SUPREME COURT OF QUEENSLAND

CITATION:	*Platt & Ors v Kollosche Enterprises P/L & Ors* [2015] QSC 23
PARTIES:	**DARYL TERENCE PLATT AND KYLIE JANE PLATT AND ANDREW RICHARD NASH** (plaintiffs) v **KOLLOSCHE ENTERPRISES PTY LTD** (first defendant) ~~**GALACOAST PTY LTD ACN 053 364 435**~~ ~~(second defendant)~~ **MICHAEL WILLIAM KOLLOSCHE** (third defendant) **PAUL DAMIEN JONES** (fourth defendant) **SHORT PUNCH & GREATORIX LAWYERS (a firm)** (fifth defendant) **HERRON TODD WHITE (GOLD COAST & NSW FAR NORTH COAST) PTY LTD ACN ~~568 359 889~~ 052 339 358**
FILE NO/S:	BS2429/13
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	11 February 2015
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2014
JUDGE:	Jackson J
ORDER:	**The order of the Court is that:** **1. the parties provide a minute of orders to give effect to these reasons on or before 27 February 2015;** **2. the parties provide written submissions as to costs in no more than 5 pages on or before 27 February 2015.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – PARTICULARS – where the first and third defendants brought an application under r 171 to strike out parts of a second amended statement of claim on the ground that paragraphs are frivolous, vexatious, unnecessary or non-compliant – where some paragraphs of the second amended statement of claim do not comply with UCPR r 150(2) – whether some paragraphs are not adequately particularised

Trade Practices Act 1974 (Cth), s 6(3)(a)
Uniform Civil Procedure Rules 1999 (Qld), r 150(2)

Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279; [1990] HCA 11, cited
Behrooz v Secretary Department of Immigration and Multicultural and Indigenous Affairs (2004) 219 CLR 486; [2004] HCA 36, cited
Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (1997) 188 CLR 241; [1997] HCA 8, cited
Street and Ors v Luna Park Sydney Pty Limited and Ors [2007] NSWSC 689, cited

COUNSEL: P Roney QC for the plaintiffs
T Pincus for the first and third defendants

SOLICITORS: Lillas Loel Lawyers for the plaintiffs
Small Myers Hughes for the first and third defendants

[1] **JACKSON J**: The first and third defendants apply to strike out paragraphs of the second amended statement of claim ("SASOC"). The application is brought under *Uniform Civil Procedure Rules* 1999 ("UCPR"), r 171. Mostly, the challenges are that the paragraph in question is irrelevant so as to constitute frivolous, vexatious, unnecessary or other non-compliant pleading, or is inadequately particularised. In these reasons, references to paragraph numbers are to the SASOC, unless the context indicates otherwise.

[2] The claim in the proceeding is for damages. It is brought over the purchase by the plaintiffs of Unit 1, 147 Hedges Avenue, Mermaid Beach in the City of Gold Coast for the price of $6.25M in March 2007.

[3] The SASOC alleges the circumstances of the purchase. On 14 March 2007, the plaintiffs appointed 147 Hedges Avenue Pty Ltd ("147HA") in writing to act as agent of the plaintiffs in the purchase of the unit ("the plaintiffs' of Appointment of 147HA"). 147HA was the named purchaser under a pre-existing contract to purchase the unit from the proprietor ("Original Property Contract"). On 20 March 2007, that contract was rescinded by a deed of rescission ("Deed of Rescission") and a replacement contract was entered into between them ("Replacement Property Contract") providing for the purchase to be by 147HA or its' nominee. At the same time, a supplemental or side contract was made between them ("Supplemental

Deed"). On 30 March 2007, the plaintiffs completed the Replacement Property Contract as nominee of 147HA.

Paragraph 17

[4] The plaintiffs allege that the first and third defendants were agents involved in the transaction in the following paragraphs:

> "17. At all times and for all purposes material to this proceeding, Kollosche Enterprises [the first defendant] and Galacoast were the duly authorised agents of 147HA in respect of their dealings with the Plaintiffs concerning the sale to them of the Property.
>
> 18. At all times and for all purposes material to this proceeding, Mr Kollosche [the third defendant] was the duly authorised agent of Kollosche Enterprises.
>
> 19. At all times material to this proceeding, Mr Kollosche was:
>
> (a) either:
>
> (i) engaged, contracted with, or employed by or acted for Galacoast in the capacity of a real estate salesperson; or
>
> (ii) alternatively, held out by Galacoast as being employed by Galacoast in the capacity of a real estate salesperson; and
>
> (b) in the premises, either:
>
> (i) duly authorised agent of Galacoast for all purposes material to this proceeding; or
>
> (ii) alternatively, the apparent or ostensible agent of Galacoast for all purposes material to this proceeding."

[5] The first and third defendants apply to strike out par 17 on the grounds that the plaintiffs have not pleaded or particularised, after request, when and how the alleged agency arose or what their dealings with the plaintiffs were.

[6] As to the agency point, where the agency of a defendant is a material fact, the facts from which the allegation of agency is alleged are part of the material facts. However, it does not appear that the liability of the first or third defendants depends on the fact of their agency for 147HA. The claims against the first and third defendants are based on their conduct alleged in pars 120 and 122, the knowledge alleged in par 124, the state of mind alleged in par 145 and the conduct alleged in par 146. None of that depends on the allegation of the fact of agency in par 17 in respect of the dealings alleged in the SASOC.

[7] In a letter from Lillas and Loel to Small Meyers Hughes dated 17 October 2014, which in part provided some particulars, a considerable amount of detail is given as to the basis of the agency alleged against the first and third defendants. Some of the matters relied on are contentious or argumentative. But the question is whether to the extent necessary, the basis of the agency is alleged. In my view, it is. In

particular, it does not seem to me that it is a material fact or a necessary particular that the plaintiffs particularise how and when the alleged agency arose.

[8] As to the first defendant's dealings, they appear from the balance of the SASOC. It is not uncommon that a party will have a proper basis for alleging that another party acted as an agent for a third party, but not know the facts by which the agent was appointed or the terms of the appointment. In some cases, a court may relieve the party from the obligation to particularise the agency until after interlocutory steps where that is appropriate.[1]

[9] It is not clear why the first or third defendants would require any further particularisation of the alleged agency in this case. In my view, it is not appropriate to strike out par 17 because of the lack of particularisation.

Paragraph 21

[10] The plaintiffs claim damages against the first and third defendants and against the fifth defendants ("SPG") as lawyers who acted in the transaction for 147HA and its "principal", Mr Rice, through the fourth defendant ("Mr Jones"). SPG is alleged to be vicariously liable for conduct of Mr Jones.

[11] Paragraph 21 alleges that:

> "21. At all times and for all purposes material to this proceeding SPG:
>
> (a) were retained to act on behalf of Mr Rice and 147HA and so acted;
>
> (b) were the duly authorised agent of Mr Rice and 147HA for all purposes material to this proceeding; and
>
> (c) received and acted on instructions from:
>
> (i) Mr Rice on his own behalf and on behalf of 147HA; ~~and~~
>
> (ii) Mr Jones on behalf of 147HS; <u>and</u>
>
> (iii) Mr Kollosche on behalf of Mr Rice and 147HA"

[12] The first and third defendants apply to strike out par 21 to the extent that it alleges that instructions were received from the third defendant on the ground that par 52A should be struck out. As appears later, in my view, par 52A should not be struck out. The ground of the application to strike out par 21 then falls away.

Paragraph 25B

[13] The plaintiffs allege that 147HA would not have completed the Original Property Contract.

[14] Paragraph 25B alleges:

> "25B Further, at the time of the making of the Original Property Contract:

---

[1] See, for example, *Street and Ors v Luna Park Sydney Pty Limited and Ors* [2007] NSWSC 689.

(a) 147HA had neither the financial capacity nor intent of completing the Original Property Contract;
(b) Mr Kollosche knew that it was his function on behalf of 147HA to ensure a buyer or buyers was procured at a higher price to be substituted or replaced for 147HA or become its nominee at a price higher than 147HA would pay were it to complete the Original Property Contract;
(c) the market for property like the Property on the Gold Coast and particularly Mermaid Beach, had undergone a recent period of uncertainty, associated with sales and purchases of such properties having occurred in a speculative or artificial market, or had resulted in official property sales records inaccurately reflecting sales of similar or comparable properties at prices which were not in fact paid;
(d) the market for property like the Property on the Gold Coast and particularly Mermaid Beach had been affected by practices which artificially inflated the apparent sale price or market value of such properties;
(e) the market for multi million prestige property like the Property on the Gold Coast and particularly Mermaid Beach had been affected by artificially inflated values or give the appearance of being artificially inflated by devices including the provision of special conditions or ancillary or collateral arrangements stipulating for the provision of selling agent financing arrangements, a significant rebate, discount or cash loans, or other payment back to the vendor of a significant portion of the purchase price on settlement;
(f) the market for property like the Property on the Gold Cost and particularly Mermaid Beach and had been affected by a practices which involved the exercise of put & call options which meant that the true nature of antecedent dealings with that property could be concealed from and not be known by the purchasers, valuers or financiers of such properties;
(g) the market for multimillion dollar prestige property like the Property, on the Gold Coast and particularly Mermaid Beach had been affected by a practices involving sales by a vendor who had rights pursuant to the terms of a put & call option which might in the circumstances contain terms which ought be considered in assessing the market value of the property in the subject transaction, including but not limited to practices providing rebates, refunds or discounts in and associated with the purchase of the lot by the seller;
(h) Mr Jones and Mr Kollosche knew, or had reasonable cause to know the matters in (a) to (f).”

[15] The first and third defendants submit that par 25B should be struck out because it is vague, of no apparent relevance and does not allege sufficient facts to support the

allegation that 147HA lacked the relevant capacities or any inference that Mr Kollosche knew any of the matters pleaded or had the alleged function on behalf of 147HA.

[16] The only particulars provided go to the allegation that 147HA had no assets or borrowing facility by which it could obtain the funds to complete the Original Property Contract.

[17] That satisfies the complaint about par 25B(a), but it does not deal with the failure to allege any fact relied on for an inference that Mr Kollosche knew the matters in subparas (a) to (f). Where knowledge of a fact is alleged as a material fact, UCPR r 150(2) requires that all facts relied on for an inference of knowledge must be pleaded.

[18] There are other problems. Subparagraphs (c) to (g) allege a number of market conditions and practices "for property like the Property on the Gold Coast and particularly Mermaid Beach". In summary, they allege that the market was affected by those practices. The breadth of those allegations is noticeable. One allegation is that there was a speculative and artificial market. Many markets are potentially subject to speculative investment. It is notorious that the markets for the sale and purchase of residential units and beach front properties at the Gold Coast has undergone many cycles of speculative investment. As to the allegation that the market was artificial, the intended meaning appears to be that the market was one made by or resulting from artifice, in the sense of contrived or through trickery, so as to inflate or give the appearance of inflated prices or values.

[19] Subparagraphs (d) and (e) continue on that theme. A number of "devices" are identified as the causes. They include "selling agent financing arrangements", "a significant rebate", "discount or cash loans" and "other payment back to the vendor (sic) of a significant portion of the purchase price on settlement". Subparagraph (f) alleges the use of put and call options to conceal the true nature of antecedent dealings involving "rebates, refunds or discounts in and associated with" purchases.

[20] The precise meaning of some of these allegations is not self-evident but the broad thrust is discernible. The allegation that Mr Kollosche was aware of the relevant practices and their effect upon the market is an important matter. The basis of his knowledge should be alleged in a way that complies with UCPR r 150(2).

[21] The third complaint is that there are no particulars of Mr Kollosche's alleged knowledge of his function in selling the unit, namely to ensure a buyer at a higher price than under the Original Property Contract, in place of 147HA. That appears to be an allegation of terms of his appointment (or the first defendant's appointment) as agent to assist in the sale of the unit. The purpose of the allegation is not clear. The allegation that Mr Kollosche knew what was his role appears to be an evidentiary fact supporting other allegations made against him as a tortfeasor or as a person involved in a statutory contravention. However that may be, the basis of his knowledge should be alleged in a way that complies with UCPR r 150(2).

[22] The first and third defendants' further complaint is that the basis of the allegation of Mr Kollosche's function has not been alleged. This is a similar point to that raised about the agency allegation in par 17.

[23] In my view, the plaintiffs should be ordered to comply with UCPR r 150(2) as to Mr Kollosche's knowledge of the first defendant's function but par 25B should not be struck out.

Paragraph 25C

[24] Paragraph 25C(a) alleges that:

> "25C. Further, at the time of the making of the Original Property Contract:
>
> (a) Mr Kollosche had been involved in the sales of a significant number of those properties in that speculative or artificial market including properties at 97, 199, 203, 213 Hedges Avenue and 1, 3, 89A, 107, 31, 33 Albatross Avenue;
> (b) ..."

[25] The first and third defendants submit that par 25C(a) should be struck out because of its vagueness and apparent irrelevance to any cause of action pleaded. The principal causes of action pleaded are that in making representations collectively defined as the "Kollosche Representations" and the "Kollosche Silence Representations" the third defendant acted fraudulently or was a person involved in misleading or deceptive conduct because he induced or was knowingly concerned in such conduct. The plaintiffs allege that the first defendant is vicariously liable for the third defendant's representations.

[26] Paragraphs 120 and 122 allege those representations as follows:

> "120. In the premises set forth in Section F of this pleading, Mr Kollosche on behalf of:
> (a) Kollosche Enterprises;
> (b) Galacoast; and
> (c) 147HA,
> made the following representations (herein called 'the Kollosche Representations') to the Plaintiffs; namely that –
> (d) 147HA had contracted to buy the Property for the sum of $6.25 million;
> (e) the Property had a fair market value of at least $6.25 million;
> (f) the Plaintiffs were acquiring the Property on the same terms that 147HA had contracted to acquire the Property;
> (g) with superficial renovations the Plaintiff would be able to sell the Property for $7.5 million;
> (h) there was a market for the Property after a superficial renovation at a sale price of $7.5 million;
> (i) acquiring the Property for the sum of $6.25 million with a view to carrying out a superficial renovation and selling it in the short term or the long term would be a profitable exercise for the Plaintiffs;

(j) the Plaintiffs could rely on the information provided to them by Mr Kollosche;

(k) an experienced real estate agent knowledgeable about properties located on Hedges and Albatross Avenue would consider the Property to have a fair market value of at least $6.25 million;

(l) Mr Kollosche believed that the Property had a fair market value of at least $6.25 million;

(m) a purchase price of $6.25 million for the Property was a bargain;

(n) acquiring the Property for the sum of $6.25 million was a good opportunity for the Plaintiffs;

(o) there was no or little risk that the Plaintiffs would not make a profit if they acquired the Property for the sum of $6.25 million.

…

122. At all times prior to the Plaintiffs' entering into Plaintiffs' Appointment and completing the Replacement Property Contract, Mr Kollosche, Kollosche Enterprises~~,~~and Galacoast ~~and to their knowledge Mr Jones, SPG and 147HA~~;

(a) intentionally remained silent at to the matters set forth in paragraph 121(b)(i)(ii) and (iii)~~the last proceeding paragraph;~~ and

(b) thereby represented to the Plainitffs (herein called 'the Kollosche Silence Representations' that:

(i) each of Mr Kollosche, Kollosche Enterprises, Galacoast and 147HA had reasonable grounds for making each of the Kollosche Representations;

(ii) there were no facts or matters which were known to Mr Kollosche, Kollosche Enterprises, Galacoast and 147HA which rendered the Kollosche Representations (or any of them) untrue, of uncertain truth, or unlikely to be fulfilled;

(iii) there were no facts or matters which were known to Mr Kollosche, Kollosche Enterprises, Galacoast and 147HA which called for some qualification to be attached to or withdrawal to be made in respect of the Kollosche Representations (or any of them);~~and~~

(iv) there were no facts or matters which were known to Mr Kollosche, Kollosche Enterprises, Galacoast and 147HA which called for disclosure of the possibility that the Kollosche Representations (or any of them) may be untrue or may not be fulfilled; and

(v) had no belief or expectation that either Mr Jones, SPG or 147HA would disclose any of

> those matters upon which they intentionally remained silent as set forth in paragraph 121(b)(i)(ii) and (iii).”

[27] In my view, par 25C(a) may be read as the particulars of the sales in which the third defendant was involved that may have exhibited the practices or devices of the kind which affected the market as alleged in par 25B, described as “that speculative or artificial market”. The third defendant’s knowledge as alleged in par 25B and his involvement as alleged in par 25C(a) are potentially inconsistent with any innocent or honest belief in the truth of the alleged representations in a number of respects.

[28] Therefore, both the allegation of the third defendant’s knowledge of those practices or devices and the identification of the transactions in which he was involved featuring those practices or devices are important planks in building the fraud alleged, or misleading or deceptive conduct alleged, constituting facts “which must be pleaded specifically and with particularity”.[2] In my view, however, the allegations in par 25C(a) are not vague or uncertain. They are a list of the transactions in the “speculative or artificial market” in which the third defendant is alleged to have been involved.

[29] In my view, it follows that par 25C(a) should not be struck out.

Paragraph 44A

[30] Paragraph 44A alleges:

> “44A Subsequent to that meeting, on the night of 7 February 2007 or on the morning of 8 February 2007 Mr Rice told Mr Kollosche the substance of what he had told Mr Platt and Mrs Platt as referred to in paragraph 44 and asked Mr Kollosche to take the matter up in an effort to sell the Property to them.”

[31] The alleged “substance” has been confined by particulars provided in correspondence to the “essential elements” as set out in subparas 44(a) and 44(l).

[32] The first and third defendants do not complain that the rest of par 44 is thereby made irrelevant to any cause of action alleged against any defendant to the proceeding. They submit that the statement of claim cannot be left as confined by the particulars as to the substance of the conversation between Mr Rice and the third defendant. I do not understand why that is so. In my view, the submission should be rejected.

[33] In my view, it follows that par 44A should not be struck out.

Paragraph 46A

[34] In par 46A, the plaintiffs allege that at a meeting held on or about 8 February 2007, the third defendant did not tell the plaintiffs of a number of matters. Some of them were “what Mr Rice had told him [the third defendant] on 7 or 8 February 2007”. That is a cross-reference to the conversation alleged in par 44A. In turn, that is a

---

2 *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279, 285, 295.

conversation in which Mr Rice is alleged to have told Mr Platt and Mrs Platt certain things.

[35] The first and third defendants submit that the words "what Mr Rice had told him [the third defendant] on 7 or 8 February 2007" in par 46A are irrelevant to any cause of action against them. In my view, there does not seem to be any reason for their inclusion. They do not constitute part of a material fact. Although it is a minor matter, which should not have caused any embarrassment or waste of costs at trial, those words should be struck out.

Paragraph 48A

[36] Paragraphs 48 and 48A allege:

> "48. During the course of the last-mentioned meeting, Mr Rice said to Mr Platt and Mrs Platt words to the effect that:
>
> (a) 147HA had contracted to buy the Property for the sum of $6.25 million;
>
> (b) Mr P Graham was under financial pressure and La Costa was being forced to sell the Property;
>
> (c) he was desirous of pursuing another business opportunity and this was his reason for allowing Mr Platt and Mrs Platt to take over the 147HA Contract;
>
> (d) with a quick makeover Mr Platt and Mrs Platt could sell the Property for $7.5 million;
>
> (e) if the Property was held by Mr Platt and Mrs Platt for a year or two the capital growth would be more due to the continuous amalgamation of properties on the Strip; and
>
> (f) taking over the 147HA Contract was a good opportunity for Mr Platt and Mrs Platt.
>
> 48A. Subsequent to that meeting of 9 February 2007 Mr Rice told Mr Kollosche the substance of what he had told Mr Platt and Mrs Platt as referred to in paragraph 48."

[37] The first and third defendants submit that the par 48A should be struck out as impermissibly vague and imprecise. Alternatively, they seek particulars of when, how and where the conversation occurred.

[38] The only vagueness is that introduced by the allegation that it was the "substance" of what Mr Rice had told Mr and Mrs Platt that Mr Rice told Mr Kollosche. In my view, there is no impermissible vagueness or imprecision. The rules recognise expressly that the effect of spoken words may be alleged in many cases: UCPR r 152. The substance is not materially different in this context.

[39] As to particulars, the plaintiffs have stated that they are not presently able to particularise whether the communication was in person or on the telephone or where it occurred. They do not specifically address when the meeting occurred. There may be some concern whether the plaintiffs have any actual basis for the allegation in par 48A, on the one hand, or whether it is just a fishing allegation, on the other hand. That point may fall to be dealt with in due course. But since the plaintiffs

have said they cannot provide the particulars requested, it would be futile to order them to do so. Instead, if the first and second defendants seek an order, it may be appropriate to require the plaintiffs to file a statement setting out the factual basis for the allegation in par 48A.

Paragraph 49A

[40] Paragraph 49A alleges:

> "49A On a date the Plaintiffs cannot presently particularise save to say that it was in February or early March 2007 Mr Kollosche told Mr Rice he could tell Mr Platt that in his opinion $6.25 million was a good price for the Property in order to facilitate and encourage a sale of it by ~~to~~ his interests."

[41] The plaintiffs stated in response to the first and third defendants' complaint that the reference to Mr Rice's interests refers to his interest in 147HA. Although the first and third defendants submit that the pleading should be amended or formally particularised on that point I do not agree.

[42] The first and third defendants submit that the words "in order to facilitate and encourage a sale of it to his interests" are ambiguous because it is not clear whether that was something Mr Kollosche said to Mr Rice.

[43] In my view, in their context, the ordinary meaning is that those words were said by Mr Kollosche to Mr Rice. That intended meaning was confirmed by the plaintiffs in their response to the complaint of the first and third defendants. The complaint should be rejected.

[44] In my view, par 49A should not be struck out.

Paragraph 50A

[45] Paragraph 50A alleges:

> "50A Subsequent to that telephone conversation Mr Rice told Mr Kollosche the substance of what he had told Mr Platt and Mrs Platt in that conversation."

[46] In effect, the first and third defendants make the same submission about par 50A as they did about par 48A. Mutatis mutandis, in my view, the answer to this complaint is the same as for par 48A.

Paragraph 52A

[47] Paragraph 52A alleges:

> "52A Subsequent to that conversation referred to in paragraph 52 Mr Rice told Mr Kollosche the substance of what he ~~had told~~ and Mr Platt and Mrs Platt had agreed, as referred to in paragraph 52, and told him that Mr Kollosche should liaise with Mr Jones, explain what was occurring in relation to the

> transaction involving the Plaintiffs, ie of that agreement and give him Mr Jones instructions as to how to proceed to best achieve an effective sale to the Plaintiffs and which Mr Kollosche ~~he~~ then proceeded to do."

[48] The plaintiff provided particulars to Paragraph 52A which were as follows:

> "Mr Kollosche discussed with Mr Rice how best to achieve an effective sale to the Plaintiffs and Mr Kollosche and Mr Rice discussed and agreed the strategy would be for the Plaintiffs to appoint 147HA as their agent in the purchase from La Costa in respect of specified purchase price of $6.25 million and for that purpose enter into a contract for the purchase as agent for those nominees."

[49] The paragraph is inelegant at best. It contains two allegations. First, that there was a conversation between Mr Rice and Mr Kollosche in which Mr Rice informed Mr Kollosche of some matters and gave him some instructions. Second, that Mr Kollosche proceeded to carry out the instructions.

[50] The first and third defendants' submit that the lack of clarity as to Mr Rice's instruction to Mr Kollosche as to how to proceed means that the paragraph should be struck out for its vagueness and imprecision.

[51] In my view, the particulars provided under par 52A are comprehensible. There is no vagueness or imprecision which calls for the paragraph to be struck out. I note the reference in the particulars to "the strategy … to appoint 147HA as [the plaintiffs] agent in the purchase".

Paragraph 53

[52] Paragraph 53 alleges:

> "53. On or about 14 March 2007 Mr Jones (in his capacity as a solicitor of SPG) on behalf of Mr Rice and 147HA, and with the knowledge of Mr Kollosche sent a letter by email to Mr Lawson of Lawson Lawyers, on behalf of *inter alia* Mr Platt and Mrs Platt dated 14 March 2007 (herein called 'the 14 March letter') that relevantly:
>
> (a) stated:
>
> '*147 Hedges Avenue Pty Ltd is contracting to purchase the above property and your clients as nominee are to complete the purchase. Attached is copy of the Contract and Agency Appointment. Please arrange for the Agency Appointment to be signed as soon as possible as we expect the Contract to be signed tomorrow.*
>
> *Settlement is to take place on 22 March, 2006 and we understand that your clients will not be in a position to complete with balance purchase monies. To this extent our client*

will provide the necessary funding to complete the purchase secured by a mortgage. We understand within two weeks of settlement your clients will have the necessary funding in place and our client's mortgage will be released for the balance purchase price.';

(b) attached a copy of the document that when executed on behalf of La Costa and 147HA became the Replacement Property Contract; and

(c) did not attach a copy of the document that when executed on behalf of La Costa and 147HA became the Supplemental Deed or otherwise refer to it and thereby impliedly represented that the attached contract was complete in its identification of the terms of the contractual arrangements between La Costa and 147HA."

[53] The first and third defendants submit that the allegation of Mr Kollosche's knowledge is made without a "pleaded basis" and should be struck out for that reason. I take that to mean that the plaintiffs have not complied with UCPR r 150(2).

[54] The plaintiffs responded to the first and third defendants' complaint to the effect that the best particulars they could provide are that Mr Kollosche's knowledge of the sending of the letter should be inferred from the fact that the letter was the result of the instructions given by Mr Kollosche to Mr Jones as pleaded at par 52A and that either Mr Kollosche was given the letter or told that a letter would be sent.

[55] The first and third defendants submit that the particulars illustrate the speculative nature of the allegation. That seems to be a way of saying that the plaintiffs may not have a clear or specific basis for the manner in which they propose to prove the allegation. However, that is not the question at hand. As well, "the mere fact that the plaintiff's prospects of success are slim is not enough to strike out a pleading."[3] The plaintiffs case is clearly enough that Mr Kollosche instructed Mr Jones as to the strategy of appointing 147HA as agent for the plaintiffs in the purchase, that Mr Jones sent a letter to the plaintiffs' solicitors and that Mr Jones either gave a copy of the letter or communicated its contents to Mr Kollosche, so that Mr Kollosche had knowledge of it.

[56] In my view, par 53 should not be struck out. However, it would be appropriate to order that the plaintiffs give the "particulars" on which they rely so as to comply with UCPR r 150(2).

Paragraph 53A(c) and (d)

[57] Paragraph 53A(c) and (d) allege:

"53A. …

---

[3] *Behrooz v Secretary Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, [91]; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 271.

(c) in particular both Mr Jones and Mr Kollosche knew that the Plaintiffs believed they were taking over the 147HA Contract on the terms which applied to it and without variation to it, save to the extent that the Plaintiffs would become the purchasers in lieu of 147HA as purchaser;

(d) both Mr Jones and Mr Kollosche intended that the attached contract appear to the Plaintiffs to be complete in its identification of the terms of the contractual arrangements between La Costa and 147H, when they knew that it was not complete in its identification of the terms of the contractual arrangements."

[58] The first and third defendants submit that the allegation that Mr Jones knew the substance of what Mr Rice and Mr Kollosche had told the plaintiffs is too vague. But that allegation is not made in par 53A(c) or (d) and is not one made against the first or third defendant.

[59] The first and third defendants submit that the allegation that Mr Kollosche knew of the plaintiffs' belief in subpara (c) and the allegation of Mr Kollosche's intention as to how the contract would appear to the plaintiffs in sub par (d) are made without any pleaded basis. I take that to mean that the plaintiffs have not complied with UCPR r 150(2).

[60] In my view, these complaints are well made. The sting of subparas (c) and (d) is that Mr Kollosche was aware that the plaintiffs were labouring under a misapprehension as to the extent of the terms as between the vendors and 147HA and that he intended that they not be disabused of their misunderstanding. It is an allegation of deliberate misleading conduct which also forms part of the plaintiffs' fraud case against the first and third defendants.

[61] In my view, the plaintiffs should be ordered to comply with UCPR r 150(2) in relation to subparas (c) and (d).

Paragraph 54

[62] Paragraph 54 alleges:

"54. Based upon ~~a~~ the strategy referred to in paragraph 52A developed by ~~and given effect to by~~ Mr Kollosche and developed by and given effect to by Mr Rice, by an agreement dated 14 March 2007 (hereinafter called 'the plaintiffs Appointment of 147HA') the plaintiffs appointed, as their agent on certain terms and conditions, 147HA."

[63] The first and third defendants submit that par 52A does not refer to a strategy developed by Mr Kollosche. They submit that there is no pleading of how or when the strategy was developed.

[64] The plaintiffs provided particulars of the strategy under par 52A. As mentioned above, the particulars identified "the strategy … to appoint 147HA as [the plaintiffs] agent in the purchase". The plaintiffs provided those particulars expressly on the basis that the particulars were to be taken to be the strategy referred to in par 54.

[65] The first and third defendants' submission that there is no strategy alleged in par 52A treats the reference to the strategy in the particulars as inadequate. In my view, fairly read, the pleading as particularised is clear enough as to the strategy. As to the absence of specific allegations as to how or when the strategy was developed, in my view they are not material facts which must be pleaded. In any event, the factual sequence alleged in pars 52A to 53B, gives a logical account of the circumstances of the implementation of the alleged strategy up to the point of the plaintiffs' execution of the plaintiffs' Appointment of 147HA, which is alleged to have been dated 14 March 2014, from the time subsequent to the conversation in late February or early March when Mr Rice is alleged to have instructed Mr Kollosche to give Mr Jones instructions.

[66] In my view, par 54 is not liable to be struck out.

Paragraphs 62, 66 and 71

[67] Paragraphs 62, 66 and 71 allege:

> "62. Further, based upon ~~a~~ the strategy referred to in paragraph 52A developed by ~~and given effect to by~~ Mr Kollosche and developed by and given effect to by Mr Rice, on or about 20 March 2007, a deed (herein called 'the Deed of Rescission') was entered into between:
> (a) La Costa; and
> (b) 147HA.
>
> …
>
> 66. Based upon the ~~a~~ strategy referred to in paragraph 52A developed by and given effect to by Mr Kollosche and Mr Rice, on or about 20 March 2007, an agreement (herein called 'the Replacement Property Contract') was entered into between:
> (a) La Costa; and
> (b) 147HA.
>
> …
>
> 71. Based upon the ~~a~~ strategy referred to in paragraph 52A developed by and given effect to by Mr Kollosche and Mr Rice, on or about 20 March 2007, a deed (herein called 'the Supplemental Deed') was entered into between:
> (a) La Costa; and
> (b) 147HA."

[68] Each of those paragraphs refers to "the strategy referred to in paragraph 52A". The first and third defendants submit that the paragraphs should be struck out because of

the points they made about the strategy in the context of their submissions about pars 52A and 54.

[69] In my view, there is a problem with these paragraphs but it is not in the alleged inadequate pleading of the strategy in par 52A. The problem is that the strategy alleged in the particulars given under par 52A appears only to deal with the plaintiffs' Appointment of 147HA. Paragraphs 62 and 66 refer to the rescission of the Original Property Contract and to the making of the Replacement Property Contract. They too might be said to be within the strategy as alleged.

[70] However, par 71 refers to the making of the Supplemental Deed, which allegedly added to and varied the terms of the Replacement Property Contract. There is no reference to this step in the strategy as it is alleged. A significant part of the basis of the plaintiffs' claims against the first and third defendants is that the existence or terms of the Supplemental Deed were not disclosed to the plaintiffs.

[71] The point is that there seems to be no connection between the strategy as alleged and the making of the Supplemental Deed, such that there is no pleaded foundation for the allegation that the Supplemental Deed was based on the strategy. In my view, the words "[based] upon the strategy referred to in paragraph 52A developed and given effect to by Mr Kollosche and Mr Rice" should be struck out of par 71 in its present form, because of that lack of connection. However, the plaintiffs should be given leave to re-plead the relevant paragraphs on this subject matter.

Paragraph 75A

[72] Paragraph 75A alleges:

> "75A. At the time of the making of the Replacement Property contract and at all material times thereafter the First to the Fifth Defendants knew, and HTW, ought have known by 15, 20 or alternatively 30 March 2007 of the matters pleaded in paragraphs 62 to 74 inclusive."

[73] The first and third defendants submit that it should be struck out as vague and imprecise. There is some lack of clarity in par 75A. It deals with two subject matters. First, it alleges that the first to fifth defendants knew certain things at the time of making the Replacement Property Contract (and thereafter). Paragraph 66 alleges that it was made on 20 March 2007. Second, par 75A alleges that HTW ought to have known the same things by three alternative dates.

[74] The first and third defendants submit that par 75A should have alleged the date 20 March 2007 as the date of the first and third defendants' knowledge. In my view, that is unnecessary. Second, the plaintiffs' response to the first and third defendants' challenge to par 75A states that the first and third defendants "… knew or ought to have known that those documents had been created." That is erroneous, to the extent that it assumes that there is any allegation that the first or third defendant ought to have known the relevant matters. There is no such allegation.

[75] However, the first and third defendants further submit that the allegation of knowledge is not based on any allegations. I take that to mean that the allegation of

knowledge in par 75A does not comply with UCPR r 150(2). In my view, that complaint is well made.

[76] In my view, the plaintiffs should be ordered to comply with UCPR r 150(2) for the allegation that the first and third defendants knew the matters pleaded in pars 62 to 74.

Paragraphs 76 and 79

[77] Those paragraphs allege:

> "76. On or about 23 March 2007 Mr Jones (in his capacity as a solicitor of SPG) on behalf of Mr Rice and 147HA, and to the knowledge in substance of Mr Kollosche sent a letter by email to Mr Tierney of PCCR, on behalf of the Plaintiffs dated 23 March 2007 (herein called 'the 23 March Letter') that relevantly:
>
> (a) states:
>
> *'147 Hedges Avenue Pty Ltd has contracted to purchase the above property [the Property] and we understand your clients as nominees are to complete the purchase. Attached is a copy of the Contract.*
>
> *Settlement is to take place on 30 March 2007 and we understand that your clients will be in a position to complete with balance purchase monies on that date'*;
>
> (b) attached a copy of the Replacement Property Contract; and
>
> (c) intentionally did not attach a copy of the Supplemental Deed or otherwise refer to it.
>
> …
>
> 79. On or about 30 march 2007 Mr Jones (in his capacity as a solicitor of SPG) on behalf of Mr Rice and 147HA and to the knowledge in substance of Mr Kollosche sent a letter by email to Mr Tierney of PCCR, on behalf of the Plaintiffs dated 30 March 2007 (herein called 'the 30 March Letter') that relevantly:
>
> (a) stated:
>
> '*We attach the Settlement Statement for the above purchase for your attention. Cheque details are also contained in the Settlement Statement. The Bank Cheque for Short Punch & Greatorix Trust Account ($1,569,976.60) represents the Balance of the Purchase Price for the 4 Albatross Units ($919,976.60) and the refurbishment reimbursement ($650,000.00)* (herein called 'the Putative Refurbishment Reimbursement').
>
> (b) attached a two page document entitled "SETTLEMENT STATEMENT' (herein called 'the

Property Settlement Statement') that relevantly provided:

(i) the vendor is 'La Costa Pty Ltd ACN 009 798 583 atf …….';

(ii) the Purchaser is '147 Hedges Avenue Pty Ltd and or Nominee (Daryl Terrance PLATT, Kylie Jane PLATT and Andrew Richard NASH)');

(iii) the property is the Property;

(iv) the adjusted purchase price (taking into account the deposit and before the addition of 147HA's legal fees of $8,017.00) waS $6,059,032.40 (herein called 'the Balance Purchase Price');

(v) the Balance Purchase Price was to be paid by way of 13 cheques drawn in the manner specified therein;

(vi) as part of (v), specified that a cheque in the sum of $1,574,776.60 was to be drawn in favour of the SPG's Trust Account (which included the Putative Refurbishment Reimbursement) (herein called 'the SPG Trust Account Payment');

(vii) as part of (v), specified that a cheque in the sum of $54,495.00 was to be drawn in favour of Galacoast (herein called 'the Galacoast Payment')."

[78] The first and third defendants submit that they are defective for the same reasons, in substance, as they submitted for par 53. The plaintiffs' case as to Mr Kollosche's knowledge, as particularised, is that Mr Kollosche instructed Mr Jones to send the letter, that Mr Jones sent the letter to the plaintiffs' solicitors and that Mr Jones either gave a copy of the letter or communicated its contents to Mr Kollosche, so that Mr Kollosche had knowledge of it.

[79] In my view, the plaintiffs should provide the relevant "particulars" in proper form so as to comply with UCPR r 150(2).

Paragraph 80

[80] Paragraph 80 alleges:

"80. At the ~~all~~ times material to this proceeding as particularised below ~~after such matters arose~~, Mr Kollosche and Mr Jones knew of the following matters (herein called 'the Material Information'):

(a) at the times of the events referred to in Sections F, G, H, I , J, L and paragraphs 52A and 79 and when the Plaintiffs entered into the Replacement Contract and at the time of its completion 147HA was entitled to a $650,000 discount on the Purchase

Price of the Property specified in the Replacement Property Contract, by reason of the Agreed Rebate;

(b) at the times of the events referred to in Sections F, G, H, I, J, L and paragraphs 52A and 79 and when the Plaintiffs entered into the Replacement Contract and at the time of its completion the Purchase Price for the Property of $6.25 million under the Original Property Contract was conditional upon La Costa agreeing to:
   (i) the Agreed Rebate;
   (ii) the Inflated Unit Sale Requirement; and
   (iii) the Contemporaneous Settlement Requirement;

(c) at the times of the events referred to in Sections F, G, H, I, J, L and paragraphs 52A and 79 and when the Plaintiffs entered into the Replacement Contract and at the time of its completion the Property did not have a market value of $6.25 million and had not been contracted to be sold to 147HA in an arms' length transaction for a genuine market value of $6.25 million;

(d) when the Plaintiffs entered into the Replacement Contract and at the time of its completion 147HA was to receive a commission or undisclosed benefit of $650,000 in respect of the Plaintiffs' purchase of the Property as nominee of 147HA pursuant to the Replacement Property Contract;

(e) when the Plaintiffs entered into the Replacement Contract and at the time of its completion 147HA was going to receive a commission or undisclosed benefit (paid to Mr Rice) in the amount of $480,000, calculated as set out in Section T herein;

(f) in the alternative to (e), when the Plaintiffs entered into the Replacement Contract and at the time of its completion Mr Rice was going to receive a secret commission or undisclosed benefit in the amount of $480,000, calculated as set out in Section T herein; ~~and~~

(g) when the Plaintiffs entered into the Replacement Contract and at the time of its completion that the Property was not being sold to 147HA solely on the terms set out in the Replacement Property Contract;

(h) when the plaintiffs entered into the Replacement Contract, at the time of the events referred to in paragraph 78 and at the time completion of the Replacement Contract that the $650,000 discount on the Purchase Price was not in respect of the sale of the Units to La Costa under the terms of his agreements with La Costa and that the said extra payments was for not specified to be nor was it in

fact an allowance for renovating the Units pursuant to the terms of any of the contracts or at all;

(i) when the Plaintiffs entered into the Replacement Contract and at the time of its completion that the Plaintiffs were unaware of the matters in (a) to (h) above;

(j) when the Plaintiffs entered into the Replacement Contract and at the time of its completion that the Plaintiffs were of the erroneous belief that the true position was to the converse of the matters in (a) and (h) above;

(k) when the Plaintiffs entered into the Replacement Contract and at the time of its completion ~~in particular~~ that the Plaintiffs were of the erroneous belief that the true position was the Property did have a market value of $6.25 million, had been contracted to be sold to 147HA in an arms' length transaction for a genuine market value of $6.25 million;

(l) when the Plaintiffs entered into the Replacement Contract at the time of its completion ~~in particular~~ that the Plaintiffs were of the erroneous belief that the Property was being sold to 147HA solely on the terms set out in the Replacement Property Contract;

(m) when the Plaintiffs entered into the Replacement Contract and at the time of its completion that the plaintiffs' knowledge and belief described (i) to (l) had been brought about by statements or representations made to them by Mr Rice, 147HA, Mr Kollosche, and/or Mr Jones in the respects pleaded against them in this pleading; and

(n) of the matters referred to already in this pleading as having been known to each of any of them , as specifically referred to in paragraphs 25, 25B, 26, 30(h), 38(h), 42(h), 48A, 50A, 52A, 53B, 76 and 79 at the times referred to in those paragraphs."

[81] The first and third defendants submit that the paragraph should be struck out for numerous reasons.

[82] First, they submit that there is no pleaded basis for the allegation of knowledge for many of the matters said to have been known. A difficulty is raised by the circumstance that par 80 collects a number of previously made allegations which include allegations of knowledge. The first and third defendants do not descend to particularity about which of the allegations are unsupported, having regard to that circumstance.

[83] Second, they submit that subpara (h) is confusing. It seems likely that the word "for" in the expression "was for not specified" is an error. In my view, however, the meaning of (h) is clear enough otherwise, having regard to par 79(a).

[84] Third, they submit that subpara (m) requires an impermissible degree of "unpacking", which I take to mean that it does not appear which statements are alleged to have caused which parts of the plaintiffs' alleged knowledge or belief. In my view, if that degree of unpacking is required it can be done by particulars. An anterior point, perhaps, is whether it is a material fact that Mr Kollosche knew that the plaintiffs had the alleged knowledge or belief. That may be an unnecessary allegation of evidence, but that question was not argued. Therefore, I will not consider it further.

[85] Fourth, the first and third defendants submit that subpara (n) creates confusion because of its cross-references to other allegations of knowledge. Subject to one point, in my view, there is no difficulty. Although subpara (n) may be unnecessary repetition, it serves to collect the earlier allegations of knowledge in a convenient way, for the purpose of the allegation made in par 81(a) that Mr Kollosche did not inform the plaintiffs of the matters that he allegedly knew.

[86] The possible exception is that because par 80 alleges that Mr Kollosche knew of the matters referred to as having been known to each or any of them, it might be suggested that Mr Kollosche knew of the matters alleged to have been known by Mr Jones. However, I am satisfied that is not how the subpara should be read in the context of the rest of the pleading. Accordingly, in my view, there is no real difficulty.

[87] The result, in my view, is that the only true difficulty with par 80 is that the plaintiffs have not or may have not complied with UCPR r 150(2) in relation to the allegations of knowledge by Mr Kollosche. This point is to some extent well made, but as previously stated it is not clear how far the difficulty extends or the extent to which the first and third defendants rely on the point.

[88] Nevertheless, it is appropriate, in my view, to order that the plaintiffs comply with UCPR r 150(2).

Paragraph 81

[89] The first and third defendants submit that par 81 should be struck out because par 80 should be struck out and par 81 depends on par 80. As par 80 should not be struck out, in my view, par 81 should not be struck out.

Pararaphs 81A, 81B and 81C

[90] Those paragraphs allege:

> "81A. Because of the knowledge herein before pleaded is having been held at or prior to 30 March 2007 by <u>each or all of</u> Mr Kollosche, and by him the First and Second Defendants, and by Jones and SPG, the Plaintiffs were entitled to, and as a matter of law there was a reasonable expectation in the circumstances, that there would be disclosed by Mr Kollosche <u>and by him the First and Second Defendants</u> and Mr Jones <u>and SPG</u> the true position in relation to the Original Property Contract or the Unit Contracts referred to in paragraphs 25 to 42 inclusive and of the matters

concerning the rescission of the Original Property Contract, the creation of the replacement Property Contract, and the execution of the Supplemental Deed pleaded in paragraphs 62 to 74 inclusive and ultimately, of the Material Information.

81B. Mr Kollosche and Mr Jones either knew, or ought reasonably have known that there was and objectively there was a reasonable expectation of the kind referred to above, but deliberately or intentionally;

(a) in the case of Mr Kollosche and Mr Jones elected not to disclose the Material Information to the Plaintiffs; and

(b) in the case of Mr Jones took positive steps to conceal the existence of some or all of the Material Information from the Plaintiffs, and their legal advisor.

81C. At the time Mr Kollosce and Mr Jones acted in the manner referred to in paragraph 81B, that conduct occurred in order to cause the Plaintiffs to complete the replacement Property Contract and not to take any steps to avoid it according to any perceived entitlement that they might have in the circumstances."

[91] The first and third defendants submit that each of these paragraphs should be struck out because of their challenge to the previous allegation of knowledge on which they depend. In view of my findings on the earlier paragraphs it is not appropriate to strike out these paragraphs on that basis.

[92] They further submit that what is meant by the allegation that the plaintiffs had an entitlement to and a reasonable expectation of disclosure of matters known to the defendants "because of" the defendants' knowledge of those matters is unclear and should be struck out.

[93] In my view, the contention is correct, at least in part. The allegation of an entitlement to and reasonable expectation of disclosure is a mixed allegation of fact and law. The plaintiffs submit that it is a material fact for their misleading or deceptive conduct case based on non-disclosure. I assume without further analysis that may be correct. Nevertheless, the entitlement or expectation will not arise only because the undisclosed facts were known to the defendants. A duty to disclose, if there is one, or the characterisation of non-disclosure as misleading or deceptive is based on more facts than knowledge alone. In my view, the words "[b]ecause of the knowledge herein pleaded as having been held at or prior to 30 March 2007 by each or all of Mr Kollosche, and by him the First and Second Defendants, and by Jones and SPG" should be struck out. The plaintiffs should have leave to replead the basis of the allegations of entitlement to and reasonable expectation of disclosure.

[94] The first and third defendants further submit that par 81A should be struck out because it does not sufficiently identify the true position. In my view, it does so by referring to pars 25 to 42.

[95] The first and third plaintiffs submit that par 81C does not allege a basis for the allegation that Mr Kollosche acted with the intention to cause the plaintiffs to complete the Replacement Property Contract. In my view, the pleading does not comply with UCPR r 150(2) in relation to that allegation. An order should be made that the plaintiffs comply with UCPR r 150(2).

Paragraph 82

[96] This paragraph alleges:

> "82 On its face the Replacement Property Contract (herein collectively called 'the putative instrument') created, and was ~~intended~~ known by Mr Kollosche ~~and Mr Rice~~ to create the false impression on the part of the Plaintiffs that the Property was under contract to be sold:
>
> (a) for the purchase price specified in the putative instrument, namely $6.25 million;
>
> (b) as an independent transaction separate from the sale of the Units by Mr Rice to La Costa; and
>
> (c) solely on the terms set out in the putative instrument."

[97] The first and third defendants submit that the allegation of knowledge by Mr Kollosche cannot survive the strike out of previous paragraphs. Since I have not struck out those paragraphs, at least in general, that objection must fail. However, the plaintiffs have not complied with UCPR r 150(2) in relation to this allegation of state of mind. They should be ordered to do so.

Paragraphs 91(d),(g) and (h)

[98] Paragraph 91 alleges:

> "91 Further to those steps mentioned Sections I, K and M, Mr Jones took the following steps in connection with sale of Property; namely –
>
> (aa) he, and by his staff at SPG liaised with the First, Second an Third Defendants in drafting the Original Property Contract;
>
> (ab) he liaised with Mr Kollosche and Mr Kollosche's staff member Ms Mattiq for the purposes of her reporting to him as she did to keep Mr Kollosche ~~them~~ advised as to the progress of the transaction and to ensure secrecy was maintained in relation to the true character of the transaction, including but not limited to advising them by email on 29 March 2007, the day before completion, not to disclose to any one copies of the Replacement Property Contract or the Supplemental Deed copies of which Mr Jones caused to be provided to them;
>
> (a) he, on behalf of SPG, acted for 147HA in relation to:

(i) the transaction the subject of the Original Property Contract until such time as it was rescinded; and
(ii) the transaction the subject of the Replacement Property Contract;

(b) he, on behalf of SPG, acted for Mr Rice in relation to the Unit Contracts;

(c) he, on behalf of SPG, ~~on the instruction of Mr Rice and Mr Kollosche~~, prepared each of the documents that when executed became:
(i) the Plaintiff's Appointment of 147HA;
(ii) the Deed of Rescission;
(iii) the Replacement Property Contract; and
(iv) the Supplemental Deed;

(d) he, on behalf of SPG, prepared to the Supplemental Deed and removed the substance of the terms contained therein from the Replacement Property Contract for the purpose of the Fraudulent Intent;

(e) he, on behalf 147HA, signed each of the documents at (c);

(f) he, on behalf of SPG and/or 147HA, attended the offices of the solicitors of La Costa on 20 March 2007 for the purpose of procuring La Costa's execution of the documents at (c);

(g) he concealed from LL and PCCR, both on behalf of the Plaintiffs, and the Plaintiffs the matters the subject of the Fraudulent Intent; and

(h) he held or knew of the Fraudulent Intent."

[99] The first and third defendants submit that since the allegation of the "Fraudulent Intent" previously made in par 85 has been deleted from the pleading, so must subparas (d), (g) and (h) that depend on the allegation of that intent. However, the plaintiffs respond that the allegations in those subparagraphs are not made against the first and third defendants. On that basis, no order need be made to strike the subparagraphs out as against the first and third defendants. In my view, that submission should be accepted, although the defect is obvious enough. As against the relevant defendants, the pleading will have to be amended.

Paragraph 92F

[100] Paragraphs 92F and 92G allege:

> "92F. Subsequently on receipt of that list, Mr Platt telephoned Mr Kollosche on or about 6 March 2007 and asked him to advise as to who was the best valuer to deal with amongst those on that list, in response to which, Mr Kollosche notified him that Mr Gillespie of HTW was the best valuer as Mr Kollosche dealt with him regularly in respect of properties in that area, and that he was the most up to date.

92G. Mr Kollosche, Mr Gillespie and Mr Rice had a history of prior professional and social dealings but at the time at the Plaintiffs were unaware of those dealings."

[101] The first and third defendants submit that these allegations are not material facts and are irrelevant. They further submit that the purpose of the paragraphs appears to be to allege an improper relationship between Mr Kollosche and Mr Gillespie. In my view, these objections are well made. The allegations are not material facts to any cause of action against the first or third defendants. They should both be struck out as against them.

Paragraph 120(f), (m) and (o)

[102] Paragraph 120 alleges:

"120. In the premises set forth in Section F of this pleading, Mr Kollosche on behalf of:

(a) Kollosche Enterprises;
(b) Galacoast; and
(c) 147HA;

made the following representations (herein called 'the Kollosche Representations') to the Plaintiffs; namely that –

(d) 147HA had contracted to buy the Property for the sum of $6.25 million;
(e) the Property had a fair market value of at least $6.25 million;
(f) the Plaintiffs were acquiring the Property on the same terms that 147HA had contracted to acquire the Property;
(g) with superficial renovations the Plaintiff would be able to sell the Property for $7.5 million;
(h) there was a market for the Property after a superficial renovation at a sale price of $7.5 million;
(i) acquiring the Property for the sum of $6.25 million with a view to carrying out a superficial renovation and selling it in the short term or the long term would be a profitable exercise for the Plaintiffs;
(j) the Plaintiffs could rely on the information provided to them by Mr Kollosche;
(k) an experienced real estate agent knowledgeable about properties located on Hedges and Albatross Avenue would consider the Property to have a fair market value of at least $6.25 million;
(l) Mr Kollosche believed that the Property had a fair market value of at least $6.25 million;
(m) a purchase price of $6.25 million for the Property was a bargain;
(n) acquiring the Property for the sum of $6.25 million was a good opportunity for the Plaintiffs;
(o) there was no or little risk that the Plaintiffs would not make a profit if they acquired the Property for the sum of $6.25 million."

[103] The first and third defendants submit that subparas (f), (m) and (o) do not follow from the "premises set forth in Section F". In the case of (f) that is because the terms of the plaintiffs acquisition were not established until events later than the meeting alleged in Section F. However, in the case of subpara (m), it is not as clear that an implied representation that the property was a bargain at $6.25M could not arise without regard to later events. The same is true of subpara (o). However, it is possible that the plaintiffs may have confined the basis of the alleged representation to Section F by mistake.

[104] It is appropriate, therefore, to make an order striking out subparas (f), (m) and (o) with leave to replead.

Paragraph 123

[105] The paragraph alleges:

> "123. In truth and fact, and in the premises set forth in Sections C, D, L and N of this pleading, regarding the Kollosche Representations:
>
> (a) 147HA had not contracted to buy the Property for the sum of $6.25 million;
>
> (b) the Property did not have a fair market value of at least $6.25 million;
>
> (c) the Plaintiffs were not acquiring the Property on the same terms that 147HA had contracted to acquire the Property;
>
> (d) with superficial renovations the Plaintiff would not be able to sell the Property for $7.5 million;
>
> (e) there was no market for the Property after a superficial renovation at a sale price of $7.5 million;
>
> (f) acquiring the Property for the sum of $6.25 million with a view to carrying out a superficial renovation and selling it in the short term or the long term would not be a profitable exercise for the Plaintiffs;
>
> (g) the Plaintiffs could not rely on the information provided to them by Mr Kollosche;
>
> (h) an experience real estate agent knowledgeable about properties located on Hedges and Albatross Avenue would not consider the Property to have a fair market value of at least $6.25 million;
>
> (i) Mr Kollosche did not believe that the Property had a fair market value of at least $6.25 million;
>
> (j) a purchase price of $6.25 million for the Property was not a bargain;
>
> (k) acquiring the Property for the sum of $6.25 million was not a good opportunity for the Plaintiffs;
>
> (l) there was significant risk that the Plaintiffs would not make a profit if they acquired the Property for the sum of $6.25 million;
>
> (m) the Plaintiffs repeat and rely on the allegations in paragraph 80."

[106] The first and third defendants submit that par 123 should be struck out because: first, other (unidentified) paragraphs should be struck out; second, the failure to allege the times of the alleged falsities is embarrassing pleading; and, third, the premises are insufficiently identified.

[107] In my view, none of these objections warrants an order striking out par 123.

Paragraph 130(aa) and (ab)

[108] Paragraph 130 alleges:

> "130. Each of the, Kollosche Representations, Kollosche Silence Representations, Jones Representations and Jones Silence Representations:
>
> (a) was made or occurred in trade or commerce within the meaning of those terms in the TPA;
>
> (aa) insofar as it occurred in telephone mail or emails communication, or by omitting to communicate by that method it involved postal telegraphic or telephonic services within the meaning of Section 6 of the TPA;
>
> (ab) insofar as it occurred in relation to the Plaintiffs who were at all material times resident in Hong Kong, occurred by persons engaged in overseas trade or commerce in within the meaning of Section 6 of the TPA;
>
> (b) was made in the knowledge that the Plaintiffs would or would be likely to rely upon it;
>
> (c) was false; and
>
> (d) constituted conduct which was misleading or deceptive or likely to mislead or deceive in contravention of section 53 of the TPA and sections 38 of the *Fair Trading Act* 1989, or involved the making of misleading representation in contravention of sections 53 of the TPA and section 40 of the *Fair Trading Act* 1989, as it was provided."

[109] The plaintiffs submit that:

(a) conduct which is misleading or deceptive or likely to mislead or deceive because of failure to make disclosure of something does not, per se, amount to "engaging in conduct to the extent to which the conduct involves the use of postal, telegraphic or telephonic services" within the meaning of s 6(3)(a) *Trade Practices Act* 1974 (Cth) ("TPA");

(b) none of the other allegations of misleading or deceptive conduct by Mr Kollosche is alleged to involve the use of postal, telegraphic or telephonic services;

(c) on those bases, s 6(3) of the TPA does not extend to Mr Kollosche's conduct as a personal contravenor of ss 52 or 53 TPA;

(d) the plaintiffs overseas residence did not make the first or third defendant's conduct "trade or commerce between Australia and places outside Australia" within the meaning of s 6(2)(a)(i) TPA; and

(e) on that basis, s 6(2) of the TPA does not extend to Mr Kollosche's conduct as a personal contravenor.

[110] The plaintiffs submit that these questions of law as to the operation of s 6(2) and s 6(3) TPA should be decided at trial.

[111] In my view, there is no need for a trial to resolve those questions. The first and third defendants' submissions should be accepted. Subparagraphs 130(aa) and (ab) should be struck out.

Paragraph 133

[112] The paragraph alleges:

> "133 At the time of making the Kollosche Representation and the Kollosche Silence Representations in each of them~~:~~
> ~~(a)~~ Mr Kollosche knew the same to be false.~~;and~~"

[113] The first and third defendants submit that this paragraph should be struck out because the paragraphs "purportedly founding the alleged Representations should be struck out". Those paragraphs are pars 120 and 122, set out previously in these reasons. I have not made an order striking out either of those paragraphs in a substantial way. Accordingly, the challenge to par 133 falls away. In passing, I note that the alleged knowledge of Mr Kollosche is not particularised and no pleading in compliance with UCPR r 150(2) is set out. In my view, the alleged knowledge should be so particularised or pleaded, either by confining it to the premises of particular paragraphs or setting out any additional facts relied upon. But that was not the first and third defendants' complaint or submission.

Paragraph 146

[114] The paragraph alleges:

> "146. In respect of the actionable conduct of the First and Second Defendants 147HA as set forth this pleading, Mr Kollosche:
> (a) personally committed such conduct;
> (b) further or alternatively, induced the commission of such conduct; and
> (c) further or alternatively, was knowingly concerned in and a party to such conduct."

[115] The first and third defendants submit that the allegation of Mr Kollosche's conduct is insufficiently precise, with the consequence that the third defendant will have to trawl through the pleading to identify Mr Kollosche's personal conduct or inducement or knowing concern of the relevant corporation's conduct.

[116] In my view, the conduct alleged against Mr Kollosche is set out in the pleading with sufficient clarity to be able to ascertain what might constitute inducement or knowing concern for the purposes of s 75B of the TPA. Perhaps it might focus the

relevant issues if the plaintiffs were to particularise the alleged conduct said to constitute the inducement of either of the corporate plaintiffs, but it does not seem to me that there is any reason in the present case to conclude that the case against Mr Kollosche as third defendant is alleged in a way that the substance is difficult to ascertain or respond to as a matter of pleading, prepare evidence which will be required for the trial or understand the scope of the legal issue raised.

Conclusion

[117] Orders should be made to give effect to these reasons. However, I will hear the parties as to the appropriate form of those orders and on the question of costs.