SUPREME COURT OF QUEENSLAND

CITATION:	*Pace & Ors v Westpac Banking Corporation* [2002] QCA 350
PARTIES:	**RENO PACE** (first plaintiff/first respondent) **MARIO ANTHONY PACE** (second plaintiff/second respondent) **PAUL MICHAEL PACE** (third plaintiff/third respondent) **JOSEPHINE PACE** (fourth plaintiff/fourth respondent) **v** **WESTPAC BANKING CORPORATION** ACN 007 457 141 (defendant/appellant)
FILE NO/S:	Appeal No 10555 of 2001 SC No 135 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	13 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2002
JUDGES:	Davies and Jerrard JJA and Wilson J Separate reasons for judgment of each member of the Court; Davies JA and Wilson J concurring as to the orders made, Jerrard JA dissenting in part
ORDER:	**1. Allow the appeal only to the extent of setting aside the order that the appellant pay the respondents' damages assessed at $173,616.51 and interest of $40,504.73 and substituting an order that it pay damages assessed at $170,024.51 and interest of $39,734.50.** **2. The appellant to pay the respondents' costs of the appeal.**
CATCHWORDS:	TRADE AND COMMERCE – TRADE PRACTICES AND RELATED MATTERS – CONSUMER PROTECTION – MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT – CHARACTER AND ATTRIBUTES OF CONDUCT – CAUSAL CONNECTION BETWEEN CONDUCT AND LOSS – where appellant's representative

assured respondents that the appellant would lend money for purchase of land and further subdivision – where first respondent relied on this assurance to complete contract for purchase of land – where appellant later refused to finance the subdivision – where appellant's conduct was held to be a cause of the respondents' loss – whether respondents' failure to sell the land after refusal of finance broke chain of causation – whether failure to sell was unreasonable

DAMAGES – GENERAL PRINCIPLES – OTHER MATTERS – where plaintiffs/respondents were granted relief to compensate for total expenditure from their own resources – where parties conceded on appeal that the amount awarded by the learned trial judge should be slightly reduced

Trade Practices Act 1974 (Cth), s 52, s 80, s 82, s 87
Property Law Act 1974 (Qld), s 83, s 84

Blacker v National Australia Bank Ltd [2001] FCA 254; Appeal No 273 of 2000, 19 March 2001, considered
Gates v City Mutual Life Assurance Society Ltd (1986) 160 CLR 1, considered
Gould v Vaggelas (1985) 157 CLR 215, considered
Henville v Walker (2001) 182 ALR 37, considered
I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd [2000] QCA 383; Appeal No 10277 of 1999, 22 September 2002, distinguished
Karedis Enterprises Pty Ltd & Greenfriars Pty Ltd v Antoniou (1995) 59 FCR 35, considered
Kizbeau Pty Ltd v W G & B Ltd (1995) 184 CLR 281, considered
March v E & M H Stramare Pty Ltd (1991) 171 CLR 506, followed
Marks v GIO Australia Holdings (1998) 196 CLR 494, considered
Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd (2001) 114 FCR 108, followed
Munchies Management Pty Ltd v Belperio (1988) 58 FCR 274, considered
Wardley Australia Ltd v State of Western Australia (1992) 175 CLR 514, considered

COUNSEL: P Keane QC, with D Savage SC, for the appellant
DF Jackson QC, with PO Land, for the respondents

SOLICITORS: Corrs Chambers Westgarth for the appellant
SR Wallace and Wallace for the respondents

[1] **DAVIES JA:** This is an appeal from a judgment of the Supreme Court making orders under s 87 of the *Trade Practices Act* 1974 (Cth) in favour of the respondents

in respect of misleading conduct by the appellant contrary to s 52 of that Act. Those orders were:

1. an order restraining the appellant from seeking to recover any part of a debt owed by the respondents on a specified account, leaving the appellant to its rights pursuant to its mortgage over the land the subject of the proceedings;
2. an order discharging two other mortgages securing that debt; and
3. payment of damages of $173,616.51 with interest thereon at 10 per cent from 30 June 1999 of $40,304.73.

[2] In this appeal the appellant does not dispute the learned trial judge's findings and conclusion that its conduct was misleading. Its challenge is rather to the correctness of the relief which was granted. In order to understand that challenge it is necessary to say something about the circumstances giving rise to that misleading conduct and the events which followed.

[3] On 13 February 1997 the respondents entered into a contract to purchase the subject land, which had an area of approximately 64.2 hectares for $287,500 subject to finance in an amount sufficient to enable them to complete the purchase. Their intention was, if sufficient finance was obtained, to complete the purchase and to subdivide the land into lots of a little over one hectare in several stages, the proceeds of sale of the first stage financing the development of subsequent stages. The purchase was completed by them with money advanced by the appellant, which in total was $370,000, sufficient to pay the whole of the purchase price together with a sum which enabled preliminary subdivision work to be done on the land. In discussions with Mr Seay, representing the appellant, before that money was advanced, Mr Reno Pace, on behalf of the respondents, sought and obtained from Mr Seay an assurance that the appellant would, when required, be likely to advance funds sufficient at least to complete stage 1 of the proposed subdivision. It was upon that assurance, which the learned trial judge found to be misleading, that the respondents completed the contract to purchase the subject land.

[4] On 18 April 1997 the respondents applied for rezoning of the land from "Rural A" to "Rural Residential". In the latter zone, but not the former, subdivision was permitted into one hectare lots. On 27 August 1997 that application was granted subject to conditions against which the respondents appealed. They applied for approval for finance for stage 1 of the development and that was refused in June 1999.

[5] In April 1999 the respondents had obtained a detailed valuation of the land from Mr Deacon of Herron Todd White Valuers for submission to the appellant in its application for finance just referred to. Mr Deacon valued the land, with the rezoning approval subject to conditions, at $475,000. It can be seen that this represented an increase in value of approximately 65 per cent in a little over two years since the land was purchased. It is true that, in that valuation, the valuer referred to a slowing in the sale rates of lots in rural residential subdivisions in the Mackay district, where this land was, over the previous 12 months of 23 per cent compared to the previous year, to a decrease in sale prices of such lots in somewhat similar subdivisions of seven per cent over the same period and to the possibility of buyer resistance to subdivided lots of this kind. However he concluded that there

had been little discernible detrimental effect in the market for "englobo" land of this kind. And he thought the land to have increased in value over the previous two years to the extent already mentioned, which represented an average rate of only a little less than 30 per cent a year. A reasonable person reading that valuation as a whole may well have concluded that what had, up till then, been a rapid increase in the value of the land was slowing rather than, as may in fact have been the case, that that value was declining.

[6] Mr Pace took this valuation to Mr Seay who remarked on the fact that the costing was a bit higher than had been estimated in 1998 but said:

> "That's okay because it's a good report and it's showing a good profit at the end of it."

Moreover, when he later told Mr Pace of the appellant's rejection of the respondents' application, he undertook to assist in seeking finance for the development from a Whitsunday law firm.

[7] Having been rejected for finance by the appellant, the respondents sought finance from other financiers, the Whitsunday law firm suggested to them by Mr Seay, the Commonwealth Bank, the Mackay Permanent Building Society and the Pioneer Building Society. All of these, it seems, were approached in the second half of 1999 although possibly the last of these was approached in January 2000. All applications were refused, in retrospect, perhaps, unsurprisingly. But the respondents were given no reason to think, in advance of these applications, that they would be fruitless.

[8] Also in the second half of 1999 and the first half of 2000 the respondents placed the land for sale in the hands of a succession of real estate agents, apparently as exclusive agencies. These were Sarina Real Estate from 17 August 1999 to 17 September 1999, Elders Real Estate from 12 October 1999 to 30 November 1999, Ray White Real Estate from 11 December 1999 to 13 January 2000 and Black's Real Estate from 1 February 2000 to 1 May 2000. Mr Pace also said that the land had been continuously on the market since August 1999. It is unclear what precise instructions the respondents had given to their real estate agents but Mr Pace told the appellant in October 1999 that there was no specific list price, that he wanted $600,000 to $650,000 but that he would go down to $500,000 if necessary to clear up the matter. He also said in evidence that, though he was seeking $600,000, he told the real estate agents that he was willing to listen to any offer. No offers were received for the land. It is unclear what, if anything, was done in the way of attempts to sell the land after 1 May 2000.

[9] The appellant had indicated to Mr Pace in October 1999 that it required its debt to be paid by 31 March 2000, the date on which it was due. It was not paid on that date. However at all times prior to that date the respondents had paid the interest thereon as it fell due.

[10] There is no satisfactory evidence of the value of the land between April 1999 and the date of trial which was in June 2001. At that latter date it seems to have been common ground and the learned trial judge held that its value was $375,000, based

on a valuation by Mr Smith of Acval - J Dodds & Associates, Valuers, as at 24 May 2001. The only other possible evidence of its value during that period was a letter from that same firm of valuers in September 2000, with respect to this and other land, purporting to give an "indicative" value of the land at $420,000. It did not, apparently, involve an inspection of the land or any analysis of comparable sales. The learned trial judge did not refer to this in his judgment saying, in effect, that the evidence did not disclose how the value of the land performed over the period from June 1999 to the date of trial. The explanation for this may well be that he thought this "indicative" valuation to be worthless.

[11] More reliable evidence, in hindsight, was a letter from Mr Deacon of 13 December 2000 which referred to market activity, demonstrating a demand for this category of land from April 1999 through to early 2000 but anecdotal data indicating that the market in subdivided lots began to soften from the beginning of 2000 and that it all but stopped in March 2000. The letter also said that the data suggested a softening in prices through late 1999 to 2000. It appears to have been this retrospective opinion which caused the learned trial judge to conclude that the evidence disclosed that after June 1999 the value of land surrounding Mackay fell. But this evidence did not show that this "softening" in prices was something which should have caused persons in the position of the respondents, at that time, to perceive that the value of their land was falling.

[12] Moreover, over the period from early October 1999 until May 2000 Mr Pace was in constant contact with Mr Buzza who had, on behalf of the appellant, taken over the management of the respondents' records from Mr Seay. Mr Pace kept Mr Buzza fully informed of his efforts to sell and of the price which he was seeking. At no time did Mr Buzza suggest that that price was too high or that more should be done to market the land; and it seems from his own diary note that he saw no need to obtain a new valuation of the land.

[13] It is unclear on this evidence when the respondents first suffered loss in consequence of the appellant's contravention. On the assumption, which I am prepared to make, that the land did not thereafter increase in value, they would have suffered loss immediately upon the appellant's refusal of finance in June 1999 if, at that time, the value of the land was less than the total of their liability to the appellant and the amounts which they had expended. On the other hand they would not then have suffered loss in consequence of the contravention if the land was then still worth more than that total.

[14] In retrospect, it may be unlikely that, when the contravention occurred in June 1999 the land was worth more than $475,000. On that basis, on the figures presented to us by Mr Keane QC, who with Mr Savage SC appeared for the appellant, even if the respondents had immediately sold the land for $475,000 they would have suffered a small loss.

[15] In fact the land remained unsold at the date of trial in June 2001 and by that date it was worth only $375,000. By that date also the amount of money expended by the respondents had substantially increased. They had continued to pay the interest on

their loan, as it fell due, until about the commencement of these proceedings notwithstanding that, from 31 March 2001, the respondents were in default under their loan consequently and under their mortgages of the subject land and other land.

[16] It was not necessary in this appeal to determine when the respondents first suffered loss in consequence of the appellant's contravention. A plea based on the statute of limitations, initially advanced in the appellant's outline of argument, was not pursued in this Court, the appellant accepting that the orders made by his Honour were probably made pursuant to s 87(1) and that this Court should follow the decision of the Full Federal Court in *Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd*.[1]

[17] Mr Keane QC for the appellant submitted that what the respondents lost in consequence of the appellant's contravention was what it cost them to buy the land and hold it until the time when they knew that the assurance was not going to be kept, that is, June 1999. However that submission is correct, in my opinion, only if the respondent's failure to sell the land then broke the chain of causation between that contravening conduct and any subsequent loss caused by a diminution in value of the land after June 1999. Whether that was so, or whether a subsequent omission by the respondents to sell at a price higher than $375,000 broke that chain are the central questions in this appeal.

[18] I would accept that the "but for" test is not an exclusive test of causation under s 87[2] and that the test posed in *March v E & M H Stramare Pty Ltd*[3] is an appropriate one to adopt here.[4] That is that an act or event has caused loss or damage if, by reference to common sense and experience, it should be regarded as a cause of it. The resolution of that question involves a value judgment.[5]

[19] Applying that test here, any fall in value of the land after June 1999 below the total of their liability to the respondent and the amount they had expended was a loss by the contravening conduct until the respondents' failure to sell itself became the supervening cause, to the exclusion of the contravening conduct, of any subsequent loss in value to the land. That would require a conclusion that the respondents' failure to sell was unreasonable; and even that might not be enough if it was

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1 (2001) 114 FCR 108.

2 *Marks v GIO Australia Holdings* (1998) 196 CLR 494 at [42], [106].

3 (1991) 171 CLR 506.

4 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525; *Henville v Walker* (2001) 182 ALR 37 at [61].

5 *March v E & M H Stramare Pty Ltd* at 517 - 518.

nevertheless the very kind of thing likely to happen in consequence of the contravention.[6]

[20] The question to be considered here may have some analogy to mitigation in tort. But it is not the same thing. Mitigation has no place in granting of relief under s 82 or s 87 except as a way of describing an act of an applicant which would break the chain of causation.[7] The question is whether the loss or damage was suffered by conduct in contravention of the Act and that will be so here, as to the whole of the loss in value of the land until trial, unless the chain of causation has been broken by a supervening omission of the respondents to sell the land at a price higher than $375,000.

[21] The learned trial judge appeared to take the view it had not been so broken. He said that "As a result of the representations the plaintiffs now own the fee simple in the land … subject to the bank's mortgage" and granted relief which compensated the respondents for their total expenditure from their own resources[8] and, in effect, left the appellant with the land at the value which it had at the date of trial. That view involved a value judgment. But in order to assess that judgment it is necessary to refer to a factual finding and a further objective fact.

[22] That factual finding was in the following terms:

> "Accepting as I do that it was reasonable for the plaintiffs to first exhaust alternative finance options and then to set about marketing the land as a single allotment a reasonable period for sale in my view would not be less than 12 months after June 1999."

[23] This finding was challenged by the appellant on the basis that there was no evidence to support it. It is true that there was no expert evidence in the case as to what would, in retrospect, have been a reasonable time within which to sell a parcel of land of this size, in the locality in which it was, after the end of June 1999. Nor was there any evidence about what would have been a reasonable price at which to market it.

[24] As to the first of these, in the valuation in April 1999 Mr Deacon had envisaged a six months marketing programme to sell the land at $475,000. But there are two features which, in retrospect, would have justified a substantially longer period after June 1999. The first is that, as now appears to be the case, demand for such land

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6 *March v E & M H Stramare Pty Ltd* at 518; cf *Gould v Vaggelas* (1985) 157 CLR 215 at 221 - 222; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 12.

7 *Marks v GIO Australia Holdings* at [38]. See, however, *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274 at 287.

8 The parties in this Court were agreed as to what that total expenditure was. His Honour assessed it at $173,616.51. However the parties agreed that that amount should be $170,024.51.

probably slowed after June even if, at least initially, its value did not fall. And the second is that his Honour included in his estimate time for the respondents also to seek finance elsewhere; and, although the respondents commenced marketing the land in August, they had plainly not given up hope of obtaining finance with which to complete stage 1.

[25] As to the second, it appears that even Mr Deacon's retrospective review of sales in December 2000 did not clearly demonstrate a fall in value of the land in the second half of 1999; so that, even if it may now be inferred that that occurred, there is no reason to think that that ought to have been evident to the respondents and, consequently, that a minimum selling price of $500,000 was unreasonably high. On the other hand, this review perhaps explains why no offers were received for the land during the period in which it was listed with real estate agents.

[26] Moreover it was not at all unlikely that persons misled by contraventions of this kind would first want to explore other avenues of finance, particularly if, as appears to have occurred here, they were encouraged in that endeavour by the contravener's offer of help; or that, in the absence of any clear evidence of a fall in value of their land, they would adhere for some time to what probably was, in retrospect, an optimistic view of the value of their land. Nor, it appears, did Mr Buzza think that the respondents' actions in this respect were at all unreasonable.

[27] Accordingly I think that his Honour was justified, having regard to the facts which I have mentioned, in concluding, as he did, that a reasonable period within which to sell the land after June 1999 was not less than 12 months. And I think that his Honour was justified in concluding that the respondents' maintenance of $500,000 as their minimum selling price over this period did not break the chain of causation.

[28] As to the period after about May 2000, it may be argued that, as time went on, evidence that the value of the land was falling should, perhaps, have become evident both to the respondents and to the appellant. But there is no evidence that it did. Nor is there any evidence of when this should have been seen.

[29] Moreover, as indicated earlier, the respondents were in default under their loan, and consequently under their mortgage of the subject land, from 31 March 2000. From then the appellant, as mortgagee, could have exercised its power of sale.[9] I am not suggesting that it should have done so. Subject to its liability for misleading conduct it was, of course, entitled under its mortgage to rely on the personal covenants. But I do not think that it was in a position, in those circumstances, to say that, when it could also have sold the land, the respondents' failure to do so was sufficient to break the chain of causation between its contravening conduct and the

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[9] Under s 83 and s 84 of the *Property Law Act* 1974 (Qld).

respondents' loss, to the extent that that loss may have increased because of a decrease in the value of the land after the end of April 2000.[10]

[30] For all those reasons, in my opinion, his Honour was justified in concluding that the appellant's contravention continued to be a cause of loss to the respondents until the land fell to the value which his Honour accepted it had at the date of trial.

[31] Two further matters should be mentioned. The first is that the subject land was sold by the appellant, under its power of sale, after judgment was given in this action, for $315,000. I do not think that this, in any way, affects the correctness of the judgment. The second is that, in theory, the respondents' claim in negligence remained alive in this appeal. But neither counsel mentioned it otherwise than in passing, it being common ground that the relief granted was granted pursuant to s 87. It is unnecessary to say anything further about that claim.

[32] Subject to the minor adjustment mentioned earlier[11] therefore, in my opinion the appeal must fail. I would therefore allow the appeal only to the extent of setting aside the order that the appellant pay the respondents' damages assessed at $173,616.51 and interest of $40,504.73 and substituting an order that it pay damages assessed at $170,024.51 and interest of $39,734.50.

Orders

1. Allow the appeal only to the extent of setting aside the order that the appellant pay the respondents' damages assessed at $173,616.51 and interest of $40,504.73 and substituting an order that it pay damages assessed at $170,024.51 and interest of $39,734.50.
2. The appellant to pay the respondents' costs of the appeal.

[33] **JERRARD JA:** In early 1997 the respondents bought land near Mackay with the intention of developing, subdividing and reselling it for a profit. The intended development was to occur in three stages. The appellant lent them the whole of the purchase price, together with a loan of money for legal and incidental costs of the purchase, and to pay for preliminary subdivisional work. At the time the respondents applied to the appellant's local Business Manager Terry Seay for those described loans, Mr Seay assured them of the Bank's willingness to lend them the necessary funds to complete stage one of the proposed subdivision. Relying on that assurance, the respondents borrowed the money, bought the land, carried out some

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[10] I think it is unnecessary for this purpose to consider whether, in this respect, the evidentiary onus fell on the appellant. However if it were necessary I would conclude that it did. See Hart and Honoré *Causation in the Law* 2nd Ed, OUP, Oxford at 422 - 423; *Watts v Rake* (1960) 108 CLR 158 at 159; *Henville v Walker* at [70], [148]; *MAM Mortgages Ltd (in liq) & Anor v Cameron Bros & Ors*; *Piesse Investments Pty Ltd v WR Mortgage Services Pty Ltd & Ors* [2002] QCA 330; Appeal No 5334 of 2001, Appeal No 1901 of 2000, Appeal No 8454 of 2000, 3 September 2002 at [10].

[11] See fn 8.

improvements, and had dealings with the relevant Local Authority which eventually resulted in subdivisional approval.[12]

[34] In or about April 1999 the respondents applied to the appellant for further loans to complete stage one, and in June 1999 the appellant declined to lend them further money. The respondents were unable to obtain other loan finance. They were unable from their own resources either to pay for the first "stage" of the proposed development and subdivision, or to repay the money already borrowed from the appellant. They did not sell their land. They brought an action against the appellant in the Supreme Court of this State, and on 29 October 2001 this Court found that the assurances relied on were negligently given by Mr Seay. The learned trial Judge also found that there was no basis upon which Mr Seay could have given any such assurances at all, and that they were misleading, and the respondents were misled or deceived.

[35] Section 52 of the *Trade Practices Act* 1974 (Cth) ("the Act") provides that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Conduct in breach of s 52 of the Act having been established, the Court ordered the appellant pay the respondents as damages the monies the respondents had actually outlaid upon the whole enterprise from their own resources, (together with interest thereon), and relieve the respondents of their liability under personal covenants for the debt owing to the appellants. The Court declared the amount owing to the appellant to be $415,018.44 as at 26 July 2001 and left the appellant Bank to the exercise of its security rights against the land. The Bank has appealed those orders.

[36] In mid April 1999 a valuation of the subject land for the respondents prepared by Herron Todd White, and presented to the appellant in support of the respondent's application for the stage one subdivision finance, valued the land at $475,000.00. The trial judge made the unchallenged finding that its value at the date of trial (June and July 2001) had fallen to $375,000.00, and also that in April 1999 the value of that type of land surrounding Mackay was falling. The appellant complains that the orders made compensated the respondents for monies lost in the venture and relieved them from the burden of their debt, without taking into account the benefit, or fact of, the respondents owning the land. They complain further that the respondents were the authors of their own misfortune, in that a prompt sale of the land in June 1999 may well have resulted in the respondents recouping their expenditure and repaying their loan, whereas now the appellant alone bore the burden of the respondents' retention of it in a falling market for two years. They also complained that should the land be ultimately sold by the appellant for more than the accumulated debt owing by the respondents, then any surplus paid to the respondents as owners of the land, would in the circumstances, be an inequitable windfall to the respondents.

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[12] The matters recited here were findings by the trial Judge not challenged on appeal.

[37] The appeal raises at least the following issues:

- When it was that the respondents suffered any loss or damage by reason of the conduct of Mr Seay (conceded on the appeal to have been both negligent and misleading and to have misled the respondents).

- Whether the respondents unreasonably failed to mitigate any loss or damage suffered, by not selling the land when accumulating interest was increasing their debt at the same time as the land fell in value.

- Whether the learned trial Judge should have found an identifiable date pre-trial, by which there was no longer the necessary causal connection between the increasing loss and damage the respondents continued to suffer on the one hand and on the other the appellant's contravening conduct, such that that loss and damage was not suffered "by" that conduct (s 82 and 87 of the Act).[13]

- Whether the orders made were appropriate.

[38] Some further background information helps to an appreciation of these issues. Reno and Paul Pace are brothers. Mario Pace is Reno's son, and Josephine is married to Paul Pace. Reno Pace was the primary actor on the respondents' behalf. He and Paul were both born in Malta, and while Reno speaks English reasonably well, Paul is not so fluent. All four were apparently employed by the Farleigh Sugar Mill at Mackay at all relevant times. Reno, Paul and a third brother had bought a 100 acre block of land at Ollets Road, Habana via Mackay in 1991, and borrowed money from Westpac to finance a subdivision of that land for re-sale. That subdivision was completed in 1992 and the Westpac borrowings were re-paid from the sale proceeds. In 1995 the three brothers decided to subdivide a 50 acre block they owned at Medina Heights at Habana, and applied to borrow $497,000.00 from the bank in March 1996 to complete that subdivision. That application was made by them to the appellant Bank through Mr Seay, who was able to persuade his superiors in the Bank to approve lending of $410,000.00. That subdivision was completed in about February 1997, and by mid 1997 sales of subdivided land were sufficient to repay the borrowed money and leave a surplus.

[39] Unknown to the respondents, Mr Seay had acted without the approval of his superiors in and about that particular loan transaction. Those superiors had wanted valuations, firm costings, marketing plans and the like. Unknown to the respondents, those superiors had initially rejected Mr Seay's submissions to them on the respondent's behalf. The relevance of this is the light that it throws on the

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[13] See the joint judgment of Mason C J Dawson Gaudron and McHugh. J J in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525, and the judgment of McHugh Hayne and Callinan JJ in *Marks v GIO Australia Holdings* (1998) 196 CLR 494 at page 510 para 38.

respondents, on Mr Seay, and on the respondents' unquestioning reliance on him in the transaction the subject of this appeal.

[40] That transaction evolved from Reno Pace having become aware in January 1997 of 62.5 hectare block of land at 3 Ollets Road being available for sale. He and the other respondents signed a contract to purchase that land for $287,500.00 "subject to finance" on or about 13 February 1997. On 19 February 1997, Reno Pace took that contract to Mr Seay, explaining to him that the respondents wanted to borrow the whole purchase price. He also told Mr Seay that there was no point in their borrowing that money if Westpac was not willing to "give us money to do the subdivision". This was because the respondents could not afford either to buy the land or finance the subdivision themselves.

[41] The learned trial Judge found that Mr Seay was first and foremost a salesman, was not a prudent banker, and that he did assure Mr Pace in February 1997, and all four respondents in March 1997, of the Bank's willingness to lend to complete stage one of the proposed subdivision. He also found that Mr Seay had no reasonable or other basis for giving that assurance, and that no prudent Banker could give any indication of the Bank's preparedness to lend for stage one, at the time of those conversations. The learned trial Judge was satisfied that Mr Seay undoubtedly knew that the respondents would eventually approach the Bank for finance to subdivide stage one, and that the evidence suggested that the ultimate rejection of that application was predictable even at the outset. He was satisfied it was reasonable for the respondents to rely on the assurances Mr Seay had given them, that they did rely on those assurances, and that they would not have proceeded to settle the contract to purchase the land, or to borrow the monies actually lent, had the negligently given assurances not in fact been made, and the respondents not in fact been misled by them. None of those findings were challenged in argument on the appeal.

[42] The respondents borrowed a principal sum of $370,000.00. This was $287,000.00 to purchase the land, $13,000.00 for legal and other incidental costs, and $70,000.00 for preliminary subdivisional work.[14]

[43] The principal sum lent was repayable on 31 March, 2000. The appellant took security over the land and security over other land owned by various of the respondents, together with a guarantee from Emanuel Pace, who had not been a borrower.

[44] The respondents sold property owned by them to meet payments of interest on the $370,000.00 lent which they were required to make; and to meet costs associated with rezoning and other preliminary works. The learned trial Judge made the unchallenged finding that the plaintiffs had spent $42,355.84 of their own funds on rezoning and other preliminary works. The finding was derived from deducting

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[14] The apportionment comes from the appellant's outline of submission.

$82,500.00, the difference between the $370,000.00 lent and the $287,500.00 paid to purchase the land, from the amount shown in exhibit 27 ($124,855.84) to have been spent on that rezoning etc. Accepting that the difference represents the respondents' own funds, Exhibit 27 also reveals that a minimum amount of $39,822.07 of that must have been spent by 31 March 2000, the date upon which the principal sum became repayable.

[45] The learned Judge found that the respondents had also paid $67,524.66 by 15 April 1999 by way of interest and charges in loan account number 20-1333 on the $370,000.00. He also found that by 29 September 2000 they had paid various fees and interest charges in loan account 20-1026 on that principal sum, totalling $63,856.12. A document presented on the appeal entitled "charges claimed by plaintiff" shows that $42,481.07 of that amount $63,856.12 had been paid by 31 March 2000. His Honour found that all the payments described came from their own resources, and he calculated they had paid from their own pockets by late September 2000 the amount of $173,616.51. This was the total of $42,355.84 (rezoning and preliminary work), $67,524.66 (interest and charges), and $63,856.12 (on fees, more interest and charges).

Using the same reasoning, one can calculate that as at 31 March 2000 the minimum amount the respondents had spent from their own resources would be $149,827.80. ($39,822.07 + $67,524.66 + $42,481.07).

[46] The reason the appellant declined to make further loans was identified in the valuation prepared for the respondents by HTW in April 1999. It showed that there had been what the learned trial Judge found to have a been a significant increase in the estimated cost of the project over the figures Mr Seay discussed with Reno Pace, and there had been a down turn in the market for the type of rural residential subdivision proposed. The evidence of Reno Pace described their having unsuccessfully tried to obtain loan finance elsewhere, once the appellant rejected the application, including from a Whitsunday law firm suggested to them by Mr Seay, from the Commonwealth Bank in August 1999, from the Mackay Permanent Building Society, the Pioneer Building Society, (most probably around December 1999/January 2000), and in June 2000 from the ANZ Bank. There is no challenge to the finding of the learned trial Judge accepting the appellant's evidence that a prudent lender would not have financed this project. No lender did.

[47] The learned Judge also accepted that it was reasonable for the respondents first to exhaust alternative finance options, and then to set about marketing the land as single allotment. That view was not the subject of any forceful challenge on the appeal, and I think it is a common sense approach.

[48] The respondents described the land as having been on the market since August 1999. In October 1999 Reno Pace told the appellant he would accept "$640,000.00/600,000.00 and would go down to $500,000.00 if necessary to clear up the matter."

He said that:

> "I was hoping I'd get my money back, sell the property. I was hoping to sell the property, pay the Bank, get our costs, and move on." (Record 141).

[49] The property was listed in December 1999 with Elders as the sole agent, and then in mid January 2000 with Ray White for six weeks at $600,000.00, with Reno Pace being "willing to listen to any offers". None were received. It was then successively listed with at least Sarina Real Estate and Black Real Estate. It remained unsold, and the learned Judge found that there was no evidence that there was in fact a buyer for the land after June 1999, at at least anything approaching the April 1999 valuation.

[50] On my calculations based on exhibit 27 by mid June 1999 the respondents had:

- Spent from their own resources $38,718.74.
- Made interest payments on account 20-1333 of $67,524.66.
- Made interest and fee payments on account 20-1026 of $14,641.99.

These amounts total $120,885.39 expended from their own resources. Adding that total to the $370,000.00 principal debt repayable on 31 March 2000 shows that even as at June 1999, a sale of the land at its April 1999 value would not have cleared their debt. By 31 March 2000 the position for them was worse, with the minimum lost expenditure being the $149,827.80 earlier calculated; and there was the principal debt now re-payable. In the interim they had attempted both the re-financing and the sale of the land described.

[51] The appellant Bank had communicated its attitude to the respondents by letter on 29 October, 1999. That was that it required repayment of the debt in full by 31 March 2000, and it noted that the land was listed for sale "with a view to meeting this requirement". It also required interest paid as it fell due. Neither the appellant's letter of 29 October 1999 to the respondents, nor its note of conversation between Reno Pace and a senior Bank officer on 26 October 1999, record the Bank making any suggestion that Reno Pace should offer the land for sale at a lower figure. There was no evidence of the Bank making any suggestion pre trial of an amount for which the respondents should be willing to sell the land. Nor was there any evidence of the Bank conceding before or at trial that the now unchallenged representations had been made, or that the Bank had any part in the respondents' woes.

[52] It seems to me quite reasonable for the respondents having wanted in October 1999 to cover their losses. But it is apparent that as time passed that result became increasingly unlikely. At the time the respondents initiated the action on 22 August 2000 they would have needed a sale with a net return of $549,153.36 ($375,536.80 + $173,616.51 they had expended) to avoid a loss.

[53] The respondents' position in the litigation was that, in addition to claims under the Act and for negligence, the respondents sued for damages for breach of asserted contractual obligations to lend money to complete stage one, and likewise claimed that the appellant was estopped from departing from the assumption formed by the respondents that it would provide further funding to allow that stage to be completed. Both those actions failed. In the unsuccessful claim in contract the respondents had sought to be placed in the position in which they claimed they would have been had the contract been performed, wanting damages for the loss of their expected profit.[15]

[54] The appellant submits that the fact the land remained unsold by the trial date, coupled with the claim for loss of bargain damages, evidences that it was the respondents' own wish to get the hoped for benefits from, and to retain ownership of, the land after March 2000 independent of the 1997 representation of Mr Seay (by then clearly known to be false), which resulted in the respondents' progressively poorer position. I think that submission is given force by the fall in value of the land between April 1999 and the trial date, which force is underlined by the fact, informed to the Court on the appeal by both parties, that in May 2002 the appellant sold the land for only $315,000.00. It had previously and unsuccessfully offered it for auction in April 2002. At the time of sale the respondents' accumulating debts totalled $452,086.87.

[55] For their part, the respondents attributed all of their financial woes as at the trial date to the conduct of the appellant and Mr Seay. In argument on appeal they denied that there had been any extinction over time of the causal connection between the appellant's conduct and their own financial position. They argued that if the trial itself had not come on for hearing until say, June 2002, because of delays in the lists, then their increasing debt and the land's decreasing value should have been solely the appellant's problem, to be borne by it.

[56] I think that last submission exposes a weakness in the respondents' position. It makes it relevant to determine when it was that the respondents' sustained actual loss or damage by reason of Mr Seay's conduct, at which time their cause of action under s 82 (1) of the Act accrued.[16] The argument also makes it relevant to determine, if different, the time by which the respondents must have realised they faced financial loss which could only be mitigated and not avoided.

[57] I think on the history described in this judgment the respondents reached that position at the beginning of April 2000. As from June 1999 they faced a prospective loss, should they be unable to re-finance elsewhere; and a likely loss once they were unable to. Whether that loss occurred depended upon the re-sale en

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15 See the joint judgment of Mason Wilson and Dawson JJ in *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at pages 11-12, cited by Gaudron J in *Marks v GIO Australia Holdings* (supra).

16 See the judgment of Mason CJ and Dawson, Gaudron and McHugh JJ in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525.

globo of the land for an amount which would clear debt. That not having happened by 31 March 2000, that date was when unavoidable loss and damage was suffered. It is obvious their position worsened the longer the land remained unsold. They were required to repay the principal debt, and it was not possible to develop the project with borrowed finance. Theirs was insufficient; and all that they had was the land. Nothing the respondents did after that date mitigated that damage, and inaction actually worsened it.

[58] The appellant's pleadings contended that the cause of action arising from conduct in contravention of s 52 of the Act was barred by the expiration of the three years, then provided for by s 82 (2) of that Act, within which to commence proceedings. This argument was based on the proposition that the respondents' loss and damage had been suffered in February or March 1997, when the misleading representations were made. I do not think that argument can really stand with the content of the joint judgment in *Wardley* (supra).[17] I understand that joint judgment holds that the detriment or prospective loss, which a party suffers when as a result of another parties' misrepresentation the first party enters into a contract which exposes that party to a contingent loss or a liability which exceeds the value or worth of the rights and benefits acquired by that party, does not equate with the concept of "loss or damage" described in s 82 of the Act. I note the observation in that joint judgment (at 527) that:

> "To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever present risk of under compensation or over compensation, the risk of the former being the greater."

[59] In any event the appellant did not pursue that particular argument on the appeal, and instead argued that the respondents' loss or damage had occurred in June 1999. I think that argument also falls foul on those same observations in *Wardley* (supra). Damage was still prospective in June 1999.

[60] In *Blacker v National Australia Bank Ltd*[18] the Full Federal Court considered an appeal in a matter in which a dairy farm had been bought in September 1993 by parties who commenced proceedings in late November 1997 against the bank which had lent them money to buy the property. The trial judge had found that the appellant had suffered "more than negligible losses in the conduct" of the dairy business carried on on that farm by May 1994, and it followed that their cause of action pursuant to s 82 (1) of the Act had accrued more than three years before the proceedings were instituted. That approach was upheld by the Full Court, which cited with approval an earlier decision of that court in *Karedis Enterprises Pty Ltd*

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17 See in particular the CLR report at pages 527, 532 and 533.

18 [2001] FCA 254

& Greenfriars Pty Ltd v Antoniou[19] wherein after the purchase of an unsuccessful coffee lounge business the Full Court had there asked itself - by what date had more than a negligible part of the loss or damage been sustained? Accepting that those are useful tests, I think that they produce the same result in this matter, mainly that more than negligible loss or damage had been sustained by April 2000, and not before.

[61] The content of the orders made by the learned trial judge shows that they were in fact made pursuant to s 87 of the Act and not s 82. It is useful at this stage to summarise parts of s 80, 82 and 87. Section 80 relevantly empowers a court exercising jurisdiction under the Act to grant an injunction in such terms as the court determines to be appropriate, where a party has engaged in conduct that constitutes a contravention of (Pt V) of the Act, which part includes s 52.

[62] Section 82 (1) of the Act relevantly provides that a person who suffers loss or damage by conduct of another person that was done in contravention of Pt V may recover the amount of the loss or damage by action against that other person. Section 82 (2) provided (at that time) that an action under subsection (1) might be commenced at any time within three years after the day the cause of action that related to that conduct accrued.

[63] Section 87 (1) relevantly provides that:

> "Without limiting the generality of s 80, where, in a proceeding instituted under this part ….. the Court finds that a person who is a party to the proceedings has suffered, or is likely to suffer loss or damage by conduct of another person that was engaged in contravention of a provision of Pt …..V….. the Court may, whether or not it grants an injunction under s 80 or makes an order under s 82….. make such order or orders as it thinks appropriate against a person who engaged in the conduct or a person who was involved in the contravention…if the court considered that the order or orders will compensate the first mentioned person in whole or part for the loss or damage or prevent or reduce the loss or damage."

[64] Section 87 (2) provides that orders that specifically may be made may include orders declaring void contracts made between the person who suffered or is likely to suffer the loss or damage and a person who engaged in the conduct, orders varying such a contract, orders refusing to enforce all or any provisions of such a contract, and orders directing the person engaged in the conduct to pay the person who suffered the loss or damage the amount of that loss or damage.

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[19] (1995) 59 FCR 35

[65] The orders made by the learned trial judge followed calculations by himself in para 47 et seq of the judgment. Rather than attempt to summarise those I will quote them:

> "To put the plaintiffs in the theoretical position they would have been in had the representation not been made or the negligence not occurred would involve adding the amount the plaintiff spent and the amount they owed the bank and deducing the value of the assets they retain. The debt owed to the bank at trial was claimed as being $415,018.44. I accept that figure as accurate. The damages would therefore be $213.634.95. Since this represents money actually spent from early 1997 through to mid 2000 and the bank debt includes interest up to the date of trial interest should be added. I allow 10% from 30 June 1999 totalling $49,841.03. In the result there would be a net debt in favour of the bank of $151,542.46. If I were limited to awarding damages I would award the plaintiff a total of $263,475.98 including interest on the claim and the bank $415,018.44 on the counterclaim resulting in a net judgment in favour of the bank of $151,542.46."

[66] His Honour went on:

> "The above scenario does not in fact leave the plaintiffs in the position they would have been in had the offending conduct of Mr Seay not occurred. Had the conduct not occurred the plaintiffs would not have held the land at 3 Ollets Road. The bank would not have had mortgages over the residential part of Medina Heights on which the plaintiffs' homes are constructed and there would not be a residual debt to the bank incurring interest."

[67] Those conclusions led His Honour to the view that it was appropriate to frame relief under s 87 as well as under s 82 and s 80. The orders he made were described by the learned trial judge as varying the contractual arrangements between the appellant and respondents, such that the bank was precluded from exercising any personal right to recover against any of the respondents the debt owed by them, and orders compensating the plaintiffs for their own money they actually spent. Those orders appear made pursuant to s 87(2). The learned judge recorded that no specific claims for relief was framed around s 87 but noted that the matter had been raised in the course of address with both counsel. I observe that the respondents' pleadings of its cause of action under the Act did in fact ask for orders declaring that various mortgages given by the respondents were void, and for orders restraining the appellant from enforcing any of the provisions of the contract. Those appeared to be orders applied for under section 87(2).

[68] The nature of the discretionary powers granted by s 87 has received some appellate consideration in the High Court, in at least the matters of *Kizbeau Pty Ltd v W G & B Pty Ltd*[20] and *Marks v GIO* (supra). In the latter case the joint judgment of

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[20] (1995) 184 CLR 281 at 298-299

McHugh, Hayne and Callinan JJ cites with approval the observation in *Kizbeau* that s 87 of the Act confers a wide discretionary power on court to make remedial orders in appropriate cases to ensure a fair result. The joint judgement specifies that that power may be exercised only if a person has suffered or is likely to suffer loss or damage as a result of a contravention.[21]

[69] The appellant argues, and I accept, that the issue of causation in this case is different from that considered relatively recently by the High Court in *Henville v Walker*[22]. There the court was concerned with two independently occurring causes occurring at the same relevant time, each of which contributed to the total of the loss or damage suffered by reason of a contravention of the Act. Here the appellant argues that loss or damage suffered by its conduct should be considered to have ended.

[70] The appellants did not really identify in argument exactly when that should be thought to have occurred. June 1999 seemed the first preferred date, but there was little real opposition to the argument that the respondents were entitled to attempt to find alternative finance, and then to attempt to sell the land. I thought those limited concessions produced the result that the date I consider the damage was suffered (31.3.00) was a date by which the appellant contended damage suffered by its conduct had ended.

[71] Those two findings can be made consistently with each other. I consider that overall the evidence led before the learned trial judge and the information placed before this court shows that the value of the land had fallen since April 1999. That evidence had included what was described as an "indicative" opinion as to the value carried out in September 2000 in which a "desk top" judgment put the value of the land at $420,000.00. There was no inspection of the land and no analysis of any comparable sales. That indicative value being below $475,000.00 was consistent with the downward trend established by agreement before His Honour, and by sale after the judgment, but could not be treated as evidence of the actual market value then.

[72] Whether or not the respondents knew that the land had fallen in value, they certainly knew that interest was accumulating. It was common ground on appeal that interest repayments stopped around the time the litigation began.

[73] While the respondents knew thereafter that their debt was accumulating, the appellant did little to clarify what the respondents' actual loss or damage was at either 31 March 2000 or when the proceedings commenced. It led no evidence of the value of the land at or about either date. The learned trial judge concluded that the evidence did not disclose how the value of the land had actually performed in

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21 Judgment para 45. Their Honours had earlier (para 35) observed that exercise of the s 87 powers was predicated upon the court finding that a party had "suffered, or is likely to suffer, loss or damage by conduct of another" engaged in the contravention of (the relevant provisions of parts IV, IVA or V) of the Act.

22 (2001) 182 ALR 37

the period between June 1999 and the date of trial other than that it fell. I think that finding was the only one open, and it makes it pure speculation to compare the respondents' disadvantaged position as at March 2000 with its position at any later date.

[74] The appellant contributed further to that difficulty by not taking any steps at any time to actually enforce the security it held over the land. It is true the respondents had asked in their statement of claim for an injunctive order restraining the appellant from exercising that power of sale, but there was no evidence of any application having been made for any such interlocutory orders. Assuming that the land continued to fall in value, inaction by the appellant in not enforcing its security contributed to the respondents' increasing loss and damage before judgment, and to the appellant's own loss after the judgment.

[75] The one matter which appears unarguable is that unpaid interest debts and charges increased the amount owing by the respondents to the appellant between 31 March 2000 and the trial date by $45,018.44. Almost as clear is that, had the land been in fact sold at any time between those two dates, it is very likely that the net sale proceeds would have extinguished the principal debt owing. I think it was equally open to both parties to cause that sale and avoid that $45,000.00 increase in the debt to the appellant.

[76] I think that leaving the bank with all of that increased debt resulting from the parties' joint inaction does not produce the fair result which the judgments in *Kizbeau* and *Marks* require a court to ensure, when exercising the wide discretionary power to make remedial orders conferred by s 87. The proper exercise of those powers is currently under further consideration by the High Court in the matter of *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*.[23] In that matter at intermediate appellate court level a special five member bench of this Court of Appeal held that a court exercising power under s 87 may award part only of a loss causally connected with a contravention found, and that a court may do so in circumstances where there are two independent causes of the loss (a valuer's wrong valuation, coupled with a complete lack of reasonable inquiry on the part of the money lender who relied on the valuation).

[77] That decision was given with respect to the discretionary powers granted by s 87, and before the decision of the High Court on the exercise of orders under s 82 of the Act in like circumstances in *Henville v Walker* (supra). I think the proper analysis of the present matter is that it differs from the essential fact situation in each of those cases. I think the view **is** fairly open that in this matter the loss and damage suffered "by" the appellant's conduct in contravention of Pt V had been suffered by 31 March 2000; whereafter the loss and damage the respondents suffered after that was jointly occasioned by their own inaction and their ambitions in the litigation, and by the appellant's like inaction and ambitions. Unlike *Henville* and *I & L*

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[23] On appeal from [2000] QCA 383, Appeal No 10277 of 1999, 22/09/00. Decision reserved in the High Court 21 November 2001.

Securities (supra), those independently arising causes of the respondents' increasing debts occurred in combination in this matter after the respondents had suffered loss and damage in reliance on the representation, and not before. None of the contributing causes after 31 March 2000 were a consequence of reliance on the representation. All existed independently of any such reliance.

[78] Loss and damage occurring in the last described situation is **not** loss and damage suffered "by" the appellant's contravening conduct. It follows that to the extent of the increased debt of $45,018.44 the orders made by the learned trial judge, which varied the contracts between the parties and precluded the bank from exercising any rights to recover from any respondent, compensated the respondents for damage they suffered from causes or circumstances other than "by" contravening conduct by the appellant. Had the appellant led evidence as to land value in March 2000 it may have been open to this court to find there were even more significant losses for which the respondents were being compensated, and which were not caused "by" that contravention.

[79] Other than that, I consider that the orders by the learned trial judge were ones fashioned to do justice in the particular case. The order made for the repayment of the respondents' own monies outlaid by them did relieve them of part of the loss they had suffered, which is a variety of order for which s 87 specifically provides. The other orders made relieved them of the remainder of the damage they had incurred by reliance on the appellant's representation. I think that the argument originally advanced in the appellant's notice of appeal and outline of argument about the possibility of an unjustified future enrichment of the respondents, should the land later be sold for a sum exceeding the debt due to the appellant, is really neither here nor there. This is because the evidence before the learned trial judge pointed only to a falling market, which finding was supported by the sale after judgment. There was never in reality a likelihood of a sale exceeding the growing debt.

[80] In any event, if the appellant had wanted the matter clarified it could have sought an order from the learned judge for the sale of the land. It was conceded without much enthusiasm during the hearing of the appeal that such an order might have been within the powers granted by s 87. It could have asked for an order reducing the amount it was to pay the respondent by the extent, if any, by which the net proceeds from the sale of the land exceeded the debts then owed on it.

[81] In the result I would order that the appeal be allowed to the extent that the total of the sum the appellant is to pay the respondents, originally ordered to be the amount of $173,616.51 together with interest at 10% from 30 June 1999 in the sum of $40,504.73, be reduced by the amount of $45,018.44.

[82] Since Davies JA and Wilson J have dismissed the appeal subject to an arithmetic reduction of the damages award, I agree with the order that the appellants should pay the respondents' costs of this appeal.

[83] **WILSON J**: Jerrard JA has described the Pace family's experience in subdividing land at Habana Heights and Medina Heights. I shall turn immediately to the present respondents' acquisition and intended subdivision of the property at 3 Olletts Road.

[84] The respondents purchased the land in February 1997 for $287,500.00 pursuant to a contract that was subject to finance in an amount "sufficient to complete." The first respondent took the contract to Mr Seay, the appellant's local business manager. He was seeking to borrow $300,000.00 to cover the purchase price and stamp duty, telling Mr Seay that there was no point in borrowing $300,000.00 unless the appellant was prepared to lend them money to subdivide the land. They discussed the land's subdivision potential. The first respondent proposed undertaking it in stages, and said that the $300,000.00 would be repaid from the sale of stage 1. The security, apart from the land being purchased, was to include the unsubdivided balance of land at Medina Heights (lots 11 and 12) and two allotments from the subdivision (lots 1 and 10). At a subsequent meeting in March 1997 between all of the plaintiffs and Mr Seay, Mr Seay told them he had good news - that the appellant would lend $370,000.00, the extra $70,000.000 being for rezoning expenses. When the first respondent said that $370,000.00 would not be enough for stage 1, Mr Seay said that there would not be any problem in lending them money for stage 1.

[85] There was no challenge to the trial judge's findings in para [44] of his reasons for judgment -

> "The plaintiffs through Reno Pace expressly sought the assurance that the bank would be likely to lend for at least stage 1 of the proposed subdivision. While I accept that no enforceable promise was made to this effect I also accept that there was no basis upon which Mr Seay could have given any assurance at all and to do so even qualified by the plaintiffs' knowledge that ultimately they would have to make a formal application and satisfy the bank's criteria was in my view both negligent and misleading."

[86] The respondents applied for finance for stage 1 in August 1998. It was ultimately refused in June 1999. By then the land had been surveyed, bores had been sunk, conditional subdivisional approval had been obtained and an appeal had been conducted against conditions attaching to that approval.

[87] When told that the appellant would not provide finance for the subdivision, the respondents' strategy (as they told Mr Buzza, of the appellant's loan management unit, in late October 1999) was to sell the land and repay the facility prior to 31 March 2000, when the principal was due for repayment. They would meet interest commitments in the meantime. The land had been on the market for 10 weeks; although there was no current list price, they would accept $600,000.00 - $640,000.00, and if necessary would reduce their price to $500,000.00 to clear the debt.

[88] The respondents tried unsuccessfully to obtain finance elsewhere. They approached a Whitsunday law firm suggested by Mr Seay, the Commonwealth Bank (in August

1999), the Mackay Permanent Building Society, the Pioneer Building Society (probably around December 1999/January 2000) and the ANZ Bank (in June 2000), all to no avail.

[89] As at 31 March 2000, there were no arrears of interest or other bank charges. However, the respondents failed to meet their obligation to repay the principal which was then due. They continued to meet interest payments until about the time the proceedings were commenced (which was on 22 August 2000).

[90] After June 1999, as the trial judge found, the value of the land fell, and although it was placed with several real estate agents, no offers were elicited. There was evidence that in April 1999 it was worth $475,000.00 (with the benefit of a rural residential rezoning). By trial it was worth only $375,000.00. In May 2002 (after the trial) it was sold for $315,000.00.

[91] The trial judge observed that there was no evidence of how the value of the land performed in the 12 months following June 1999. He made no mention of an "indicative value" of $420,000.00 assigned to the property by a valuer in September 2000. This did not involve any error on his part, since it could not have been relied on as evidence of value when it was qualified by its description as "indicative only" and by the valuer's statement -

> "Should you require a precise assessment, full Reports of the properties* should be obtained, which would include a full hypothetical development analysis of the proposed subdivision site."
>
> *"Indicative values" of two other lots were also given.

At most, it could have provided some support for the finding (that was otherwise open) that the market was falling.

[92] On the hearing of the appeal, it was common ground that the respondents' cause of action under the *Trade Practices Act* accrued in June 1999, when their expenditure on preliminary works and interest and bank charges incurred in consequence of the statements of Mr Seay became irrecoverable because they could not obtain finance to subdivide the land. The appellant challenged the trial judge's assessment of the loss caused by Mr Seay's misleading conduct and the relief granted.

[93] The trial judge accepted that it was reasonable for the respondents first to exhaust alternative finance options and then to set about marketing the land as a single allotment, and that a reasonable period for sale would be not less than 12 months after June 1999. In the absence of evidence how the value of the land performed between then and trial, he adopted the value at trial ($375,000.00) as the value of the land on a poor market.

[94] In consequence of Mr Seay's representations, the respondents owned the fee simple in 3 Olletts Road subject to the appellant's mortgage. The appellant also had security over lots 11 and 12. The principal advanced had been $370,000.00. The

respondents had paid interest and charges on that loan of $67,524.66. They also claimed $63,856.12 in relation to another account, consisting mainly of interest in relation to the $370,000.00 loan between August 1999 and September 2000. They had also expended $42,355.84 from their own resources on the project. So, they had expended $173,616.51, made up as follows -

$67,524.66 + $63,856.12 + $42,355.84 - $120.00 = $173,616.62

It was conceded on appeal that this amount should have been reduced by a further $3,592.00, leaving a balance of $170,024.51.

[95] The trial judge's initial assessment of damages was -

On the claim (respondents)	Debt at trial	$ 415,018.44
	Amount spent by respondents	173,616.51
		588,634.95
	less value at trial	375,000.00
		213,634.95
	plus interest 10% from 30/6/99	49,841.03
		$263,475.98
On the counterclaim (appellant)	Debt at trial	$415,018.44
Net in favour of appellant		$ 415,018.44
	less	263,475.98
		$151,542.46

But he went on to observe in para [48] of his reasons for judgment:

> "The above scenario does not in fact leave the plaintiffs in the position they would have been in had the offending conduct of Mr Seay not occurred. Had the conduct not occurred the plaintiffs would not have held the land at 3 Olletts Road. The bank would not have had mortgages over the residential part of Medina Heights on which the plaintiffs' homes are constructed and there would not be a residual debt to the bank incurring interest. In addition, the plaintiffs would not be subject to the uncertainty of the market in attempting to sell the 3 Olletts Road land which now might be worth more or less than the value I have put on it."

[96] This is the relief granted by the trial judge. On the claim, he released the respondents from their personal covenant under the mortgage (by granting an injunction restraining the appellant from seeking to recover any part of the debt pursuant to any personal covenant), he ordered that the mortgages over lots 11 and 12 in Medina Heights (the respondents' homes) be released at the appellant's expense, and he ordered the appellant to pay the respondents damages of $173,616.51 plus interest of $40,504.73. On the appellants' counterclaim for moneys owing to it, he declared the amount owing as at 26 July 2001 to be $415,018.44. The appellant's enforcement of its security over the Olletts Road property was not inhibited.

[97] In so moulding the relief, the trial judge was purporting to act under ss 82 and 87 of the *Trade Practices Act*. Mr Keane QC, who appeared as senior counsel for the appellant, submitted that he erred in not focussing first on what loss was caused by the appellant and then addressing compensation for that loss. In his submission the trial judge overlooked the causation issue and dealt only with compensation. Further, Mr Keane submitted, he erred in failing to strike a balance of advantage and disadvantage when the cause of action accrued.

[98] Both s 82 and s 87 are concerned with loss or damage suffered "by" conduct in contravention of Part V of the Act. That conduct need only be a cause of the loss; it need not be the sole cause: *Henville v Walker* (2001) 182 ALR 37. Mr Keane's argument was that there had come a point when the causal effect of the appellant's conduct was spent, and that that point was 30 June 1999 or so shortly thereafter that it made no difference; thereafter, the respondents' loss was caused solely by their own decision to hold on to the land. Mr DF Jackson QC, senior counsel for the respondents, countered that that had not been made out as a matter of fact at trial; that there was a finding of fact to the contrary, based on oral evidence.

[99] Mr Keane challenged the trial judge's finding that a reasonable period for sale would be not less than 12 months after June 1999. He contended that there was no evidence what a reasonable time would have been (such as evidence from a real estate agent or a valuer as to a marketing campaign) and no basis for concluding that by the time it could reasonably have been sold it would have realised less than $475,000.00.

[100] The trial judge was entitled to have regard to what actually occurred. As I have outlined above, the principal did not fall due until 31 March 2000, and the respondents met all interest and other charges to that point and indeed until about the time the proceedings were instituted. They tried to obtain refinance, but without success. They listed the property with several real estate agents, but received no offers. Land values were falling, and it was open to the trial judge to infer from the valuation evidence before him that the value of the land on a poor market was $375,000.00 (more than the principal owing to the appellant).

[101] In my view the trial judge's finding that a reasonable period for sale would have been not less than 12 months after June 1999 was open to him. The loss the respondents suffered until the expiration of that period was suffered by (or caused by) Mr Seay's conduct in breach of Part V of the *Trade Practices Act*, and so is compensable.

[102] The order sterilising the personal covenants, made pursuant to s 87 of the *Trade Practices Act*, was properly made to restore the respondents to the position they would have been in, but for Mr Seay's conduct.

[103] In the circumstances, it is not necessary to consider the parties' submissions on negligence.

[104] I would allow the appeal only to the extent of setting aside the order that the appellant pay the respondents damages assessed at $173,616.51 and substituting an order that it pay damages assessed at $170,024.51, and making the necessary consequential change to the interest calculation.

[105] I agree with the orders proposed by Davies JA, including the order as to costs.