SUPREME COURT OF QUEENSLAND

CITATION:	*Seirlis v Bengtson &Ors* [2013] QSC 240
PARTIES:	**IMOGEN ELISE SEIRLIS** (plaintiff) v **MARK STACEY BENGTSON** **JUDITH FAY BENGTSON** **ROBERT ALAN ZIRBEL** **LYNDIS ARRAN ZIRBEL** **VARGAN HILL PTY LTD** (first defendants) and **PHILIP JAMES WAIGHT** **HADGELIAS HOLDINGS PTY LTD (ACN 010 422 983)** (second defendants)
FILE NO/S:	7430 of 2011
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	11 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	18, 19, 20 March 2013, 22 and 23 April 2013 Further written submissions provided on 2 August 2013
JUDGE:	Philip McMurdo J
ORDER:	**The defendants pay to the plaintiff the sum of $312,037, including $47,037 of interest to the date of this judgment.**
CATCHWORDS:	TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – PARTICULAR CASES – REAL ESTATE TRANSACTIONS – where the plaintiff entered into a contract for the purchase of an apartment from the first defendants – where second defendants were selling agents of the first defendants – where there were representations that apartment had three car parks– where implication that this amounted to a representation that apartment had three car parks that could lawfully be used – where concrete plinth was physical impediment to use of third car park – where concrete plinth could not be lawfully removed without approval of

Body Corporate of apartment building and amendment of development approval plan by the city council – where the plaintiff aware of presence of concrete plinth prior to the contract date – where the defendants did not suggest plaintiff knew of the legal impediment at the time of contract – where the value of the apartment was affected by the absence of a third car park – where the plaintiff brought action for misleading and deceptive conduct against the defendants – whether representations were misleading or deceptive – whether plaintiff knew of legal impediment at time of contract – whether plaintiff would have entered into the contract in the absence of the representations – whether plaintiff entitled to damages claimed for reduction in the value of the apartment and other losses claimed to have been suffered as a consequence of entering into the contract of sale

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – PROFESSIONAL PERSONS – where the plaintiff alleged the second defendant real estate agent owed her a duty of care – where the plaintiff alleged the duty of care was to take care in the provision of information – where the information not provided by the agent was whether the apartment had a third car park that could lawfully be used – where the apartment only had two lawful car parks – whether the second defendant owed the plaintiff a duty of care

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – PARTICULAR CASES – REAL ESTATE TRANSACTIONS – where the plaintiff entered into a contract for the purchase of an apartment from the first defendants – where second defendants were selling agents of the first defendants – where representations were made in advertisements and publications that the apartment had three lawful car parks – where further representations made by the real estate agent assuring that apartment would have three lawful car parks – whether each of the defendants was liable for the representations made

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – ACTIONS FOR DAMAGES – OTHER MATTERS – where defendants liable for misleading and deceptive conduct – where liability arose from representations made by the second defendants – where conduct of second defendants was deemed to be the conduct of the first defendants under s 84 of the *Trade Practices Act* 1974 (Cth) – where second defendant real estate agent was liable for a separate representation he

made – whether any defendant was entitled to apportionment of its liability

Civil Liability Act 2003 (Qld), s 31, s 32F
Fair Trading Act 1989 (Qld), s 37, s 38, s 99
Trade Practices Act 1974 (Cth), s 51A, s 52, s 82

Barrett v J R. West Ltd [1970] NZLR 789, cited
Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592; [2004] HCA 60, cited
Gould v Vaggelas (1985) 157 CLR 215; [1984] HCA 68, cited
Henville v Walker (2001) 206 CLR 459; [2001] HCA 52, cited
Holmes v Jones (1907) 4 CLR 1692, cited
HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640; [2004] HCA 54, applied
Kizbeau Pty Ltd v W G & B Pty Ltd (1995) 184 CLR 281; [1995] HCA 4, applied
MacCormick v Nowland (1988) ATPR 40-852, discussed
Norris v Sibberas [1990] VR 161, discussed
Quality Corporation (Aust) Pty Limited v Millford Buildings (Vic) Pty Ltd [2003] QSC 95, discussed
Richardson v Norris Smith Real Estate Ltd [1977] 1 NZLR 152, cited
Roots v Oentory Pty Ltd [1983] 2 Qd R 745, discussed
Sweet v Mercantile Credits Ltd [1998] QCA 442, cited
Tomasetti v Brailey [2012] NSWCA 399, applied
Toteff v Antonas (1952) 87 CLR 647, applied
Yorke v Lucas (1985) 158 CLR 661; [1985] HCA 65, applied

COUNSEL: D Cooper SC, with M Lawrence, for the plaintiff
S C Fisher for the first defendants
R Perry SC for the second defendants

SOLICITORS: Warlow Scott for the plaintiff
Romans & Romans for the first defendants
Carter Newell for the second defendants

[1] The plaintiff, Mrs Seirlis, owns an apartment in the building called Riparian Plaza in the Brisbane CBD. She purchased it from the first defendants in 2010. Their selling agents were the second defendants.

[2] She claims that she was induced to purchase it by misrepresentations made by or on behalf of the defendants about the number of car parks which belonged to this apartment. Plainly it was advertised by the agents, in their brochures and upon the internet, as having three car spaces. It is also clear now that there were and could be only two car spaces which belonged to this apartment. There was also a storage area which was large enough for a third car space. Immediately before signing what became the contract, Mrs Seirlis was told by the agent, Mr Waight, that this area could be converted to a third car space. But what Mrs Seirlis was not told by the agent was that the development approval for this building prevented this storage area being used *lawfully* for parking.

[3] Mrs Seirlis says that she relied upon these representations in buying the apartment. She claims that in consequence, she suffered loss. She says that the apartment was not worth the contract price, which was $2.5 million, but instead was worth no more than $2.325 million as at the date of the contract and $2.1 million as at the date of settlement. She claims further losses which, broadly speaking, involve the costs of her raising some of the necessary funds for this purchase.

[4] She claims these losses as damages pursuant to s 82 of the *Trade Practices Act* 1974 (Cth) (the TPA), as damages pursuant to s 99 of the *Fair Trading Act* 1989 (Qld) (the FTA), and as damages for negligence. She also claimed them, against the vendors, as damages for breach of contract, but abandoned that claim.

[5] The defendants each deny any liability to Mrs Seirlis. In particular, they deny that anything which was communicated to her about the number of car spaces was conduct by which she was mislead or deceived at any relevant time. Further, they deny that she has suffered any loss from purchasing this apartment, having regard to evidence that it was indeed worth the amount which she paid for it.

[6] Despite the very many arguments pursued by each of the parties, there is no significant factual question about what Mrs Seirlis was or was not told about car parks. There are factual issues about whether any of this mattered to Mrs Seirlis in her purchase of the apartment and if so, whether she suffered the losses as she claims. There are also questions of the respective legal responsibilities for the representations which were made by the agents.

The development approval

[7] The development approval for this building incorporated approved layout plans of the car parking area. Within that area, the plans depicted car parking spaces as well as certain areas, adjacent to or between car spaces, which were marked as storage areas. A condition of the development approval was that these marked areas were to "remain strictly for use as storage" and that they were to be delineated from car parking spaces by the concrete surface of the storage areas being raised 200 mm above the level of the driveway, with a right angle edge. The approval did not require the storage areas to be enclosed by walls, but it was possible for an owner, in accordance with a certain design which was prescribed by the building's community management statement, to convert the area to a storage room. The development approval stated that this condition for the construction of a raised surface for the storage areas was "required to assure additional car parking spaces are not created from areas designated for storage."

[8] Part of the lot which Mrs Seirlis purchased was in the car park of the building and consisted of two car parking spaces and between them, a storage space. Consistently with the condition of approval, the surface of the storage space had been raised at least 200 mm. No walls had been constructed around it.

[9] Section 580(1) of the *Sustainable Planning Act* 2009 (Qld) provides that a person must not contravene a development application, including any condition of an approval. Section 582 of that Act provides that a person must not use premises if the use is not a lawful use. Therefore, this raised area could not be used as a car park lawfully. Nor could the slab by which the surface had been raised be removed lawfully.

The representations

[10] In April 2010, the plaintiff, her husband and their young child were living in another apartment in this building which they had rented for some years. Mr Seirlis has extensive experience in property development. He and Mrs Seirlis became interested in buying an apartment in the building.

[11] This apartment was advertised for an auction to be held on the 23rd of that month. The agents prepared a sales brochure which included this line:

> "Car Parking: 3".

The agents caused the property to be advertised in the Brisbane News, describing one of its features as "3 car parking". And they advertised the apartment upon the website realestate.com.au as having "three secure car spaces located side by side." Each of these advertisements was an unambiguous representation that the apartment had three car spaces of its own. It revealed nothing about the legal or indeed the physical impediment to the use of the storage space as a car park.

[12] Mrs Seirlis discussed with her husband the possibility of purchasing this apartment. She showed him the advertisement in the Brisbane News and on the website. They decided to inspect it. She rang Mr Waight and an inspection was arranged. Mrs Seirlis, but not Mr Seirlis, went to that inspection, where Mr Waight handed her the brochure to which I have referred.

[13] Mrs Seirlis says that at this inspection, Mr Waight confirmed that there were three car parks. Mr Waight says that he told her that there were two parking spaces "with a third area with a plinth that was there for the use of a storage shed, if someone wanted to construct one, and that in many cases that had been taken away and people had parked their third car there".[1] She did not inspect the car parks on that occasion.

[14] That evening, Mr and Mrs Seirlis discussed the proposed purchase. This apartment had the same layout as another, two floors above, with which they were familiar because it had been owned by Mr Seirlis's brother. They decided to make an offer of $2.5 million.

[15] Mr Seirlis rang Mr Waight and made that offer. On the evening of 21 April, Mr Waight came to their apartment with a draft contract. Mr Seirlis and Mr Waight discussed some of its terms. Mr Waight completed by hand some details. Mrs Seirlis then signed the document. It had not been signed by the vendors.

[16] The document which she signed provided for a purchase price of $2.5 million, with a deposit of $100,000 to be paid within five days of the contract. Settlement was to occur 90 days from the contract. There was a special condition that "this contract is subject to the purchaser inspecting the property within 48 hours of the date of this contract," which was requested by Mr Seirlis because to that point, he had not been inside it.

[17] On the following day, 22 April, Mr and Mrs Seirlis inspected the apartment. Mr Waight says that he then took Mr Seirlis to the car park area and showed him the two car spaces together with the raised area. He says that in the parking area,

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1 T 4-30, ll 14-17.

Mr Seirlis told him that Mr Seirlis was "aware of the car parking situation in the building".[2] Mr Seirlis says that he did not then go to the car park area with Mr Waight. But he and Mrs Seirlis say that later that day they looked at the car spaces. They say that they did so as they drove out of the building to go to the airport to meet Mrs Seirlis's father, Mr Allen, who was visiting from Perth. They say that it was not until then that either of them knew that there were only two car spaces together with the raised area. They say that this disturbed them, so that they again inspected the area that evening when returning to the building with Mr Allen.

[18] The vendors were prepared to sell at the price which Mrs Seirlis had offered. But there were two changes to be made to the contract document. One was requested by Mr and Mrs Seirlis, which was to provide that the deposit would be paid within five business days (rather than simply five days). The other change was to add a special condition by which Mrs Seirlis waived the cooling off period. To that end, she obtained the necessary certificate from her solicitor. Mr Waight made those changes to the document which Mrs Seirlis had signed on 21 April and brought it to the Seirlis's apartment on the morning of 23 April. She then initialled those amendments.

[19] Mr and Mrs Seirlis say that at this meeting of 23 April, but before the amended contract document was initialled by her, they raised their concerns about the number of car spaces. Mrs Seirlis says that she asked him to explain the raised surface. Mr Waight answered that "I'll have it removed before settlement."[3] They say that Mr Seirlis then asked whether that proposed removal should be recorded in the contract, to which Mr Waight replied that "it didn't need to go in there."[4] Mr Seirlis asked for some confirmation that it would be removed before settlement and Mr Waight said that he would send an email to that effect.

[20] Mr Waight's evidence is that on this occasion, he did say that the plinth would be removed, and that he would pay for its removal.[5] But he says that this was in response to a request by Mr and Mrs Seirlis that the vendors pay for that, to which Mr Waight said that the negotiations with the vendors were concluded but that he would meet the cost.[6]

[21] On the afternoon of 23 April, Mr Waight sent an email to Mr Seirlis attaching a copy of the floor plan of the apartment and adding:

> "The concrete will be removed prior to settlement to create three car spaces."

After the contract

[22] The contract provided for settlement within 90 days of its date, so that the settlement date became 22 July 2010.

[23] On 15 July 2010, Mr Seirlis emailed Mr Waight raising "a couple of points that need to be addressed prior to settlement". One of them was that Mr Waight was asked to advise "when the concrete slab will be removed".

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2 T 4-35, ll 49-50.
3 T 1-43, ll 36-37.
4 Evidence of Mrs Seirlis T 1-43, ll 37-38.
5 T 4-37.
6 T 4-37.

[24] On 19 July, Mr Waight forwarded that email to two of the vendors, saying "I am taking care of the concrete slab. Adam, were you able to get a quote to have this removed?". At the same time, Mr Waight replied to Mr Seirlis, saying "I will personally be looking after the [concrete] pad".

[25] On 20 July, lawyers for Mrs Seirlis (Warlow Scott) wrote to lawyers for the vendors (Hunt Lawyers), enclosing a draft settlement statement and referring to other details for a settlement on the due date.

[26] On 21 July, Warlow Scott wrote to Hunt Lawyers as follows:

> "We note a third car park is to be provided and that certain alterations to the Lot have to be carried out.
>
> Would you please confirm when the works will be completed and provide a copy of the Body Corporate Consent and Building Management Committee Consent."

[27] On the same day, Hunt Lawyers replied:

> "Our clients have advised us that at no stage did they agree to attend to the works. Attached is a copy of an email from the real estate agent at Ray White which is self-explanatory."

The enclosed email was from Mr Waight to one of the vendors, sent on 21 July, as follows:

> "A few days after the contract had been accepted and signed, the buyer asked about removing the concrete pad on the third car space.
>
> The buyer was aware throughout negotiations that the pad was still in existence on the third car space.
>
> I said to the buyer that due to the fact that the contract had been finalised, I would give an undertaking to pay for the removal of the pad myself.
>
> The agreement was between the buyer and myself and at no stage was there an agreement given by the sellers to have the pad removed.
>
> I did mention to the sellers that I had agreed to pay for the removal of the pad out of my own pocket.
>
> The buyer agreed with this arrangement and we have spoken further about the removal over the past couple of weeks and as late as early this week and late last week.
>
> I am a man of my word and I will arrange to have the pad removed as soon as I can arrange a contractor to do so.
>
> Since completion of the Riparian Plaza development, [most] owners have elected to have the pad removed from their third car space.
>
> In fact, there are only a very few in existence.

> Please be assured that I will arrange to have this matter attended to as soon as is practical."

[28] On the morning of 22 July, Warlow Scott wrote to Hunt Lawyers asking for confirmation that "the third car park promised and advertised has been provided" and that "[t]he necessary body corporate and planning consents for the third car park have been provided".

[29] Warlow Scott wrote again on that day as follows:

> "… We are instructed that the Lot area in the basement provides for two car parks and that there is a further raised area which does not allow a third car park and actually contains approximately a foot deep concrete.
>
> Our client merely wants to comply with the proper processes of the Body Corporate.
>
> We note by law 19 requires the written consent of the Body Corporate and this will involve the Building Management Committee.
>
> We also are mindful that the Development Approval for this development will have specified a certain amount of car parks.
>
> As you can appreciate, our client is concerned that regardless of whether or not the concrete is removed to enable a car park, that removal will not be either properly processed with the required consent of the Body Corporate nor will it be in accordance with the relevant Development Approval.
>
> Not withstanding this, our client is ready willing and able to settle but requires assurances that it will be able to utilize three car parking spaces.
>
> We invite your client's proposal to resolve this issue.
>
> Our client does not wish to be embroiled in a Body Corporate dispute if your client immediately carries out works without complying with the appropriate bylaws. Our client wishes to be a respectful and compliant owner in the building.
>
> We respectfully suggest that your client propose a time frame for carrying out the works so that an appropriate Settlement Date can be confirmed.
>
> Obviously, an appropriate period cannot be determined until the consent of the Body Corporate has been obtained. …"

[30] Settlement did not occur on 22 July. On the following day, Warlow Scott wrote to Hunt Lawyers:

> "… Our client requires your client to at least apply for the body corporate consent. You will appreciate that it is not acceptable to merely remove the concrete if it is in breach of the by-laws and

> requires reinstatement. We understand consent could be done simply through a committee resolution.
>
> We also strongly request that the agent does not simply jackhammer the concrete away to create a third car park as that is simply not addressing the core issue that it will be a breach of the body corporate by-laws without the consent being granted.
>
> As time is no longer of the essence, we propose that your client make the application for body corporate consent and then the matter can be addressed within a reasonable time after that decision is to hand. ..."

[31] On 26 July, Hunt Lawyers wrote to Warlow Scott, saying that Mrs Seirlis was in breach of the contract but that the vendors elected to affirm it and would sue her "for damages and specific performance …". On the same day, they wrote a letter, headed "without prejudice" but which the first defendants agreed to include in the evidence, as follows:

> "We refer to your recent correspondence and advise that we have spoken to the Managing Agents for the building and have been advised that the Body Corporate will not formally consent to the use of the storage area as an additional car park.
>
> This issue of the use of the storage area as a car park is common throughout the owners of the lots and the informal practice is to allow cars to be parked in this area.
>
> We are advised that the Body Corporate cannot and will not formally consent to the use of the storage area as a car park as this would be in breach of the Council's Development Conditions. It is understood that Council will not consent to a variation of use for the storage area to allow for a car park. …"

[32] Mrs Seirlis decided to settle, notwithstanding ongoing claims by Mr and Mrs Seirlis that the contract had been induced by a misrepresentation. Her evidence is that she was pressured to do so by proceedings commenced by the vendors seeking specific performance. The contract was settled on 27 September 2010.

Misleading and deceptive conduct

[33] At any time relevant for this case, the applicable law was the TPA and the FTA. Section 52 of the TPA provided that a corporation should not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Section 38(1) of the FTA was in identical terms, save that the word "corporation" was replaced by the word "person".

[34] The case for Mrs Seirlis is that there was conduct, involving the advertising brochure, the advertisement in the Brisbane News, the advertisement on realestate.com.au and the undertaking by Mr Waight to remove the concrete plinth, which was misleading or deceptive or likely to mislead or deceive. This was because a representation that there were or would be three car park spaces had the necessary implication that those spaces could be used lawfully. It was misleading to say that there were or could be three spaces, when the use of the third space, although physically possible by the removal of the plinth, would be illegal.

[35] In some of the arguments for the defendants, there was a suggestion that the undertaking to remove the plinth was in a different category, firstly because it was not conduct by anyone other than Mr Waight and secondly, because it was a representation as to a future matter. I will return to the first of those suggestions. As to the second, it is correct to say that this was a statement by Mr Waight that he would do something in the future. But it was misleading and deceptive because it was liable to induce an error as to a present fact, namely the existence of a legal impediment to the use of this space as a car park. It was not as if Mr Waight disclosed that impediment, but undertook to in some way procure its removal, which might have been misleading if there were not reasonable grounds for suggesting that this removal would be procured. A statement of that kind would have been a representation as to what the legal position would become, rather than what it was. Mr Waight's statement was not a "representation with respect to any future matter" within what was then s 51A of the TPA or s 37 of the FTA, because the relevant representation was as to a then existing legal obstacle to the removal of the slab and the use of the space as a car park.

[36] The first defendants do not seem to dispute that the advertisements were misleading and deceptive. But they submit that there was no potential for that conduct to mislead Mrs Seirlis, once she had seen the area in question, because it would then have been obvious to her that there were but two car spaces. And they submit that having discovered that fact, no subsequent conduct, more particularly that of Mr Waight's undertaking to remove the plinth, could have been misleading because she entered into the contract knowing that there were in fact only two car spaces. These arguments misunderstand the case for Mrs Seirlis. Her alleged error was not in thinking at the time of the contract that there were then three car spaces. It was that she thought that all that needed to be done in order to have three car spaces was the physical removal of the plinth. Such an error, if it existed, was likely to have been caused by the advertisements in promoting the property with three car parks as well as by Mr Waight's statement that other plinths had been removed and his promise to remove the plinth. It does not matter whether this implication was or was not intended by any of the defendants.

[37] In my conclusion, each of the advertisements, Mr Waight's statement and his promise about the plinth, constituted conduct which was misleading or deceptive or likely to mislead or deceive. I will return to the questions of whose conduct this was, and the legal responsibilities of each of the defendants for some or all of that conduct.

The effect on Mrs Seirlis

[38] Mrs Seirlis seeks damages pursuant to s 82 of the TPA or s 99 of the FTA, for losses which she says that she suffered by that misleading or deceptive conduct. There are several components of her damages claim, but each is based upon the allegation that she was induced to enter into the contract by that conduct.

[39] Her evidence, if accepted, would prove that fact. She says that after Mr Waight said that the plinth would be removed, she initialled the amendments to the contract, feeling "comfortable that I was going to get three car parks based on the previous material I had read, and also Waight confirming previously that the unit had three

car parks".[7] She would not have signed the contract either on 21 or 23 April if she had known that she would not "get three lawful car parks".[8] The storage area would not have been of any value to her because she felt that the apartment had ample storage.[9]

[40] The decision to purchase was made by both Mr and Mrs Seirlis and his state of mind is also relevant. His evidence is that had he known prior to the contract being signed on either 21 or 23 April, that it would not be possible to get three spaces which could lawfully be used as a car park, he would not have agreed to the purchase of this apartment.[10]

[41] At this stage, some further circumstances should be noted. The first is that as at April 2010, many of these slabs or plinths in the building had been removed and those spaces were being used as car parks. The second is that Mr Seirlis's brother had owned more than one apartment in the building and had been, until a few months prior to April 2010, the secretary of the body corporate for the building. Those circumstances, together with the facts that Mr and Mrs Seirlis had lived in this building for some years and that Mr Seirlis was a property developer, are relevant to the likelihood that in truth they did understand that there was some limitation upon the use of the storage space as a car park.

[42] Their evidence is that they were unaware of the existence of the plinth for their lot until the evening of 22 April, because until then neither of them had looked at the area of car parking associated with this apartment. And they say that they were unaware that owners of other apartments had removed the plinths. In my view, each of those facts is unlikely and their evidence in that respect is unpersuasive. Especially with Mr Seirlis's work in property, it is likely that they had noticed that for some apartments there was a plinth and for others there was not. It is also likely that they had learnt that some plinths had been removed. There may not have been clear evidence of that removal from the surface of the concrete. But someone with the interest and experience of Mr Seirlis is likely to have noticed that apartments with identical areas and designs had in some cases three and in other cases two car parks. The number of car spaces for an apartment was relevant to its market value, which is why, unsurprisingly, this apartment was promoted with a certain number of car spaces. The number of car spaces is likely to have been considered by Mr and Mrs Seirlis to be particularly important because of the location of this building and the restrictions upon street parking.

[43] But it is another thing to say that Mr and Mrs Seirlis knew about the legal impediment to this conversion of the storage space. As to that matter, Mr Seirlis wrote to the body corporate manager on 21 July 2010 inquiring whether any application had been made to the body corporate to remove the plinth. Mr Seirlis received a reply from the body corporate manager on 21 July, informing him that no application had been made and that an application to the body corporate would be necessary. According to Mr Seirlis, it was not until after the settlement date of 22 July that he learnt, from his inquiry of the Brisbane City Council, that the development approval for the building precluded the use of the storage area as a car park. But I infer that by 22 July, he was alert to the potential relevance of a

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7 T 1-43, ll 53-55.
8 T 1-44, ll 1-2.
9 T 1-44, ll 3-9.
10 T 1-89, ll 22-26.

development approval, because on the morning of 22 July, his lawyers sought confirmation from the vendors' lawyers that "the necessary body corporate and planning consents for the third car park have been provided". And on his own evidence, he was aware that at least the body corporate consent had not been provided, at the time of this letter.

[44] By-law 19 of the community management statement provided that an occupier of a lot was not to make any structural alteration to the lot without the prior written consent of the body corporate. When Mr Seirlis wrote to the body corporate on 21 July, plainly he was aware of the existence of a provision of that kind. He may or may not have been aware of that requirement as at the date of the contract. But if he was aware of it, it does not follow that he or, more particularly, Mrs Seirlis, knew of the legal impediment which was provided by the terms of the development approval.

[45] The experience of Mr Seirlis as a property developer, together with his brother's involvement in the body corporate, raised the real possibility they were aware of the legal impediment from the development approval, but that Mrs Seirlis signed the contract unconcerned by that impediment and believing that despite it, the approval of the body corporate would be forthcoming. Yet at no stage in the cross-examination of Mr or Mrs Seirlis was it suggested that either of them did know of that legal impediment at the time of the contract.

[46] Ultimately, I am persuaded that they were unaware of the impediment from the development approval. The fact that the contrary was not put to them in cross-examination is important here. And they were not asked, for example, to explain their understanding of why these plinths had been constructed in the first place. In the defendants' submissions, it was emphasised that, as I accept, Mr and Mrs Seirlis were aware that many of the plinths had been removed to provide car spaces. But that awareness is likely to have led them to believe that there was no legal obstacle, apart from the requirement for the consent of the body corporate, and to believe that this would be granted.

[47] The defendants suggest that the fact of the legal impediment was immaterial to Mrs Seirlis, or in other words, she would have purchased and at the same price had she been aware of it. That is said to be indicated by the fact that Mrs Seirlis ultimately settled the contract, well knowing of the legal impediment. Indeed, the second defendants submit that her decision to settle broke the chain of causation between the defendants' conduct and the damage of which she complains. But these submissions misunderstand the legal position of Mrs Seirlis pending the completion of his contract. She had no *contractual* right to terminate the contract, although it had been induced by misleading and deceptive conduct. The contract was susceptible to termination by an order under s 87 of the TPA. But unless and until that order was made, she was obliged to perform the contract.

[48] Further, her personal circumstances at that time must be considered. She was sued for specific performance of the contract, but she was at risk of a subsequent termination by the vendors and a forfeiture of her deposit. And this apartment had been purchased as the Seirlis family home, providing a particular reason for her to complete the contract at that stage, although she would not have entered into it months earlier with knowledge of the critical fact.

[49] Some time in the trial was taken up with an investigation of the ability of Mrs Seirlis to settle on the due date of 22 July 2010. The second defendants suggested that she was not able to settle on 22 July, which was said to be demonstrated by the fact that no cheques had been drawn by the lending bank to effect the settlement. But the evidence demonstrates that she had obtained the required finance to settle and that the bank was not asked to draw the cheques because she had decided not to settle on 22 July in the light of what had emerged in relation to the body corporate's approval of the removal of the plinth.

[50] The defendants also relied upon the fact that, when applying for bank finance to settle the contract, Mr and Mrs Seirlis represented to the bank that the apartment was worth the contract price, $2.5 million. But that is explicable upon the basis that they wished to maximise their prospects of obtaining finance.

[51] The legal impediment was likely to have been material to most buyers. And the fact that only two spaces could be lawfully used was also likely to have been important to them. This was not a matter in which only a lawyer would have been interested. The potential for dispute and perhaps of a prosecution or other legal action, from using the space illegally would be important to most buyers and owners. I accept their evidence that Mrs Seirlis would not have entered into this contract had they known of the legal impediment from the development approval.

Value of the apartment

[52] In *Kizbeau Pty Ltd v W G & B Pty Ltd*,[11] the High Court (Brennan, Deane, Dawson, Gaudron and McHugh JJ) said that where damages are sought under s 82 of the TPA, based upon a contravention of s 52 which induces a contract of purchase, an appropriate guide for the assessment of damages is provided by actions for damages for deceit for inducing a person to enter into such a contract. In such cases, the court said, "the proper measure of damages is the difference between the real value of the thing acquired as at the date of acquisition and the price paid for it".[12] This measure of damages is not universal, inflexible or rigid.[13] But the arguments here appear to accept that the difference (if any) between the price paid by Mrs Seirlis and the value of the apartment as at the date of completion on 27 September 2010 would be an appropriate measure of damages under the TPA or the FTA. Her loss was the amount which she paid less "the real value of the thing [she] got".[14] Moreover, there was an apparent concession that in this case the same measure of damages would be appropriate also for the liability of any of the defendants for negligence.

[53] Two valuers gave evidence. Mr Hooper, who was called in the plaintiff's case, valued the apartment at $2.325 million as at 23 April 2010 (the date of the contract) and at $2.1 million as at 27 September 2010. The other valuer, Mr Kendall, who was called by the defendants, valued the apartment at $2.5 million as at 23 April 2010, but did not provide within his report a valuation as at 27 September 2010.

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11 (1995) 184 CLR 281 at 290-291.

12 (1995) 184 CLR 281 at 291 citing *Holmes v Jones* (1907) 4 CLR 1692 at 1702-1703; *Toteff v Antonas* (1952) 87 CLR 647 at 650-651; *Gould v Vaggelas* (1985) 157 CLR 215 at 220, 255, 265.

13 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 657 per Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ.

14 *Toteff v Antonas* (1952) 87 CLR 647 at 650 per Dixon J.

[54] Pursuant to a direction from the court, the valuers met prior to the trial and produced a joint statement, setting out their points of agreement and disagreement. They agreed that the apartment had a market value, as at the date of the contract, of $2.5 million "assuming the provision of three car spaces". That is consistent with Mr Kendall's original valuation, which is to the effect that the legal impediment to the use of a third car space would be immaterial to potential buyers and thereby to the value of the apartment.

[55] In their "points of disagreement", they recorded that Mr Hooper had deducted $175,000 as being, in his opinion, the value of the third car space, so as to arrive at $2.325 million as at the date of the contract. Mr Kendall wrote that the value of the third car space, in his view, would not have been $175,000. He referred to parts of Mr Hooper's report which suggested that a third car space was worth $100,000 or (in another part of the report) something in the range of $79,000 to $90,000. The outcome of their meeting was that Mr Kendall did not see fit to revise his valuation and that Mr Hooper saw fit to add only $5,000 to $10,000 to his valuation as at 23 April 2010, to allow for the worth of the slab in the storage area.

[56] I go first to Mr Kendall's valuation. He wrote that at least 14 slabs had been removed from this building's car parking area, representing almost 30 per cent of all apartments in the building, from which he inferred that "the slab for [the subject apartment] could be removed in [sic] the absence of significant repercussions". He thought that it was probable that these areas were designated "other than as car spaces" because "[of] a former Council restricting car space approvals in Brisbane CBD to encourage the use of public transport". He thought that the Council which held office in 2010 did not hold "such aspirations to the same extent in this regard". In other words, he supposed that this development approval would not be enforced by the Council. He was encouraged in that view by his understanding that there had not been a "weight of complaints" about the use of the storage areas as car spaces. And he suggested that it was possible that residents in the building would prefer these spaces to be used for cars than for the erection of storage rooms. Further, he thought that some prospective purchasers would not need to park more than two cars but would prefer a storage facility.

[57] It is fair to say that Mr Kendall's opinion was affected by his perception that the legal prohibition upon the use of these spaces for cars would not be enforced. That is his own view, but it is not an opinion for which he has a relevant expertise. Faced with a complaint of a contravention of the development approval, it is difficult to accept that the Council would never act upon it. The prospect of a complaint would depend upon very many circumstances. But it is not beyond human experience that close neighbours make some complaints which have a good legal basis although the conduct of which they complain, on an objective view, does not much affect them.

[58] Therefore, I do not accept this important premise of Mr Kendall's opinion and the weight of his evidence is thereby affected.

[59] Mr Hooper referred to some comparable sales in this building, in a period from April 2009 to November 2010. Within the building there are apartments of different sizes and aspects, as well as different floors. Of those eight sales, two involved identical apartments in their aspect, size and design. One was number 4404, two floors above the Seirlis apartment which is 4204. This apartment was sold by Mr Seirlis's brother in January 2010 for $2.65 million. Mr Hooper described it as

having a slightly superior fit-out and a superior elevation because it was two floors higher than the subject apartment. The other was apartment 4804. It was sold in October 2009 for $2.9 million and again in December 2010 for $2.35 million. This is six floors above the Seirlis apartment and was described as having a slightly superior fit-out. Each of the Seirlis apartment and these two have an area of 314 square metres. The other sales identified by Mr Hooper were of apartments varying in size from 183 square metres to 269 square metres. There are other differences, such as the aspect, which also limited their relevance.

[60] For the apartment that was sold by Mr Seirlis's brother, it is known that the plinth had been removed. What is not known is whether the buyer purchased with knowledge that the use of the third space was illegal. It appears that apartment 4804 had two car spaces in use because of Mr Hooper's reference to its storage area having a value of $50,000.

[61] Mr Hooper identified a downward trend in the value of apartments in the building, as part of a trend in the wider market for apartments of this kind, over the period of these comparable sales. In his view, the value of these larger apartments was deteriorating at the rate of $45,000 per month. Over the five months from the date of contract to the date of settlement, that amounts to a fall in value of $225,000, explaining the difference between his two valuations.

[62] He also saw fit to allow $30,000 per floor as an estimate of the impact of height within this building upon the value of an equivalent apartment.

[63] Therefore, apartment 4404 was used to value the Seirlis apartment by deducting from its sale price $60,000 for the difference of two floors and $135,000 for the passage of three months (to April 2010). He also deducted $50,000 for the superior fit-out of apartment 4404. That brought his calculation to $2.405 million. Then he deducted a further $100,000 as his estimated value of a third car space.

[64] Mr Hooper also used the sale price of apartment 4804 ($2.9 million) from which he deducted six months at $45,000 per month and six floors at $30,000 per floor, as well as $50,000 for its superior fit-out. The result was an amount of $2.4 million, from which he deducted $50,000 for "value of existing storage". On that calculation, apartment 4804 could be used to derive a value for the Seirlis apartment of $2.35 million.

[65] His calculations from apartments 4404 and 4804 thereby provided him with a range of $2.305 million to $2.35 million, as at the date of contract, and of $2.08 million to $2.125 million as at the date of settlement. He then fixed values, from within those ranges, at respectively $2.325 million and $2.1 million.

[66] There are some bases for criticism of his reasoning when it is considered with the joint statement of the valuers. In the joint statement, Mr Hooper agreed that the value of the Seirlis apartment as at the date of the contract would have been $2.5 million assuming that it had three car spaces, so that the impact upon value of the loss of the third space was $175,000. This was apparently inconsistent with his figure of $100,000 used in calculating a value for the Seirlis apartment from the price for apartment 4404. Secondly, if something was to be subtracted from the price for apartment 4404 as the value of the third car space, something had to be added for a storage area. In the joint statement, he said that the would be prepared to add $5,000 to $10,000 for the (unbuilt) storage area. He allowed $50,000 for the

value of the storage space for apartment 4804. Perhaps the difference would be due to the cost of construction of a storage room.

[67] Curiously, Mr Hooper did not apply the same analysis to the December 2010 sale of apartment 4804. The two sale prices for this apartment varied by $550,000, indicating a depreciation in value of the order of $40,000 per month. The use of that rate, rather than $45,000 per month, would increase the calculated value of the Seirlis apartment by more than $50,000 as at the date of settlement and $30,000 as at the date of contract. The second sale of 4804 was the closest in time to the relevant valuation date.

[68] Clearly, there are several variables within Mr Hooper's calculations which provide the bases for questioning the precise values at which he arrived. The allowance of $30,000 per floor can be questioned, although I accept that the values would rise, floor by floor, according to the level.

[69] The more reliable indicator of value, as at the date of contract, comes from the consensus between the valuers that with three usable car parks, the Seirlis apartment would have been worth $2.5 million. The approach of Mr Hooper, as set out in the joint statement of the valuers, was persuasive. This was to deduct from $2.5 million an amount for the impact of the loss of a third usable car space. But the amount which he then suggested ($175,000), was reached simply by subtracting $2.325 million from $2.5 million. In comparing the sale of apartment 4404 with the Seirlis apartment, he saw fit to deduct $100,000 as the value of a third car space. I am persuaded that the value as at the date of the contract was no more than $2.4 million.

[70] There is then a need to allow for the deterioration in values between the date of contract and the date of settlement. The rate of deterioration in values could well be somewhat less than Mr Hooper's figure, which was not based on a large number of sales. And the rate of duration (if any) from late September to early December 2010 is not demonstrated by his or other evidence. This means that the December 2010 sale of apartment 4804 has some particular weight. Ultimately, I am not persuaded that the value of the apartment was lower than $2.25 million.

Other damages?

[71] The damages sought by Mrs Seirlis go beyond this difference between price and value. She seeks further damages totalling in excess of $300,000. Her case in this respect is relatively complex.

[72] It begins with the allegation that in order to be ready to settle on the due date of 22 July 2010, she procured funds that came from relevantly three sources: borrowing from a bank, borrowing from her parents and borrowing from her family trust. She says that she caused the trust to sell shares to provide her with available funds. She then says that the value of those shares rose between when they were sold by the trust (13 July 2010) and 15 September 2010 by an amount of $188,909.38. She says that this loss would have been avoided had she not been required by the contract to settle on 22 July 2010. If instead, the contract had required her to settle on 27 September 2010 (when she did settle), she would have caused the trust to sell the shares on 15 September with the consequence that she would have been able to borrow from the trust another $188,909.38. She says that her borrowing from the family trust would have been interest free. Therefore, had she not had to cause the

trust to sell shares in anticipation of a July settlement, she would have had to borrow commensurately less from a bank.

[73] Then she says that she was required to borrow too much, in that she should only have been paying $2.1 million at the settlement on 27 September 2010, because that was the value of the apartment. She and Mr Seirlis executed a deed of agreement with her parents, which apparently records the terms of a loan by them of $540,000 from moneys borrowed by her parents from a bank. They were to pay her parents interest at the same rate as the parents paid to the bank.

[74] Her case is that ultimately she borrowed $213,877.31 from her parents. The balance of the funds needed for settlement came from a loan from Westpac of $1.75 million and shares sold by the family trust yielding $561,622.58. She claims that had the price been $2.1 million, and had she not had to have the shares sold in July rather than September 2010, she would have required a loan from Westpac of but $1,344,845.83 and no loan from her parents. She had to borrow $619,032.48 because those shares were sold in July and because she paid $2.5 million rather than $2.1 million. She claims interest on those excess borrowings, calculated by the rate charged by Westpac as to $405,155.17 and the rate payable to her parents on $213,877.31. Until 18 March 2013, that is an amount of $108,108.75. Adding that to her additional borrowings of $619,032.48, the consequent loss claimed is $727,141.23. But those additional borrowings include her loss from paying more than the apartment was worth ($400,000) so that the additional losses claimed total $327,141.23.

[75] It can be seen then that much of this further claim is, in essence, for the cost of borrowing what is said to be the difference between the price and the value of the apartment. Most commonly, the measure of damages in a case such as this is the difference between price and value. The plaintiff is regarded as worse off for having made the contract because she must pay the contract price. But she has a benefit as a result of the contract, which is that she has the property which has its value. In some cases further losses are allowed. So that where a misrepresentation has resulted in the acquisition of a business for more than it was worth, but the purchaser suffers additional losses which result directly from the misrepresentation of the vendor, the purchaser can be compensated for them if such losses would not be regarded as too remote.[15]

[76] The cost of the so-called additional borrowings has been calculated by reference to the interest paid by Mrs Seirlis to Westpac and payable by her parents to their bank. The rates vary from 5.5 per cent to seven per cent. Ordinarily, interest would be allowed on the damages, representing the difference between the price and the value, under s 58 of the *Civil Proceedings Act 2011* (Qld). An award of interest under s 58 on the loss of $250,000, from the date of settlement to the date of judgment, would effectively compensate Mrs Seirlis for the ongoing cost during that period of paying too much for the apartment.

[77] The claim for interest on borrowing $188,909.38 would seek to place Mrs Seirlis in the position she would enjoy had the agreed date for settlement been 27 September and not 22 July 2010. But there is no logical basis for including this component in order to compensate her for the losses which resulted from her purchase of this

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15 *Henville v Walker* (2001) 206 CLR 459 at 472-473 per Gleeson CJ.

apartment. Had she not been misled, she would not have purchased the apartment. It is not the case that had she not been misled, she would have purchased it but with a later settlement date.

[78] A further flaw in this part of her claim is that it effectively includes not only a claim for the cost of borrowing a further $188,909.38, but also a claim for the amount of $188,909.38 itself. That can be seen from paragraph 44 of the further amended statement of claim. According to the calculations set out in the scheduling which are exhibit 7, the interest on the borrowings from her parents was $40,543.55 and the interest on the so-called excess borrowing from Westpac was $67,565.20. The lodgement fees and stamp duty were higher for the fact that the price was $2.5 million than would have been the case had the property been purchased at its value. The amount of this excess, even on a difference between price and value of $400,000, is claimed to be, in total, $26,264. Paragraph 44 also includes, in effect, a claim for legal fees said to have been incurred by Mrs Seirlis from the original date of settlement to the actual date of settlement, in the amount of $3,390.07. The so-called additional borrowings of $188,909.38 makes up effectively the balance which is claimed. But Mrs Seirlis cannot claim that she is worse off by the $188,909.38 which could have been made by the trust by holding the shares until 15 September 2010, because these shares were not her property.

[79] Of these claims for further losses, I am persuaded to make some allowance for the extra stamp duty and lodgement fees, from purchasing this property for $2.5 million rather than for $2.25 million. An amount of $15,000 will be allowed on that basis. Therefore, I assess the loss to Mrs Seirlis, which is caused by the misleading conduct, at $265,000.

Negligence

[80] Mrs Seirlis claims damages for negligence against each defendant. The pleaded case in that respect contains no allegation, save perhaps in two respects, which is specifically referrable to a negligence claim. Paragraph 32 of the pleading alleges that the conduct complained of was both misleading and deceptive and negligent "on the part of the second defendants". And paragraph 34 alleges that the first defendants are vicariously liable for "the conduct of the second defendants and any loss caused by that conduct".

[81] There is no allegation that the second defendants owed a duty of care, but it might be said that that is implicit in the allegation that they were negligent.

[82] There is no allegation that the first defendants owed a duty of care and that they are liable in negligence other than as vicariously liable for the negligence of the second defendants.

[83] In the written submissions for Mrs Seirlis, it is said that "the defendants owed the plaintiff a duty of care to ensure that all advertising representations, and all responses to requests for information from prospective purchasers, were true and legally accurate because of the reliance which they expected and intended that a potential purchaser would place upon those representations and the foreseeability of loss and damage to the plaintiff if the representations were incorrect".[16] But those

[16] Written submissions, paragraph 29.

submissions subsequently confined the allegation of negligence to the agents, for whom the vendors were said to be vicariously liable.[17]

[84] The negligence case was barely argued for the plaintiff, but it is necessary to discuss it. The submissions for Mrs Seirlis on this issue cited only one case, being a decision of Pincus J sitting as a single judge in the Federal Court in *MacCormick v Nowland*.[18] The judgment does not strongly support the imposition of a duty of care upon a vendor's agent in favour of a purchaser. Pincus J expressed "some reservations" about imposing such a duty, but felt that he should follow the judgment of Thomas J in this court in *Roots v Oentory Pty Ltd*.[19] Thomas J there concluded that a vendor's agent in the sale of a business, who had induced the plaintiffs to purchase the business by statements or opinions as to the future earnings of the business, owed a duty of care to the purchasers. But the facts of that case were important, as Thomas J explained in describing the position of the agent:[20]

> "He said that he knew the business very well, and this gave the purchasers a false basis for belief in his statements concerning the profits. There was the plainest possible implication that he was personally satisfied that the return from the business was the represented $800 per week.
>
> He took the positive role of allaying the purchaser's fears and in adding his personal seal of approval to the representations as to present and future income. He utterly failed to disclose that the only basis for such representations was Mr Ward's own say-so and perhaps the minor supporting fact that during his own visits to the premises the place had seemed busy. His reassuring role continued to the very end and was instrumental in persuading Mr and Mrs Roots not only to make, but also to complete the contract. He had no justification for personally supporting any representation as to present or future profits.
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> The conduct I have described was, to say the least, careless, and well below that which a purchaser is entitled to expect from a real estate agent in such a situation. In the circumstances his conduct was negligent, and in breach of the duty of care owed to the purchasers."

[85] The Court of Appeal has recognised that real estate agents can owe duties to prospective purchasers in some circumstances: *Sweet v Mercantile Credits Ltd*.[21]

[86] In *Norris v Sibberas*,[22] Marks J (with whom Murphy and Beach JJ agreed) discussed *Roots v Oentory Pty Ltd* and some single judge decisions from New Zealand, in which agents had been held liable to prospective purchasers, in one case for incorrectly saying that the property had mains sewerage[23] and in the other for

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17 Written submissions, paragraph 32.
18 (1988) ATPR 40-852.
19 [1983] 2 Qd R 745.
20 [1983] 2 Qd R 745 at 758.
21 [1998] QCA 442 at [31].
22 [1990] VR 161.
23 *Barrett v J R. West Ltd* [1970] NZLR 789.

giving incorrect information about the location of a boundary.[24] Marks J said that these cases illustrate that a vendor's agent, might, in given circumstances, owe a duty to take reasonable care not to make misstatements to prospective purchasers. But as *Norris v Sibberas* shows, the existence or otherwise of a duty of care depends upon the circumstances of the particular case. In that case, the appellant was held not to owe a duty for statements which were within the expertise of an accountant which, as the purchasers knew, was not the agent's expertise.[25]

[87] In *Quality Corporation (Aust) Pty Limited v Millford Buildings (Vic) Pty Ltd*,[26] I held that the agent in that case did owe a duty of care to the purchasers because the agent made it known to them that it had used professional judgment in the collection, assessment and distribution of the information upon which the purchasers relied in acquiring a business.[27]

[88] I am not persuaded that the agents here owed a duty of care to Mrs Seirlis, which required them to ensure that she was fully informed about the way in which this space could be lawfully used. The agents were not lawyers or town planners. It is one thing to say that they were required to be careful in communicating the details of the property which had been provided to them by their clients. It is another to say that they were obliged to make their own independent inquiries, which may have required them to procure their own professional advice, in order to check that these details were correct and not misleading or deceptive.

[89] In my conclusions, the agents are not liable in negligence.

The liability of each defendant

[90] It is necessary to then consider the legal responsibility of each defendant before turning to the arguments about contributory negligence and proportionate liability.

[91] Mr Waight was not an employee of the other second defendant, Hadgelias Holdings Pty Ltd ("Hadgelias"). He was an independent contractor. The publication of the three advertisements constituted conduct, for the purposes of s 52 of the TPA, which was engaged in by Hadgelias. It thereby contravened s 52. The loss of Mrs Seirlis was caused by that conduct, although she was also induced to purchase by the statements and promises by Mr Waight that the slab could be and would be removed. I accept Mr Waight's evidence that prior to 23 April, he said to Mrs Seirlis that there was a third area with a plinth which was there for the use as a storage shed, but that in many cases that had been taken away and people were parking in that space.[28] It is likely that Mr Waight said that to avoid any surprise on the part of a purchaser if she had not seen the area in question. In making that statement, Mr Waight was speaking for Hadgelias and in turn for the vendors. That statement also constituted conduct by Hadgelias and it was misleading because of the implication from it that the storage space could be lawfully used in this way. Therefore, Hadgelias is liable to her for damages under s 82 of the TPA.

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24 *Richardson v Norris Smith Real Estate Ltd* [1977] 1 NZLR 152.
25 *Norris v Sibberas* [1990] VR 161, 174-175.
26 [2003] QSC 95.
27 [2003] QSC 95 at [43].
28 T 4-30.

Ultimately, the second defendants abandoned their plea that the agent acted as mere conduits of the vendors' representations.[29]

[92] I accept Mr Waight's evidence as to his undertaking to have the slab removed. On his version, he explained that it was too late for further negotiations with the vendors and that he would arrange for and meet the cost of the removal of the slab. Had this been a promise made on behalf of the vendors, it would have been recorded somewhat differently and probably as a term of the contract itself. He had no authority from the vendors or from Hadgelias to make this promise on their behalf.

[93] Therefore, the conduct constituted by his promise to remove the slab was not the conduct of Hadgelias. It was misleading and deceptive, as I have found. But it did not contravene s 52 of the TPA because it was made by Mr Waight, a natural person. Instead, it contravened s 38 of the FTA. It induced Mrs Seirlis to purchase, and Mr Waight is liable to Mrs Seirlis for damages under s 99 of the FTA. Only a "consumer" can recover damages for a contravention of s 38.[30] But Mrs Seirlis was a consumer (as defined in s 6 of the FTA) because she acquired this "interest in land" otherwise than for a business.

[94] Section 84(2) of the TPA provides:

> "(2) Any conduct engaged in on behalf of a body corporate:
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> (a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;
>
> shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate."

Mr Waight was not an employee of Hadgelias. He was an agent of Hadgelias. But his undertaking to procure the removal of the slab was not made, or apparently made, on behalf of Hadgelias. Therefore, s 84(2) does not make his conduct in that respect its conduct.

[95] Of the vendors, one is a corporation. Section 84(2) has the effect that the relevant conduct of Hadgelias, was also the conduct of the corporate vendor. The conduct of Hadgelias was conduct engaged in on behalf of the corporate vendor by Hadgelias as the agent of that body corporate within the scope of its actual or apparent authority. In this case, the authority was actual, because there is no question that the vendors did instruct the agents that the apartment was to be advertised as having three car spaces.

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29 T 5-35, 36; cf *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592.

30 *Fair Trading Act* 1989 (Qld), s 99(4).

[96] Section 84(2) does not have the effect of making the conduct of Mr Waight, in undertaking to remove the slab, the conduct of the corporate vendor, because in this respect, he did not act at the direction or with the consent or agreement of a director, employee or agent of the corporate vendor.

[97] Section 84(4) of the TPA provides:

> "(4) Conduct engaged in on behalf of a person other than a body corporate:
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> (a) by an employee or agent of the person within the scope of the actual or apparent authority of the employee or agent; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of an employee or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;
>
> shall be deemed, for the purposes of this Act, to have been engaged in also by the first-mention person."

The relevant conduct of Hadgelias was also conduct engaged in on behalf of persons other than a body corporate, namely the four vendors who are natural persons. Therefore, that conduct is deemed, for the purposes of the TPA, to have been engaged in also by those vendors.

[98] The conduct in which the corporate vendor is deemed to have engaged was conduct by it, in contravention of s 52.

[99] But notwithstanding the deeming provision of s 84(4), the four other vendors did not contravene s 52, because they are not corporations.

[100] However, the four other vendors were persons involved in the contraventions of s 52 by the corporate vendor and Hadgelias. Section 82(1) of the TPA permits a person who suffers loss or damage by conduct of another person that was done in contravention of (amongst other provisions) s 52 may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention. Section 75B of the TPA provides that a reference to a person involved in a contravention should be read as a reference to a person who has aided, abetted, counselled or procured the contravention or who has been in any way, directly or indirectly, knowingly concerned in, or party to the contravention. In order to be "knowingly concerned" a person must have knowledge of the essential facts constituting the contravention.[31]

[101] The elements of this contravention were the fact of the representations and the facts by which they were misleading or deceptive. Each of the vendors knew of the relevant development approval conditions with respect to the car parks and by which the third space was to be used as storage. Mr Foote, a director of the

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[31] *Yorke v Lucas* (1985) 158 CLR 661 at 670.

corporate vendor, gave that evidence.[32] There was no attempt to contradict that, either by evidence from another vendor or otherwise. Nor was there any submission that I should not accept his evidence. In turn, the vendors together instructed the agents to advertise the apartment as having three car parks.

[102] Therefore, each of the four individuals who were vendors was aware of the elements of the contravention. Each participated by instructing the agents to advertise the apartment with three car parks. Each was a knowing participant in the contravention by Hadgelias and, in turn, the contravention of s 52 by the corporate vendor.

[103] Consequently, each of the first defendants and Hadgelias is liable to pay damages to Mrs Seirlis under s 82 of the TPA. Mr Waight is liable to pay damages for the same loss under s 99 of the FTA.

Contributory negligence

[104] For this case, the former s 82(1B) of the TPA provided that the damages for which a claimant such as Mrs Seirlis might recover for economic loss caused by a contravention of s 52 were to be reduced to the extent which was just and equitable having regard to the claimant's share in the responsibility for the loss, by the claimant's failure to take reasonable care.

[105] For the first defendants it was submitted that Mrs Seirlis was negligent by "knowingly" failing to inspect the car parking spaces in response to invitations to do so. But Mrs Seirlis did see the spaces before she became contractually bound. (There was no contract before she initialled amendments to the contract document on the morning of 23 April. Further, it appears that at that point the amendments had not been initialled by the vendors.)

[106] The first defendants also submit that Mrs Seirlis "went to contract knowing the physical dimensions of the car parking site [and] that there were two car parking spaces and a storage slab".[33] Again, this misconceives the case for Mrs Seirlis. She well knew what was then the physical condition of the area. She was misled about the use to which it could legally be put.

[107] The second defendants had pleaded contributory negligence but abandoned that case in their ultimate submissions.[34]

Proportionate liability

[108] The second defendants plead that their liabilities should be reduced pursuant to s 87CD of the TPA and s 31 of the *Civil Liability Act 2003* (Qld). They argue that their liabilities to Mrs Seirlis should be reduced under these provisions to the point of placing the whole of the responsibility for her loss upon the first defendants.

[109] The second defendants argue that it is the first defendants who should be held wholly responsibility having regard to the following: the first defendants instructed them to promote the apartment with three car parks, knowing of the legal

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32 T 3-96.

33 Written submissions, paragraph 141(D).

34 Written submissions, paragraph 86.

impediment to the use of the third space; the second defendants did not have knowledge of that impediment and it was the first defendants who insisted upon the completion of the contract when faced with the allegation that they had misled their purchaser. Each of those facts is established. But there is a threshold question in relation to each of the provisions upon which the second defendants rely, as to whether it permits a reduction of the liability of one or other of the second defendants.

[110] Before going to those questions, something should be said of the position of the first defendants in relation to this question of proportionate liability. The written submissions for the first defendants reveal some misconception of the effect of the apportionment of liability under these provisions. At places the submissions would suggest that there was some claim by the second defendants against the first defendants in reliance upon these provisions. Of course, that is not their effect. The second defendants have pleaded these matters as a defence, in whole or in part, to the plaintiff's claim.

[111] The first defendants submitted that this question of proportionate liability should not be decided at the same time as other questions in the case and within this judgment. Rather, the first defendants said, they should be permitted to make submissions with the benefit of the findings on other questions. In my view, there is no reason, out of fairness to the defendants or otherwise, to postpone the consideration of the arguments for proportionate liability.

[112] The first defendants did make one submission as to why the responsibility should fall upon their agents. The submission is that it was only the undertaking by Mr Waight to have the plinth removed, which persuaded Mrs Seirlis to become bound by the contract. But that is inconsistent with my findings that she was induced by not only that undertaking, but by the advertisements and by Mr Waight's earlier statement that the plinth could be removed as it had been for other apartments. His statement in that respect was made as their agent. The first defendants also asserted that this undertaking by Mr Waight somehow precluded the first defendants "in practical terms" from themselves removing the plinth. If the plinth could have been removed lawfully, Mr Waight's undertaking to do so would not have affected the defendants' ability to do so. But neither was entitled to remove it.

[113] The result is that the first defendants suggest no fact or circumstance from which it would be appropriate to reduce their liability to the plaintiff, assuming that one or both of these proportionate liability provisions applies to the present case.

[114] Section 87CD of the TPA provides, in part:

> "(1) In any proceeding involving an apportionable claim:
>
> (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
>
> (b) the court may give judgment against the defendant for not more than that amount.

> (2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
>
> (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part; and
>
> (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
>
> (3) In apportioning responsibility between defendants in the proceedings:
>
> (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and
>
> (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.
>
> …"

[115] Section 87CB of the TPA defines a "concurrent wrongdoer" in this context as:

> "… a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim."

[116] The claim is an "apportionable claim" if, according to the then relevant provisions of the TPA, it was a claim for damages which was caused by conduct done in contravention of s 52 of that Act. The liabilities of the first defendants and of Hadgelias are for damages for conduct in contravention of s 52. But the liability of Mr Waight is for damages under the FTA, for which Mr Waight seeks to have his liability reduced under s 31 of the *Civil Liability Act* 2003 (Qld).

[117] For Hadgelias, the argument is that it and the first defendants were concurrent wrongdoers, whose acts or omissions have caused the loss to Mrs Seirlis which is the subject of her claim under the TPA. In essence, the argument for Mrs Seirlis is that there must be distinct acts or omissions between those who are said to be concurrent wrongdoers and that here, the relevant acts or omissions are one and the same between Hadgelias and the first defendants. In the present case, the conduct of Hadgelias is deemed to have been that of the first defendants, by s 84(2) of the TPA. Although no authority was cited for this argument, it is well founded upon a recent decision of the New South Wales Court of Appeal in *Tomasetti v Brailey*.[35] That case concerned the suggested application of the relevantly identical provisions for proportionate liability which are contained within the *Civil Liability Act* 2002 (NSW). Claims were there made for damages from misleading and deceptive conduct in contravention of s 42 of the *Fair Trading Act* 1987 (NSW) and for negligent misstatement, in respect of certain investments which were said to have been recommended by a Mr Brailey, a financial adviser who practised through a

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35 [2012] NSWCA 399.

company called TJC Financial Planning Pty Ltd. The principal judgment was given by Macfarlan JA, with whom McColl and Campbell JJA agreed. His Honour considered the argument that Mr Brailey and his company were "concurrent wrongdoers" with the consequence that Mr Brailey's responsibility for the alleged damage or loss might be reduced. Macfarlan JA wrote:

> "152. It follows from my conclusions concerning the partnership issues that Mr Brailey's conduct occurred when he was acting, in the main, on behalf of TJC. As a result, TJC would be vicariously liable for Mr Brailey's conduct or, alternatively, as the respondents submitted was the preferable view, directly liable on the basis that Mr Brailey's conduct was not simply that of an agent of the company but that of the company itself (see *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705). For the purpose of determining whether Mr Brailey and TJC were 'concurrent wrongdoers', it does not matter which alternative is correct, as on either basis Mr Brailey and TJC would be jointly liable to the appellants (see the discussion of joint tortfeasors in R P Balkin and J L R Davis, *Law of Torts*, 4th ed (2009) LexisNexis Butterworths [29.25]).
>
> 153. The primary judge took the view that as between Mr Brailey and TJC, 'the former should … bear 'the lion's share' of responsibility' for the appellants' losses (Judgment [822]). On appeal, the respondents submitted that as TJC was the responsible entity under the *Corporations Act 2001* (Cth) and carried on the business and benefited financially from it, TJC should bear more than 50 per cent of the responsibility (Respondents' Written Submissions, as amended on 2 October 2012 [88]). On the other hand the appellants contended that 'any apportionment of damage to TJC should be either slight, or nil' (Appellants' Supplementary Submissions dated 25 October 2012 [7]).
>
> 154. In my view, even if the causes of action all arose after 1 December 2004, neither the liability of Mr Brailey nor that of TJC is limited by s 35(1). As the primary judge said, and as the respondents' submissions recognised, 'Mr Brailey was, in effect, BFL Financial Planning Pty Ltd [later named TJC]' (Judgment [821], Respondents' Written Submissions as amended on 2 October 2012 [86]). The acts and omissions of Mr Brailey in advising the appellants were the corporate acts of TJC. Accordingly, they were both responsible for the appellants' losses, their acts and mind being the same. I find nothing in the terms of s 35(1) that requires responsibility for a loss to be apportioned between concurrent wrongdoers of this type so that the total of the percentages for which they are liable is 100 per cent. The section simply limits the liability of the defendant to the proportion of the loss that the Court considers just having regard to the defendant's responsibility for the damage or

> loss. Here Mr Brailey and TJC were each fully responsible for the losses and it is just that each be liable for 100 per cent of the losses.

[118] According to this reasoning, Mr Brailey and his company were "concurrent wrongdoers", but because the acts or omissions of each wrongdoer were one and the same, the equivalent of s 87CD did not require an apportionment. That reasoning is applicable to this case and I see no reason not to apply it. It follows that the liability of the first defendants and Hadgelias cannot be apportioned.

[119] Mr Waight is liable under the FTA for the misleading and deceptive conduct involved in his undertaking to remove the plinth. That is a distinct act or omission.

[120] But the reduction of his liability is precluded by s 32F of the *Civil Liability Act* 2003 (Qld), as it was at the relevant time, as follows:

> "**32F What if a concurrent wrongdoer is proved to have engaged in misleading or deceptive conduct under the Fair Trading Act**
>
> Despite sections 31 and 32A, a concurrent wrongdoer in a proceeding in relation to an apportionable claim who contravenes the *Fair Trading Act 1989*, section 38 is severally liable for the damages awarded against any other concurrent wrongdoer to the apportionable claim."

The consequence of this provision is that Mr Waight must be held severally liable for the damages awarded against the other defendants. Therefore, there can be no reduction in his liability.

[121] Section 30 of the *Civil Liability Act* 2003 (Qld) provides that a concurrent wrongdoer, in relation to a claim, is a person who is 1 of 2 or more persons whose acts or omissions caused, independently of each other, the loss or damage that is the subject of the claim. Therefore, each of the other defendants was a concurrent wrongdoer in this sense, because their acts or omissions, although one and the same between those other defendants, were distinct from Mr Waight's conduct for which he is individually liable, and the respective acts or omissions caused, independently of each other, the same loss.

[122] It follows that none of the defendants has a basis for a reduction of liability under the proportionate liability provisions.

Conclusion

[123] Each of the defendants is liable in the same amount to the plaintiff. The plaintiff will have a judgment against each of the defendants in the sum of $312,037, consisting of damages of $265,000 plus interest on that sum at six per cent per annum for 35.5 months from 27 September 2010.