SUPREME COURT OF QUEENSLAND

CITATION:	*Juniper Property Holdings No 15 P/L v Caltabiano (No 2)* [2016] QSC 5
PARTIES:	**JUNIPER PROPERTY HOLDINGS NO 15 PTY LTD ACN 099 125 274 (Receivers and Managers Appointed)** (plaintiff) v **CARMELO CALTABIANO** (defendant)
FILE NO/S:	BS5180/14
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	15 January 2016
DELIVERED AT:	Brisbane
HEARING DATE:	10-12 June 2015
JUDGE:	Jackson J
ORDER:	**The judgment of the court is:** **1. The defendant's counterclaim is dismissed.** **2. Declare that the plaintiff validly terminated the contract between the parties dated 18 May 2007.** **3. Declare that the deposit under the contract between the parties dated 18 May 2007, together with interest accrued thereon, is forfeited to the plaintiff.** **4. The defendant pay to the plaintiff the sum of $14,132,246 including interest of $1,471,509.** **5. The defendant pay the plaintiff's costs of the proceeding**
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 defendant contracted to purchase an apartment in the plaintiff's development off the plan – where the defendant alleges that

misrepresentations as to comparative value of the apartment and other apartments were made by the plaintiff's agent – where the defendant alleges that he relied upon the alleged representations – whether the alleged representations were made – whether the defendant relied upon the alleged representations

Trade Practices Act 1974 (Cth), s 52, 87

ACN 070 037 599 Pty Ltd v Larvik Pty Ltd [2008] QCA 416, cited
Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25, applied
Cordelia Holdings Pty Ltd v Newkey Investments Pty Ltd [2004] FCAFC 48, cited
Dukemaster v Bluehive [2002] FCAFC 377, cited
Fabcot Pty Ltd & Anor v Port Macquarie-Hastings Council [2011] NSWCA 167, cited
Gould v Vaggelas (1985) 157 CLR 215; [1985] HCA 75, cited
Henville v Walker (2001) 206 CLR 459; [2001] HCA 52, cited
I & L Securities v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109; [2002] HCA 41, followed
Julstar Pty Ltd v Hart Trading Pty Ltd [2014] FCAFC 151, cited
Lord Buddha v Harpur [2013] VSCA 101, cited
Razdan v Westpac Banking Corporation [2014] NSWCA 126, followed
Ricochet Pty Ltd v Equity Trustees Executor & Agency Co Ltd (1993) FCR 229; [1993] FCA 99, applied
Travel Compensation Fund v Tambree & Ors (2005) 224 CLR 627; [2005] HCA 69, cited
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514; [1992] HCA 55, applied
Watson v Foxman (1995) 49 NSWLR 315, applied

COUNSEL:	P Davis QC and C Jennings for the plaintiff R Bain QC and J Morris for the defendant
SOLICITORS:	Norton Rose Fulbright Australia for the plaintiff Johnsons Solicitors & Attorneys for the defendant

[1] **Jackson J**: This is a dispute over the completion of a contract of sale of land. The plaintiff claims sums due under the contract and damages for breach of contract by failing to complete the contract. The defendant defends on the ground that he was entitled to terminate the contract for misleading or deceptive conduct and counterclaims damages for loss or damage suffered by that conduct.

The contract and uncontroversial facts

[2] From before April 2006, the plaintiff marketed, constructed and sold units in the "Soul" development at Surfers Paradise. Soul is a modern high-rise residential, retail and commercial complex. Atop the building is a prestigious four-floor penthouse which was the subject of the contract of sale made between the parties.

[3] In April 2006, units in Soul were being sold "off the plan". Construction of the building, including the penthouse, proceeded over the following years.

[4] The defendant is an experienced businessman who became a prospective purchaser of the penthouse in April 2006.

[5] Justin Daniels was a sales consultant employed by the plaintiff in April 2006. The defendant's initial contact was with Mr Daniels.

[6] On 19 July 2006, the parties entered into a contract of sale of the penthouse (to be built) for the purchase price of $16.85 million.

[7] On 18 May 2007, the parties agreed by deed to rescind the first contract and replaced it with a second contract in similar terms.

[8] On 7 June 2012, the plaintiff became the registered owner of the lot that comprised the penthouse.

[9] As constructed, the penthouse had a total floor area of 1,043 square metres, divided between 519 square metres of internal living area and 524 square metres of balcony or roof deck outdoor area.

[10] On 26 July 2012, the plaintiff gave notice that the date for settlement was 10 August 2012.

[11] On 9 August 2012, the defendant requested an extension of the date for settlement.

[12] On 13 August 2012, the plaintiff agreed to extend the date for settlement to 10 September 2012, with time to remain of the essence.

[13] On 10 September 2012, the defendant failed to attend at the agreed place and time for settlement.

[14] On 3 October 2012, the plaintiff gave a notice to complete on 18 October 2012.

[15] On 18 October 2012, the defendant failed to pay the purchase price upon attending the place of settlement.

[16] On 4 March 2014, the plaintiff gave another notice to complete on 19 March 2014.

[17] By cl 15.6 of the contract, the defendant agreed to pay interest on the outstanding amount of the purchase price for the penthouse. For the period between 10 September 2012 and 19 March 2014 the amount of that interest was $3,843,184.93.

[18] On 19 March 2014, the defendant failed to attend at the time and place nominated for settlement.

[19] On 19 March 2014, after the defendant's failure to settle the contract on that day, the plaintiff elected to terminate the contract for breach. The plaintiff elected to declare the deposit forfeited and reserved its rights otherwise.

[20] On 5 June 2014, the plaintiff started this proceeding claiming damages for breach of contract.

[21] On 18 July 2014, by the defence and counterclaim, the defendant purported to rescind the contract for alleged misleading or deceptive conduct by Mr Daniels as an employee and agent of the plaintiff engaged in during the pre-contractual discussions in contravention of s 52 of the *Trade Practices Act* 1974 (Cth) ("the TPA").

[22] On 7 April 2015, the plaintiff resold the penthouse for $7,000,000. The plaintiff also incurred expenses as a result of the defendant's failure to complete the contract in accordance with its terms.

[23] Apart from the interest payable under cl 15.6, the plaintiff's damages for breach of contract are $8,817,552.41.

[24] The plaintiff claims:

(a) a declaration that the deposit, together with interest accrued thereon, is forfeited to the plaintiff;
(b) interest under cl 15.6 in the sum of $3,843,184 as a debt;
(c) damages for breach of contract in the sum of $8,817,552;
(d) interest under s 58 of the *Civil Proceedings Act* 2011 (Qld) ("CPA") on those sums, and costs.

[25] The remaining issues for determination are the defence based on alleged misleading or deceptive conduct and the defendant's counterclaim based on the same conduct. The defendant counterclaims:

(a) a declaration that the contract between the parties was validly rescinded by the defendant or an order under s 87 of the TPA declaring the contract to be void ab initio;
(b) an order for the return of the deposit of $1,683,000 to the defendant with interest;
(c) damages under s 87 of the TPA;
(d) interest under the CPA; and
(e) costs.

[26] The defendant's damages comprise legal costs and the cost of providing a bank guarantee or guarantees for the deposit, totalling $244,035.13.

[27] For the reasons that follow, the plaintiff is entitled to the orders it seeks and the defendant's counterclaim must be dismissed.

Alleged representations

[28] On 22 April 2006, the defendant met Mr Daniels at the sales office at Cavill Avenue, Surfers Paradise and they discussed the penthouses in Soul that were available for sale.

[29] Also on 22 April 2006, but after the sales office meeting, the defendant spoke to Mr Daniels on the telephone while driving.

[30] The defendant alleges that he relied on representations made by Mr Daniels on the following Monday, 24 April 2006 in a further conversation on the telephone.

[31] By par 3 of the amended defence ("the defence") the defendant alleges that, in the sales office meeting, the defendant said that any offer would be conditional upon "the plaintiff evidencing proof satisfying the defendant that the sum of $16.85 million was reasonable value for the penthouse".

[32] By par 5 of the defence, the defendant alleges that on 24 April 2006, in response to his request for proof that the sum of $16.85 million was reasonable value for the penthouse (made on 22 April 2006), the plaintiff made the following representations:

> "5.1 The Penthouse in the Gold Coast Beach Front 'Jade' complex had been sold for $20 million;
> 5.2 The Penthouse was better than the Jade Complex Penthouse as the Jade Complex Penthouse was of a similar floor area but was only 15 stories high and flanked by two buildings that impacted on the view; and
> 5.3 The Penthouse in the Q1 complex was sold in 2002 for $7.8 million and was half the floor size of the [Soul] Penthouse."

[33] The plaintiff denies that the representations were made.

[34] By par 7 of the defence, the defendant alleges that the representations were false because:

> (a) the Jade penthouse had not been sold, either for $20 million or at all; and
> (b) the Q1 penthouse was not half the floor size of the Soul penthouse.

[35] The defendant's evidence about the representations was given orally from recollection. He did not make or have any written record of the relevant conversations. The same was true of Mr Daniels and the other relevant witness to the negotiations, David Kortlang. Mr Kortlang was a senior employee of the plaintiff who was responsible for the supervision of relevant sales consultants, including Mr Daniels, and was involved in the dealings leading to the contract, although he was not a party to the conversations between the defendant and Mr Daniels.

[36] The defendant said that on 24 April 2006 Mr Daniels said that "the Jade penthouse had sold for 20 million" and explained that it "was flanked by two buildings and had… only views to the East and that Soul was superior in … elevation to that".

[37] The defendant said that on 24 April 2014, Mr Daniels further said that the "Q1 [penthouse] sold for $7.8 million", that he replied "well, that's only half the value", to which Mr Daniels responded that the Q1 penthouse was "only half the floor area."

[38] The defendant's evidence was that he was satisfied by Mr Daniels' statements that the Soul penthouse was worth $16.85 million and decided to buy it on the strength of those statements. He made no other inquiry, sought no advice from any other person and had

no pre-existing personal knowledge about market conditions or value for the purchase of the penthouse. He did not even look at the newspapers.

[39] He said that within a period of about 48 hours from first showing interest in the Soul penthouse he agreed to pay $16.85 million for it in a market that he knew nothing about. And that was based on the statements he alleges that Mr Daniels made as to the comparisons with the Jade penthouse and the Q1 penthouse. But he did not make any inquiries about or have any other awareness of those properties, apart from having driven by the buildings. At first blush, it is an incredible story.

[40] Q1 was another high-rise modern residential, retail and commercial complex at Surfers paradise. The Q1 penthouse was first sold on 4 November 2005 for $7.8 million under a contract entered into on 20 September 2002.

[41] The Q1 penthouse had a floor area of 951 square metres, including 229 square metres of balcony and patio area. The floor area is greater than one half of the floor area of the Soul penthouse.

[42] Jade was another smaller luxury apartment or unit development at Surfers Paradise. As at April 2006, it had not been completed. The Jade penthouse was sold on 12 May 2012 for $7 million under a contract dated 27 April 2012. So far as the evidence goes, at April 2006, the Jade penthouse had not been sold, either for $20 million or at all.

[43] A remarkable feature of the defendant's case, on the evidence, is that he did not raise the question of any misrepresentation by Mr Daniels until he filed and served the defence and counterclaim in this proceeding. He said that he became aware of the untruth of the representations until April 2012 after he obtained a valuation of the penthouse. That too seems a remarkably long period from when the first contract was entered into. The global financial crisis both came and went in the meantime.

[44] The defendant said that he told his solicitors about the representations alleged in pars 5.1 and 5.3 of the defence in a telephone conversation sometime after April 2012.

[45] Around that time, the defendant was investigating ways to avoid the contract. The documents relating to the defendant's retainer of his solicitors at the time were subpoenaed and produced. However there were no file notes made about this telephone conversation. The partner in charge of the file gave evidence that a review of the file did not yield any file note about the defendant communicating the alleged misrepresentations to the solicitors. Nor was he aware of any alleged misrepresentations.

[46] The tax invoices for the solicitors' legal services were tendered. However, nothing on the face of the bills contained any charges for advice about any misrepresentations.

[47] In the usual course of events, one would expect that if the defendant had raised an allegation of misrepresentations with his solicitors in April 2012, there would be a note of it somewhere.

[48] On 5 November 2012, the defendant sent an email to his current solicitors stating that "the stratergy (sic) is to have a smoking gun to pressure the receivers" to reduce the price of the penthouse and setting out "the main points of contention".

[49] The suggested main points of contention were:

> "Prior to entering into a (sic) the initial contract in 2006 the main condition was to prove it was worth the price tag of 16.85M. The contract was reissued in 2007 … The examples of value were the Jade Penthouse which they said was of 20M value when the fact is it never sold until recently at about 7M and the Q1 Penthouse which again was potentially inappropriate as it resold for about 4.5M a few years ago…"

[50] The thrust of the alleged misrepresentations in pars 5.1 and 5.3 of the defence is that that the defendant was told by Mr Daniels that the Jade complex had been sold for $20 million and that Q1 was half the floor size of the Soul Penthouse. However, the email does not clearly support those allegations.

[51] About the Jade penthouse, it provided that the plaintiff "said [it] was of 20M **value** when the fact is it never sold until recently at about $7M" (emphasis added). There was no mention that the defendant had been told that the Jade penthouse had been sold for $20 million.

[52] About the Q1 penthouse, the email provided that it "was potentially inappropriate as it resold for about 4.5M a few years ago with the original price at about 7M". There was no mention that the defendant had been told that the Q1 penthouse floor size or area was only half that of the Soul penthouse.

[53] Mr Daniels said that on Monday following the day of his first conversation with the defendant on 24 April 2006, he spoke to Mr Kortlang about substantiation of the price for the Soul penthouse. He said that Mr Kortlang said he could say that "Q1 was further back from the beach, didn't have proper balconies, had like glass louvered shut off balconies … and it was half the apartment as far as quality and … all things go". This answer did not refer to the comparative floor areas. The defendant's counsel followed it up with a leading question as to whether anything was said of the relative size of the Q1 penthouse against the intended size of the Soul penthouse. The answer given was not that the floor area of the Q1 was about half the area of the Soul penthouse, but that it was "about, sort of, half the interior" and "also wasn't on top of the actual building". These are not the things the defendant alleges were said by Mr Daniels to the defendant.

[54] Mr Daniels said that he spoke to the defendant after speaking to Mr Kortlang. He said that he "mentioned about Jade being – going for $20 million and being lower in size and, of course, flanked by other buildings" Noticeably, the words "being – going for $20 million" do not clearly support a representation that the Jade penthouse had been sold for that price, as opposed to a representation that it was for sale for that price. The defendant's case is not that the latter representation was made or that, if made, it was untrue.

[55] Under cross-examination by the plaintiff's counsel, reference was made to a meeting between Mr Daniels and the plaintiff's lawyers on 24 July 2014. The plaintiff's solicitors took contemporaneous notes in the meeting, copies of which were tendered.

[56] During the meeting, the plaintiff's lawyers showed Mr Daniels a copy of the defendant's defence in the proceeding.[1] In response to reading par 5.1 of the defence, Mr Daniels

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[1] There was no change between the original defence and the amended defence in paras 5.1 to 5.3.

was recorded as having said the following: "I can't have told him that [the Jade penthouse] was sold. I must have told him that it was on the market. When this contract went through it was all over the papers as being the most expensive apartment in the paper".

[57] Mr Daniels' evidence in cross-examination was that he was told that the Jade penthouse had been sold for $20 million. He did not clearly say that was what he told the defendant.

[58] In passing, I note that Mr Daniels' evidence at trial was given with a higher degree of conviction in comparison to the tenor of the responses he was recorded as having provided to the plaintiff's solicitors at the meeting on 24 July 2014. In my view, the contemporaneous notes taken by the plaintiff's solicitors of the meeting are more likely to be accurate.

[59] At trial, Mr Daniels evidence was that the sale of the Jade penthouse was well known in real estate circles, that it was in the news, and that he was told by his superiors to tell people that the Jade complex was sold. There was some potential inconsistency in his answers on the last point, since in evidence in chief his answers suggested that he considered that he was required to speak to his superiors before being permitted to compare the Soul penthouse with Jade (or presumably Q1).

[60] Copies of a number of newspaper articles about the Jade complex were tendered, taken from the Sunday Telegraph, the Daily Telegraph, Gold Coast Bulletin, The Australian, the Sun-Herald and The Weekend Bulletin. None of the articles refers to the Jade penthouse being sold by April 2006 or later in that year. The indication given by the articles is that the Jade penthouse was on the market.

[61] No other evidence was tendered that supported Mr Daniel's evidence that it was "common knowledge" in real estate circles that the Jade penthouse had been sold in 2006. That is not surprising, since it was not the fact.

[62] In my view, although other matters were raised about Mr Daniels' evidence, it is unnecessary to go further on this point. I do not regard Mr Daniels' evidence as substantially supporting the defendant's allegation that Mr Daniels told the defendant that the Jade penthouse had been sold for $20 million.

[63] As to the Q1 penthouse, Mr Daniels evidence was that when he spoke to the defendant after speaking to Mr Kortlang, he said "that Q1's penthouse was quite inferior as far as quality and size go and didn't have proper balconies as well". A later question asked him whether the defendant had said anything about the physical size of the Q1 penthouse. The answer he gave was that "he (the defendant) was talking about the size" and that "I (Mr Daniels) mentioned it was about half, as far as interior space and… total space goes". Further attempts to add to this evidence by the defendant's counsel were unsuccessful.

[64] At his meeting with the plaintiff's lawyers on 24 July 2014, in response to reading par 5.3 of the defence, Mr Daniels said: "I can't recall telling anyone that I have ever met that the Q1 penthouse was half the size of [the] Soul [penthouse]…Although I can't specifically recall, I believe that I may have told him that it was sold for $7.8mill; because it had been".

[65] In my view, Mr Daniels failed in any substantial way to support the defendant's allegation that Mr Daniels told the defendant that the Q1 penthouse was half the floor size or area of the Soul penthouse.

[66] Mr Kortlang gave evidence that the plaintiff's staff were not instructed to sell by comparison with other buildings. Mr Kortlang also said that he had no interest in the Jade complex and denied telling any of his sales staff about the Jade complex being for sale. The plaintiff had a set pricing schedule for the sale of the Soul complex and the sales staff were told to promote sales off the pricelist. The price of the Soul penthouse in the schedule was $16.85 million. The plaintiff's marketing scheme for the sale of the Soul complex was that Soul was an incomparable or unique property development.

[67] His evidence did not support the fact that he spoke to Mr Daniels about substantiation of the value of the Soul penthouse by reference to either the Jade or Q1 penthouses.

[68] In considering whether a misleading or deceptive representation was made, McClelland CJ in *Watson v Foxman,*[2] said:

> "... Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.
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> Each element of the cause of action must be proved to the reasonable satisfaction of the court, which means that the court "must feel an actual persuasion of its occurrence or existence". Such satisfaction is "not ¼ attained or established independently of the nature and consequence of the fact or facts to be proved" including the "seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding.
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> Considerations of the above kinds can pose serious difficulties of proof for a party relying upon spoken words as the foundation of a causes of action based on s 52 of the *Trade Practices Act* 1974 (Cth) … in the absence of

[2] (1995) 49 NSWLR 315.

> some reliable contemporaneous record or other satisfactory corroboration."[3]

[69] Adopting that approach, in the result, in my view, the defendant has failed to prove on the balance of probabilities that either of the two representations alleged in pars 5.1 and 5.3 of the defence was made.

Reliance on the alleged representations as a cause of loss or damage

[70] In case I am wrong in finding that the alleged representations were not made, in the circumstances of this case, the defendant must also prove that he relied upon them or either of them in entering into the contracts, so that he will have suffered loss or damage by the contravening conduct for the purposes of s 87 of the TPA.[4]

[71] By par 36 of the amended counterclaim, the defendant claims orders pursuant to s 87 of the TPA. In *I & L Securities v HTW Valuers (Brisbane) Pty Ltd*,[5] Gaudron, Gummow and Hayne JJ said:

> "[Section 87] requires that there be a finding that a person who is a party to the proceeding has suffered or is likely to suffer loss or damage by conduct of another person that was engaged in in contravention of a provision of the specified parts of the Act … s 87 speaks of loss or damage suffered or likely to be suffered 'by conduct of another person that was engaged in … in contravention of a provision' of specified parts of the Act. Section 87 … therefore requires the identification of a causal connection between loss or damage and contravention.
>
> If there is a contravention of the Act and, following that contravention, a person suffers loss or damage, it may be possible to identify several features of the history of events as having contributed to the person suffering loss. To take the simple example of a person who suffers loss or damage following a person making a misleading or deceptive statement, the loss may be said to have been caused by the combined effect of the making of the statement and the reliance on it by the person who suffers loss. Sometimes it will be open to say that the person who relied on the statement was foolish to do so or, at least, did not take reasonable care to protect his or her own interests."[6]

[72] Their Honours then said:

> "There may be many acts or omissions that could be said to have contributed to the happening of an event… it is hardly surprising that

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3 *Watson v Foxman* (1995) 49 NSWLR 315, 318-319. See also *Julstar Pty Ltd v Hart Trading Pty Ltd* [2014] FCAFC 151, [72]-[74].

4 For convenience and consistency of reference, I will continue to refer to the representations in pars 5.1 and 5.3 of the defence as the alleged representations although the hypothesis at this point is that those representations were made, and the balance of the analysis proceeds on that assumption.

5 (2002) 210 CLR 109, 127.

6 *I & L Securities v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 127-128.

> it is now well established that the question presented by s 82 [and s 87] of the Act is not what was the (sole) cause of the loss or damage which has allegedly been sustained. It is enough to demonstrate that contravention of a relevant provision of the Act was a cause of the loss or damage sustained"[7] (citations omitted)

[73] Proof of reliance is "a sufficient connection to satisfy the concept of causation".[8]

[74] The onus is on the defendant to prove on the balance of probabilities that he relied on the alleged representations.[9] The defendant's justification for his reliance was that he had a high regard for the plaintiff and saw the plaintiff as knowledgeable in the marketplace.

[75] The defendant gave evidence that but for the alleged representations he would not have entered into the contract to purchase the Soul Penthouse. The issue of evidence of that kind was summarised in *Razdan v Westpac Banking Corporation*,[10] where McColl JA said:

> "Indeed, courts are cautious in accepting assertions of reliance in this context because they are regarded as essentially self-serving: *Hanave Pty Ltd v LFOT Pty Ltd (formerly Jagar Projects Pty Ltd)* [1999] FCA 357 ; (1999) 43 IPR 545 (at [50]) per Kiefel J (Wilcox J agreeing (at [11]). They are similar to statements as to what a person would have done if some impugned conduct had not occurred which have little probative value unless the "reliability of their evidence" is confirmed by "reference to objective factors": *Chappel v Hart* [1998] HCA 55; (1998) 195 CLR 232 (at [32] (fn (64)) per McHugh J; (at [93] Item 7) per Kirby J; *Rosenberg v Percival* [2001] HCA 18 ; (2001) 205 CLR 434 (at [24]) per McHugh J. Thus, in *Ricochet v Equity Trustees* [1993] FCA 99; (1993) 41 FCR 229 (at 235) the Full Federal Court (Lockhart, Gummow and French JJ) upheld the trial judge's finding of no reliance by the key people concerned, notwithstanding direct evidence as to reliance. However, a declaration of non-reliance by a person said to have been affected by the conduct is relevant to the question of causation: *Campbell v Backoffice Investments Pty Ltd* (at [29]) per French CJ."[11]

[76] I agree with Her Honour's analysis. It is all too easy for a representee to give evidence in hindsight of what they would have done. With this in mind, I must look to see what other evidence supports the defendant's evidence that he would not have entered into the contract but for the alleged representations.

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7 *I & L Securities v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 128, [56]-[57]. See also *Henville v Walker* (2001) 206 CLR 459, 468-469; *Travel Compensation Fund v Tambree & Ors* (2005) 224 CLR 627, 640, [32].

8 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525; *I & L Securities v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 127.

9 For a summary of the principles applicable derived from *Gould v Vaggelas* (1985) 157 CLR 215, see *Lord Buddha v Harpur* [2013] VSCA 101, [159].

10 [2014] NSWCA 126.

11 *Razdan v Westpac Banking Corporation* [2014] NSWCA 126. Similarly, see *Fabcot Pty Ltd & Anor v Port Macquarie-Hastings Council* [2011] NSWCA 167, [183]-[187].

[77] In my view, the logical starting point is that a representation as to a comparative sale and the comparable features of the two properties is one that, in the ordinary course, falls into the class or classes of representations calculated to induce a representee to enter into a contract of purchase, in the sense that it is objectively likely to tend to that result. But regard must be had to all the circumstances.

[78] By par 6 of the amended reply and answer, the plaintiff denies that the defendant relied on the alleged representations because of terms of both the original and replacement contracts. They include an entire agreement clause and clauses expressly denying reliance upon pre-contractual representations.

[79] In *Campbell v Backoffice Investments Pty Ltd*,[12] the plurality said:

> "It is as well to add, however, that, of itself, neither the inclusion of an entire agreement clause in an agreement nor the inclusion of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent the provision of misleading information before a contract was made constituting a contravention of the prohibition against misleading or deceptive conduct by which loss or damage was sustained."[13]

[80] In my view, the fact that an entire agreement clause or non-reliance clause was included in the contract is not sufficient to demonstrate a break in the chain of causation between the alleged representations as misleading or deceptive conduct and the loss or damage suffered by the defendant if held to the contract.[14] The defendant's evidence was that he did not read the relevant clauses. That is not surprising or inherently unlikely.

[81] The defendant submits that the fact that he did not obtain external advice as to the value of the Soul penthouse or the prudence of the purchase only serves to emphasise his reliance on the alleged representations. However, in my view, it is commercially illogical and inherently improbable that in deciding upon a $16.85 million purchase the defendant would not have obtained such advice because of reliance on the alleged representations made by the plaintiff's sales consultant comprising comparisons with properties that the defendant did not know anything about. This is where the defendant's story is incredible.

[82] The defendant was an experienced and astute businessman who had built up a $100 million business between 1994 and 2007, including the acquisition of other businesses and property that were merged into the defendant's company or its business. He, or people employed by him or his company, conducted due diligence for those transactions.

[83] In 2006, the defendant said that he was looking to relocate his residence from Cashmere to the Gold Coast. He gave evidence that he was going to finance the balance of the purchase price of the Soul penthouse by the sale of his business or a similar transaction.

[84] When the alleged representations were made to the defendant in April 2006, he did not make any inquiries as to the Jade penthouse or the Q1 penthouse. He showed no interest

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12 (2009) 238 CLR 304.

13 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 348.

14 I am not here concerned with whether the entire agreement clause and the non-reliance clauses could have the effect that the alleged representations, in context, were not misleading or deceptive.

in them. At some point, he had driven past the Jade and Q1 buildings, but he did not say that he did so to compare them. Nor had he looked or did he look at newspapers or any other sources of information or conduct his own investigations as to their market value or the market value of the Soul penthouse.

[85] By early 2010, the defendant's financial position was deteriorating and he was selling most of his assets. At this time, the defendant was also looking to on-sell the Soul penthouse. The defendant said in evidence that he was looking to sell the Soul penthouse for $22 - 25 million. This was before he was aware that the alleged representations were false. He appointed agents to sell the property, however at no point did tell his agents of the alleged representations as to the value of the Jade penthouse or Q1 penthouse as possible support for the value of the Soul penthouse.

[86] These indications are consistent with the defendant not attaching any importance to the representations.

[87] Two further factors support the conclusion that the defendant did not rely on the alleged representations. First, the defendant failed to confirm to the plaintiff or anyone else at the time that the alleged representations were made. Second, there is no evidence of any complaint by the plaintiff after he said that he learned of the falsity of the representations before delivery of the defence and counterclaim. This weighs against a finding that the defendant relied upon the alleged representations.[15]

[88] Overall, assessed with a critical eye, the evidence does not prove on the balance of probabilities that the defendant relied on the alleged representations. The defendant's conduct is more consistent with the conclusion that the alleged representations were not a cause of his entering into the contract for the purchase of the Soul Penthouse.

[89] In my view, the defendant has failed to satisfy the causative threshold[16] for his counterclaim and it must be dismissed on this alternative ground as well.

Interest

[90] The plaintiff's claim for interest under s 58 of the CPA is calculated as follows:

Principal ($)	Date	Cash Rate	Default Rate	Days	Interest ($)
12,660,737	19/3/2014 – 30/6/2014	2.5	4	104	234,483.79
12,660,737	1/7/2014 – 31/12/2014	2.5	4	184	414,855.93
12,660,737	1/1/2015 – 30/6/2015	2.5	4	181	408,091.97
12,660,737	1/7/2015 – 31/12/2015	2.5	4	184	382,943.94

15 See for example: *Dukemaster v Bluehive* [2002] FCAFC 377, [79]-[80]; *Cordelia Holdings Pty Ltd v Newkey Investments Pty Ltd* [2004] FCAFC 48, [71]–[77]; *ACN 070 037 599 Pty Ltd v Larvik Pty Ltd* [2008] QCA 416, [134].

16 *Ricochet Pty Ltd v Equity Trustees Executor & Agency Co Ltd* (1993) FCR 229, 235.

12,660,737	1/1/2016 – 15/1/2016	2.5	4	15	31,132.96
Total Interest Payable:					1,471,508.59