SUPREME COURT OF QUEENSLAND

CITATION:	*Mark Bain Constructions Pty Ltd v Avis*; *Mark Bain Constructions Pty Ltd v Barnscape Pty Ltd* [2012] QCA 100
PARTIES:	**In the "Avis Appeal":** **MARK BAIN CONSTRUCTIONS PTY LTD** ACN 010 846 385 (appellant) **v** **CAROL LYNETTE AVIS** (respondent) **In the "Barnscape Appeal":** **MARK BAIN CONSTRUCTIONS PTY LTD** ACN 010 846 385 (appellant) **v** **BARNSCAPE PTY LTD** ACN 077 636 367 (respondent)
FILE NO/S:	Appeal No 3844 of 2011 Appeal No 3845 of 2011 SC No 2488 of 2007 SC No 2491 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	21 September 2011
JUDGES:	Fraser and Chesterman JJA, and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In the "Avis Appeal" (No 3844 of 2011):** **1. Allow the appeal.** **2. Set aside the orders made in the Trial Division in 2488/07 on 11 April and 6 June 2011.** **3. In lieu thereof order that:** **(a) there be judgment for the plaintiff for $219,237.86 inclusive of interest to 11 April 2011.**

(b) the first defendant pay the plaintiff's costs of the proceeding to 2 February 2010 fixed at $36,614.36.

(c) the plaintiff's costs of the proceedings from 2 February 2010 and the defendant's costs of the application to amend heard on 16 April 2010, and the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010, be assessed on the standard basis.

(d) the first defendant pay the plaintiff's costs of the proceedings from 2 February 2010 as assessed, less her costs of the application to amend heard on 16 April 2010, and the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010.

(e) the plaintiff pay the first defendant's costs of the application to amend heard on 16 April 2010, and the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010, including its costs of obtaining the further expert report ordered on 16 April 2010.

In the "Barnscape Appeal" (No 3845 of 2011):

4. Allow the appeal.

5. Set aside the orders made in the Trial Division in 2491/07 on 11 April and 6 June 2011.

6. In lieu thereof order that:

(a) there be judgment for the plaintiff for $288,860.33 inclusive of interest to 11 April 2011.

(b) the first defendant pay the plaintiff's costs of the proceeding to 2 February 2010 fixed at $44,166.93.

(c) the plaintiff's costs of the proceedings from 2 February 2010 and the defendant's costs of the application to amend heard on 16 April 2010, and the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010, be assessed on the standard basis.

(d) the first defendant pay the plaintiff's costs of the proceedings from 2 February 2010 as assessed, less its costs of the application to amend heard on 16 April 2010, and the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010.

(e) the plaintiff pay the first defendant's costs of the application to amend heard on 16 April 2010, and the costs of the hearings on 31 May 2010, 1 June 2010

and 3 June 2010, including its costs of obtaining the further expert report ordered on 16 April 2010.

CATCHWORDS: TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – ACTIONS FOR DAMAGES – ASSESSMENT OR AVAILABILITY OF DAMAGES – PARTICULAR CASES – DAMAGES ARISING OUT OF PURCHASE OF LAND OR BUSINESS OR LEASE – where respondents, separately, entered into a contract to purchase a luxury apartment off the plan from the developer vendor – where, in entering the contract, respondents relied on representations made by real estate agents that the ocean view from the apartment would be uninterrupted – where contracts settled and respondents were dissatisfied with their view as it was obstructed by a new building – where respondents claimed that the representations with respect to the view were false, misleading and deceptive in contravention of s 52 and s 53A *Trade Practices Act* 1974 (Cth) – where respondents instituted proceedings against the developer on the basis that the real estate agent was its agent duly authorised to make these representations – where the appellant contended that the real estate agent was only authorised to market the apartments for sale – where the trial judge found that the representations made by the real estate agent fell within the scope of its actual authority – where the appellant argued that there was no representation as to a future matter – whether the trial judge erred in finding that the real estate agent had actual authority – whether the trial judge erred in finding that the representations were as to future matters – whether the trial judge erred in applying s 51A *Trade Practices Act* 1974 (Cth) – whether the real estate agents continued to be agents after the contract was entered into, but before settlement of the contract

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER *UNIFORM CIVIL PROCEDURE RULES* AND PREDECESSORS – DISCONTINUANCE – where, at the beginning of the trial, the appellant and respondents compromised proceedings against the second defendants at trial – where the appellant argued that the respondents suffered a single loss and the compromise operated as a compromise of the entire proceedings – where the trial judge found that the compromise did not release the appellant from liability - whether the trial judge erred in failing to find that the respondents' compromises with the second defendants at trial were also compromises as against the appellant

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION

LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE CONDUCT GENERALLY – GENERALLY – where the trial judge found that the respondents were induced into the contract by reliance upon the representations made by real estate agents – where the appellant argued that the respondents did not rely upon, and were not induced by, the representations – where the appellant argued that the representations amounted to mere puffery in context of the contractual provisions – where the appellant argued that the extensive business experience, understanding of contracts and reliance upon legal advice by the respondents indicated that the respondents did not rely upon the representations made by the real estate agents – whether the trial judge erred in finding that the respondents relied upon the representations and were induced into the contract

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – ACTIONS FOR DAMAGES – ASSESSMENT OR AVAILABILITY OF DAMAGES – PARTICULAR CASES – DAMAGES ARISING OUT OF PURCHASE OF LAND OR BUSINESS OR LEASE – where the trial judge refused leave to reintroduce a measure of loss that had been abandoned by the respondents – where the trial judge exercised the powers provided in UCPR rr 156 and 658 to assess damages in accordance with the abandoned measure of loss – where the appellant argued that assessing damages in accordance with the abandoned measure of loss substantially prejudiced the appellant – whether the trial judge erred in assessing damages in accordance with the abandoned measure of loss

Trade Practices Act 1974 (Cth), s 51A, s 52, s 53A, s 82, s 84

Avis & Anor v Mark Bain Constructions Pty Ltd [2011] QSC 80, considered
Avis & Anor v Mark Bain Constructions Pty Ltd [No 2] [2011] QSC 151, cited
Baxter v Obacelo Pty Ltd (2001) 205 CLR 635; [2001] HCA 66, cited
Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592; [2004] HCA 60, cited
HTW Valuers (Central Qld) v Astonland Pty Ltd (2004) 217 CLR 640; [2004] HCA 54, cited
Morris v River Wild Management Pty Ltd (2011) 284 ALR 413; [2011] VSCA 283, considered
Mullens v Miller (1882) 22 Ch D 194, cited
Poulet Frais Pty Ltd v Silver Fox Company Pty Ltd (2005) 220 ALR 211; [2005] FCAFC 131, considered

Presser v Caldwell Estates Pty Ltd [1971] 2 NSWLR 471, considered
Ruxley Electronics & Construction Ltd v Forsyth [1996] AC 344, cited
Scaffidi v Perpetual Trustees Victoria Ltd [2011] WASCA 159, cited
The Commonwealth of Australia v Amann Aviation Pty Ltd (1991) 174 CLR 64; [1991] HCA 54, cited
Waltip Pty Ltd v Capalaba Park Shopping Centre Pty Ltd [1989] ATPR 40-975, cited

COUNSEL: A P J Collins for the appellant in the Avis Appeal and appellant in the Barnscape Appeal
S S Monks for the respondent in the Avis Appeal and respondent in the Barnscape Appeal

SOLICITORS: Holland & Holland Solicitors for the appellant in the Avis Appeal and appellant in the Barnscape Appeal
Boyd Legal for the respondent in the Avis Appeal and respondent in the Barnscape Appeal

[1] **FRASER JA:** The appellant "Mark Bain Constructions", was the builder and developer of a block of units called "Number One Park" at 1 Park Crescent, Sunshine Beach. The respondents, Mrs Avis and Barnscape Pty Ltd ("Barnscape"), each contracted to buy a penthouse unit off the plan in Number One Park from Mark Bain Constructions. Each of them duly settled the contract after the building was constructed. By that time it had become apparent that the views of the surf from the penthouse units were substantially obstructed by a building ("the Splash development") which had been built between Number One Park and the ocean.

[2] Mrs Avis and Barnscape each brought proceedings in the Trial Division claiming damages for misleading and deceptive conduct under s 82 of the *Trade Practices Act* 1974 (Cth) against Mark Bain Constructions and against a real estate agent. In Mrs Avis' proceeding the real estate agent was Roombridge Pty Ltd, which traded as "Laguna Real Estate". In Barnscape's proceeding the real estate agent was Noblemont Pty Ltd, which traded as "Dolphin Bay Real Estate". In each case Mark Bain Constructions brought third party proceedings against the agent. The trials were heard together.

[3] Shortly before the trials commenced, Mrs Avis and Barnscape settled their claims against the agents on terms which required each agent to pay $200,000, inclusive of interest and costs. By that time Mrs Avis had incurred costs of $113,057.16 and Barnscape had incurred costs of $121,610.16. On the first day of the trial Mark Bain Constructions settled its third party claims against the agents. The trial judge made orders by consent that Mrs Avis and Barnscape have leave to file notices of discontinuance against the real estate agent and that the third party proceedings brought by Mark Bain Constructions against each agent be dismissed, with no orders as to costs.

[4] The claims against Mark Bain Constructions proceeded to judgment. The trial judge found that Mrs Avis and Barnscape had contracted in reliance upon misrepresentations made by the agents with the authority of Mark Bain Constructions. On 11 April 2011, the trial judge made orders against Mark Bain Constructions for compensation under the *Trade Practices Act* in favour of

Mrs Avis for $283,917 and in favour of Barnscape for $216,483.[1] Subsequently, on 6 June 2011, the trial judge repeated those orders and added orders that Mark Bain Constructions pay interest to Mrs Avis of $185,471.70 and to Barnscape of $141,419.75, and that it pay their costs of the proceedings to be assessed on the standard basis, save for their costs of their applications to amend their statements of claim.[2]

[5] Mark Bain Constructions has appealed in both matters. Its notices of appeal rely upon numerous grounds, which concern both liability and quantum. Each respondent filed notices of contention concerning the quantum of the compensation which they were awarded. Before addressing the extensive issues in the appeal, it is useful to identify some important findings by the trial judge which are not challenged:

(a) Mark Bain Constructions engaged each of Dolphin Bay Real Estate and Laguna Real Estate "as a real estate agent to market for sale the proposed units in 'Number One Park'".

(b) Before Barnscape contracted to buy its unit, Dolphin Bay Real Estate, by its representative Mr Conolly, represented to Barnscape, by its directors Mr and Mrs Brecht, that

(i) there would be spectacular uninterrupted surf views from the penthouses in Number One Park.

(ii) the Splash development would commence shortly, but due to the contours of the land and council development restrictions, that development would not interrupt the views of the surf from the penthouses and surf views would be available over the rooftop of the Splash development; and

(iii) Mark Bain Constructions and the agent each had the means, ability, skill and experience to conduct appropriate searches and enquiries of local or State government records and authorities, and otherwise determine whether the views from the penthouses at Number One Park could be built out or impeded by the Splash development, and each had exercised due care and diligence in undertaking those searches and enquiries and determining that the Splash development would not interrupt the surf views from the penthouses.[3]

(c) Before Mrs Avis contracted to buy her unit, Laguna Real Estate, by its representative Mr Forsyth, made representations to the same effect to Mrs Avis, in conversations with Mr and Mrs Avis and also with a friend of a friend of theirs, Mr Shannon, who was himself a real estate agent.[4]

(d) The representations were false because construction of the Splash development in accordance with previously approved plans, which complied with the local council's height restrictions, would block the views of the surf from the penthouses in Number One Park:[5]

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1 *Avis & Anor v Mark Bain Constructions Pty Ltd* [2011] QSC 80.

2 *Avis & Anor v Mark Bain Constructions Pty Ltd [No 2]* [2011] QSC 151.

3 The trial judge accepted the allegations to this effect pleaded by Barnscape: [2011] QSC 80 at [32], [46].

4 The trial judge accepted the allegations to this effect pleaded by Mrs Avis: [2011] QSC 80 at [99], [102].

5 I have paraphrased the similar allegations in the Statements of Claim in each proceeding which the trial judge accepted: [2011] QSC 80 at [50]-[51] and [116]-[117].

> "The near equivalence of the top floors of the Number One Park and Splash in height in the plans approved by the council, meant that there was never going to be uninterrupted white water views from the penthouse units in Number One Park once Splash was constructed."[6]

(e) The representations were made in trade or commerce in connection with the sale of an interest in land.[7]

[6] In relation to (b) and (c), at the hearing of the appeals Mark Bain Constructions abandoned the ground in both notices of appeal that the trial judge erred in finding that the representations as alleged in the statement of claim were established. The abandonment of that contention also makes it unnecessary to consider other grounds of appeal concerning the admissibility of evidence relating to the question whether the representations were made.

Representation as to a future matter

[7] The trial judge found that "…to the extent that the representations were representations as to future matters" they fell within s 51A of the *Trade Practices Act*.[8] It is a ground of each appeal that the trial judge erred in applying s 51A because there was no representation as to a future matter. This ground was not developed in the written or oral submissions advanced for Mark Bain Constructions. There is no merit in it.

[8] The directly relevant statutory provisions are as follows:

> "51A Interpretation
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> (1) [Misleading representations] For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
>
> (2) [Representations respecting future matters] For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.
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> …
>
> 52(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of sub-section (1).

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6 [2011] QSC 80 at [117].
7 [2011] QSC 80 at [52], [117].
8 [2011] QSC 80 at [47], [115].

> 53A False representations and other misleading or offensive conduct in relation to land
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> (1) A corporation shall not, in trade or commerce, in connexion with the sale or grant, or the possible sale or grant, of an interest in land or in connexion with the promotion by any means of the sale or grant of an interest in land:
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> …
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> (b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land; …"

[9] Number One Park and the Splash development had not been constructed when the representations were made and when Mrs Avis and Barnscape entered into the contracts to buy their penthouse units. The representations about the views from the penthouses which would be available from the units plainly were representations with respect to future matters. Mark Bain Constructions did not call any representative of that company or of either agent to give evidence. It did not adduce any evidence that it had any grounds for making the representations. Section 51A(2) therefore applied to deem it not to have had reasonable grounds for making those representations which, by s 51A(1), should therefore be taken to be misleading.

[10] In any event, counsel for Mark Bain Constructions did not challenge the evidence of a surveyor, Mr Laing, that a licensed person in the building and construction industry would have appreciated upon looking at the approved plans for Number One Park and the Splash development that it would be impossible to look from Number One Park over the roof of the Splash development to see the ocean because both buildings would be constructed at the same height. Indeed, the cross-examination of Mr Laing was directed to eliciting evidence that it would be relatively simple for an intending purchaser of a unit in Number One Park to ascertain as much, either by retaining a surveyor to make the necessary investigations or by making enquiries at the council. As the trial judge remarked,[9] there was no real attempt at the trial to suggest that the representations about the views were other than false in light of the near equivalence in height of the top floors of Number One Park and the Splash development in the approved plans.

[11] The same evidence supported the allegation of falsity of the pleaded representation that Mark Bain Constructions and each agent had exercised due care and diligence in undertaking the necessary searches and enquiries. The plan for the Splash development was lodged with, and approved by, the council long before either agent made the representations to Mrs Avis and Barnscape. A comparison between the Splash development plan and the approved plan for Number One Park demonstrated, as the trial judge found,[10] that the floor level of the top studio unit in the Splash development was obviously going to be higher than the floor level of the penthouse units in Number One Park. It was apparent, and it could readily have

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9 [2011] QSC 80 at [117].

10 [2011] QSC 80 at [112].

been ascertained by the agents and Mark Bain Constructions, that when both buildings were constructed the Splash building would substantially obstruct the views of the surf from the penthouse units in Number One Park.

Authority of the agents to make the pleaded representations

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

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

[13] As was submitted for Mark Bain Constructions, if the agents did not have actual or apparent authority, s 84(2) of the *Trade Practices Act* was not engaged. Mrs Avis and Barnscape each pleaded in a second further amended statement of claim filed 17 July 2009 that, in all material respects, the relevant agent was "duly authorised to act on behalf of and to bind" Mark Bain Constructions. Mark Bain Constructions' contracts with the agents were not in evidence, but it admitted that it engaged each agent, "as a real estate agent to market for sale the proposed units in…Number One Park."

[14] After the trial commenced and Mark Bain Constructions had compromised its third party claims against the agents, Mrs Avis and Barnscape sought leave to amend their statements of claim to include allegations that the agent possessed "apparent authority" to make the pleaded representations on behalf of Mark Bain Constructions. The trial judge granted leave to make those amendments, holding that apparent authority had already been pleaded and the amendments merely clarified and further particularised that allegation.[11] Mark Bain Constructions challenged that conclusion, contending that the allegation in each case that the agent was "duly authorised to act on behalf of and to bind [Mark Bain Constructions] in all respects material to this action" pleaded only that the agent had the actual authority of Mark Bain Constructions to make the pleaded representations. In my respectful opinion that contention is correct.

[15] It does not necessarily follow that the amendment should not have been allowed, but it is unnecessary to consider that issue because the trial judge was correct in holding that the agents had actual authority to make the representations.

[16] In this respect, the trial judge observed:[12]

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11 [2011] QSC 80 at [13].

12 [2011] QSC 80 at [129]-[132]. I have omitted citations.

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

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

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

> 'A man employs an agent to let a house for him; that authority, in my opinion, contains also an authority to describe the property truly, to represent its actual situation, and, if he thinks fit, to represent its value. That is within the scope of the agent's authority; and when the authority is changed, and instead of being an authority to let it becomes an authority to find a purchaser, I think the authority is just the same. I think the principal does thereby authorise his agent to describe, and binds him to describe truly, the property which is to be the subject disposed of; he authorises the agent to state any fact or circumstances which may relate to the value of the property. That, I take it, is clearly laid down in the cases referred to. It would be very dangerous, in my opinion, to limit the authority of an agent in the way in which the argument before me has proposed to limit, namely, that the duty of Mr Dean simply was to go out into the world and find a man likely to buy, and to bring him to the Plaintiff, the vendor, and to say, "Here is a man who is willing to buy."'

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

[17] Mark Bain Constructions argued that, contrary to the trial judge's conclusion, the agents' representations about the views which would be available from the units upon completion of construction were outside the scope of the agents' actual authority; although the agents' authority extended to statements about the view presently available, it did not extend to statements about characteristics of the subject property which might exist in the future, the height of other buildings yet to be constructed, or whether such buildings impede the view from the subject property. Mark Bain Constructions also argued that it was outside the actual authority of each agent to represent that the agent had the means, ability, skill and experience to conduct appropriate searches and enquiries to determine whether the views from the penthouses would be built out or impeded by the Splash development, or that the agent possessed or exercised due care and diligence in undertaking the necessary searches and enquiries. It was submitted that the question whether the views from the completed building would be impeded by another building involved such complexity and expertise beyond that usually possessed by real estate agents that an authority to make such representations should not be implied.

[18] Those submissions tended to deflect attention from the only evidence of the agents' actual authority, namely, the admission that each agent was engaged by Mark Bain Constructions "as a real estate agent to market for sale the proposed units in…Number One Park". That engagement must be construed in the context that, as the reference to "proposed" units indicates, the units did not exist at the time when the agents were engaged to market them for sale. The agents were authorised to "market" those proposed units. In ordinary language, the word "market" has a broad meaning. The *Chambers Dictionary* defines the transitive verb as including "to put on the market, to sell; to advertise, promote". Similarly, the *Oxford Dictionary*,[13] includes the meaning "promote and distribute (a product etc) for sale". The agents' conduct in making representations about the desirable views that would be available from the units once the building was constructed plainly amounted to promoting the proposed units for sale. I see no reason to doubt that such conduct formed part of each agent's core function of marketing the units.

[19] It does not seem surprising that an agent engaged to market units in a building to be constructed near the ocean on the Sunshine Coast would make it the agent's business to ascertain and tell potential purchasers about the nature of the ocean views which would be available from the units upon completion and whether those views would then be built out by an approved development between the subject units and the sea. As I have already mentioned, the evidence suggests that there was nothing particularly complex in the task of determining whether the Splash development would impede what would otherwise be the unrestricted views described by the agents.

[20] Bearing in mind that the properties which the agent was retained to market were units to be constructed, the representations about the views which would be available from the completed units amounted to descriptions of the property or representations of its "actual situation" of the kind described by Bacon V-C in the passage which the trial judge extracted from *Mullens v Miller*.[14] The trial judge's conclusion that the agents had actual authority to make the representations about the views were correct.

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13 The *New Shorter Oxford English Dictionary On Historical Principles.*

14 (1882) 22 Ch D 194 at 199.

[21] Mark Bain Constructions referred to Asprey JA's reasons in *Presser v Caldwell Estates Pty Ltd*[15] as authority for the proposition that the principal is vicariously liable for the tortious act of the agent only if the tortious act, although not expressly directed to be performed, is of the kind which the principal, by retaining the agent, has impliedly authorised the agent to do. The case was concerned with the implied authority of an agent retained to negotiate contracts for the sale of land in the context of a question whether the principal was liable in tort for statements by an agent about the geological structure of the subsoil, whereas the statements in issue in this case concern the views which would be available upon the construction of the subject matter of the sale. I can see nothing in Asprey JA's reasons which militates against a conclusion that, in this very different case, the agents had actual authority to make the relevant representations.

[22] Nothing is to be gained by referring to other decisions concerning the extent of the authority of real estate agents under the terms of different engagements in the sale of land improved by existing buildings. As a matter of construction, the authority given by Mark Bain Constructions to each of Dolphin Bay Real Estate and Laguna Real Estate to "market for sale the proposed units" in Number One Park, conferred actual authority to represent to intending purchasers that the Splash development to be constructed between Number One Park and the ocean would not interrupt the views of the surf from the penthouses and that surf views would be available over the rooftop of the Splash development. The additional representations by the agents that they had exercised the necessary care and diligence in determining that the Splash development would not interrupt the surf views were incidental to, being designed to persuade the purchasers to act upon, the representations about the views. Each of those representations was within each agent's actual authority. It follows that s 84(2) of the *Trade Practices Act* deemed the representations to have been made by Mark Bain Constructions.

Contravening conduct and causation

[23] In each case, the trial judge found that the representations made by the agent constituted what I will call "contravening conduct" by Mark Bain Constructions, that is, both misleading and deceptive conduct in contravention of s 52(1) of the *Trade Practices Act* and false representations concerning the characteristics of land in contravention of s 53A(1)(b) of the *Trade Practices Act*.[16]

[24] The trial judge also found that each of Barnscape and Mrs Avis had suffered loss "by" the contravening conduct, in terms of s 82(1) of the *Trade Practices Act*,[17] which provides that "a person who suffers loss or damage by conduct of another person that was done in contravention of Part … V … may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

[25] The damages awarded by the trial judge in each case were calculated by finding the difference between the price paid for the unit and its true value at the time of the settlement of the contract, and then deducting an amount on account of the pre-trial settlement payment made by the agent to the respective purchaser. It will be

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15 [1971] 2 NSWLR 471 at 485 per Asprey JA.

16 [2011] QSC 80 at [52] (Barnscape) and [117] (Avis).

17 [2011] QSC 80 at [134]-[137] (referring to s 82 and authorities upon it), [170] (Barnscape), [189] (Avis) and [205]-[206] (concerning the deduction on account of settlement with the agent).

necessary to return to the numerous grounds of appeal concerning that measure of damages, but I will first discuss Mark Bain's Constructions' challenges to the findings that it was guilty of contravening conduct which caused Barnscape and Mrs Avis to enter into, and complete, the contracts.

[26] Mark Bain Constructions argued that the effect of various circumstances, including the standard terms in the contract of purchase, was that the false representations made by the agents did not amount to contravening conduct by Mark Bain Constructions. Alternatively, Mark Bain Constructions argued that, if it was guilty of that contravening conduct, Barnscape and Mrs Avis failed to prove that they suffered the claimed loss "by" the contraventions.

[27] Mark Bain Constructions' extensive grounds of appeal raised only the latter point, concerning causation. No ground of appeal challenged the trial judge's findings that the representations constituted contraventions of the relevant provisions of the *Trade Practices Act*. It is nevertheless appropriate to consider the argument because Barnscape and Mrs Avis did not object to Mark Bain Constructions advancing it.

Barnscape: contravening conduct and causation

[28] For present purposes, it is necessary to provide only a relatively brief summary of the trial judge's detailed analysis of the facts relating to the Barnscape purchase and contract.[18]

[29] The directors of Barnscape, Mr and Mrs Brecht, were successful business people with money available to invest. In April 2003, after a holiday in the Sunshine Coast, Mr and Mrs Brecht were interested in buying an investment property in Sunshine Beach, provided that it was on or near the beach with uninterrupted ocean views that could not be built out. At the first meeting between Mr and Mrs Brecht and Mr Conolly, representing Dolphin Bay Real Estate, in April 2003, Mr and Mrs Brecht told Mr Conolly of their requirements when they met him at the Dolphin Real Estate office in Sunshine Beach. After driving around Sunshine Beach and looking at various properties, they returned to the Dolphin Bay Real Estate office where Mr Conolly made the representations about the view. Mr Conolly took Mr and Mrs Brecht to the site of Number One Park, and repeated the representations about the view in the course of pointing out nearby buildings and indicating the height of Number One Park and the lie of the land. He also told Mr and Mrs Brecht more than once that he had personally checked with local council on a number of occasions to make sure that what he was telling them about the views was correct. After Mr and Mrs Brecht returned to their home in Sydney, Mr Conolly communicated to Mr and Mrs Brecht that the selling price of unit No 7 in Number One Park was $1,250,000. When Mrs Brecht asked Mr Conolly again about the views from unit number 7 because of her requirement that the property have uninterrupted views of the water and could never be built out, he reassured her of those matters, describing the property, as he had earlier, as "crème de la crème". On 30 April 2003, Mr and Mrs Brecht sent Mr Conolly a cheque for $500 as a "refundable holding deposit".

[30] Mr and Mrs Brecht arranged for their Queensland solicitor, Anne Murray, to check the contract. On 11 June 2003, Mr and Mrs Brecht sent an email to Mr Conolly informing him of that, and that, apart from a few small things, the contract was

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18 [2011] QSC 80 [20]-[88].

acceptable. They indicated that before they paid the 10 per cent deposit they wanted to ensure that the view would justify the price, so they planned to return to Sunshine Beach in the next few weeks to meet Mr Conolly and make sure the finished unit would have good ocean views. On 12 June 2003, Mr Conolly replied by email advising that Mr Forsyth of Laguna Real Estate, who was dealing directly with Mark Bain, advised that the floor level of the penthouses of Number One Park was to be one metre higher than the top floor of the adjacent Moroccan building. He stated that:

> "Both Mr Forsyth & Mr Bain have assured me the views as such will be outstanding…[t]hey have suggested I encourage you to sign a contract with a special clause inserted which states you have the opportunity to withdraw should the views not be to your satisfaction. Please contact me to discuss this option which I believe is in everyones [sic] best interests."

[31] Mr Brecht replied by email also on 12 June 2003 as follows:

> "This sounds great and does fill both of us with a level of confidence that is certainly enough for us to sign the contract whether we have seen the site again or not. I will instruct Anne Murray to insert a clause as you have suggested and send the signed contract along with the official deposit to you as soon as Anne can get the revised contract to us. In the meantime Lyn Anne and/or myself will still try to get to Sunshine Beach again for a day to meet with you."

[32] On 13 June 2003, Mr Conolly replied by email. He asked Mr Brecht to send him a draft of the proposed clause so it could be approved by the developer. He made the following suggestion for the clause:

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

[33] As was contemplated as a possibility in Mr Brecht's email of 12 June 2003, on 21 and 22 June 2003 Mrs Brecht returned to Sunshine Beach and again met with Mr Conolly. Mr Conolly took Mrs Brecht, and her friend and interior decorator Ms Skinner, to two buildings near the site of the proposed Number One Park building. Mr Conolly effectively repeated the representations about the view, expanding upon those representations by reference to various landmarks and views available from other buildings. Mrs Brecht said that she wanted the television antennae on top of another building to be removed because it interfered with the (anticipated) view from unit 7, Number One Park. Mr Conolly thought that would not be a problem but he would have to discuss it with Mr Bain.

[34] On 23 June 2003, Mrs Brecht sent an email to Mr Conolly thanking him for showing her the site on the weekend and indicating that she and her husband were keen to finalise the exchange of contracts. They sought clarification on some "final

points" including the possibility of relocating the television antenna which had been discussed on the weekend. On 25 June 2003, Mr Conolly responded by email that "the developer is happy to accommodate your recommendations". An attached email from Mr Forsyth of Laguna Real Estate stated that "…the developer will move the tv antenna at his cost".

[35] Barnscape executed a contract to buy unit 7 for $1,200,000 and sent it and a bank guarantee for the deposit of $120,000 to Mr Conolly on 2 July 2003. The contract contained standard terms 14.1.7 and 14.1.8 and also special conditions 34.1 and 34.3 which were written by Mrs Brecht:

> "14.1.7 that the Buyer has not relied on any representations by or from the Seller, the Seller's agent or any other person or corporation, other than those representations specified in this Contract about the Lot, Scheme Land, Schedule of Finishes, Chattels, Common Property, Building Works, proposed management operation, achievable occupancies, financial returns or tax benefits.
>
> 14.1.8 that in entering into this Contract the Buyer confirms and agrees that all representations made by or on behalf of the Seller are as set out in this Contract and that the terms, covenants and conditions of this Contract constitute the only agreement between the Buyer and the Seller to the exclusion of all other representations to the fullest extent permitted by law. The Buyer waives any claim or right inconsistent with this acknowledgment and agrees to indemnify the Seller from any claim brought by the Buyer in breach of this clause and the Seller's costs of resisting any such claim calculated on a solicitor and own client basis.
>
> …
>
> 34.1 This contract is subject to the purchaser satisfying itself within 21 days from the date hereof that the view from the subject property will be as it anticipates. If it is not the Purchaser shall notify the Vendors solicitors in writing and all deposit monies shall be refunded in full to the Purchaser.
>
> …
>
> 34.3 At their cost the developer will relocate the TV antenna from the roof of the building in front of the balcony to Unit 7, so as not to interfere with the view or outlook from the balcony of unit 7."

[36] Mark Bain signed and dated the contract on behalf of Mark Bain Constructions on 3 July 2003. Clause 34.1 was crossed out and initialled by Mr Bain.

[37] In accepting that Barnscape was induced to enter into the contract in reliance upon the representations, the trial judge reasoned as followed:[19]

> "Mrs Brecht had consulted with her solicitor before inserting clause 34 and relied on her advice as to the standard and special terms of the

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19 [2011] QSC 80 at [80]-[84].

contract. However, as pleaded in paragraph 10 of the statement of claim, when signing the contract on behalf of Barnscape Mr and Mrs Brecht relied on the representations made to them referred to in paragraphs 7, 9 and 9A of the statement of claim about the views. Mrs Brecht informed Mr Brecht of the representations made to her by Mr Conolly on her visit to Sunshine Beach when he was not present. Mrs Brecht said in her evidence:

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

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

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

Mrs Brecht answered, 'Absolutely no way.'

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

The standard terms found in clauses 14.1.7 and 14.1.8 could not, without more, exclude the operation of the TPA. [*Demagogue v Ramensky* (1992) 39 FCR 31 at 46 per Gummow J; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1*) (1988) 39 FCR 546 at 561 per Lockhart J; *Downey v Carlson Hotels Asia Pacific P/L* [2005] QCA 199 at [82].] As Steytler P held in *Warwick Entertainment Centre Pty Ltd v Alpine Holdings Pty Ltd* [2005] WASCA 174 at [59]:

> 'In the case of a claim arising out of a contravention of s 52 of the Act the relevant question, in this context at least, is always one of reliance or inducement. If, as a result of misleading conduct, a person is induced to enter into a contract and suffers loss, the right to a remedy will subsist whatever the parties may provide in their agreement: *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987) 71 ALR 367 at 371, per Sheppard J with whom Fox J and, relevantly, Jackson J were in agreement; *Petera Pty Ltd v EAJ Pty Ltd* (1985) 7 FCR 375 at 378, per Wilcox J; and *Oraka Pty Ltd v Leda Holdings Ltd* (1997) ATPR 41-558 at 43, 717.

> Exclusion clauses in a contract will only preclude a remedy under the Act when those clauses demonstrate that the party in question did not, in fact, rely on the conduct or where the conduct could not, as a whole, have been seen to be misleading: *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535 at 557; *Kewside Pty Ltd v Warman International Ltd* (1990) ATPR 41-012.'
>
> It is a question of fact whether those clauses erased the effect of the representation in the minds of Mr and Mrs Brecht on behalf of Barnscape. [See *Re Benlist Pty Limited v Olivetti Australia Pty Limited* [1990] FCA 289 at [24]-[25]; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [130].] Those clauses did not have that effect in this case. They relied on the representations made as to what would be the view from unit 7, Number One Park and their reliance induced them to enter into the Barnscape contract."

[38] The trial judge found that Mrs Brecht went to Sunshine Beach on 3 March 2004, when the Splash building was quite high, although not yet completed, and thought that it was obvious that it was not going to be at the height that Mr Conolly had represented; on that or a later visit in March 2004 she told Mr Conolly that she did not think that the height of the Splash development was what he had represented it would be, but Mr Conolly reassured her that they would still be able to see over the top of the Splash building once it was finished and the view could never be built out; and he again told her that he had checked with the council.[20]

[39] Mrs Brecht expressed a further concern to Mr Conolly when she visited the site in early June just before settlement. The trial judge found that Mr Conolly told both Mr and Mrs Brecht that the problem was that the Splash development had been built too high. In response to Mrs Brecht's question, whether settlement could be delayed, Mr Conolly told her that Mr Bain had said that they would lose their deposit if they did not settle on the due date. The trial judge also found that Barnscape decided to settle on legal advice, but that the legal advice was "based on the representations made to the plaintiff and so tainted by that."[21]

[40] After settlement Mr and Mrs Brecht and Mrs Avis engaged a surveyor to investigate whether the Splash development was built in breach of council height limits. The council communicated its view that the Splash development was not built above the permitted height and, after that advice had been questioned by the surveyor but confirmed by the council, Mr and Mrs Brecht and Mrs Avis obtained legal advice in relation to the present proceedings.

Barnscape: contravening conduct

[41] Mark Bain Constructions argued that, in determining whether there was misleading and deceptive conduct, the trial judge should have taken into account cll 14.1.7 and 14.1.8 of the standard terms. It was perhaps implicit in the argument that the trial judge should also have taken those clauses into account in determining whether or not the agent's representations about the view constituted "a false or misleading representation concerning the…characteristics of the land" in term of s 53A of the *Trade Practices Act*.

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20 [2011] QSC 80 at [86].

21 [2011] QSC 80 at [87].

[42] Mark Bain Constructions relied upon the following passage in the reasons of McHugh J in *Butcher v Lachlan Elder Realty Pty Ltd*[22]:

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

[43] As appears from that passage, it is necessary to determine whether any particular circumstance is relevant to the question whether a contravention of s 52 has occurred (or, I would add, whether or not there has been a false representation in terms of s 53A).

[44] An example of that approach may be found in *Poulet Frais v Silver Fox*,[23] upon which Mark Bain Constructions relied. The applicants claimed that the respondent had supplied various documents which included a representation that a proposed franchise would produce specified weekly gross sales figures and annual net operating profits. There was no clear representation that those results would be achieved in the document which set out the relevant figures. The respondent had insisted upon certificates by the applicants that they had the benefit of explanations by their solicitor about the franchise agreement and associated legal and business risks, and explanations by their accountant, financial or investment advisor, or other suitable person about financial aspects, and certificates to similar effect by the solicitor and accountant/financial advisor. The franchise agreement, supplied more than two months before it was executed by the applicants, included a schedule which set out minimum performance figures which differed from those allegedly represented. It was in that context that the Full Court of the Federal Court (Branson, Nicholson and Jacobsen JJ) took into account two clauses of the franchise agreement which were in similar terms to cll 14.1.7 and 14.1.8, observing that the clauses "…served to emphasise what was, in any event, apparent from the terms of the information pack and the disclosure documents, namely that Poulet Frais was not giving any guarantees or assurances as to the turnover or profitability that Silver Fox would experience as a franchisee". [24]

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22 (2004) 218 CLR 592 at 625 [109], cited with approval in *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 341 [102], 348 [130].

23 (2005) 220 ALR 211 at [20].

24 (2005) 220 ALR 211 at [80]-[82].

[45] One can readily understand that those clauses, which took effect in combination with the schedule of the franchise agreement which differed from the claimed representation, were relevant to the question whether the promissory representation alleged in that case had been made,[25] but this case is very different. Whether the representations were made turned upon an assessment of the respondents' evidence, which was not contradicted by any evidence from the agents. Indeed, it is not now in issue that the representations were made.

[46] The effect of Mark Bain Constructions' argument was that, accepting that the representations were made, in the context of the contractual provisions and other circumstances (notably the Brechts' extensive business experience, their understanding of the role of contracts, and their reliance upon their legal advice) those representations amounted only to puffery. In the circumstances of this case, that argument really addressed the different question whether Barnscape relied upon the representations, rather than whether they were made and were misleading.

[47] It must be borne in mind that Barnscape did not appreciate that the agent's repeated assurances were misleading until after it had entered into the contract. Furthermore, Mark Bain Constructions did not point to any evidence, and I have found none, which would justify a finding that Barnscape or its solicitor, Ms Murray, was in possession of the draft contract when Mr Conolly first made the representations in April 2003. The email from Mr and Mrs Brecht to Mr Conolly dated 11 June 2003 made it plain that Ms Murray had looked at the draft contract on or before that date, but we were referred to no evidence that the draft contract had been given to Barnscape or Ms Murray before June 2003. That was not put to Mr and Mrs Brecht in cross-examination and Mark Bain Constructions did not call Mr Conolly or any other person to give evidence upon the topic.

[48] Even in relation to the continuing effect of those initial representations, and in relation to the representations made by Mr Conolly after the draft contract had been provided to Ms Murray, cll 14.1.7 and 14.1.8 had no significant bearing upon the question whether the contravening conduct occurred. One reason for that is that Mark Bain Constructions did not seek a finding that the Brechts appreciated the effect of the clauses before Barnscape executed the contract. Furthermore, as to cl 14.1.7, it is merely an acknowledgement and agreement that Barnscape did not rely upon representations other than those specified in the contract about various topics. That is consistent with the representations having been made and having been false.

[49] Clause 14.1.8 is broader. It is an acknowledgement and agreement upon three matters. First, "to the fullest extent permitted by law", all representations made by or on behalf of a seller are as set out in the contract. The effect of the trial judge's findings is that this statement is wrong. That conclusion was plainly open on the evidence. Secondly, it is agreed that the contract constitutes the only agreement. That is not inconsistent with the misleading representations having been made. The third agreement is that the buyer waives any inconsistent claim or right and agrees to indemnify the seller against any such claim brought in breach of the clause. That was legally ineffective for the reasons given by the trial judge,[26] and Mark Bain Constructions did not submit to the contrary. As the trial judge recognised, the real

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25 A similar approach was taken in analogous circumstances in *HW Thompson Building Pty Ltd v Allen Property Services Pty Ltd* (1983) 48 ALR 667.

26 See also *Warwick Entertainment Centre Pty Ltd v Alpine Holdings Pty Ltd* (2005) 224 ALR 134 at [59].

question was whether the clauses actually had the effect of "erasing whatever is misleading in the conduct".[27]

[50] It is established that "conduct" within the meaning of s 52 is not confined to "representations",[28] but in this case the alleged misleading conduct did consist of representations. Mark Bain Constructions has not established any ground for setting aside the trial judge's conclusions that those representations were misleading and, by s 84(2), were deemed for the purposes of the *Trade Practices Act* to have constituted conduct engaged in by Mark Bain Constructions.

Barnscape: causation

[51] The passages in the trial judge's reasons which directly relate to the question whether Barnscape relied upon Mark Bain Constructions' false representations are set out earlier in these reasons. Mark Bain Constructions argued that the trial judge erred in considering whether the contractual clauses "erased the affect of the representation in the minds of Mr and Mrs Brecht on behalf of Barnscape",[29] and in failing to attribute appropriate weight to other relevant circumstances, particularly that Barnscape sought advice from its solicitors about impediments to the view, sought an amendment to the contract by the insertion of cl 34 concerning the view, and that Mr and Mrs Brecht were experienced in the purchase and sale of properties and cautiously reviewed the contract. Barnscape referred also to Mrs Brecht's evidence that she appreciated that she could investigate the views herself with the local council and could have retained a professional, and that she made no contact with Mark Bain Constructions directly and did not undertake any council searches.

[52] These points are not insubstantial, but there is no reason to think that the trial judge did not take them into account. Her Honour did not overlook the potentially important circumstance that Mrs Brecht sought the addition of cl 34, the relevant provisions of which are set out earlier. That conduct, particularly when viewed in the context of the other circumstances upon which Mark Bain Constructions relied, was capable of suggesting that Barnscape relied upon the terms of the contract rather than upon anything represented by the agent. However, Mrs Brecht gave apparently persuasive evidence that, in respect of the process of satisfying Barnscape under proposed cl 34, Mr Conolly assured her that he had checked with the Council and reassured her about the views on many occasions. She gave evidence that he took her to the site, "…physically drew lines, pointed out places from here, from that tree to that antenna, to that house, to there, that this is where these buildings would come, finish", said that this was "…why you will have the outlook. You are going to have uninterrupted views", and "…reconfirm, reassured me in every way he possibly could." Mrs Brecht gave evidence that, whilst her solicitor looked at the contract for her, she relied upon Mr Conolly's representations.

[53] Mrs Brecht was pressed in cross-examination to explain why she did not do something else to satisfy herself about the represented view and she answered that it was "[b]ecause of Mr Conolly's adamant assurance over and over again whenever it came up. He had been to the council on many occasions and assured us that he had

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27 *Benlist Pty Ltd v Olivetti Australia Pty Ltd* (1990) ATPR 410043 at 51,590, quoted with approval by Keane JA in *Downey & Anor v Carlson Hotels Asia Pacific P/L* [2005] QCA 199 at [83].

28 *Campbell v Backoffice Investments* (2009) 238 CLR 304 at [102].

29 [2011] QSC 80 at [84].

checked it on many occasions and it was correct." Mrs Brecht spoke of her extensive dealings with agents and she gave evidence that this was "the first time that this has - in my experience with all those properties that something like this has happened." Mrs Brecht was cross-examined over a lengthy period. So far as can be gleaned from the transcript, she was a co-operative witness. She made appropriate concessions, but she adhered to her evidence that she had relied upon Mr Conolly's representations. Mr Brecht had much less involvement in the purchase, but his evidence was consistent with that given by his wife.

[54] It must also be borne in mind that, on the trial judge's findings: the Brechts adopted as one of their strict criteria in purchasing the unit that there should be uninterrupted ocean views; they nevertheless caused Barnscape to contract to purchase the unit at a time when they knew that the Splash building was being constructed between the unit and the ocean; they did so after the agent had very clearly and repeatedly represented to Barnscape that the ocean view from the unit would not be impeded by the completed Splash building; and they did not make any other investigations about that topic.

[55] On this evidence, the conclusion was reasonably open that Mrs Brecht satisfied herself about the view, as contemplated by proposed cl 34, by relying upon the further representations made by Mr Conolly when Mrs Brecht returned to Sunshine Beach on 21 and 22 June 2003, after he had earlier suggested a draft for that clause. Furthermore, the trial judge's analysis was strongly influenced by her Honour's views about the Brechts' credibility and the reliability of their evidence and there is no sufficient basis for concluding that her Honour misused her advantage in seeing and hearing the evidence given by the witnesses. It is therefore not open to an appellate court to substitute a different view of the facts.[30]

[56] Mark Bain Constructions advanced a separate argument concerning causation, that the representations related only to entry into the contract, or allowing the contract to become unconditional, but that Barnscape's decision to complete the contract broke the chain of causation upon which it relied. This argument was rejected by the trial judge, particularly in the following passage: [31]

> "When Mrs Brecht expressed further concern after a site visit in early June just before settlement, Mr Conolly told her that the problem was with Splash, that it had been built too high. He made the same statement to Mr Brecht by telephone. When Mrs Brecht asked if settlement could be delayed, she was told by Mr Conolly that Mr Bain had said that if they did not settle on the date due for settlement, they would lose their deposit. She said, on cross-examination, that if she had been able to terminate the contract at that time without financial penalty, she would have done so. The Brechts took legal advice and decided they had to settle on the Barnscape contract. The legal advice was however based on the representations made to the plaintiff and so tainted by that. The Barnscape contract settled on 9 June 2004. The representations made on behalf of the first defendant before the entry into, and prior to the settlement of, the Barnscape contract were relied upon by the plaintiff and so caused whatever recoverable loss it suffered. The

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30 Cf *Fox v Percy* (2003) 214 CLR 118 at 127 [26]-[27].

31 [2011] QSC 80 at [87].

> decision to settle was reasonable in the circumstances and did not break the chain of causation." (citations omitted)

[57] I do not accept Mark Bain Constructions' arguments that there was no basis for her Honour's conclusion that the Brechts' legal advice was "tainted" by the representations made to the plaintiff, that Barnscape's decision to settle broke the chain of causation between Mark Bain Constructions' misleading conduct and the loss claimed by Barnscape, and that Barnscape's evidence about the post-contract representations was irrelevant. Barnscape was contractually obliged to settle. It can readily be understood why it would not commence or provoke litigation at a time when it could not be satisfied that the agent's representations were misleading. Mrs Brecht gave direct evidence that Barnscape settled the contract because Mr Conolly persuaded her that non-fulfilment of the representations about the views was the Splash development's fault in building above the approved height, the true position only coming to light after settlement.

[58] That, and similar evidence also accepted by the trial judge, was plainly relevant and admissible to prove that the alleged contravention caused the claimed loss. Barnscape's legal advice to settle was based in part upon Mrs Brecht's mistaken belief in the truth of Mr Conolly's representations that the fault lay with the Splash development. The trial judge was right to describe that legal advice as "tainted" by the representations. For these reasons, which are similar to those given in *MacCormick v Nowland*[32] and *Basheer & De Conno Pty Ltd v Corani*,[33] Barnscape's decision to settle did not sever the causal link between the contravening conduct and its loss.

Avis: contravening conduct and causation

[59] The factual background concerning the purchase by Mrs Avis is largely not contentious. Both she and her husband were involved in the negotiations for her purchase of unit 8 at Number One Park. Mark Bain Constructions acknowledged in its written outline that a property would only meet their requirements if it had "spectacular, uninterrupted views." The trial judge accepted that Mr and Mrs Avis told a resident of Sunshine Beach, Mr Shannon, that their two criteria, aspect and "uninterrupted water views", had to be satisfied before they would purchase.[34] Mr Shannon introduced Mr and Mrs Avis to Mr Forsyth of Laguna Real Estate. The representations which Mr Forsyth made concerning the views were made after Mr and Mrs Avis had made plain to him their focus upon their requirement for uninterrupted views.[35] Mr and Mrs Avis had contracted for the purchase and sale of real estate on about 16 previous occasions.

[60] Mr Avis, who was found to be financially astute (he had been the head of a major financial advisory company and appointed to the board of a private equity firm[36]) accepted in cross-examination that he never did anything without the advice of a lawyer, that contracts are usually "relatively comprehensive and contain matters such as special conditions, finance clauses". In response to the suggestion that, notwithstanding the importance of the view and the impact of the Splash

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32 [1988] ATPR 49,180 at 49,182 – 49, 183.
33 (2005) SASC 468 at [57] – [64].
34 [2011] QSC 80 at [92].
35 [2011] QSC 80 at [95].
36 [2011] QSC 80 at [89].

development he did not seek to include any provision in the contract to protect his position, Mr Avis responded, "No, it was an oversight, wasn't it?" He gave evidence that he didn't tell his solicitor about the importance to him of the uninterrupted view because he had "physical evidence" (apparently a reference to the agent's demonstration to him of the represented views), he had the word of "people that I trusted", and "it just didn't enter my mind that I should have done that."

[61] The trial judge referred to Mr and Mrs Avis having taken legal advice before contracting, but was nonetheless satisfied that Mrs Avis contracted in reliance on the agent's representations.[37] Her Honour also found that despite cll 14.17 and 14.18, Mrs Avis relied upon the representations made to her about the view from unit 8.[38]

[62] After entry into the contract dated 15 September 2003, in May 2004 Mr Shannon told Mr Avis that the Splash building would considerably intrude on the views from the unit, falsifying the representations made by Mr Forsyth. Mr Shannon was initially reassured by Mr Forsyth saying that "it was going to be okay", but Mr Forsyth eventually admitted that there was a problem. In consequence, Mrs Avis wrote to the Council on 16 May 2004 seeking a copy of the Council's report about this issue. A few days before settlement it became obvious to Mr Avis, upon a visit to the site that the Splash development was much higher than had been represented by Mr Forsyth and would affect the views from unit 8. Mr Avis spoke to Mr Bain just before settlement in June 2004, indicating that he did not want to settle the contract because of what had happened with the Splash building. Mr Avis told Mr Bain that the property was not worth the purchase price and sought a reduction in the price.

[63] Mr Bain refused to consider any reduction, told Mr Avis that he must settle, and said that "the problem is that the Splash building has been built above the height limit. If you have any issue you need to take it up with the owner, the developer, the builder of the Splash building."[39] Mr Bain threatened legal action if Mr Avis refused to settle. Mrs Avis settled after Mr Avis obtained legal advice from his solicitor, Mr Jackson, that she should do so. The trial judge accepted Mr Jackson's evidence about this advice, which her Honour accurately summarised as follows:[40]

> "…Mr Avis told Mr Jackson that the view from the unit they had contracted to purchase was blocked by an adjoining building and that his understanding was that building was built higher than it should have been. Mr Jackson advised him that in those circumstances he should settle. Mr Jackson's advice was predicated on the misrepresentation made by Mr Bain to Mr Avis that any obstructions to the view by Splash was the result of Splash being constructed above the legal limit."

[64] The trial judge found that Mr Avis relayed to Mrs Avis the effect of Mr Jackson's advice and the conversation with Mr Bain, they decided to settle the contract, and they did so in reliance upon the representation made by Mr Bain that the problem

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37 [2011] QSC 80 at [103].
38 [2011] QSC 80 at [105].
39 [2011] QSC 80 at [111].
40 [2011] QSC 80 at [113].

was that the Splash building had been built above the allowed height limit.[41] The trial judge held:[42]

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

[65] Mark Bain Constructions' challenges to the findings that it had engaged in contravening conduct which caused Mrs Avis' claimed loss largely mirrored its challenges to the similar findings in relation to Barnscape. It is therefore not necessary for me to add much to the reasons I have already given in relation to Barnscape.

[66] The trial judge did not err in principle in finding that the contractual provisions "did not exclude the operation of the TPA because the clauses did not erase the affect of the representations in the mind of Mrs Avis".[43] That was a logical way of expressing the conclusion, particularly since Mark Bain Constructions did not refer to any evidence, and I have found none, that Mr or Mrs Avis was given a copy of the draft contract or became aware of the terms of cll 14.17 and 14.18 before Mr Forsyth made the pleaded misrepresentations in June and July 2003.

[67] Another point which distinguishes Mrs Avis' case from that of Barnscape is that Mrs Avis did not seek to include any clause in the contract in relation to the view available from the unit. That difference suggests that Mrs Avis' case on reliance was, if anything, stronger than Barnscape's case. However, Mark Bain Constructions argued that Mr Avis' admission of an oversight in failing to include reference to the agent's representations about the view in the contract should not be visited upon Mark Bain Constructions. The cross-examination of Mr Avis on that point was, I accept, a legitimate attempt to establish that he did not rely upon the misrepresentations; but the trial judge was not bound to draw that inference. That is so notwithstanding the extent of Mr Avis' business experience and his and Mrs Avis' understanding of contracts and reliance upon legal advice. The trial judge took all of those matters into account.

[68] In relation to Mark Bain Constructions' argument that the effect of the contravening conduct ceased upon settlement of the contract, the apparently reliable evidence of Mr Avis' solicitor, Mr Jackson, justified the trial judge's conclusion that his advice to settle was influenced by Mr Bain's misrepresentation that the obstructions to the

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41 [2011] QSC 80 at [114].
42 [2011] QSC 80 at [118].
43 [2011] QSC 80 at [105].

view resulted from the Splash development being constructed above the legal height limit. Mrs Avis' case was in this respect even stronger than Barnscape's case.

[69] Similarly to Barnscape's case, the evidence of Mr and Mrs Avis to which the trial judge referred supplied a sufficient basis for the trial judge's conclusions that misleading representations made by the agent induced Mrs Avis to contract to buy her unit and to complete that contract. Again, there is no basis for a conclusion that the trial judge misused her Honour's advantage in seeing and hearing the witnesses give evidence.

Estoppel

[70] In both appeals, Mark Bain Constructions argued that the trial judge should have found that the respondent was "estopped from denying the representation so made to the appellant by the execution of the contract of sale that the respondent did not rely on any matter beyond that contained in the contract of sale."

[71] Mark Bain Constructions' submissions under these grounds of appeal amounted to little more than a repetition of them. It is not necessary to cite authority for the proposition that such an estoppel could not be established in the absence of proof that Mark Bain Constructions acted upon the alleged representations. There was no evidence to that effect. It is therefore unnecessary to discuss the apparently fatal obstacle to these grounds of appeal presented by the decision in *Waltip v Capalaba Park*.[44]

[72] Mark Bain Constructions also characterised each respondent's decision to complete the contract as an "election". I see no basis for thinking that completion of the contract amounted to an election which precluded either respondent from obtaining a statutory remedy which was otherwise available under the *Trade Practices Act* 1974.

The authority of the agent after contract

[73] Each notice of appeal included a ground that the trial judge erred in failing to find that representations made by the agent after execution of the contract of sale were not made as Mark Bain Constructions' agent. If that were so, it would not falsify the trial judge's findings that Mrs Avis and Barnscape relied upon the pre-contractual representations in deciding to enter into the contracts which contractually obliged them to settle. I also consider that the word "sale", in the admitted engagement of each agent to market the proposed units "for sale", should not be construed as though it did not comprehend completion of the contract.

[74] In light of the frequent litigation about unit sales in this State since the early 1980s, it was clearly foreseeable that, in the necessarily lengthy period between contract and completion, a purchaser might become reluctant to complete despite Mark Bain Constructions' insistence upon completion. From an objective viewpoint, the vendor and the agent must have contemplated it as being in both of their interests for the agent to promote completion of the contract to the purchaser in such circumstances. Commercial commonsense thus accords with the natural meaning of the engagement.

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44 [1989] ATPR 40-975 at 50, 663.

Compromise

[75] It was a ground of appeal in each matter that the trial judge erred in failing to find that the respondent's compromise with the agent amounted also to a compromise as against Mark Bain Constructions. The trial judge rejected this argument in the following passage of the reasons:[45]

> "The third issue dealt with by the plaintiffs in their submissions was the matter raised by the first defendant's submission that the compromise with the real estate agent was in respect of the same joint liability and therefore it amounted to a compromise of the entire proceedings. The plaintiffs conceded that if the settlement agreement be construed as a release, it would release all others who were jointly liable for the same conduct. However if the settlement agreement be construed merely as a covenant not to sue, it would not release the other debtors. Even if a settlement agreement purports to be a release, if it discloses an intention to reserve rights against the other joint tortfeasor, or can be construed such that the intention was that the other jointly liable parties were to remain liable, it will be treated as a mere covenant not to sue.
>
> The correspondence between the solicitors for the real estate agents and the solicitors for the plaintiffs clearly show that the offer to settle made by the second defendant real estate agents was made with the clear understanding that the plaintiffs could pursue their action against the first defendant. The settlement agreement between the plaintiffs and the second defendants was a contract between the plaintiff and the second defendant which compromised the action between them but did not affect the liabilities of the first defendant to the plaintiffs. It clearly disclosed an intention to reserve rights against the first defendant and as such is to be construed as a covenant not to sue the second defendant rather than a release of the whole action: see *Pollak v National Australia Bank Limited*. [38] [2002] FCA 237 at [15] – [17]."

[76] Mark Bain Constructions did not develop an argument that there was any error in that reasoning. In the very different case of *Scaffidi v Perpetual Trustees Victoria Ltd*,[46] which Mark Bain Constructions cited, the Western Australian Court of Appeal made it clear that the result depended upon the proper construction of certain orders approving a settlement and the proper construction of the settlement deed.[47] That court applied the well known common law principles: a release granted to one joint obliger discharges the others, and, in consequence, the courts are reluctant to construe a compromise with one joint obliger as a release rather than as a covenant not to sue;[48]and even if a document is expressed as a release, it will be read as a covenant not to sue, and will not operate as a release of others jointly liable, if it expressly reserves the plaintiff's rights against those others.[49]

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45 [2011] QSC 80 at [202]-]203].

46 [2011] WASCA 159.

47 [2011] WASCA 159 at [12].

48 See *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 581-582, 608-609 and *JF & BE Palmer Pty Ltd v Blowers & Lowe Pty Ltd* (1987) 16 FCR 89; (1987) 75 ALR 509, 511-512.

49 *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635, 650 [26]; [2001] HCA 66.

[77] The trial judge applied those rules. If they are applicable in this case, they do not assist Mark Bain Constructions. The relevant settlement was made by an email sent on 2 February 2010 from the solicitor for Mrs Avis and Barnscape which accepted an offer to settle made on behalf of the agent in each case. The letter sent on behalf of Laguna Real Estate in the Avis matter, for example, offered $200,000 inclusive of interests and costs "on behalf of our client, the second defendant, alone" and it included a term that "[y]our client will be at liberty to continue to pursue its action against the first defendant, or to enter into any such arrangement, as it considers appropriate, to resolve its claim against the first defendant." There was no reference to a release, even of the agent. The intention not to release Mark Bain Constructions is manifest. The primary judge was clearly correct in finding that the terms of the settlement agreements between each respondent and agent evidenced a clear understanding that each respondent could pursue the action against Mark Bain Constructions.

[78] Mark Bain Constructions cited no authority for the unlikely proposition that these arcane common law rules might preclude the prosecution of a claim against one respondent for damages under the *Trade Practices Act* where the claimant has compromised with another respondent. However it is not necessary to discuss that issue in view of my conclusion that the result of any application of the common law rules would be that Mark Bain Constructions was not released by the respondents' compromises with the agents. It is necessary to add only that *Peterson v Moloney*,[50] which was cited by Mark Bain Constructions, is of no relevance for the reasons given by the trial judge.[51] Mark Bain Constructions did not argue that there was any error in those reasons.

Departure from the pleaded claims for compensation

[79] The compensation awarded by the trial judge in each case represented the difference between the price paid for the unit and its true value at the time of settlement of the contract, with a deduction to take into account the payment made by the agent in the compromise. (Under this heading, the deduction is not relevant.) In making those awards, the trial judge preferred the expert evidence of the respondents' valuer, Mr Caspers, to that given by Mark Bain Constructions' valuer, Mr Cox. At the hearing of the appeals, Mark Bain Constructions abandoned its ground of appeal in each matter that the trial judge erred in failing to take into account the evidence of Mr Cox.

[80] Mark Bain Constructions contended that the trial judge awarded "damages" (in fact, the judgments were for compensation under the *Trade Practices Act*) to Barnscape and to Mrs Avis on a basis which was not claimed or pleaded and which was contrary to the pleaded claims for damages; that the primary judge erred in finding that rr 156 and 658 of UCPR empowered the award of damages on a basis other than that which was pleaded or, if those rules conferred such power, that her Honour erred in the exercise of the discretion to grant such relief, exercised the power in a manner which took Mark Bain Constructions by surprise, and erred by permitting each respondent to reopen their case and adduce further evidence after the close of evidence; and that the trial judge erred in admitting expert opinion evidence in respect of matters which were not the subject of the pleaded cases.

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50 (1951) 84 CLR 91.

51 [2011] QSC 80 at [194] – [201].

[81] Barnscape and Mrs Avis each went to trial on a second further amended statement of claim filed on 17 July 2009. On the first day of the trial, 15 February 2010, each of them obtained leave to file a third further amended statement of claim. The amendments related to the agency issue. There was no amendment of the allegations about the losses claimed in the previous pleading. The trials proceeded on the third further amended statements of claim, and they were not further amended.

[82] The relevant allegations in Barnscape's and Mrs Avis's third further amended statements of claim followed the same pattern. Had the agent not made the pleaded misrepresentations, Barnscape and Mrs Avis would not have contracted to purchase or settle the purchase of the unit. They would instead have searched for and purchased an alternative property which met their criteria (including as to the required ocean views). If they had not found an alternative property which met those criteria, they would not have purchased any property.

[83] Barnscape alleged in paragraph 23 that, by reason of Mark Bain Constructions' misleading and deceptive conduct, Barnscape "suffered loss or damage as particularised in paragraphs 27 and 30 below." Paragraph 27 pleaded that Barnscape "lost the opportunity to acquire an alternative property and profit from its increase in value since the middle of 2003, the quantum thereof being the difference between the value of the property at the time the plaintiff sold it ($1,035,000), and the contemporaneous value of an alternative property ($1,608,000), namely $573,000." The reference in paragraph 23 to paragraph 30 was evidently a mistake, the last paragraph of the pleading being numbered 28. Paragraph 28 alleged, further or alternatively to paragraph 27, that Barnscape sustained four categories of loss flowing from Barnscape's purchase: interest paid on money Barnscape borrowed to settle the purchase of the property from settlement on 9 June 2004 until resale of the property on 29 May 2007, lost investment opportunities for approximately $600,000 which Barnscape put towards the purchase of the property, "loss on capital, being the purchase price of $1,200,000 minus the sale price $1,035,000, totalling $165,000", and transaction costs.

[84] Mrs Avis alleged in paragraph 20 of her third further amended statement of claim that, by reason of Mark Bain Constructions' misleading and deceptive conduct, she "suffered loss or damage as particularised in paragraph 25 below." Paragraph 25 alleged that she lost "the opportunity to acquire an alternative property and profit from its increase in value since the middle of 2003", which she quantified as the difference between the present value of an alternative property and the value of the unit when she sold it. Paragraph 26 made the further or alternative claim that, as a result of purchasing the property, Mrs Avis suffered loss and damage in three categories, namely, interest on the purchase price of $1,225,000 which she borrowed from 9 June 2004 until 24 February 2009, "loss on capital, being the purchase price of $1,225,000 minus sale price of $890,000, totalling $335,000", and transaction costs.

[85] The pleadings upon which Barnscape and Mrs Avis went to trial did not allege that they sustained a loss measured by the difference between contract price and value (at the time of acquisition of the unit or otherwise).

[86] In opening the respondents' cases, however, their counsel foreshadowed expert evidence to establish that each unit was worth less than its purchase price at the time

of acquisition. Counsel for Mark Bain Constructions observed that no such case was pleaded and there would be an objection if any such evidence were adduced.[52] On the second day of the trial, the respondents' counsel adverted to a concern that it was "potentially being open to it being asserted down the track that the plaintiff had not proved her case … if there isn't some expert evidence that the property was in fact worth less as it was … represented…", but he acknowledged that no such case was pleaded. Mark Bain Constructions' counsel made it plain that any amendment to plead that measure of damage would be opposed. On the third day of the trial, the respondents' counsel referred to evidence to be given by their valuer, Mr Caspers, about the value of the units at the time of the contracts or the time of settlement. Counsel for Mark Bain Constructions maintained his foreshadowed objection to the admissibility of such evidence. The trial judge expressed a tentative view that the evidence might be adduced and the question of its inadmissibility deferred until a later time. Neither counsel advocated a contrary approach.

[87] Counsel and the trial judge made similar statements just before Mr Caspers was called to give evidence. Subject to Mark Bain Constructions' objection as to relevance, Mr Caspers was then permitted to give evidence for the respondents, largely in the form of his brief valuation reports, that at the time of each purchase there was a substantial difference between the purchase price and the value of the unit purchased. In Mrs Avis' case, Mr Casper reported that, as against the contract price in September 2003 of $1,225,000, the value of the unit was $755,000, leaving a shortfall of $470,000. In Barnscape's case, he reported that, as against a contract price in July 2003 of $1.2 million, the value was $800,000, leaving a shortfall of $400,000.

[88] At the commencement of cross-examination, Mark Bain Constructions' counsel sought to reserve his position on the evidence to which he had objected and to cross-examine in the event that the trial judge ruled that the evidence was admissible. The trial judge responded that counsel should cross-examine on the evidence immediately. Counsel cross-examined Mr Caspers in relation to this issue, and also upon other aspects of Mr Caspers' evidence which were in conformity with the pleaded cases.

[89] Mark Bain Constructions had earlier called evidence from its valuer, Mr Cox, who, by consent of the parties, was interposed to give evidence during the cases of the respondents. Mr Cox's valuation reports did not respond to the evidence of the unpleaded loss in the reports given by Mr Caspers, and Mr Cox was not called to give evidence again after the completion of Mr Caspers' evidence. The evidence was completed on the fifth day of the trial, 19 February 2010.

[90] Thereafter, the parties exchanged written submissions and 31 March 2010 was allocated for the hearing of oral submissions. During submissions, Mark Bain Constructions' counsel repeated his objection to damages being assessed on a different basis from that which was pleaded. Barnscape and Mrs Avis then applied for leave to amend their statements of claim. Their proposed fourth further amended statement of claim in each case added an allegation that they sustained a loss measured by the difference between the purchase price and the value of the unit at the date of settlement. On a separate day allocated for the hearing of that application, 16 April 2010, Mark Bain Constructions objected to the amendments.

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[52] Apparent errors in the transcript in the attribution of speakers were resolved by an agreed chronology supplied by counsel after the hearing of the appeal with the leave of the Court.

According to counsels' joint submission lodged with the Court's leave after the hearing of the appeal, the trial judge ruled that there would be a further hearing of evidence of the value of properties, the amendment application would be ruled upon in the judgment after the trial, and counsel should agree on the further questions to be asked of the experts.

[91] In support of the application for leave to amend, the respondents relied upon affidavits by their solicitor. The solicitor noted that each respondent's claim for capital loss pleaded in paragraph 26 of the third further amended statement of claim (i.e. the claim for the loss on resale of the unit) had been introduced in the second further amended statement of claim on 17 July 2009, and that Mark Bain Constructions had not objected to the pleading as being not maintainable nor pleaded that a claim for loss of capital could only be for the difference between the purchase price and its value at the date of settlement.

[92] Mark Bain Constructions relied upon an affidavit by its solicitor. As he deposed, in the proceedings originally issued by Mrs Avis and Barnscape on 21 March 2007, they claimed damage in an estimated amount of $450,000, but gave no particulars of the basis upon which the damages were claimed. In April 2007, in response to a request for particulars by Mark Bain Constructions, Mrs Avis particularised the loss and damage as comprising "the difference between the price paid by the plaintiff for the property and the actual value of the property had the effect of the Splash development on the property's aspect been apparent at the time of purchase" (i.e. the measure awarded by the trial judge). At that time the respondents made alternative claims for the difference between the value of the property at the time of trial and its value had its aspect not been affected by the Splash development.

[93] The solicitor deposed that as a result of those, and further particulars supplied by the respondents, he then proceeded on the basis of the claimed "traditional method of assessment of damages, being the difference between the purchase price and the actual value at the time of the acquisition", and prepared to meet the claims on that basis. However, as the solicitor also deposed, on 14 July 2008 each respondent delivered amended statements of claim which articulated a new case on damages, abandoning the claim based on the difference between purchase price and actual value of the units. The new pleading reframed the claims as being for "lost opportunity to acquire and profit from the acquisition of an alternative property". (That summarises paragraphs 23 to 27 of the Barnscape amended statement of claim and paragraphs 20 to 25 of the Avis amended statement of claim, both filed on 14 July 2008.) The solicitor deposed that there was no conduct by Mark Bain Constructions to induce the change and the plaintiffs did not explain why they had abandoned the "traditional approach to damages".

[94] The solicitor deposed that he then took instructions and prepared Mark Bain Constructions' defence based on the reframed damages cases and he did not prepare to meet any claim based upon the "traditional method of claiming damages". In subsequent interlocutory steps, and in a mediation, there was no suggestion on behalf of the plaintiffs that their damages claims would be prosecuted otherwise than in accordance with the pleadings. The solicitor went on to refer to the amendments made in the second further amended statements of claim, summarised earlier in these reasons, and to the continuing absence of any claim for the difference between the purchase price and the value of the unit at the time of acquisition. The solicitor recorded that he formed the view that this matter had been

closely considered by the plaintiffs' counsel and that he prepared for trial on the basis of the pleaded cases.

[95] The solicitor also referred to the settlement made between the plaintiffs and the agents for the payment of the sum of $200,000 and to negotiations for a settlement between Mark Bain Constructions, the agents, and the plaintiffs. He deposed that "important considerations in conducting those negotiations" included "the likely extent of the damages". The solicitor went on to depose that the compromise made between Mark Bain Constructions and the agents "was entered into by reference to the factors referred to above" and that a "critical factor was the level of exposure which [Mark Bain Constructions] perceived that it had in light of the pleaded cases". He deposed that if the plaintiffs were given leave to amend, Mark Bain Constructions would be "seriously prejudiced because it has irretrievably abandoned its rights to indemnity against the real estate agents (which it had sought in the third party proceedings) and which abandonment was agreed by [Mark Bain Constructions] solely upon a consideration of the plaintiffs pleaded cases at that point in time." The solicitor also deposed that Mark Bain Constructions had incurred substantial costs in relation to the five day trial on the basis of the pleaded cases and conducted negotiations before and during trial on that basis.

[96] Mark Bain Constructions subsequently filed a further affidavit by the same solicitor and an affidavit by Mr Bain, the managing director of Mark Bain Constructions. The solicitor deposed that he had assumed that the basis of both plaintiffs' claims for damages was only as was set out in their pleadings. He rejected any suggestion that the claims for damages which were pleaded by the plaintiff were not maintainable as a matter of law or treated as such by Mark Bain Constructions. He deposed that at no time was it suggested on behalf of Mark Bain Constructions that the alternative case first pleaded in July 2009 for capital loss as the difference between the purchase price and the ultimate sale price could not be claimed. He deposed that, on the basis of his instructions, Mark Bain Constructions agreed to settle with the agents "on the basis of a 'walk away' position in the light of the matters advised upon and referred to in my previous affidavit" and that "if the new basis of damages that have now been pleaded had been made in the pleadings, and pursued at trial, I would have advised the First Defendant not to settle with the Third Party on the basis that my client did in fact settle the Third Party proceedings."

[97] Mr Bain deposed that one of the critical issues in his decision to settle with the agents was the perception of the plaintiffs' lack of prospects in succeeding on the quantum claim as it was then framed. If Mark Bain Constructions was found liable, the $200,000 already paid to the plaintiffs by the agent would be taken into account and might extinguish the pleaded claim against Mark Bain Constructions. If he had been advised before the settlement between Mark Bain Constructions and the agents that the plaintiffs intended to amend their claims to include the claim for loss of capital on the basis of the alleged difference between the purchase price and value at settlement, he would not have agreed on behalf of Mark Bain Constructions to discontinue the third party proceedings against the agents.

[98] The respondents did not file any responsive affidavit or seek to cross-examine Mr Bain or the solicitor.

[99] In response to the trial judge's ruling on 16 April 2010, both counsel informed the judge that the valuers would be asked to report on the "true value" of the apartments

at the date of the contracts and at the date of settlement of the contracts. The respondents obtained a supplementary valuation report from their valuer, Mr Caspers, and Mark Bain Constructions obtained a supplementary valuation report from its valuer, Mr Cox. The valuers gave evidence and were cross-examined over three days from 31 May 2010.

The trial judge's reasons

[100] In the trial judge's reasons for judgment, her Honour summarised Mark Bain Constructions' grounds of opposition to the application for leave to file the fourth further amended statement of claim: Mrs Avis and Barnscape had abandoned their claim for damages on the basis they now sought to claim, the application to amend was made far too late, and Mark Bain Constructions had compromised its third party proceedings on the basis of the pleadings as they were at the commencement of the trial.[53] Her Honour referred to relevant factors in relation to the application to amend identified in *Aon Risk Services Australia Ltd v Australian National University*[54] including the nature and importance of the amendment to the party applying, the extent of the delay, costs and other prejudice occasioned by the proposed amendment to the respondents of the application and others, and the explanation for the delay in seeking the amendment to the pleadings. Her Honour referred also to her order on 16 April 2010 requiring the plaintiffs to pay the costs of the applications to amend and consequential costs such as the costs of obtaining the further expert reports ordered on 16 April 2010.[55]

[101] The trial judge did not allow the amendment, but her Honour nevertheless considered that damages could be assessed in the manner set out in the proposed fourth further amended statement of claim for the following reasons:[56]

> "[146] In addition to the relief specifically sought the court has power pursuant to r 156 of the UCPR to grant general relief or relief other than that specified in the pleadings irrespective of whether general or other relief is expressly claimed in the proceedings. This rule is supplemented by r 658 of the UCPR which provides:
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> '(1) The court may, at any stage of a proceeding, on the application of a party, make any order, including a judgment, that the nature of the case requires.
>
> (2) The court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim, counterclaim or similar document.'
>
> [147] These rules were referred to by the Court of Appeal in *Coppo v Banalasta Oil Plantation Ltd; Borg v Pawski* [2005] QCA 96. At [30] McMurdo P held:
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> 'The relief sought at trial against Plantation Equity included a declaration that each loan agreement was

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53 [2011] QSC 80 at [15] – [18].
54 (2009) 239 CLR 175 at [214] – [215].
55 [2011] QSC 80 at [19].
56 [2011] QSC 80 at [146] – [151].

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

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

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

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

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

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

[151] The first defendant's arguments as to prejudice are not maintainable in view of the rules which enable the court to give the appropriate relief on the pleaded cause of action

> notwithstanding the failure to specifically plead that relief. It was perilous to settle on the basis, if it did, that the plaintiffs would be limited to the pleaded relief." (citations omitted)

[102] In relation to Barnscape's claim, the trial judge considered that each of the different calculations of quantum of damages advanced by Barnscape were arguable and it would be "possible" to award compensation on those bases,[57] but that there were "uncertainties involved in valuing the loss of opportunity to purchase an alternative property or engage in another investment."[58] Her Honour concluded, with reference to authority[59], that the difference between the price paid or payable under the contract and the value of the property at that date was a quantifiable loss which should be the measure of compensation.[60]

[103] Her Honour accordingly held that the "proper measure" of Barnscape's loss, the difference between the price paid for the unit and its true value at the time of settlement, was $380,000[61] (the contract price of $1,200,000 less Mr Caspers' valuation at the time of settlement of $820,000).[62]

[104] In relation to Mrs Avis' claim, the trial judge found that the loss she suffered was the difference between the price she paid for the unit and its true value at the time of settlement, namely $450,000[63] (that is, the difference between the contract price of $1,225,000 and Mr Caspers' valuation of the unit at the time of settlement of $775,000).[64]

Consideration

[105] I accept the submission for Mark Bain Constructions that the trial judge's discretion miscarried. The unchallenged evidence adduced on behalf of Mark Bain Constructions established that the application to amend was made extraordinarily late, that it would cause serious disruption and delay (as it did, requiring a further three days of hearing after the trial had otherwise concluded), and, most importantly, that: by amendments made on 14 July 2008 the respondents had omitted from their statements of claim an allegation of loss of the character awarded by the trial judge, the parties thereafter conducted interlocutory proceedings, a mediation, and settlement negotiations on the basis only of allegations of loss of a different character, the respondents settled with the agents only on the basis of those allegations, the respondents pursued only those allegations to trial, taking those matters into account, Mark Bain Constructions settled with the agents after the commencement of the trial on the footing that the respondents had decided not to seek recovery upon the basis awarded by the trial judge, and Mark Bain Constructions would not have made that settlement agreement if such a claim had been made.

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57 [2011] QSC 80 at [156] – [166].

58 [2011] QSC 80 at [168].

59 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Potts* v *Miller* (1940) 64 CLR 282 at 297-299; *Toteffv v Antonas* (1952) 87 CLR 647 at 650-651; *South Australia v Johnson* (1982) 42 ALR 161 at 170; *Gates* v *City Mutual Life Assurance Society Ltd* (1985) 160 CLR 1 at 12.

60 [2011] QSC 80 at [169], citing *Marks v GIO Australia Holdings* (1998) 196 CLR 494 at [95].

61 [2011] QSC 80 at [170].

62 [2011] QSC 80 at [154].

63 [2011] QSC 80 at [189].

64 [2011] QSC 80 at [186].

[106] Mark Bain Constructions might have been pleasantly surprised by the respondents' abandonment of their original and conventional pleading of loss, particularly where that loss was supported by Mr Caspers' reports and was not inconsistent with the respondents' amended claims of smaller losses on the resales. Even so, in the absence of any challenge to the evidence adduced for Mark Bain Constructions in opposition to the amendments, that evidence could not be disregarded. That evidence established a strong case that giving leave to amend would cause substantial prejudice to Mark Bain Constructions, in the ways already described. The prejudice that it had compromised with the agents on the basis of different allegations of loss could not be remedied by an order as to costs. The proper application of the principles expressed in *Aon Risk Services Australia Ltd v Australian National University* to which the trial judge referred required the refusal of the application for leave to amend.

[107] The trial judge did not grant leave to amend, but on the different basis that it was not necessary. The respondents supported that approach. One of their arguments was that it was not necessary for them to have pleaded the measure of damages which ultimately was awarded by the trial judge. In a related argument, they contended that the trial judge was correct in concluding, in paragraph 15 of the reasons, that Mr Caspers' evidence that the purchase prices exceeded the true values of the properties was admissible to show that the respondents had suffered a loss at the time they contracted to purchase the properties, even though their claim for compensation under s 82 of the *Trade Practices Act* was not pleaded on that basis. Those arguments cannot be reconciled with the modern rules of pleading damages in the UCPR. Rule 150(1)(b) provides that the matters which must be specifically pleaded include "every type of damage claimed …". Rule 155(1) provides that the pleading "must state the nature and amount of the damages claimed". Rule 155(2) provides that a party claiming general damages must include particulars in the pleading, including "the nature of the loss or damage suffered", "the exact circumstances in which the loss or damage was suffered", and "the basis on which the amount claimed has been worked out or estimated." Rule 155(3) provides that, if practicable, "each type of general damages" and "the nature of the damages claimed for each type" must also be pleaded. Rule 155(4) requires a party claiming damages also to "specifically plead any matter relating to the assessment of damages that, if not pleaded, may take an opposing party by surprise." The respondents were obliged to and did comply with those rules in the pleading upon which they went to trial, but they did not plead the nature or measure of the loss awarded by the trial judge.

[108] The respondents submitted that the trial judge nevertheless correctly exercised the power given by rr 156 and 658, referred to in paragraph 146 of her Honour's reasons, or at least there was no ground for setting aside her Honour's exercise of those powers. That submission must also be rejected. Each rule confers a discretion, the exercise of which must take into account the particular circumstances of the case. In *Coppo v Banalasta Oil Plantation Ltd*, to which the trial judge referred, the exercise of the discretion to allow a new claim for damages did not occasion prejudice to the respondent because, whilst that had not been claimed or pleaded, the material facts had been pleaded and the relevant evidence had been adduced in support of a closely related claim for declaratory relief.[65] In my respectful opinion that decision provided no support for the favourable exercise

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65 See [2005] QCA 96 at [83] – [88] per Chesterman JA.

of the discretion in this case, in which Mark Bain Constructions predictably prepared for trial and settled with the agents on the footing that the plaintiffs did not pursue their original claim for damages.

[109] This is far from being a case in which the parties chose to disregard the pleadings and to fight the case on different issues.[66] When, on the first day of the trial, the respondents' counsel first hinted at an attempt to reinstate the original claim for damages, Mark Bain Constructions' counsel insisted that the trial proceed on the pleadings and maintained that position when the respondent subsequently sought to adduce evidence in support of the unpleaded claim. It was not submitted that Mark Bain Constructions departed from insistence upon adherence to the pleadings at any other stage of the proceedings.

[110] The respondents' attempts to blame Mark Bain Constructions for the respondents' failure to maintain their original pleading are also devoid of merit. There was no attempt to challenge the affidavit evidence adduced on behalf of Mark Bain Constructions that it had no role in the respondents' decisions to abandon their original pleading of loss.

[111] The respondents' counsel argued that acceptance of these grounds of appeal would mean that a plaintiff "would always have to plead and particularise every possible hypothetical way that damages should be calculated". Rather, a plaintiff would ordinarily claim damages on a conventional basis which the evidence supported. *Ruxley Electronics v Forsyth*,[67] upon which the respondents relied, did not involve any question concerning amendments to damages claims or the application of rules analogous to UCPR rr 156 and 658, at least so far as the report of the speeches in the House of Lords reveals. The respondents also argued that Mark Bain Constructions could not, by settling with the agent, restrict the powers of the trial judge to award damages in accordance with rr 156 and 658. That is so, but, as I have mentioned, the powers under each of those rules must be exercised with reference to the particular circumstances of each case. In this case, the unchallenged evidence adduced by Mark Bain Constructions demonstrated substantial prejudice, including irremediable prejudice, if the powers were exercised in favour of the respondents.

[112] The respondents argued that the value of the units at the time of purchase was always in issue. The respondents pointed out that in a valuation dated October 2008, Mr Cox reported that the purchase price of $1.2 million for Barnscape's unit in 2003 and the purchase price of $1.225 million for Mrs Avis' unit in 2003 were "considered to represent 'True Value'". (Mr Cox described his understanding of the meaning of "True Value" with reference to *HTW Valuers (Central Queensland) Pty Ltd v Astonland Pty Ltd*[68]). However, reference to the instructions to Mr Cox set out earlier in his report reveals that he was not asked to report on the question whether the purchase price of either unit exceeded its value at the time of contract or at the time of settlement. In the context of the pleadings and the amendments to them, the report did not imply that this measure of damages was in issue.

[113] It was also submitted that Mark Bain Constructions' amended defence itself pleaded the measure of damages upon which the respondent succeeded. That is not so. On 25 February 2010, Mark Bain Constructions filed defences to the third further

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66 Contrast *Dare v Pulham* (1982) 148 CLR 658 at 664.

67 [1996] AC 344.

68 (2004) 217 CLR 640.

amended statement of claim in each matter. In the Barnscape matter, paragraph 21(ii) of the amended defence denied the allegation in paragraph 23 of the third further amended statement of claim that Barnscape had suffered loss or damage, one ground of the denial being that the price paid by the Plaintiff was at least equivalent to the market value "at the material time alleged by the Plaintiff …". Paragraph 20(ii) of the defence to Mrs Avis' claim denied the allegation in paragraph 20 of her third further amended statement of claim that she had suffered loss or damage, the grounds of denial including that the price she paid for her unit was at least equivalent to its market value "at the times for assessment alleged by the plaintiff or at any other relevant time …". Those defences could not justify the respondents in claiming losses on a different basis from their own pleadings. The respondents' replies merely joined issue upon the allegations in the defences.

[114] Another argument made by the respondents was that Mr Caspers' original report included evidence of the difference between the contract price and market value. The reports are themselves undated, but they refer to dates of inspection of the units of 18 February 2008 (in relation to Avis) and 19 February 2008 (in relation to Barnscape). The index to the appeal record gives the date of each report as 19 February 2008. Each report refers to the instructions as being to "assess the market value of the property and as per your instructions, we have valued the subject property as of 1 September 2003 and as of…" (18 February 2008 in the case of Avis and 30 May 2007 in the case of Barnscape) "…on the basis of actual views and represented views …". It seems, therefore, that these reports were prepared before the respondents amended their statements of claim on 14 July 2008 to introduce the different measures of the claimed losses.

[115] The respondents argued that Mark Bain Constructions had not demonstrated prejudice because it had not proved that it might have succeeded in its third party claim against the agents. It is not easy to reconcile this argument with the absence of any cross-examination of Mr Bain and the solicitor, whose affidavits at least implied that the settlement with the agent surrendered something of substantial value which would not have been surrendered in different circumstances. Furthermore, on the face of the pleadings, the claim against the agent might be thought to have had some merit, bearing in mind the respondents' acknowledgement in argument that the agents' defences were in substance a denial that they had made the representations. That case could not stand with the trial judge's findings.

[116] Another argument advanced for the respondents was that Mark Bain Constructions could not demonstrate prejudice without establishing that the respondents might not be awarded the same level of damages in their pleaded damages claims as was sought in the proposed amendment. That overlooks the practical reality, effectively sworn to in Mark Bain Constructions' affidavits, that the re-introduction of the abandoned case on damages would increase the exposure of Mark Bain Constructions to a judgment for damages.

[117] The respondents' argument was not advanced by its submission that proof that the price exceeded the value of the land at the time of contract or settlement was essential to proof of loss under s 82(1). The authority cited by the respondents[69] does not support that argument, we were not referred to any authority which does, it

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[69] *Robertson Street Properties P/L v RPM Promotion Ps/L & Ors* [2005] QCA 389 at [5] per McPherson JA and at [47] per Keane JA, McMurdo P agreeing.

is inconsistent with the pleading upon which the respondents went to trial and with their notices of contention in the appeals, and the section is not open to such a construction.[70]

[118] The respondents' submission that evidence could be admitted to demonstrate that there was good reason for the respondents to be concerned about the views and to rely upon what they were told about them, if accepted, might justify the admission of evidence to prove the rather obvious proposition that the units would be worth more with the represented views than with more limited views. That could not justify the admission of Mr Casper's evidence quantifying the difference between the contract prices and the values of the properties at the time of settlement. It could not justify assessing loss on a basis which was not pleaded.

Conclusion

[119] The proceedings were conducted by the parties in accordance with the pleadings until the respondents sought to reintroduce a measure of loss they had abandoned much earlier. The respondents' applications for leave to amend at the end of the trial to reintroduce that new measure of loss were correctly not granted, but the trial judge's exercise of the powers given by UCPR rr 156 and 658 miscarried because her Honour did not take into account the prejudice thereby caused to Mark Bain Constructions. On the unchallenged evidence, the prejudice was substantial and included prejudice which could not be remedied by orders for costs. For those reasons, the judgments given by the trial judge cannot stand.

[120] It is appropriate to make one additional comment. The deferral of the ruling upon the admissibility of the expert evidence concerning the usual measure of damages in this case, in which, I should add, all counsel acquiesced, may not have made any practical difference to the result in this case. Nevertheless it is right to draw attention to the fact that, since judgment was given in the Trial Division, the High Court has emphasised the general rule that trial judges should rule upon objections to admissibility of evidence as soon as possible, often immediately after the objection has been made and argued. [71]

[121] It is necessary then to consider the respondents' notices of contention, in which they sought judgments in accordance with the alternative measures pleaded in the statements of claim upon which they went to trial. At the hearing of the appeal, and in a supplementary submission delivered by leave after the hearing, the respondents sought orders either that the matters be remitted to the trial judge to consider those claims or, if it was found to be practicable, that the necessary findings be made and judgments be given in these appeals. Mark Bain Constructions argued that neither course should be taken because the evidence was incapable of establishing any of the pleaded damages claims.

Mrs Avis' notice of contention

[122] Mrs Avis pleaded the following damages claims:

(a) Lost opportunity to acquire an alternative property and profit from its increase in value since the middle of 2003.

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[70] See *HTW Valuers v Astonland* (2004) 217 CLR 640 at [65] per Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ.

[71] *Dasreef Pty Ltd v Hawchar* [2011] HCA 21 at [19], per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

(b) Interest on the purchase price of $1,225,000 borrowed, between 9 June 2004 until resale of the unit on 24 February 2009.
(c) Loss of capital, being the purchase price of $1,225,000 less the sale price of $890,000, totalling $335,000.
(d) Costs of the transaction of purchasing the unit.

[123] As to (a), the trial judge rejected Mrs Avis' loss of opportunity claim, finding that it was unlikely that she would have purchased either of the alternative properties which she nominated (unit 1 and unit 2 in the Splash building) because neither of them had the surf views which she required; it was more likely that, if she had not purchased the subject unit, she would not have purchased any property at Sunshine Beach; and it could not be said that she had lost the opportunity to achieve the substantial increase in the value of units in that area of which Mr Caspers gave evidence.[72] The respondents conceded in their supplementary submissions that the evidence at the trial did not support a calculation on the basis of Mrs Avis' pleaded loss of opportunity claim.

[124] As to (c), I consider that the findings and the evidence do establish that Mrs Avis sustained a loss as a result of the misleading conduct in an amount which was at least equivalent to the loss on resale of $335,000. The trial judge made the following relevant findings:[73]

> "After settlement, Mr and Mrs Avis furnished the unit and used it for themselves and their family for holidays. The fitout had been completed before they found out in September 2004 that Splash was not in breach of the height limits of the council.
>
> The funds used to purchase unit 8 were borrowed from Westpac. The Avises borrowed 100 per cent of the purchase price. Although the unit was purchased for capital growth, the unit was not used for income producing purposes, so the interest on the loan used to purchase the property was not tax deductible.
>
> Mr Avis said that they did not attempt to sell the unit until they had resolved the question of whether Splash was above the regulated height or not. Once they took legal proceedings they were uncertain whether or not to sell. Other reasons for selling were more personal. An additional reason for selling was the Avises' daughters had moved overseas and one had given birth so they started travelling to visit them rather than just visiting one holiday site in Australia. Mr Avis also needed to travel overseas because of a new position that he had taken up.
>
> On 1 August 2008 Mr and Mrs Avis decided to sell unit 8 and appointed Ray White Real Estate and Dowling & Neylan Real Estate to sell the unit for $1,035,000. The contract settled on 23 February 2009 for $890,000. The marketing brochure by Ray White Real Estate correctly referred to the unit having "ocean views".
>
> There is no dispute that the price obtained by Mrs Avis when she sold the unit was the market price and it was sold after a proper marketing campaign.

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72 [2011] QSC 80 at [180].
73 [2011] QSC 80 at [181]-[188].

> In his evidence Mr Caspers valued unit 8 with its impeded view as being worth $755,000.00 as at 1 September 2003 and as at 9 June 2004 as $775,000. If the property had had an unimpeded view, as represented, its value would have been $875,000.00.
>
> Mr Caspers valued unit 8 as at 18 February 2008 at $985,000. Had it had an unimpeded view, it would have been valued at $1,145,000.
>
> If it had not been for the misrepresentations Mrs Avis would not have purchased unit 8. She would not then have suffered the capital loss of $335,000 pleaded in paragraphs 26(b); she would not have had to pay the interest on the capital borrowed of $409,221 and she would have saved on bank fees and conveyancing charges. However, Mr and Mrs Avis would not have enjoyed the personal use of the property. Their sale of the property was influenced by personal factors not related to the representations which induced its purchase. Those matters are particularly difficult to quantify."

[125] The usual method of assessing loss in such a case, the deduction of true value at the date of acquisition of the asset from the purchase price is "no more than a guide to the assessment of damages under s 82", and the section permits other approaches to the assessment provided that they do not work an injustice.[74] I consider that the capital loss on resale is a permissible approach in the particular circumstances of this case. That the timing of the resale was influenced by personal considerations does not obscure the fact that Mrs Avis lost $335,000 on resale of a unit which she purchased for capital growth as a result of Mark Bain Constructions' contravention of the *Trade Practices Act*. (Mark Bain Constructions did not in this appeal raise the theoretical possibility that the rental value of the property exceeded the expenses, which included interest on the whole purchase price. That seems unlikely when regard is had to the low rental income received by Barnscape, which did seek to reduce its losses by renting out its unit.[75])

[126] Importantly, Mrs Avis' delay in reselling did not increase the capital loss. She settled her contract to purchase the unit on 9 June 2004 and it was not made clear until November 2004 that the Splash building had been built in accordance with the local council's approval and the law, thereby allowing Mrs Avis to conclude that the agent's statement about the view amounted to misrepresentations. It is evident from the accepted evidence of Mr Caspers that the unit was then, and at the dates of contract and settlement, worth considerably less than the $890,000 for which Mrs Avis resold it in February 2009. It was not in contest that she resold the unit at the then prevailing market value. It therefore does no injustice to Mark Bain Constructions to award Mrs Avis her capital loss on the resale. Indeed, in relation to this claim the delay in reselling advantages Mark Bain Constructions, both because the capital loss would have been greater at the time of acquisition and in November 2004 and because interest on the loss will run only from the much later date of resale.

[127] Interest on the purchase price should not be allowed as an additional head of damages. It was one of the costs of holding the unit which entitled Mrs Avis to

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74 *HTW Valuers v Astonland* (2004) 217 CLR 640 at [65] per Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ.

75 Under an order made on 21 April 2009, the evidence in each proceeding was also evidence in the other.

occupy it from the date of acquisition until resale. She did not rent the unit but it might have been rented, substantially reducing the loss sought to be charged against Mark Bain Constructions. Mrs Avis did not adduce any evidence of the rental value. Having regard also to the lengthy period during which Mrs Avis owned the unit after she ascertained that the representations made by the agent were misleading, the transaction costs of acquiring the unit ($1,419.76) also should be regarded as referable to Mrs Avis' occupation of the unit and not allowed as a separate head of damages.

Accounting for the settlement with the agent

[128] As mentioned earlier, each agent made a payment of $200,000 inclusive of claim, interest and costs. In order to determine the appropriate variation to the judgment sum it is necessary to consider Mark Bain Constructions' challenge to the trial judge's methodology for taking into account the payments made to the respondents under their settlements with the agents. The same issues arise in relation to each respondent.

[129] Mrs Avis' total legal costs of her proceeding against both defendants up to the time she settled with the agent amounted to $113,057.16. The tendered schedules of costs in each case did not itemise the costs but merely stated the amounts of the billed and unbilled cost and outlays. The trial judge considered that the costs were incurred equally by Mrs Avis between Mark Bain Constructions and the agent and that half of the total amount ($56,528.58) should be attributed to the legal costs involving the claim against Mark Bain Constructions.[76] The trial judge then found that the amount of the costs allocated to the settlement sum should be reduced by another 40 per cent to take account of the amount that would be allowed on assessment. That reduced the relevant amount of costs to $33,917. The trial judge set off the balance of the $200,000 settlement, $166,083, against Mrs Avis's loss.

[130] Mark Bain Constructions disclaimed any challenge to the accuracy of any of the figures used by the trial judge. Mark Bain Constructions' argument, at trial and again on appeal, was that, in the absence of any evidence about how the settlement sum should be divided as between costs and claim, it could not be assumed that all of Mrs Avis' costs incurred in her proceeding against the agent were recovered in the settlement. It argued that the whole of the $200,000 sum should instead be allocated to the claim, in reduction of the amount of Mark Bain Constructions' liability.

[131] The result of such an allocation would be to reduce the amount recovered by Mrs Avis by the whole settlement sum, but the only evidence, the terms of her settlement with the agent, established that the payment was made and received on account of both claim and costs. That is a common mode of settling claims. There is no suggestion that the settlement agreement did not express the parties' true agreement. It would therefore be wrong to allocate the whole of the settlement to the claim. There is, however, substance in Mark Bain Constructions' submission that the evidence did not justify the assumption that all of Mrs Avis' costs incurred in her proceeding against the agent were recovered in the settlement. That submission requires consideration of the questions whether the settlement sum should be apportioned as between claim and costs and, if so, how that should be done in the absence of any apportionment in the terms of the settlement.

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76 [2011] QSC 80 at [206].

[132] Mark Bain Constructions referred to the decision at trial in *Morris v River Wild Management Pty Ltd*.[77] The claimants (to whose rights River Wild acceded) accepted an offer from one respondent, Morris, to pay a substantial sum together with costs to be taxed. The claimants also settled with the other respondents, accepting two "all up" offers each of similar amounts as well as other "all up" offers of much smaller amounts. The trial judge considered that 30 per cent of the total costs should be regarded as having been recovered by the claimants under each of the two substantial "all up" settlements, that the settlement with Morris, being in a similar amount, should be presumed also to allow for the recovery of 30 per cent of the total costs, and the remaining 10 per cent should be regarded as having been recovered from the other respondents in their much smaller settlements.[78]

[133] That decision was overturned by the Victorian Court of Appeal.[79] I will summarise the Court's conclusions in relation to the apportionment issue.[80] It was held that although the payments under the "all up" settlement agreements were made in satisfaction of each respondent's liability for the claimant's damages and costs, it did not follow that each respondent had paid a substantial amount by way of costs, still less that each respondent had paid a proportion of its settlement sum which was equal to the proportion of the total of all settlement sums comprised of that respondent's settlement sum. The terms of the "all up" settlements could not be construed as requiring that each settlement sum be prorated between damages and costs. The common law principles concerning double recovery did not apply because the total of the claimant's recoverable claim and costs of its proceedings against all respondents exceeded the total of all amounts payable under the various terms of settlement, including the full amount agreed to be paid by Mr Morris under his terms of settlement. Because the amounts paid by the respondents other than Mr Morris were paid and received on an "undissected basis" in part satisfaction of the claimant's total loss and outgoings, there was no acceptable basis on which to apportion the payments between damages and costs and it was necessary to treat each payment as made on account of "an undissected liability for damages and costs".[81] It was held that Morris was not entitled to any credit against his costs obligation because the total of the payments made by the other respondents on account of damages and costs did not exceed the difference between the total of the claimant's total loss (the sum of its recoverable claim and total costs liability) and the total amount Morris was obliged to pay on account of damages and costs.[82]

[134] *Morris v River Wild Management Pty Ltd* does not govern this matter, since in that case it was not necessary to divide the settlement sums into claim and costs. In this case, it is necessary to do so as part of the assessment of Mrs Avis' loss in her claim against Mark Bain Constructions. The "undissected" nature of the settlement between Mrs Avis and the agent makes that task difficult, but the settled rule is that mere difficulty in estimating a loss does not relieve the Court from the responsibility of making the best estimate it can.[83]

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77 [2009] VSCA 439.

78 [2009] VSCA 439 at [14].

79 *Morris v River Wild Management Pty Ltd* [2011] VSCA 283 per Nettle and Redlich JJA, with whose reasons Weinberg JA agreed. The High Court refused special leave to appeal against this decision: [2012] HCA Trans 72.

80 (2011) 284 ALR 413, [2011] VSCA 283 at [47]-[52].

81 (2011) 284 ALR 413, [2011] VSCA 283 at [53].

82 (2011) 284 ALR 413, [2011] VSCA 283 at [54]-[55].

83 *The Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83, per Mason CJ and Dawson J; see also at 102 per Brennan J, and at 105 per Deane J.

[135] I am indebted to Fryberg J for the suggestion that the most appropriate method of allocation in these appeals is to determine the proportions of the total liability on the date of settlement represented by claim, interest, and costs, and then to apply those proportions to the balance outstanding after payment by the agent of the settlement sum of $200,000. Applying that methodology in Mrs Avis' case:

(a) The total liability of each defendant immediately prior to the settlement on 2 February 2010 was $434,406.90, apportioned as follows:

		$	**%**
(A)	Loss on resale	335,000	77.12
(B)	Interest on 335,000 from date of resale (23 February 2009) up until settlement with the agent (2 February 2010), at 10% p.a.[84]	31,572.60	7.26
(C)	Costs (60% of $113,057.16)[85]	67,834.30	15.62
	TOTAL	**434,406.90**	**100**

(b) Deduction of the settlement sum of $200,000 from that total liability leaves $234,406.90 as the remaining liability of Mark Bain Constructions after the settlement.

(c) Apportionment of Mark Bain Constructions' remaining liability of $234,406.90 according to the percentages in (a) gives:

		$	**%**
(D)	Loss on resale	180,774.60	77.12
(E)	Interest	17,017.94	7.26
(F)	Costs	36,614.36	15.62
	TOTAL	**234,406.90**	**100**
(G)	Interest after settlement with agent (2 February 2010) up until 11 April 2011, on Mark Bain Constructions' proportion of the loss on resale (D), at 10% p.a.[86]	21,445.32	

(d) The total amount of claim and interest payable by Mark Bain Constructions is therefore $219,237.86, calculated as follows:

180,774.60 (D)
+ 17,017.94 (E)
+ 21,445.32 (G)
219,237.86

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84 Practice Direction 6 of 2007.

85 Neither party challenged the trial judge's finding that the actual costs should be discounted by 40 per cent to reflect assessed costs.

86 Practice Direction 6 of 2007.

(e) Mrs Avis' unpaid (recoverable) costs up to the date of the settlement were $36,614.36 (F).

[136] Because the approach to the assessment of loss which I propose differs markedly from that of the trial judge, I have considered it appropriate in that calculation that the discretion as to interest should be exercised afresh. So far as the rates of interest are concerned, however, I have adopted the trial judge's approach in *Avis & Anor v Mark Bain Constructions Pty Ltd [No 2]*[87] of using the interest rates in the Practice Directions which apply to default judgments. Neither party submitted that there was any error in that approach.

Barnscape's notice of contention

[137] Barnscape completed the contract to purchase the unit for $1,200,000 on 9 June 2004 and resold the unit for the market price of $1,035,000 on 29 May 2007. Under its notice of contention, Barnscape sought recovery of the following losses pleaded in its third further amended statement of claim:

(a) Lost opportunity to acquire an alternative property and profit from its increase in value.

(b) Interest of $156,220 paid by Barnscape on approximately $600,000 it borrowed to purchase the property. The interest was paid during the period from settlement of the contract on 9 June 2004 until resale on 29 May 2007.

(c) Lost investment opportunities for the approximately $600,000 that Barnscape put towards the purchase price of the unit. The particulars referred to capital gain from the purchase of a vacant lot at Kangaroo Island near to other land which Barnscape purchased on 27 February 2004, or interest which Barnscape could have earned by investing the cash in interest bearing deposits or bonds.

(d) Loss on capital, being the purchase price of $1,200,000 minus the sale price of $1,035,000, totalling $165,000.

[138] The trial judge observed that compensation on each of the pleaded bases was "possible",[88] but did not assess compensation on any of those bases. In relation to items (b) to (d), the trial judge observed:[89]

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

[139] The trial judge mentioned the capital loss on resale but it is not further discussed in her Honour's reasons. Other findings support this claim. Barnscape bought the unit as an investment property[90] in reliance upon the agent's representations. The trial

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87 [2011] QSC 151.

88 [2011] QSC 80 at [166].

89 [2011] QSC 80 at [171].

90 [2011] QSC 80 at [160].

judge's remark that the asset appreciated was derived from Mr Caspers' accepted evidence that after the real estate market in the Sunshine Beach area peaked in about mid-2003, it rose slightly but was more or less stagnant in 2004 and 2005, it rose again during 2006, and prices plateaued during 2007 and 2008.[91] Thus Barnscape's delay in the resale resulted in an increase in the resale price, to Mark Bain Construction's benefit in relation to the claim for loss on the resale. The deferral of the commencement date for interest on damages also benefitted Mark Bain Constructions. Furthermore, the trial judge accepted Barnscape's explanation for the delay. At the time of settlement of Barnscape's contract, two other penthouse units were on the market and the Brechts considered that the Barnscape unit would not attract a good price if marketed at the same time; Barnscape then appointed a real estate agent to sell the unit on 12 May 2006 and, once the unit was offered for sale, it took 12 months to sell.[92]

[140] In these circumstances, for reasons similar to those I gave in relation to Mrs Avis' claim, Barnscape's capital loss on resale of $165,000 should be allowed.

[141] As to the claims for the holding costs of the unit, the trial judge noted that Barnscape let the unit as a holiday rental property, that Mr and Mrs Brecht also used it personally from time to time, and that the purpose of renting the unit was to provide some income whilst Barnscape worked out the cause of the problem with the view and until they sold the property.[93] Barnscape sustained a very substantial loss on this account. The evidence cited by Barnscape was to the following effect: as against rental income of $70,221.92, Barnscape paid interest of $156,222 on the approximately $600,000 it borrowed to buy the unit, it would have earned bank interest of approximately $99,000 on the $600,000 of its own money used to pay the balance of the purchase price (or it would have entered into a different named investment, which proved to be very profitable), and it paid rates of $7,019.70 and Body Corporate fees of $11,325. On those figures, the net loss, in addition to the loss of capital of $165,000 on resale, was $203,343.

[142] The claim for $99,000 should not be discounted. Mrs Brecht, whose evidence the trial judge was plainly disposed to accept, gave evidence that Barnscape had $2.6 million in other investments and that, if the $600,000 had not gone to purchasing the unit or an alternative property, it would have been invested in managed funds. As Mark Bain Constructions was at pains to emphasise in a different aspect of the case, the Brechts were experienced and successful business people. It seems most unlikely that they would not have invested the $600,000 in the manner described by Mrs Brecht if it had been available and they had not found an alternative property.

[143] The pleaded alternative property was vacant land on Kangaroo Island in South Australia. The trial judge found that Barnscape lost "the real opportunity" to profit from that land, in which there was "large potential profit".[94] Real property searches proved that the land was sold on 17 May 2005 for $540,000 and sold again (still unimproved) on 27 March 2006 for $755,000, producing a profit within the year of $215,000. Barnscape could have put most of the $600,000 into that purchase. Nevertheless, it would be necessary substantially to discount a claim on that basis. Mrs Brecht's evidence was given in hindsight. Had Barnscape anticipated the

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91 [2011] QSC 80 at [164].
92 [2011] QSC 80 at [162].
93 [2011] QSC 80 at [160].
94 [2011] QSC 80 at [167].

favourable rate of return achieved by the buyer of the land it could have, but did not, put some of its other funds into purchasing the land. Furthermore, if Barnscape had sought to purchase the land, it would have been in competition with others at the auction sale of that land. However, even allowing for very substantial discounting, the lost "real opportunity" to earn some $200,00 within one year suggests that it is reasonable to allow $99,000 at bank interest rates in the order of 5.5% for loss of use of the $600,000 over three years.

[144] The holding costs would have been much lower had Barnscape not delayed in reselling for nearly three years. However, Barnscape found itself in a difficult situation as a result of Mark Bain Constructions' contravening conduct. Mrs Brecht, who managed the investment for Barnscape, gave evidence that she and her husband wished to sell the property and get out of it as soon as they could, once they realised that the problem with the represented height of Splash was the responsibility of Mark Bain Constructions. The only reason for not selling the unit earlier was because two other penthouse units were on the market, which made it a "really bad decision" to sell since Barnscape was "trying to salvage as much money out of this property". The trial judge accepted that explanation for the delay in the resale.[95] Furthermore, on the accepted valuation evidence, the capital loss on the resale might have proved to be much greater had Barnscape sold earlier. On this evidence, there was nothing unreasonable about its delay in selling; and, if this is relevant, it is the kind of thing which was readily foreseeable when the contravening conduct occurred.

[145] In relation to the rental of the unit, Mrs Brecht gave evidence that as soon as Barnscape could furnish the property, it engaged an agent to rent it out in order to earn income from what had proved to be a loss making venture. An agent was engaged for that purpose and the unit was rented for holiday letting. Mrs Brecht gave evidence that, despite having engaged the agent to let the property, the property was in fact not rented out a lot. It was not suggested to Mrs Brecht that Barnscape bore any responsibility for the agent's failure to produce a better return. Mr Brecht agreed in cross-examination that he and his wife and members of his family sometimes used the unit, but not frequently. He thought they stayed there for perhaps a week, and sometimes a few days, and it might have been as many as ten times over the three year period in which Barnscape held the unit. It was not put to Mr Brecht that they occupied the unit at a time when the rental agent might otherwise have found a tenant. Furthermore, although Mr Brecht repeatedly made it clear that his wife possessed superior knowledge about the matter, and although she was recalled to give evidence after Mr Brecht had completed his evidence, it was not suggested to Mrs Brecht that any rental income, which otherwise might have been derived by the rental agent, was lost as a result of the Brechts occupying the unit.

[146] I conclude that the Brechts' limited personal use of the unit does not justify holding Barnscape out of recovery of the holding losses it incurred for property which it would not have purchased but for Mark Bain Constructions' contravention of the *Trade Practices Act*. The value to Barnscape of the Brechts' limited use of the unit may reasonably be accounted for by a modest deduction from the holding costs. The agents' records for the period in which most income was earned, from 1 July 2006 until the property was sold on 29 May 2007, record the receipt of about

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95 [2011] QSC 80 at [162].

$27,000 in rental.[96] I would deduct $5,000 as the value to Barnscape of the Brechts' occasional use of the unit over the three year period. The holding costs should then be reduced to $198,343.

[147] The settlement with the agent should be accounted for using the methodology I discussed in relation to Mrs Avis' claim. Applying that methodology to the ascertainment of Barnscape's loss:

(a) The total liability of each defendant immediately prior to the settlement on 2 February 2010 was $506,927.93, apportioned as follows:

			$	%
(H)	Loss on resale		165,000	32.55
(I)	Interest on 165,000		44,111.51	8.70
	Interest on 165,000 at 9% p.a.[97] from date of resale (29 May 2007) until 30 June 2007	1301.92		
	Interest on 165,000 at 10% p.a.[98] from 1 July 2007 until date of settlement with agent (2 February 2010)	42,809.59		
(J)	Holding costs		198,343	39.13
(K)	Interest on holding costs (J) from 3 December 2005[99] until 29 May 2007 at 9% p.a.[100]		26,507.32	5.23
(L)	Costs[101]		72,966.10	14.39
	TOTAL		**506,927.93**	**100**

(b) Deduction of the settlement sum of $200,000 from that total liability leaves $306,927.93 as the remaining liability of Mark Bain Constructions after the settlement.

(c) Apportionment of Mark Bain Constructions' remaining liability of $306,927.93 according to the percentages in (a) gives:

Apportionment of remaining Mark Bain Constructions liability

		$	%
(M)	Loss on resale + holding costs	220,005.94	71.68 (H) + (J)

96 [2011] QSC 80 at [160].

97 Practice Direction 2 of 2002.

98 Practice Direction 6 of 2007.

99 Interest on the holding costs has been applied from the mid-point between the date of settlement of the contract (9 June 2004) and the date of resale (29 May 2007) to account for the gradual accrual.

100 Practice Direction 2 of 2002.

101 60 per cent of Barnscape's total legal costs of $121,610.16 up to the date of its settlement with the agent. As was the case in relation to Mrs Avis' claim, neither party challenged the trial judge's finding that the actual costs should be discounted by 40 per cent to reflect assessed costs.

(N)	Interest	42,755.06	13.93 (I) + (K)
(O)	Costs	44,166.93	14.39 (L)
	TOTAL	**306,927.93**	**100**
(P)	Interest after settlement with agent (2 February 2010) up until 11 April 2011, on Mark Bain Constructions' portion of loss on resale + holding costs (M), at 10% p.a.[102]	26,099.33	

(d) The total amount of claim and interest payable by Mark Bain Constructions is therefore $288,860.33, calculated as follows:

220,005.94 (M)
+ 42,755.06 (N)
+ 26,099.33 (P)
288,860.33

(e) Barnscape's unpaid (recoverable) costs up to the date of the settlement were $44,166.93 (O).

[148] Those calculations assume, correctly in my view, that Barnscape cannot establish a greater loss in its claim for the loss of opportunity to profit from the purchase of a different property. Barnscape's case on the alternative properties was based upon Mr Caspers' accepted evidence that there was a 34.4 per cent increase in prices in Sunshine Beach from mid-2003 to May 2007.[103] Barnscape's case was that it therefore would have obtained a return of about 34 per cent upon investing $1,200,000 in an alternative unit, rather than in purchasing its unit in Number One Park. On those premises, it contended it had lost the opportunity to earn profit of $408,000 between mid-2003 and May 2007.

[149] In its pleading, Barnscape identified seven alternative properties which it alleged met its requirement for uninterrupted surf views, which it would have succeeded in finding in the middle of 2003, and which it would have purchased for a price within its budget of between $1 and $2.2 million dollars. A significant difficulty facing Barnscape in this claim is that the Brechts did not give evidence that they would have purchased any of those alternative properties. The only property which Mrs Brecht specifically referred to in evidence was 34 Park Crescent, Sunshine Beach. Mrs Brecht gave evidence that she and her husband "seriously considered putting that money into that property", but decided against it because it needed renovation.

[150] Furthermore, as the trial judge concluded, the only one of the alternative properties particularised which became available during the relevant period and had the type of ocean view required by Barnscape was unit 4 in Splash.[104] It was sold on 7 October 2003 for $1,950,000. That was towards the top of Barnscape's budget. Whilst

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102 Practice Direction 6 of 2007.
103 [2011] QSC 80 at [163].
104 [2011] QSC 80 at [159].

Barnscape had access to the necessary funds, the Brechts did not give evidence that Barnscape would or might have purchased that unit if it had not purchased the unit in Number One Park.

[151] In Barnscape's submissions in the appeal, it also identified unit 2, 16 Henderson Street as an alternative property it might have purchased, but it was not one of the alternative properties particularised in Barnscape's pleading. No evidence was given about it by Mr and Mrs Brecht, and the only evidence given about its views (by Mr Cox in his October 2008 report) was that it had "good ocean views".

[152] It is not necessary to pursue this analysis further. In light of the evidence to which I have adverted, if Barnscape might have purchased one of the pleaded alternative properties, and if the lost opportunity to earn profit of $408,000 from such a purchase might be valued by reference to an estimate of the degree of probabilities or possibilities,[105] the resulting loss would certainly be less than the proved loss on the resale and holding costs.

Disposition and proposed orders

[153] The orders I favour are set out at the end of these reasons. They give rise to some procedural issues. The orders made in the Trial Division, which are described in [4] of these reasons, involved some duplication and the orders for interest made on 6 June 2011 provided for interest up to 11 April 2011. Those technical errors may be corrected by setting aside both sets of orders and replacing them with orders which provide for judgment for a total amount inclusive of interest up to 11 April 2011.

[154] The trial judge's costs orders appropriately required the plaintiff in each proceeding to pay the first defendant's costs of the application to amend and of the three days of hearing devoted to the measure of loss that was not pleaded. Additional orders should be made to ensure that the plaintiffs do not recover their own costs of that additional hearing. Otherwise each plaintiff was given the costs of the proceedings. Those orders remain appropriate, save that the plaintiff's costs up to the time of their settlements with the agent should be fixed in accordance with [135](e) and [147](e) of these reasons. Those amounts exceed by a fairly small margin the amount of one half of the respondents' total recoverable costs which the trial judge assumed was the amount of costs recoverable from Mark Bain Constructions. The orders I propose are appropriate because, immediately prior to the settlement, each respondent stood to recover at least the fixed amount of the costs from Mark Bain Constructions. That is so for a combination of reasons: contrary to the trial judge's assumption, a substantial amount of the costs must have been common to the claims against the agent and Mark Bain Constructions, most of the issues presumably being common to the claims against both; to the extent that costs were exclusively referrable to the claim against the agent, Mark Bain Constructions' denial that it had authorised the agent to make the representations meant that, as between it and each respondent, it was reasonable for the respondent to incur additional costs of proceeding against the agent; and by settling with the agent on a "walk away" basis, Mark Bain Constructions surrendered any claim that, as between it and the agent, the agent should bear any different share of each respondent's costs.

[155] Rule 766(1)(d) of UCPR provides that the Court of Appeal may make the order as to the whole or part of the costs of an appeal it considers appropriate. The costs

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105 Cf *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355.

orders in each appeal must take into account the fact that Mark Bain Constructions was required to appeal to vindicate its entitlement to have the amount of each award reduced. The reductions are substantial in each case. In addition to changes in the costs orders, the orders I propose would reduce the total of the amounts awarded by the trial judge for compensation and interest, in Mrs Avis' case from $469,388.70 to $219,237.86 and in Barnscape's case from $357,902.75 to $288,860.33. Viewed in isolation, those results would favour orders giving the costs of each appeal to Mark Bain Constructions, but this is a case in which the results on separate issues should be taken into account. Mark Bain Constructions failed on each of its numerous grounds of appeal aimed at avoiding any judgment against it for its contraventions of the *Trade Practices Act* found in the Trial Division and the respondents achieved a substantial measure of success on their notices of contention. It is also relevant that some of Mark Bain Constructions' arguments common to both appeals, most notably the contention that the respondents' settlements with the agents released it from any liability to the respondents, were bereft of legal merit. In all of the circumstances, I consider that in each appeal there should be no order as to the costs of the appeal.

[156] The following orders are appropriate:

In appeal no. 3844/11 (Avis)

1. Allow the appeal.
2. Set aside the orders made in the Trial Division in 2488/07 on 11 April and 6 June 2011.
3. In lieu thereof order that:
   (a) there be judgment for the plaintiff for $219,237.86 inclusive of interest to 11 April 2011.
   (b) the first defendant pay the plaintiff's costs of the proceeding to 2 February 2010 fixed at $36,614.36.
   (c) the plaintiff's costs of the proceedings from 2 February 2010 and the defendant's costs of the application to amend heard on 16 April 2010, and the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010, be assessed on the standard basis.
   (d) the first defendant pay the plaintiff's costs of the proceedings from 2 February 2010 as assessed, less her costs of the application to amend heard on 16 April 2010, and the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010.
   (e) the plaintiff pay the first defendant's costs of the application to amend heard on 16 April 2010, and the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010, including its costs of obtaining the further expert report ordered on 16 April 2010.

In appeal no 3845/11 (Barnscape)

1. Allow the appeal.
2. Set aside the orders made in the Trial Division in 2491/07 on 11 April and 6 June 2011.
3. In lieu thereof order that:
   (a) there be judgment for the plaintiff for $288,860.33 inclusive of interest to 11 April 2011.
   (b) the first defendant pay the plaintiff's costs of the proceeding to 2 February 2010 fixed at $44,166.93.

(c) the plaintiff's costs of the proceedings from 2 February 2010 and the defendant's costs of the application to amend heard on 16 April 2010, and the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010, be assessed on the standard basis.

(d) the first defendant pay the plaintiff's costs of the proceedings from 2 February 2010 as assessed, less its costs of the application to amend heard on 16 April 2010, and the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010.

(e) the plaintiff pay the first defendant's costs of the application to amend heard on 16 April 2010, and the costs of the hearings on 31 May 2010, 1 June 2010 and 3 June 2010, including its costs of obtaining the further expert report ordered on 16 April 2010.

[157] **CHESTERMAN JA**: I agree that the Court should make the orders proposed by Fraser JA for the reasons given by his Honour.

[158] **FRYBERG J:** I agree with the orders proposed by Fraser JA and with his Honour's reasons for them.