger lot, and to use the connecting lot either for their visitors or for renting to medium/long term tenants. The first lot that they contracted to purchase had a purchase price of $2.687million. The second lot had a purchase price of $863,000.

[308] On 23 October 2006, Mr Gough and Ms Groves executed contracts to purchase the two lots. Prior to signing those contracts they received disclosure statements, including an Operator PDS and a Developer PDS. In January 2007, December 2008 and May 2010, Mr Gough and Ms Groves received further disclosure statements in relation to each lot.

[309] It seems that Mr Gough and Ms Groves received communications about the on-site letting program that was initially proposed. Their pleading indicates that Mr Gough and Ms Groves first became aware of Peppers' involvement in the Oracle around July 2010 when they were shown an email sent to another purchaser. That email announced that *The Oracle* would be branded *Peppers Broadbeach*, that it would be a flagship Peppers hotel, that Peppers had entered an exclusive management

agreement in relation to *The Oracle* and other matters. They received an Owners Information Pack dated 12 August 2010.

[310] The settlement date for Mr Gough's and Ms Groves's lots was 19 October 2010. On 13 October their solicitors wrote to SSI's solicitors to cancel both contracts.

[311] Their pleading raises essentially the same grounds of inaccuracy and material prejudice that were relied upon in the Wicks proceeding, and which I have previously addressed. In their affidavits, Mr Gough and Ms Groves particularly complain of the loss of the exclusive, "high-end" character of the Oracle development. Their affidavits say that they looked forward to mixing and forming relationships with other wealthy individuals. The Peppers brand, they say, devalues their investment and destroys the Oracle's unique, iconic status, and will result in their neighbours comprising substantial numbers of short-term tourists. Because of their jewellery business, they also have a particular concern for privacy and security, values which, they say, are compromised by the presence of, and orientation towards, tourist traffic. Under cross-examination, Mr Gough in particular did not articulate all of these concerns, and different concerns were expressed by each of them in their oral evidence.

[312] Interestingly, in cross-examination Ms Groves gave evidence of having been told before entering the contract that there would be 60 per cent owner-occupiers in the building and that the remaining 40 per cent would be "long-term rental". She understood this to mean letting of between one and six months. Neither she nor Mr Gough read the disclosure statements. Mr Gough did not give evidence of having been told that there would be 60 per cent owner-occupiers and 40 per cent long-term tenants. However, I found both Ms Groves and Mr Gough to be honest witnesses and I accept that Ms Groves has a genuine recollection of being told there would be 60 per cent owner-occupiers and of the remainder being what she understood to be long-term rentals. I also accept that she believed what she was told. As she explained:

> "I have to trust what people tell me when I'm buying something, the same way somebody has to trust me when they [are] in my business."

[313] I accept that because she did not read the disclosure statements, trusted in what she was told and did not think about short-term letting, she thought that the building would be an "upmarket, mostly residential apartment building", occupied to the extent of 60 per cent by owner-occupiers. She did not expect the provision of hotel-like services such as room service to short-stay guests. Her belief that the building was to consist mainly of owner-occupiers and tenants staying a month or more was a motivating factor in purchasing the apartment because she was worried about how busy it could be.

[314] Mr Gough read only the part of the contracts relating to the price. He did not read the disclosure documents and gave them to his lawyers. He did not imagine that the building would only be occupied by owners and long-term tenants. He expected people to be there on short-term stays for a week or more. He understood that the letting agent business would be conducted so that it attracted both short- and medium-term stays. He expected certain hotel-like services such as reception staff to meet guests. He did not anticipate that there would be room service. Mr Gough

was taken through a variety of services and his evidence was that he did not think that these would be available to short-term guests. He accepted that the concern expressed in his affidavit was that he did not want to live in an apartment building "that services the short term tourist market offering hotel type services". Under cross-examination, he clarified that his concern was not so much about the hotel-type services about which he was questioned, such as valet parking, room service, the capacity to have alcohol served at the pool and tours arranged, it was "more the amount of people that a hotel would attract on a short-term basis". His concern was with people who came for a couple of days or a day.

[315] Mr Gough and Ms Groves listed their apartments for sale in August 2009. This was after the global financial crisis. Their original plan had been to sell their residential home and after the global financial crisis that seemed no longer to be in their financial interests. As a result they listed the apartments for sale. The listing occurred well before the announcement of the appointment of Peppers.

[316] Mr Gough and Ms Groves articulated different concerns in their oral evidence, and those concerns do not coincide with the many matters mentioned in their affidavit evidence. Ms Groves's principal concern is that the building is not occupied by owner-occupiers and long-term tenants as she understood it would as a result of oral representations made to her, and she is worried about how busy it may be as a result of the presence of short-term tenants. Mr Gough's principal concern, as articulated in his oral evidence, is the number of people that would be attracted on a short-term basis. Their respective concerns are not about the name of the tower and its branding as *Peppers Broadbeach*. Their concern is not even with the fact that Peppers rather than some other operator has been appointed as the caretaker and letting agent. Rather, their concerns are: a) that Peppers' operation will attract short-term letting; and b) the amount of people that will be attracted to the building as part of the short-term tourist market.

[317] Like the other plaintiffs in these proceedings, Mr Gough and Ms Groves did not complain about the appointment of Peppers when its appointment was announced.

[318] I take account of the fact that Mr Gough and Ms Groves changed their plan to reside in the apartments as a result of the global financial crisis and a reassessment of their plans. I do not accept, however, that this means that their decision to cancel was based only upon financial considerations. I accept their evidence that they have a concern about the number of short-term guests in the building and about how busy it may be. They may have had these concerns at an earlier stage had they read the disclosure statements and, in the case of Ms Groves, not relied upon what she was told or at least what she understood she was told about 40 per cent of the apartments being occupied by long-term tenants.

[319] Again, the entitlement to terminate under s 214 or s 217 of the *BCCM Act* does not arise simply because a buyer's expectations have been disappointed and he or she receives at settlement something substantially different from what was expected. The relevant point of reference is the BCCM Disclosure Statement, not expectations derived from extraneous sources. The Act requires material prejudice to be as a result of an inaccuracy. The inaccuracy must be the cause of the material prejudice. I am not satisfied that any prejudice to Mr Gough and Ms Groves as a result of being compelled to complete the contract is because of an accuracy in the BCCM Disclosure Statement.

Ms Ryan

[320] Ms Ryan works as a teacher's aide. She thought that *The Oracle* stood apart from other developments on the Gold Coast and was well-situated to cater to a growing market of downsizing and retiring baby boomers. She never planned to live in, or to take possession of, her apartment. Rather, her intention was to on-sell it to another buyer prior to settlement. She contracted to buy a two-bedroom apartment in Oracle Tower One on 10 January 2006 for $940,000. That contract was replaced by a new contract on 18 July 2006.

[321] The initial contract was entered into after she spoke to a real estate agent who told her that *The Oracle* was to be "an iconic residential project with permanent and long-term residents only". After investigating in late 2005 other projects planned for Broadbeach, and finding nothing which compared to *The Oracle*, she entered the contract. Her affidavit states:

> "I was satisfied that The Oracle would meet the requirements of a different and separate market from existing and planned developments in Broadbeach such as the Meriton, Sierra Grande, the Soffitel [sic] and Jupiters Casino. The Oracle was to be an iconic, luxury, residential development and had a unique position on the beach-side offering high quality finishes for discerning long-term residents and quality inclusions and facilities such as a Zen garden, private wine locker, gym, movie theatre and a teppanyaki bbq for use by owner/occupiers. I believed it would define Broadbeach long term as predominantly a city-like residential living environment with a mix of residential, hotels and commercial buildings."

[322] Ms Ryan received a disclosure statement in January 2006, along with the Operator PDS and Developer PDS. She received another disclosure statement on 14 July 2006 before signing the second contract. She received further disclosure statements in September 2006, January 2007, December 2008 and May 2010. Ms Ryan gave oral evidence of probably "scanning through" the disclosure statements that she received.

[323] The only means by which Ms Ryan would be able to perform the contract was by finding another purchaser and arranging contemporaneous settlements. She had no independent means of settling the contract.

[324] In early 2010, and before any announcement of Peppers, Ms Ryan listed the property at a price of $1.28 million. This price was selected because it would enable her to cover the purchase price, stamp duty and agent's commission. However, the price of $1.28 million was unrealistic in the light of the global financial crisis and its impact on property prices, even though Ms Ryan had the hope that such an iconic building would not be affected as other parts of the market had been.

[325] In July 2010 she was sent an email announcing that Peppers would manage *The Oracle*, which would henceforth be a flagship Peppers hotel branded *Peppers Broadbeach*. In August or September 2010 she received the Owners Information Pack including a letter and brochure promoting Peppers and *Peppers Broadbeach*, a

furniture package brochure and various forms. In October 2010 she was sent the Peppers Investor Brochure promoting *Peppers Broadbeach*.

[326] In her affidavit, Ms Ryan says that upon receiving the Owner's Information Pack from SSI on around 12 August 2010 she became aware that the circumstances with respect to her purchase had substantially changed from what she understood to be the case as a result of what was represented to her. Her affidavit says that she was "shocked and disappointed" to hear that Peppers/Mantra had been appointed as letting agents and that the building would be a Peppers flagship hotel. She did not complain to SSI about this. Instead, on 22 September 2010 she wrote to Mr Con Nikiforides of Niecon and explained her predicament. She explained that she did not have the funds to settle and that the matter had cost her $7,500 in bank guarantee fees. She explained that she had a mortgage of around $100,000 on her $300,000 townhouse, was in her mid-50s and earned about $550 per week as a teacher's aide. She asked to be let out of the contract and explained the difficulties that she had in meeting the required deposit of $94,000. She explained that she had brought up her children without maintenance from her former husband and saw the investment in *The Oracle* as a way of finally getting ahead by using the equity in her home as the deposit.

[327] Her personal circumstances were apt to evoke sympathy. Ms Ryan's letter mentioned the severe health problems of her aged parents and the circumstances of her daughter who had recently separated from her husband and was left with the care of two small children and a $50,000 business debt. They were coming to live with Ms Ryan. Ms Ryan offered to work for Niecon in order to make up the deposit amount. A notation on the file copy of a letter of 22 September 2010 indicates that it received the standard Niecon response. Ms Ryan explained in her oral evidence that she did not complain in this letter or in others that she wrote to Mr Nikiforides in October 2010 that she was upset by the appointment of Peppers. She said that she did not know her legal rights and that she did not want to put herself in a bad light with Niecon by laying any blame on it. She did not complain about the building being turned into a hotel because she did not want to make it sound as if she hated the building, and she was offering to work for Niecon. She hoped to be let out of the contract. I accept her evidence as to her reasons for not complaining about the appointment of Peppers.

[328] Ms Ryan's settlement date was 27 October 2010. This was extended by agreement to 9 November 2010. On 4 November, however, her solicitors wrote to SSI's solicitors to cancel the contract.

[329] Ms Ryan pleads the same six grounds of inaccuracy as the other plaintiffs in these actions. She also pleads 13 grounds on which she would be materially prejudiced if required to complete the contract. Her affidavit makes the claim that the value of her apartment has been compromised by the Peppers re-branding. She says that her apartment's value would be higher if it was part of an iconic, luxury, residential development as opposed to being part of a hotel. The appointment of Peppers is said to have negatively impacted on the prestige of her lot, which it will no longer attract the sort of wealthy baby-boomers to whom she hoped to on-sell. Instead, her prospective market is now said to be limited to investors interested in night-rate letting, which is a market already met by other Broadbeach developments.

[330] A separate complaint is made in relation to letting fees, but this complaint is without merit for the reasons given in SSI's submissions at paragraph 340, and which was explored in her cross-examination.

[331] In her oral evidence, Ms Ryan reiterated that she was led to believe that *The Oracle* was to be a prestigious address and that the complex itself was unique. She was persuaded that the main market for it was "retiring baby-boomers" and that this was a large market. She was taken in cross-examination, as other plaintiffs were, to the contractual documents and disclosure statements. Her evidence was that references in the Operator PDS to short-term holiday letting would have come as a surprise to her had she read them. This is because it was not what was promoted to her. However, she did not read that document or the other documents. She recalled the documents but could not recall reading them.

[332] In her oral evidence, she identified her concern as short-term letting, and the fact that the letting agent is Peppers, with accommodation being offered under its name. Her complaint would have been the same had the same services been offered by an agent under some innocuous unknown name. She identified her problem with the Peppers branding as being that it "devalues the development because it's not residential and you don't get the same capital gain and… the banks won't lend as much money on [it]." She stated that "it's just not The Oracle". Her concern with the branding of Peppers was not the name as such, but that the name is linked to a chain of hotels and the building was not "long-term residential in the mainstream". Instead of providing a lifestyle for long-term residents, the appointment of Peppers placed a focus on short stays. As Ms Ryan explained: "You don't go to Peppers to retire or to live" and so "that dynamic has changed."

[333] As a result of what she was told prior to entering into the contract, Ms Ryan did not expect short-stay guests. Her definition of a short stay was not precise but it included people who booked at night-rates. She did not necessarily expect people to stay there for many months but did not expect it to be a place where people could go and stay overnight. She did not expect the business to attract weekend guests. In various ways, Ms Ryan explained that she was disappointed with the prospect of *The Oracle* having short-term guests. It was not "the iconic vision that everybody had". She expected the apartment, with its facilities that included a full kitchen, to be a home in which people lived. She accepted, however, that the contract documents that she signed placed no restriction on her capacity to short-term let her apartment and she did not think that anyone else had promised such a thing. She simply assumed that purchasers would live there.

[334] I found Ms Ryan's oral evidence more informative of the substance of her complaint than her affidavit. However, one sub-paragraph of her affidavit captures the prejudice she claims to have suffered as a result of the development being rebranded Peppers:

> "The Oracle was to be an iconic, unique and luxury residential complex with the intention of attracting well-off baby-boomers who wished to downsize and live out their lives in luxury and exclusive living. The Oracle with the rebranding of Peppers will no longer attract such persons or any person looking for a residential apartment to live in or to let as a residential apartment ...".

The essence of her complaint is that she believed that the development was to be for owner-occupiers and permanent residents only. Like other plaintiffs, she complains that the letting agent conducts a business which will attract short-stay holiday makers.

[335] In her oral evidence she explained that her complaint was not just that Peppers was offering certain hotel-like services, but that it was offering them "under a new name", namely *Peppers Broadbeach*. As she said in her oral evidence: "It's just not The Oracle." Part of her complaint was that the branding of the development as *Peppers Broadbeach* had a number of consequences, principally the attraction of short-term tenants, and that the Peppers branding and descriptions of it as a hotel had severely compromised her ability to sell the apartment to the market that she had identified.

[336] Ms Ryan, probably more than any of the other plaintiffs, articulated the relevant prejudice occasioned to her because of a change in the name itself. The relevant prejudice arises because the residential tower is not known as *The Oracle*, but is branded as *Peppers Broadbeach*. This prejudice relates to what Ms Ryan understood the name *The Oracle* to mean as a result of what was said to her by an identified real estate agent and by unnamed Niecon sales staff before she entered the contract, namely that *The Oracle* would be an iconic residential project with permanent and long-term residents only. She believed that there was a market for on-selling an apartment in such a tower. The relevant prejudice is not to her own personal residential amenity; rather, it is that a tower branded *Peppers Broadbeach*, and not known as *The Oracle*, is not what she expected to purchase.

[337] Her case, as pleaded and as put in submissions, did not focus upon an alleged inaccuracy in the name of the tower itself. Instead, it was pleaded on the wider basis that I have earlier addressed. The relevant pleaded inaccuracy is that the disclosure statement describes her lot as being a lot in a residential tower in *The Oracle*, whereas a disclosure statement if given now would state that the lot would be a lot in a hotel/resort branded *Peppers Broadbeach*. An inaccuracy in respect of the name of the tower itself was not specifically pleaded. Ms Ryan's evidence in relation to prejudice includes the fact that the lot is not in a tower known as *The Oracle*, and that the residential towers have been branded *Peppers Broadbeach*. Part of her case on prejudice relates to the name itself, and what that name meant to Ms Ryan.

[338] I have earlier found that the disclosure statement stated that the residential component of the development was to be known as *The Oracle*. I have found that it has been branded *Peppers Broadbeach*. Accordingly, the disclosure statement would be inaccurate in this regard. It had become inaccurate in this regard prior to the date for settlement of Ms Ryan's contract and at the time she purported to exercise a statutory entitlement to cancel it. The statutory entitlement to cancel under s 214(4)(b) arises if the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate. Section 217(c) has a similar causal element. An inaccuracy in the information disclosed in the disclosure statement, as rectified by any further statement, is not itself sufficient. The buyer must show that "because" of the inaccuracy in the information disclosed in the disclosure statement, he or she would be materially prejudiced if compelled to complete the contract. I have earlier addressed what is meant by "materially prejudiced". The test is objective having

regard to the particular buyer's circumstances: would someone in those circumstances be materially prejudiced? As with the other plaintiffs relying upon the statutory right to cancel, it is necessary to identify the relevant "material prejudice", and there must be a causal relationship between the inaccuracy and the prejudice.

[339] In Ms Ryan's case, the substance of her complaint is not the name of the residential tower as such (that is, that the tower is no longer known as *The Oracle*). The name aspect is part of a broader case on prejudice relating to the conduct of the development, namely that the arrangements that have been put in place attract short stays with the result that the tower has become a hotel/resort. The relevant prejudice is pleaded in paragraph 41(a) of her pleading, namely that the apartment purportedly offered in performance is not an apartment in a residential tower in *The Oracle* but, rather, an apartment in a hotel/resort branded *Peppers Broadbeach* with the features, attributes, uses and consequences referred to in paragraphs 33 to 38 of that pleading.

[340] As with other plaintiffs, the claimed prejudice relates to the difference between what was expected as a result of statements not found in the disclosure statement and what is offered by way of contractual performance. However, the *BCCM Act* requires a causal relationship between the inaccuracy and the prejudice, and, as was said in *Mirvac Queensland Pty Ltd v Wilson*,[36] there must be "proportionality between the inaccuracy and the prejudice".

[341] The relevant inaccuracy in the disclosure statement relates to the name by which the tower was to be known. This is the inaccuracy that has been established by Ms Ryan and the other plaintiffs. The disclosure statement has not been shown to have been inaccurate in the other respects pleaded by them. Having regard to the need for a causal relationship between the inaccuracy and the prejudice claimed by Ms Ryan, the disclosure statement did not say the things about the tower that she expected as a result of what was said to her. It did not say that the tower was to be occupied by permanent and long-term residents only. It did not say that owners could not let their apartments for a short term. The Caretaking and Letting Agreement contemplated, among other things, that the letting agent might operate a tour desk.

[342] Any inaccuracy in the disclosure statement with respect to the name of the residential tower (being an inaccuracy not specifically pleaded) is an inaccuracy in respect of a tower in which apartments might be let for short-term stays. The disclosure statement did not become inaccurate because the appointment of Peppers permits such conduct. The disclosure statement was not inaccurate, and did not become inaccurate, because the tower might be a "resort" for a large number of persons occupying apartments for a short time. Any inaccuracy in the disclosure statement in respect of the name of the tower needs to be seen in that context.

[343] In assessing "material prejudice", regard must be had to Ms Ryan's particular circumstances. She was misled by at least one real estate agent into believing that *The Oracle* was to be for permanent and long-term residents only. Her belief in this regard was in part a function of her failure to read each of the disclosure statements. If she had done so, she would not have formed that belief. She also would have

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[36] [2010] QCA 322 at [50], endorsing what was said in *Wilson v Mirvac Queensland Pty Ltd* [2010] QSC 87 at [32].

questioned that belief if she had reflected on the absence of any contractual provision in her standard contract (and presumably in standard contracts signed by other buyers) that prevented her from letting her apartment on a short-term basis. In any event, I accept that Ms Ryan had an expectation that *The Oracle* would consist of permanent and long-term residents.

[344] Ms Ryan attached significance to the name *The Oracle* because of what that name conveyed to her in the light of what she had been told (even if these things were not part of any contractual promise). She intended to on-sell the apartment to persons seeking an apartment with the features that she expected *The Oracle* to have, being individuals who wished to live in the apartment on a permanent basis or let it to others on a long-term lease.

[345] Having regard to those personal circumstances, I conclude that someone in those circumstances would be materially prejudiced if compelled to complete the contract and acquire an apartment in a tower branded *Peppers Broadbeach* because of the meaning and significance that was attached to the name *The Oracle* as a result of non-contractual representations. That person would also be prejudiced even if the tower was not branded *Peppers Broadbeach*, and was known as *The Oracle*, but was managed by a letting agent with a focus on short-term stays.

[346] The material prejudice that arises because of the focus of Peppers on short-term stays is not because of an inaccuracy in the disclosure statement. The only relevant inaccuracy is in the name of the tower itself. The material prejudice is not because of that inaccuracy. The extent to which the disclosure statement was or became inaccurate is in respect of the name of the tower itself. The material prejudice pleaded and proven by Ms Ryan relates to the difference between what she expected (on the basis of non-contractual representations) *The Oracle* would be like, and what was provided for in the contract, including the disclosure statement which formed part of it and which permitted short stays.

[347] The tower that was to be known as *The Oracle*, as described in the disclosure statement, did not have the features that Ms Ryan expected, but it did have the features described in that document. These included an on-site letting agent who could promote its business and focus on short stays. The name given in the disclosure statement was the name of a tower having those features, not a tower having the features which Ms Ryan understood that *The Oracle* would have. The inaccuracy in the name of the tower must be seen in that context.

[348] In summary, the apartment was still in a development named *The Oracle*, even if the tower itself would not be known as *The Oracle* because of the branding being undertaken by Peppers. A disclosure statement stating that the tower would be known as *The Oracle* would have been inaccurate if given in October 2010, but only in respect of the name of the tower itself. It would not have been inaccurate in relation to the nature of the tower and the type of guests that the letting agent might seek to attract to it. It is these matters, not the name of the tower itself, that constitute the substance of Ms Ryan's disappointed expectations and the prejudice that she says she will suffer as a result if she is compelled to complete the contract.

[349] Any inaccuracy in the disclosure statement is not the cause of the material prejudice that has been pleaded and proven by Ms Ryan.

Conclusion – cancellation under the *BCCM Act*

[350] The plaintiffs who claimed an entitlement to cancel pursuant to the *BCCM Act* have not established such an entitlement. I have had regard to the personal circumstances of each such claimant. In general terms, however, the focus of each of those plaintiffs was on the expectation that *The Oracle* would be predominantly, if not exclusively, occupied by owner-occupants and long-term tenants. This was important to Mr and Mrs Wicks and to Mr Gough and Ms Groves because of their own residential amenity. It was important to Ms Ryan because an iconic, luxury, residential tower catering to permanent and long-term tenants was what she understood *The Oracle* to be as a result of representations that were made to her. Each of the plaintiffs' expectations were not met because the tower in which they contracted to purchase an apartment permits short-term letting and the letting agent has a focus on short-term letting.

[351] The disappointed expectations of each of the plaintiffs may be described as a "material prejudice". Having regard to each plaintiff's circumstances, someone in those circumstances would be materially prejudiced if compelled to complete the contract. They would be disadvantaged in a substantial way. However, the prejudice is not because of an inaccuracy in the information disclosed in the BCCM Disclosure Statement. They are not materially prejudiced in the respects alleged, given the extent to which the disclosure statement was, or had become, inaccurate prior to the date for their contract to settle. The prejudice suffered by the plaintiffs is because the contract (including the BCCM Disclosure Statement that formed part of it) did not give protection to their expectations.

Other plaintiffs

[352] The personal circumstances of the other plaintiffs are not relevant to any claim under the *BCCM Act*. The written submissions of the plaintiffs do not address the individual circumstances of the plaintiffs apart from those plaintiffs who rely upon an entitlement to cancel their contracts under the *BCCM Act*. SSI makes some general submissions about the evidence given by the plaintiffs, and then descends to some detail concerning the evidence of each of them. The general submissions are as follows. First, the evidence given by the plaintiffs in relation to their expectations in respect of their apartments is irrelevant to the construction of the contract, or any issue of whether there has been a departure from it. Indeed, this evidence tends to disprove the plaintiffs' pleaded cases because it makes clear that the plaintiffs' expectations were not based upon the "core documents", being the contract and the disclosure statements. In fact, generally the plaintiffs did not read these documents or read only a small part of them. SSI also relies upon the absence of complaint by the plaintiffs about the appointment of Peppers until they went to their present solicitor. Finally, the general point is made that the plaintiffs are aware that the market value of their apartments had been substantially reduced as a result of broader economic events and, understandably, none of them wished to proceed with their contracts in those circumstances. I accept these general submissions.

[353] It is unnecessary to address the individual circumstances of the other plaintiffs. The circumstances of their entry into the contracts are not in dispute. It is unnecessary to canvass in these reasons the oral evidence given by each of these plaintiffs concerning their expectations and the respects in which they say they will be prejudiced by being compelled to complete their contracts. In general, I found each

of the plaintiffs to be an honest and reliable witness. I did not find substantial parts of the evidence given by Mr and Mrs Parsons to be reliable. Their former solicitor's correspondence sent in late 2010 did not reflect their actual circumstances. Mrs Parsons's evidence is that in late 2010 her husband still wanted to purchase the apartment. There was no document supporting Mr Parsons's evidence that he complained about the appointment of Peppers. I conclude that the predominant reason for Mr Parsons being disappointed with the purchase and wishing to explore reasons not to complete is the valuation that he obtained on 19 October 2010. I found Mr Parsons's evidence of having no recollection of receiving certain correspondence unconvincing. Apart from the evidence of Mr and Mrs Parsons which I found to be unreliable, I found the oral evidence of the other plaintiffs in relation to their expectations to be reliable. I do not propose to address their oral evidence in any detail. Their expectations differed in some respects, but generally were along the same lines. For example, Mr Walsh, who intended to let out the apartment that he and Mr Hutchins contracted to purchase to a long-term tenant, understood that he could rent out the apartment for a short term if he wanted to. When he entered the contract he understood that the building was directed "towards a residential market", but expected that the letting agent would be experienced, would promote its business and might conduct its business in a way that would attract short stay or holiday business. He did not expect, however, that there would be hotel-like services such as valet parking and room service, and it is these things that in his view have turned the development into a hotel-like environment. To similar effect is the evidence of Ms Ferguson, who understood that apartments in *The Oracle* could be let for short-term and holiday purposes, but thought that this would represent only a very small percentage because the development was "mainly marketed for [the] long-term, residential owner-occupier". Ms Taylor, who entered into the same contract, accepted that the decline in the market value of the apartment was part of the reason that she does not wish to complete, but did not wish to settle because she felt that she and Ms Ferguson were not now getting what they had contracted to purchase. When she entered the contract, Ms Taylor expected that there might be holiday letting but that most of the people who were purchasing an apartment were purchasing it to "either live in it or [when they were not living in it] close it up". In this regard, she expected that it would be "more of a residential building." She was aware that purchasers could use their apartments for holiday letting. Mr Hutchins likewise knew that it was possible that apartments could be let for short periods, but expected that it would be occupied primarily by long-term residents.

[354] The convincing oral evidence given by a variety of plaintiffs about their expectations, and how the apartment offered to them at settlement falls short of those expectations, fails to prove that those expectations had contractual protection, and that there has been a repudiation of a contract that protected those expectations. The contractual promises are found in the contractual documents, not in the evidence of the plaintiffs about what they expected as a result of other matters, or what they imagined the building was going to be like in circumstances in which they did not read the contractual documents. As with the evidence of those plaintiffs who claimed an entitlement to cancel under the *BCCM Act*, the other plaintiffs are, in various ways and in varying degrees, disappointed because of features of the apartment tower, not to mention a decline in the value of luxury apartments on the Gold Coast because of general economic conditions.

[355] In different ways the plaintiffs are disappointed because the apartment is not in the kind of building that they expected. They may have expected the building not to have the number of short-term stays that the appointed letting agent has achieved, and they may not have expected that short-term guests would be able to receive certain hotel-like services. However, the plaintiffs' expectations were not based on the provisions of the contract, including documents that formed part of it by virtue of the *BCCM Act*, or on the other disclosure statements that they received. Their disappointed expectations do not give them an entitlement to terminate their contracts for repudiation. Their contracts did not protect those expectations.

Conclusion

[356] The plaintiffs in each proceeding have not established that they were discharged from their contract under the general law. Mr and Mrs Wicks, Mr Gough and Ms Groves, and Ms Ryan have not established that they were entitled to cancel their respective contracts under the *BCCM Act*. The plaintiffs breached their contracts by failing to settle. SSI was ready, willing and able to complete the contracts. In each proceeding it is entitled to a decree of specific performance.

[357] SSI has also established an entitlement to damages. It proved an entitlement to damages which were calculated to the date of trial on an agreed basis. The final calculation will need to be updated to the date of judgment.

[358] In each proceeding there will be judgment for the defendant. SSI is entitled to a decree of specific performance on its counterclaim, and also judgment on its counterclaim against the buyers and guarantors. I will hear the parties, if necessary, on the question of costs. However, there appears to be no reason as to why costs should not follow the event. I direct the defendant to submit proposed minutes of order within seven days. I anticipate that the form of order requiring each buyer specifically to perform and carry into effect the relevant contract will be in a form similar to that ordered in comparable cases and, if required, I will hear the parties as to the date for completion and other terms of the orders.