DISTRICT COURT OF QUEENSLAND

CITATION:	*Laurel Star Pty Ltd v Babstock Pty Ltd (No 3)* [2023] QDC 10
PARTIES:	**LAUREL STAR PTY LTD ACN 624 444 864 as trustee for the Alan and Dorothy Marburg Family Trust** (First plaintiff) AND **DOROTHY ANN MARBURG** (Second plaintiff) **v** **BABSTOCK PTY LTD ACN 010 443 124 as trustee for The Kenman Real Estate Unit Trust ABN 60 266 220 872** (First defendant) AND **WAG PROPERTY MANAGEMENT PTY LTD ACN 136 174 242 as trustee for The WAG Unit Trust** (Second defendant)
FILE NO:	2326/18
DIVISION:	Civil
PROCEEDING:	Trial
DELIVERED ON:	10 February 2023
DELIVERED AT:	Brisbane
HEARING DATE:	11 to 15 May 2020, 13 July 2022 (last written submissions, 25 January 2023)
JUDGE:	Barlow KC DCJ

ORDERS:

1. **Each of the Rent Roll Contract and the Business Contract made on 1 December 2017 between the plaintiffs and the first defendant, including the second plaintiff's guarantee of the first plaintiff's obligations under the contracts, be declared void *ab initio*.**
2. **There be judgment for the first plaintiff against both defendants for damages in the sum of $42,844.86.**
3. **The defendants pay, or cause to be paid, to the first plaintiff the sum of $41,500 comprising the balance of the deposit under the Rent Roll Contract.**

4. **There be judgment for the plaintiffs on the counterclaim.**

5. **Unless, within 14 days, a party provides to the associate for Judge Barlow KC submissions about costs, the defendants pay the plaintiffs' costs of the proceeding, including any reserved costs.**

CATCHWORDS: TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE CONDUCT GENERALLY – GENERALLY –the defendants made representations before contracts were made - whether representations were misleading or deceptive – whether the plaintiff relied on the representations – whether representations caused plaintiffs loss – whether contracts should be declared void

DAMAGES – ASSESSMENT OF DAMAGES IN ACTIONS FOR MISLEADING OR DECEPTIVE CONDUCT – OTHER MATTERS –the defendants made misrepresentations to the plaintiffs constituting misleading or deceptive conduct – the plaintiffs were induced to enter into contracts –plaintiffs repudiated the contracts – the defendants made a counterclaim for breach of contract – whether the plaintiffs' liability for breach was a result of the defendants' misrepresentations - whether the plaintiffs' liability for breach was a loss arising from the defendants' misleading or deceptive conduct

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – CASE MANAGEMENT – GENERALLY –the plaintiff sought an unpleaded remedy after trial –the defendants did not contend to be prejudiced by the unpleaded relief – whether unpleaded relief should be granted

LEGISLATION
Australian Consumer Law (Cth) ss 237, 243
Residential Tenancies and Rooming Accommodation Act 2008 (Qld) s 65
Uniform Civil Procedure Rules 1999 (Qld) rr 156, 658

CASES
Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452, cited
Community and Public Sector Union v Telstra Corp Ltd (No 2) (2001) 112 FCR 324, [2001] FCA 479, followed
Coppo v Banalasta Oil Plantation Ltd; Borg v Pawski [2005] QCA 96, cited
Cropper v Smith (1884) 26 Ch D 700, considered

Harvard Nominees Pty Ltd v Tiller (2020) 282 FCR 530, cited
Harvard Nominees Pty Ltd v Tiller (No 4) (2022) 403 ALR 498, [2022] FCA 105, followed
Lean v Tutmut River Orchard Management Ltd [2003] FCA 269, cited
Macks v Viscariello (2017) 130 SASR 1, cited
Motor Yacht Sales Australia (t/as The Boutique Boat Company) v Cheng [2021] NSWSC 1141, cited
Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd [1976] 1 NSWLR 5, cited
Segenhoe Ltd v Akins (1990) 29 NSWLR 569, cited
Strong Wise Ltd v Esso Australia Resources Pty Ltd (No 2) (2010) 185 FCR 237, cited
Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315, cited
Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 192 CLR 603, cited
Venerdi Pty Ltd v Anthony Moreton Group Funds Management Ltd [2015] 1 Qd R 214, followed

COUNSEL:	AJH Morris KC for the plaintiffs BWJ Kidston for the defendants
SOLICITORS:	Sarinas Legal for the plaintiffs Carter Capner Law for the defendants

Contents

Introduction

[1] On 3 December 2020, I gave judgment for the plaintiffs on their claim and dismissed the defendants' counterclaim, finding that the defendants had breached the parties' contract for the sale of a rent roll from the defendants to the first plaintiff.[1] The background to the parties' dispute and most of the relevant evidence are set out in my primary reasons, which should be read with these reasons.

[2] On 29 April 2022, the Court of Appeal allowed the defendants' appeal, set aside the orders that I had made[2] and remitted the proceeding to this court for determination of the remaining issues.[3]

[3] On 13 July 2022, I heard further from the parties, who agreed that the remaining issues were the subject of submissions at the original trial and, unless the court required further assistance on any issue, they were content for me to consider and deliver judgment on them without further submissions from the parties.

[4] I subsequently invited the parties to provide written submissions on some of the issues arising during my reconsideration of the parties' respective claims. The parties agreed on a timetable, but neither party complied with it, repeatedly seeking extensions of time. Ultimately, the plaintiffs' solicitors filed submissions on 5 October 2022. I did not receive the defendants' submissions until 14 December 2022 and I received the plaintiffs' submissions in reply on 25 January 2023.

The issues

[5] The following issues remain for my determination:

(a) whether the Sales Information Booklet provided to the plaintiffs by the defendants' agent contained misleading or deceptive information (misrepresentations) on which they relied in entering into the Rent Roll Contract and the Business Contract (both including guarantees by Mrs Marburg) and in continuing with those contracts after the due diligence date;[4]

(b) if so, whether the plaintiffs were entitled to rescind the Rent Roll Contract for misrepresentation, or the court should order relief to that effect and what loss (if any) the plaintiffs suffered as a consequence of the misrepresentations;[5]

(c) whether the plaintiffs repudiated the Rent Roll Contract and that repudiation was accepted by the defendants, who thereby terminated the contract;[6]

(d) if so, what (if any) damages the defendants suffered as a result of the plaintiffs' breach by repudiation.

[6] Before addressing those issues, I shall deal briefly with another issue raised by the plaintiffs.

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1 *Laurel Star Pty Ltd v Babstock Pty Ltd* [2020] QDC 305 (**primary reasons**). Abbreviations in those reasons are also used in these reasons.

2 Including a subsequent order for costs: *Laurel Star Pty Ltd v Babstock Pty Ltd (No 2)* [2021] QDC 1.

3 *Babstock Pty Ltd v Laurel Star Pty Ltd* [2022] QCA 63 (**CA reasons**).

4 Matters concerning this issue are referred to in the primary reasons, [4]-[5], [19], [188].

5 Primary reasons, [188].

6 Primary reasons, [190]. Also, CA reasons, [40].

Rectification claim

[7] In their submissions in the remitted trial, the plaintiffs re-enlivened their claim for rectification of the Rent Roll Contract: a claim that they did not pursue in their final submissions at the original hearing. In my primary reasons I found it unnecessary to consider the claim in the circumstances, although I commented that the plaintiffs' proposition that each contract was intended to be dependent on completion of the other did not seem so undeniably clear that the claim would succeed.[7] I made that comment, having found that the Business Contract was not essential to the completion of the Rent Roll Contract, as the rent roll could be managed from other premises.[8]

[8] Indeed, the proper construction of each contract has the consequence that there is no case for rectification of the Rent Roll Contract to make it dependent on the completion of the Business Contract. I reject that part of the plaintiffs' claim.

Misleading or deceptive conduct

The allegations

[9] In the Sale Information Booklet[9] that was sent by RED's employee, Dean Yeo, by email to Mr and Mrs Marburg on 17 November 2017, it stated,[10] concerning Entry Condition Reports (**ECR**s) for the properties on the rent roll, that:

(a) 100% of current ECRs on all properties were held on file;

(b) 100% of current ECRs were fully signed by all tenants and agency staff; and

(c) 100% of photographs were held on file in the defendants' office and were taken at the time of the ECRs.

[10] The Sale Information Booklet also included a statement that the properties were located in Bellbowrie and Moggill and a table that listed the properties comprising the rent roll, namely 88 properties in Bellbowrie and 60 properties in Moggill.[11]

[11] The plaintiffs contend that those statements amounted to representations by either Babstock or WAG (or both), that 100% of current ECRs on all properties were held on file, 100% of ECRs were fully signed by all tenants and agency staff, and the properties comprising the rent roll were all situated in Bellbowrie or Moggill (**representations**).[12]

[12] The plaintiffs allege[13] that each of the representations was false, but they relied on them in taking the following steps:

(a) Laurel Star's predecessor as trustee (**Marburg Investments**) entered into the Business Contract and the Rent Roll Contract;

(b) Laurel Star was substituted as buyer after it became the trustee;

(c) Mrs Marburg executed the contracts as guarantor for the buyer; and

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7 Primary reasons, [51]-[54].

8 Primary reasons, [47]-[49]. The reference in [47] to clauses 25 and 26 should, though, be to clauses 24 and 25 respectively.

9 Exhibit 1.45.

10 Exhibit 1.45, p 7.

11 Exhibit 1.45, pp 5, 12-16.

12 Third further amended statement of claim (**statement of claim**), [7].

13 Statement of claim, [8], [10], [24].

(d) Laurel Star (or its predecessor) paid deposits totalling $82,500, pursuant to the contracts.

[13] The defendants admit that the statements were made in the Sale Information Booklet.[14] However, they contend that the representations as pleaded by the plaintiffs were not made, or the plaintiffs did not rely on them and each contract contained an entire agreement clause by which the parties excluded reliance on any representations made before the contracts were made.[15]

[14] The defendants also rely on the statement in the Sale Information Booklet that, "The actual number [of properties] transferred at Settlement may vary,"[16] as well as the following "disclaimer of liability" in the booklet:[17]

> Real Estate Dynamics, for itself and for the vendor of the Business for whom it acts, advises that all potential purchasers of the Business should satisfy themselves as to the truth and accuracy of all information given to them by Real Estate Dynamics concerning the Business by conducting their own inquiries and investigations assisted, where appropriate, by their professional advisors.
>
> No person in the employ of Real Estate Dynamics has any authority to make or give any representation or warranty whatsoever in relation to the Business.
>
> Real Estate Dynamics absolutely and unequivocally disclaims all and any responsibility for the accuracy of all information provided by it to any potential purchaser of the Business, and repeats that:
>
> > it is not the source of that information; and
>
> > it has neither endorsed or approved that information; and
>
> > it has merely passed this information on to the potential purchasers, for what it is worth, in the expectation and understanding that the potential purchasers will undertake their own inquiries assisted, where appropriate, by their professional advisors, as to the truth and accuracy of the information provided to them.
>
> The potential purchasers have executed this disclaimer and, in doing so, have represented to Real Estate Dynamics that they have read, understood, and accepted this disclaimer of liability.

The parties' contentions

[15] The plaintiffs submit, essentially, that it is wrong to suggest that they did not rely upon the representations because:

(a) they are not persons of conspicuous wealth or affluence;

(b) they were making a significant personal investment, being $825,000;

(c) they were borrowing a substantial component of that sum;

(d) the purchase of the business was not as a "passive investment", but the plaintiffs intended to work actively in the business;

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14 Defence to Third Amended Statement of Claim and Further Amended Counterclaim (**defence and counterclaim**), [6](b).

15 Those clauses are set out in my primary reasons at p 8 [26] (clause 39 of the Business Contract) and pp 9-10 [31] (clause 1.8 of the Rent Roll Contract).

16 Exhibit 1.45, p 125.

17 Exhibit 1.45, p 110.

(e) "they were doing so at a stage of life when it might be said (without intending any disrespect) that their best years were behind them";

(f) they had some limited experience in the domestic rental market and industry, although sufficient experience to be aware of the desirability of having current ECRs, fully signed by all tenants and agency staff, for all properties;

(g) they undertook considerable research into a suitable investment, including rejecting other opportunities that they considered less propitious; and

(h) Mr Marburg, upon being dissatisfied with the formal due diligence, devoted a considerable amount of his time in an attempt to remedy perceived deficiencies in the existing due diligence.

[16] In particular, the plaintiffs say that the representations in relation to current, fully signed ECRs, with photographs of the properties taken at the times of the ECRs, being on file for all properties were significant to the plaintiffs' investment in the business, as those matters enhanced the value of the investment and, given their intention of actively working in the business, minimised foreseeable complications in the operation of the business.

[17] The plaintiffs conceded that the representation in relation to the properties comprising the rent roll being located in Bellbowrie and Moggill was less critical, but nonetheless say that they relied upon it. The plaintiffs submit that Bellbowrie and Moggill are considered relatively affluent suburbs, which could enhance the value of the investment and reduce potential complications in the operation of the business. Therefore, they attached significance to this representation.

[18] The defendants submitted that the plaintiffs should not be believed, in saying that they relied on the representations, because after they entered into the contracts, the plaintiffs undertook a due diligence, as they were entitled to do under the contracts. Mr Marburg not only looked at documents himself, but Laurel Star engaged a supposed expert[18] who undertook a due diligence examination of each file and reported any discrepancies or anomalies that she found. In the course, or at the end, of that process, she reported that a few of the ECRs were missing, having been lost in a flood. It also became known to that person (although perhaps not to Mr or Mrs Marburg), before the due diligence date, that 16 of the properties were in suburbs other than Bellbowrie and Moggill.[19]

[19] Counsel for the defendant, Mr Kidston, also noted that, in an email of 10 January 2018 to Mr Yeo,[20] Mr Marburg said:

> I was wondering what the situation was when I originally read Helen's list [presumably, exhibit 9] which shows properties in Kenmore, Anstead and even 1 in Booval and Goodna – but that did not concern me and was not a problem if they are included, even though we were told that all properties were in Bellbowrie and Moggill.

[20] Mr Marburg also accepted under cross examination that he had analysed the spreadsheet that CRESQ provided to him, he reviewed it carefully and he was aware

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18 Helen Rolfe, trading as Complete Real Estate Services Queensland (**CRESQ**).

19 Exhibit 9.

20 Exhibit 23. Referred to in the defendant's closing submissions at [46](p).

that a number of the properties were not located in Bellbowrie and Moggill, before giving notice of the satisfaction of his due diligence.[21]

[21] The defendants submitted that, as the contracts provided the plaintiffs the opportunity to undertake a due diligence examination and, if they were not satisfied with it, to terminate the contracts by a certain date, even if they entered into the contracts in reliance on the representations, they had the opportunity to withdraw. However, they chose not to withdraw even though they found out, after the contracts were made but before the due diligence date, that the representations were not completely accurate.

[22] Furthermore, the plaintiffs' failure to ascertain the degree of inaccuracy was not as a result of continuing to rely on the representations, but because of their appointed agent's failure to conduct the due diligence carefully and to inform the plaintiffs of the full extent of any departures from the requirements of the relevant legislation and the representations. Therefore, even if the plaintiffs relied on the representations in entering into the contracts, that reliance did not cause them any loss and they ceased to rely on them at a time when they could have terminated the contracts. Instead, they relied on their agent in deciding not to terminate by the due diligence date.

[23] The plaintiffs' counsel, Mr Morris KC, submitted that the representations about the ECRs were:

> of profound significance to the investment being made …, both as enhancing the value of their investment and, given their intention of working actively in the business, as minimising foreseeable complications in its day-to-day operations.[22]

[24] As for the representation about the locations of the properties, Mr Morris accepted that it may have been of less importance but, given the location of the business, the nature of the representation and its apparent purpose, the inherent likelihood is that the plaintiffs relied on it in entering into the contracts.

[25] Mr Morris submitted (with his usual flair) that, to suggest that the plaintiffs did not rely on these representations, made in a booklet promoting the business and the rent roll for sale:

> is akin to asserting that, although they placed their life's savings on the 3rd race at Eagle Farm, it was a matter of complete indifference to them when they discovered that – contrary to the information which had been supplied to them – the mare which they were backing had not in fact achieved 10 wins from her last 10 starts, and did not even enjoy the distinguished blood-lines which had been claimed for her.[23]

[26] Mr Morris submitted that the defendants' reliance on the due diligence process, as demonstrating that the plaintiffs did not rely on the representation, was flawed. They entered the contracts in reliance on the representations. Having done so, he submitted, it cannot be said that they are precluded from being relieved from that contract because another "escape route" existed. Also, despite the due diligence process provided for in the contracts:

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21 T1-56.

22 Plaintiffs' closing submissions, [28].

23 Plaintiffs' closing submissions, [30].

> the scope of the discrepancies between the features of the proposed investment as represented, and the actual features of the proposed investment, did not strike the Plaintiffs as a thunderbolt from the blue; it gradually emerged, objectionable item by objectionable item and disagreeable detail by disagreeable detail, over the course of a protracted and … unsatisfactory process. … to terminate a contract under a due diligence clause is a major decision, and the Marburgs can hardly be blamed for a degree of indecision, even as the "due diligence" process rolled on, and still more unacceptable revelations gradually emerged.[24]

Discussion and findings

Representations

[27] There is no doubt that the statements were made in the Sale Information Booklet and that they constituted representations about the ECRs and the locations of the properties on the rent roll.

[28] The information in the Sale Information Booklet was provided in order that a potential buyer could find out information that would assist it in deciding whether or not to sign a contract to buy the rent roll and the business. It was clearly designed to provide enough information to be persuasive. Any potential purchaser would be unable to check the accuracy of the information without first signing a contract, as the defendants did not offer to permit the buyer to undertake a due diligence before signing a contract. It was the contract itself that provided for a period of 14 days within which the buyer could undertake due diligence enquiries, also imposing an obligation on a buyer to keep confidential any information revealed to it in that process. That might be seen as a way of committing a purchaser to a contract before allowing the purchaser to investigate the business, rather than permitting the purchaser to investigate the business before committing to a contract. In the circumstances, the representations in the Sale Information Booklet take on far more significance than they would if a due diligence were possible before deciding whether to contract at all.

[29] I find that the representations were made by RED on behalf of the defendants. They were intended to induce potential purchasers to enter into contracts in reliance on them and before the interested party could check the accuracy of the representations.

Reliance in entering contracts

[30] Mr Marburg's evidence was to the effect that he and Mrs Marburg wanted to buy a business that was well conducted and had proper records – particularly properly and fully kept entry condition reports so as not to have any potential disputes with tenants about the original condition of the properties at the end of their tenancy agreements. They also wanted a business in which the properties being managed were all in a discrete area, not spread around the suburbs, as they felt that would make their management easier and cheaper (involving less travelling to inspect properties). All these factors were very important to them, as they were investing their retirement savings into the business and wanted it to provide a reliable and not overly taxing source of income that would enable them to semi-retire.

[31] Mrs Marburg gave similar evidence, particularly stating that the representations that 100% of ECRs were held and fully signed were very important to her. The

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[24] Plaintiffs' closing submissions, [34].

representation about the locations of the properties was also a relevant factor that she took into account, as making management of the properties easier and cheaper.

[32] The defendants contended that I should not believe Mr Marburg's evidence, in particular, that he relied on the ECR representations, because nowhere in the pre-due diligence date correspondence did he or Mrs Marburg raise any concerns about the ECRs. But that is not surprising, given what CRESQ told them about the ECRs, both before that date and on 9 January 2018.[25] While a few were missing due to a flood, they were assured that the rest were on the files, properly completed and signed. There was little reason for them, at that time, to raise any concerns. In any event, this information was provided to them later, not before they entered into the contracts.

[33] I have no difficulty in finding that Mr and Mrs Marburg relied on the representations made in the Sale Information Booklet about the ECRs in making their decision to have the former trustee of their family trust enter the contracts. Mrs Marburg also relied on them in giving her personal guarantee of the trustee's performance of the contracts.

[34] The defendants, however, contend that, while Mr and Mrs Marburg, on behalf of the former trustee, may have caused it to rely on the representations in deciding to enter the contracts, by the time Laurel Star became trustee and was substituted as purchaser, they were aware that the representations were not all correct, yet they caused Laurel Star to become the buyer. Therefore, Laurel Star, in committing itself to the contracts, did not rely on the representations. I shall discuss this submission later.

Disclaimer and entire agreement clause

[35] The disclaimer in the Sale Information Booklet is not, in my view, evidence that overcomes Mr and Mrs Marburg's evidence of the plaintiffs' reliance on the representations in deciding to enter into the contracts. Nor does it absolve the defendants from responsibility and liability for those representations. It did not seek to do so. Rather, it was clearly drawn to protect RED from any liability to a potential purchaser should any of the information, provided by the seller to RED for the purpose of including in the booklet, turn out to be incorrect. It did not purport to alter the responsibility of the seller. To the extent that it referred to the seller, it only did so in advising buyers to undertake their own investigations. But, as I have said, they could only make very limited investigations before they signed the contracts. The disclaimer is therefore of no assistance to the defendants.

[36] The entire agreement clause in the Business Contract says nothing about representations and does not assist the defendants. The clause in the Rent Roll Contract is more extensive, but all it seeks to do, relevantly, is to ensure that any pre-contractual representations were not to comprise terms, nor to give rise to implied terms, of the contract, nor to comprise a collateral contract. Contrary to the defendants' submissions, it does not purport to exclude reliance on representations outside the context of the contract itself. In any event, such a clause could not exclude liability for any misrepresentations made contrary to the *Australian Consumer Law* (**ACL**).

[37] The plaintiffs do not contend that the representations were of a contractual nature. They contend that the representations, made before the contracts, induced them to enter into the contracts and were misleading or deceptive. The entire agreement

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25 See [50] and [51] below.

clauses are irrelevant to that contention. Indeed, even if one of them had provided that the plaintiffs had not relied on any pre-contractual representation, that would only be one factor in determining whether the plaintiffs had in fact relied on representations. If the court were satisfied that, notwithstanding such a clause, the plaintiffs had relied on such representations, then the clause cannot operate to prevent the legal consequences of such reliance.[26]

[38] Consequently, the entire agreement clauses have no relevant effect.

Were the representations misleading or deceptive?

[39] Clearly each of the representations was incorrect. As eventually became apparent:[27]

(a) At least 19 of the ECRs were not signed by all tenants, or were not signed at all, at the time the reports were completed;[28] additionally, some had not been signed for the agency by someone who had in fact conducted the inspection;[29]

(b) there was no ECR in existence for 2 properties, apparently because they had been destroyed in a flood;[30] and

(c) 16 properties were in suburbs other than Bellbowrie and Moggill.

[40] The defendants contended that any defects in ECRs were easily able to be corrected, by having an agent (if necessary) and all tenants sign those that were signed only by one of several tenants (or not at all) and by creating new ECRs to replace those that had been destroyed. While any such ECRs may not have complied with the time limits and procedures for creating an ECR set out in the relevant statute, the ECRs would be valid and would constitute evidence of the condition of the original condition of the properties in the event of any dispute.

[41] With respect, I disagree with those contentions. The purpose of an ECR is that it will constitute evidence of the state of a property at the commencement of the tenancy agreement: evidence that would be important in the event of a dispute during or at the end of the tenancy. If that evidence is created at a later time than within a few days of the commencement of a tenancy agreement, it is not signed by the agent who conducted the inspection, or it is signed only by one of several tenants (or not at all) or it is signed (if at all) by an agent who had not conducted the inspection, then it will not be persuasive evidence having the effect and strength that the statutory regime purports to give it.

[42] Whether or not the landlord or the original agent can be criticised or has a reasonable excuse for not having an ECR made in accordance with the statute, if there is no such ECR then the evidence is not available or is of less weight. Notably, failure of a landlord or a tenant to sign and date an ECR within the times stated in the Act is an

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26 The plaintiffs, correctly in my view, referred me to the legal effect of such a clause as described by Jackson J in *Venerdi Pty Ltd v Anthony Moreton Group Funds Management Ltd* [2015] 1 Qd R 214, [1]-[4].

27 Even though the exact types and numbers of discrepancies were in contention.

28 The defendants' rental manager at the time, Ms Nicole Satherley, said that she had arranged for the tenants to sign the ECRs during the contracts' pre-settlement period (rather than when the reports were completed) and reviewed other alleged deficiencies in the case of 34 properties: T3-114:45. The relevant properties were listed in a spreadsheet comprising exhibit 84, of which 19 had not previously been signed by all or any tenants.

29 Satherley, T4-27-28.

30 Satherley, T3-117.

offence under that Act[31] and the production of a false document (such as one backdated to appear that it was signed by all tenants at about the date of commencement of a tenancy) may also be the offence of forgery under the Queensland *Criminal Code*.

[43] Mr Morris KC submitted, in this regard, that:

> Given that the legislative regime mandates a process for ECRs, requiring completion and execution at or about the time that occupancy begins, it would be an exceedingly brave lawyer who advised the Plaintiff that it does not matter that a document is a bogus one, purporting to have been completed and executed in accordance with the legislative requirements, but falsified to create that counter-factual illusion; that, whilst someone may be prosecuted for producing the fabricated document, that does not diminish its evidentiary value in civil proceedings.[32]

[44] I agree. Any evidence that an ECR relied on by a landlord or Laurel Star as the agent was not created on the date entered in it, or was in part backdated, or was signed months or years after the tenancy agreement commenced, would no doubt lead to a tribunal of fact excluding or giving little weight to the document. As Mr Morris submitted, that defeats the purpose of the legislative regime.

[45] The defendants also submitted that any incorrect statement about the ECRs made in 2017, before the contracts were made, was not shown to be wrong because the plaintiffs later discovered that ECRs created in May 2018 were not fully signed and the representation could not apply to any such ECRs. I disagree. The vast majority (if not all) of the relevant leases and incomplete ECRs dated back before the contracts,[33] so the representations were wrong when the contracts were made and at the proposed settlement dates.

[46] Therefore, it was misleading or deceptive, or likely to mislead or deceive, for the defendants, in the Sale Information Booklet, to make the representations about the ECRs.

[47] As for the locations of the properties, there is no doubt that, at the time the booklet was provided to the plaintiffs, there were some properties on the rent roll that were not in Bellbowrie or Moggill. There were 5 in Anstead, 4 in Kenmore, 2 in Brookfield, 2 in Mt Crosby and 1 each in Chapel Hill, Booval and Goodna.[34] While the number of properties outside the stated suburbs was, on one view, not a large proportion of the total, it was still wrong to state that they were all in those suburbs. The statements were misleading or deceptive, or likely to mislead or deceive.

Did the plaintiffs cease to rely on the representations before becoming bound to complete the contracts?

[48] As I have said, Laurel Star's predecessor as buyer and trustee of the Marburgs' family trust, by its director Mrs Marburg, relied on the representations in entering into the contracts. Mrs Marburg also relied on them personally in giving her guarantee of the purchaser's obligations. However, the defendants submitted that at least some of the

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31 *Residential Tenancies and Rooming Accommodation Act* 2008, s 65.

32 Plaintiffs' closing submissions, [37].

33 In saying this, I have compared the list of defective ECRs in exhibit 84 with the list of properties as at 15 December 2017 (exhibit 9).

34 As disclosed on 15 December 2017: exhibit 9.

true facts emerged during the period in which the plaintiffs were able to, and did, undertake their due diligence, with a right to terminate the contracts if they were not satisfied with the results of their investigations. The plaintiffs were therefore disabused of the truth of the representations while they had an opportunity to be released from the contracts. Yet, instead of terminating the contracts, they informed the defendants that they were satisfied with their due diligence. Even though, perhaps, the full extent of the inaccuracies did not become evident to the plaintiffs during the contractual due diligence process, all the information was made available to CRESQ. Had it done its job properly, CRESQ – and therefore the plaintiffs – would have recorded the accurate number of deficiencies in the ECRs and the number of properties outside the stated suburbs. That information, if properly looked at, would have served to correct the misleading statements. In deciding that they were satisfied with the due diligence and to affirm the contracts, the plaintiffs did not rely on the representations, but on what they had been told by CRESQ. The representations therefore were not the cause (or even a cause) of their decision to affirm the contracts.

[49] As I have quoted above from the plaintiffs' submissions, they submitted that the true extent of the deficiencies in the ECRs did not become apparent during the due diligence process, but only over the months following completion of that process, when Mr Marburg was able to review the files himself. Therefore, although they had some advice from CRESQ, it was incomplete and in some respects wrong and they remained under the influence of – and continued to rely on – the representations made in the Sale Information Booklet.

[50] By the end of the formal due diligence process (which was extended by agreement to 22 December 2017), the plaintiffs had been told by their due diligence agent, CRESQ,[35] that:

(a) 16 (that is, 11%) of the 148 properties on the rent roll were not in the stated suburbs of Bellbowrie and Moggill;

(b) ECRs for "a few" properties were not on file as they had been destroyed in a flood;

(c) other than those, all of the ECRs had been signed by the tenants or copies had been initialled by the tenants.

[51] On 9 January 2018, CRESQ told Mr and Mrs Marburg that "all [tenant] files viewed where (*sic*) in a good manner with all required paperwork on the file (Bonds, ECR, Leases, application forms)."[36]

[52] On 10 January 2018, Mr Marburg sent to Mr Yeo of RED the email to which I have referred above.[37]

[53] That demonstrates that, although the Sale Information Booklet stated that all properties were in Bellbowrie and Moggill and several were not in fact in those suburbs, the plaintiffs were aware of, and not concerned by, that discrepancy by the time of the due diligence date.

[54] I find that, by the due diligence date, the plaintiffs no longer relied on the representation as to the locations of properties. They knew by then that it was wrong

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35 CRESQ did not provide a report as such to Mr and Mrs Marburg, but simply some summaries of what they had found and lists of the properties and arrears in rent: exhibits 5, 7, 9, 11.

36 Exhibit 19.

37 Exhibit 23: see [19] above.

and therefore they were no longer misled by it when they decided not to exercise their right to terminate the contracts. It was not of major consequence to them given the relatively small number of properties outside the represented suburbs.

[55] However, even though they relied in part on the information provided to them by CRESQ, in deciding that they would not terminate the contract, they still continued to rely on the representations about the number and quality of ECRs for the vast majority of the properties. They knew that there were a few "anomalies", but not the extent of incomplete or unsigned ECRs. They discovered the full extent of the misrepresentations only in the following months, as Mr Marburg himself examined the full files. Therefore, they did rely on the representations about the ECRs when they did not take up the opportunity to terminate the contract by the end of the due diligence period. That reliance led to Laurel Star's predecessor as trustee and buyer being irrevocably bound to complete the contracts, which ultimately Laurel Star breached by failing to settle after it was substituted as the buyer.

Effect of change of trustee

[56] In the defendants' submissions on the remittal (although not pleaded, nor contended at the initial trial), the defendants sought to distinguish between the identity of the buyer when the contracts were made and Laurel Star when it was substituted as buyer. The defendants contend that, even if the earlier trustee relied on any misrepresentations in making the contracts, Laurel Star itself did not rely on them when it was substituted as trustee and buyer in March 2018.

[57] In my view, that submission is wrong. The trustee of the trust was the entity that made the contracts in that capacity. When it was substituted as trustee, its substitution as buyer under the contracts was agreed by the parties and was essentially mechanical. At that stage, as I have found above, Mr and Mrs Marburg continued to operate and to make their decisions in reliance on the general truth of the representations (subject only to a few apparently insubstantial discrepancies). They had not discovered the true facts during their due diligence before then, as the defendants submitted.[38] They continued to believe the representations, particularly Mr Marburg as director of their new trustee and the substitute buyer, Laurel Star, at least until about 16 April 2018 when Mr Marburg appears to have first identified that 30 ECRs were not signed by the tenant or the agent, or both.[39]

[58] In any event, the substitution of Laurel Star was necessary, as the former company was no longer trustee (the capacity in which it entered the contracts). The substitution did not affect that the contracts were made (and, by the substitution of Laurel Star, novated) in reliance (by Mr and Mrs Marburg) on the representations and that their trustee was bound by them. Furthermore, as Mr Morris submitted in the extract set out at [26] above, even then the plaintiffs were still to find out the true facts bit by bit.

[59] Therefore, Laurel Star's decision to be substituted as the buyer and thereby to assume the buyer's rights and obligations under the contracts was made in partial reliance on the misrepresentations.

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38 Defendants' submission on remittal, [9].

39 Exhibit 50.

Remedies – can Laurel Star now seek an unpleaded remedy?

[60] In its claim and in its last statement of claim, Laurel Star sought damages for the defendants' misleading or deceptive conduct. It also sought declarations that the contracts "have been validly terminated" - which, of course, the Court of Appeal has determined against it – and orders for the return of its deposits and damages. Mrs Marburg sought an order under s 237 of the ACL that the guarantees of Laurel's Star's obligations that she had given were void and unenforceable. Laurel Star did not seek such an order under s 237 concerning the contracts generally.

[61] In the parties' closing submissions at the conclusion of the original trial, neither party addressed the rescission or non-enforcement of the contracts or the guarantee, except that the defendants submitted that the declarations sought were unnecessary so the court should not make them. Laurel Star sought damages, as well as the return of the deposits. The plaintiffs did not cavil with the defendants' submissions on the relief to be granted, including damages. Rather, they agreed that the relief should be damages in the amount contended by the defendants. Ultimately, the parties also agreed with the form of the other orders concerning the release of the deposits.

[62] However, although the plaintiffs did not, in their pleadings or at the conclusion of the trial, seek an order declaring the contracts void, in the further submissions provided to me by the plaintiffs' solicitors on the remittal, they submitted that an award of damages would not compensate the plaintiffs adequately. Rather, in addition to damages the court should order, under s 237 of the ACL, that the contracts be declared void *ab initio*, which (they submitted) is the only way to ensure a fair result.[40]

[63] Thus, the first question to resolve is whether it is open to Laurel Star now to seek this new relief, even though it did not seek it at any earlier stage of the proceeding, including in their earlier submissions to the court.

[64] The defendants submitted that, as Laurel Star did not seek an order for rescission (or a declaration of invalidity) of the contracts at any earlier time in the proceeding, it should not now be permitted to seek such an order. Rather, if the plaintiffs succeed in their claim that the defendants had engaged in misleading or deceptive conduct, any relief for Laurel Star should be restricted to damages, as sought in the claim and statement of claim.[41] They accept that, if I find for Mrs Marburg on the claim for misleading or deceptive conduct, the appropriate order in her favour is to set aside her guarantees.[42]

[65] As the proceeding has been remitted to this court for determination of the remaining issues in the proceeding, what is now before me and the parties is a continuation of the trial, though interrupted by final orders that have now been set aside.[43] The remitted hearing should be conducted on the basis that it is a continuation of the original trial, "where the parties can only mend their hand or change course in

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40 Plaintiffs' submissions on remittal, [18]-[36].

41 Defendants' submissions on remittal, [3], [12].

42 Defendants' submissions on remittal, [21].

43 *Community and Public Sector Union v Telstra Corp Ltd (No 2)* (2001) 112 FCR 324, [2001] FCA 479 (***CPSU v Telstra***), [15]. The principles applying on a remitted trial were helpfully set out by Jackson J in *Harvard Nominees Pty Ltd v Tiller (No 4)* (2022) 403 ALR 498, [2022] FCA 105 (***Harvard Nominees***), [43]-[51].

accordance with well known rules."[44] The situation before me is therefore akin to a plaintiff, after the evidence has all been called, seeking different relief from that set out in its claim and statement of claim. In such a case, a court will not normally prevent a plaintiff from seeking additional or alternative relief if that can be done without prejudice to the defendant and the relief sought is consistent with the manner in which the trial was conducted.[45]

[66] This principle has been approved in many instances where a court has been asked to grant relief that was not pleaded (and sometimes was not even sought by the relevant party). If relief other than that sought in the pleadings is appropriate and is open on the pleaded facts (or on the facts elicited at trial, whether or not pleaded), the court may grant that relief, provided that the other party is not prejudiced by the first party's failure to plead the relief. Rules 156 and 658 of the *Uniform Civil Procedure Rules* 1999 make this clear, as have a number of cases in which relief other than that claimed by a party was granted by the court.[46]

[67] The defendants do not contend that they would be materially prejudiced (nor indeed, prejudiced at all) by the late claim to void the contracts. They have not suggested that, had they known of it before or during the evidence, they would have called any different witnesses or tendered any different documents or they would have asked additional (or fewer) questions of the witnesses called. Indeed, far from being prejudiced, they anticipated such a claim for relief in their original submissions about the plaintiffs' ACL claim and contended simply that the claim was not made out because of alleged "deemed admissions" of allegations in the defendants' defence to which, the defendants contended, no sufficient denial was pleaded in the plaintiffs' reply.[47]

[68] In the circumstances, it is open to Laurel Star now to seek an order under s 237 of the ACL declaring the Rent Roll Contract void.

Remedies – rescission of contracts and damages

[69] The plaintiffs' solicitors, in their submissions on the remittal, relied extensively on the principles regarding the grant of rescission[48] for breaches of the ACL as recently summarised by Jackson J of the Federal Court of Australia.[49] I adopt those principles, with respect, without repeating them here.

[70] The plaintiffs submitted that, applying those principles, rescission of both the contracts is appropriate in this case. Their solicitors submitted:[50]

> The business was a repository of hope for their retirement, entered into because of the very features that were made out in the Representations. Instead they

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44 *CPSU v Telstra*, [17]; approved in *Fernando v Commonwealth* (2014) 231 FCR 251, [2014] FCAFC 181, [52]-[53].

45 Analogously with the long-standing reasons of Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700, 710; affirmed in *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146, 154 and more recently applied in *Barker v Linklater* [2008] 1 Qd R 405, 421 [54].

46 For example, *Coppo v Banalasta Oil Plantation Ltd; Borg v Pawski* [2005] QCA 96, [30]; *Strong Wise Ltd v Esso Australia Resources Pty Ltd (No 2)* (2010) 185 FCR 237, [62]-[63]; on a slightly different, but analogous, point, *Macks v Viscariello* (2017) 130 SASR 1, [109]-[112].

47 Defendants' closing submissions, [36]-[38].

48 A term that I infer means an order declaring them void.

49 *Harvard Nominees*, [73]-[88].

50 Plaintiffs' submissions on remittal, [27], [30].

> found that what they were purchasing was in fact riddled with errors and issues which would hang as an albatross around their neck were they to complete and would sour what was supposed to be a straight forward business to support them in their retirement. … [T]o leave the plaintiffs without the remedy of rescission, and merely to order damages … would be to condemn the plaintiffs to a continuation of a sale transaction that was tainted from the outset with the fundamental misrepresentations.

[71] Of course, as Babstock terminated the contracts for the plaintiffs' repudiation shortly after the latter occurred, the plaintiffs are not now "condemned to a continuation of a sale transaction." However, the plaintiffs submit that in one sense they are still so condemned because, unless the contracts are rescinded from their inception, the plaintiffs will now be liable to the defendants in damages for breach of the contracts. The avoidance of the contracts would relieve the plaintiffs from liability to the defendants that arises only from contracts induced by the defendants' misleading or deceptive conduct: a continuing albatross around their necks (unless any liability of the plaintiffs to the defendants under the counterclaim would comprise part of the plaintiffs' damages as a result of the defendants' misleading or deceptive conduct).

[72] The facts in this case are different to those in *Harvard Nominees* and the other cases to which Jackson J referred at [78]ff. In some of those cases the contract remained on foot during the dispute. Here, of course, the contract was terminated by Babstock in May 2018,[51] at which stage it retook possession of the business. The relevance of this is that, if I were to find that rescission *ab initio* was appropriate, it would not result in substantial practical difficulties for the parties in having to deal with the consequences of a long-standing contract.

[73] Although it did not form part of the relief sought by Laurel Star in the statement of claim, I consider that an order declaring the contracts void *ab initio* because of the defendants' misleading or deceptive conduct would be the simplest solution and is merited in the circumstances. I am satisfied that the plaintiffs would not have entered into the contracts and the guarantees if they had been told that a considerable number (over 12% and possibly up to 20%) of the ECRs had not been completed and signed correctly, as they wanted a business that was likely to be trouble free. In that case, Laurel Star would not have become liable for breach of the contracts by attempting to terminate them upon discovering that what they had been told was materially wrong and, in the case of Mrs Marburg, she would not have become liable under her guarantees. As they relied on the defendants' misleading or deceptive conduct in making and continuing with the contracts until they attempted to terminate them, I consider it appropriate that the contracts be declared void *ab initio*.[52] Such a declaration will compensate the plaintiffs for and reduce their loss, particularly by avoiding liability for breach of the contracts and under the guarantees. To put it in terms expressed by Jackson J, there is:

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51 The Court of Appeal held that Laurel Star did not validly terminate the Rent Roll Contract: CA reasons, [40]. Consequently, its attempted termination was a repudiation of the contracts and Babstock terminated both contracts for Laurel Star's repudiation on 18 May 2018: primary reasons, [21].

52 Under ss 237 and 243(a)(i) of the ACL.

> utility in relieving the purchasers *ab initio* from the transaction in which their hopes and expectations had been formed in the past as a result of misleading conduct and since dashed.[53]

[74] The order on which I have settled is simple. It has the same result as if I had considered the counterclaim, determined damages on the counterclaim and then determined that the liability for those damages was a consequence of the defendants' conduct and should therefore form part of the plaintiffs' damages. That would, in my view, be a reasonable conclusion to draw, as the plaintiffs would not have been in the position of being bound by (and breaching) contracts to buy a business and a rent roll that were not in accordance with their understanding: an understanding that resulted from misleading or deceptive conduct by the defendants. This is especially so when their attempt to terminate the contracts (that constituted breaches of the contracts) was, at least in substantial part, engendered by their discovery that what they had been told about the rent roll was wrong in material respects. That connection between the misrepresentation and the plaintiffs' liability for breach of the contracts gives the result that the loss comprising that liability was materially contributed to by the defendants' conduct in breach of the ACL.[54] That being the case, any liability of the plaintiffs on the defendants' counterclaim for breach of the contracts would be causally connected to (and a result of) the defendants' original misleading or deceptive conduct, on which the plaintiffs had relied in making the contracts.

[75] It is perhaps relevant to note that equity takes a similar view, in sometimes not enforcing a party's right to damages for breach of contract by the other party who was induced to enter the contract by the first party's misrepresentation.[55] The principles developed in equity are relevant to the exercise of the statutory discretion to make orders in the nature of rescission under s 243 of the ACL.[56]

[76] The defendants submitted that I should not consider that any liability of Laurel Star for damages on the defendants' counterclaim should be treated as part of Laurel Star's loss under the ACL. First, they submit, Laurel Star did not claim any such liability as a loss to it caused by the defendants' breach of the ACL. Secondly, if it were, then CRESQ and Mr Marburg would be concurrent wrongdoers who should be wholly liable for Laurel Star's loss because they did not undertake a proper due diligence. If they had, then the buyer could have terminated the contracts under the due diligence clause.

[77] As to the first submission, I do not consider it to be an obstacle to making an award of damages that would do justice between the parties. The factual issues have been fully explored in evidence. As I have said, justice demands that the plaintiffs' loss be properly compensated and they would not have been liable to the defendants if they had not made the contracts in reliance on the defendants' conduct in breach of the ACL.

[78] As to the second submission, Mr Marburg did not conduct the due diligence, so he could have no liability as a concurrent wrongdoer. CRESQ certainly did not conduct

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53 *Harvard Nominees (No 4)*, [84]. Mr and Mrs Marburg's hope and expectation were that they would acquire a business that had been well run in compliance with the law and would be easy to operate.

54 Cf *Gardner Corporation Pty Ltd v Zed Bears Pty Ltd* [2003] WASC 13, [93].

55 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, [25], referring to *Redgrave v Hurd* (1880) 1 Ch D 1, 12-13.

56 *Harvard Nominees Pty Ltd v Tiller* (2020) 282 FCR 530, [96] (Full Court).

a proper due diligence investigation and it did not report the correct facts to the plaintiffs. However, its conduct did not contribute to the plaintiffs' loss (and their liability to the defendants) in any substantial way: it would be wrong, in my view, to hold that, because CRESQ did not discover the deficiencies in the ECRs, they caused or contributed to the plaintiffs' liability to the defendants for the subject of the counterclaim, which arises from their subsequent attempt to terminate the contracts when they discovered the truth.

[79] Therefore, had I decided not to declare the contracts void, I would have held that any liability of the plaintiffs' to the defendants on the counterclaim, for breach of the contracts and under the guarantees, was a consequence of entering into and continuing with the contracts and the guarantees in reliance on Babstock's misleading or deceptive conduct. In that case, the plaintiffs' liability (if any) in damages to the defendants was a consequence of the defendants' wrongful conduct. The result would be that the plaintiffs would have been entitled to additional damages equal to that liability.

[80] Such a conclusion on the parties' respective entitlements to damages would result in the defendants not receiving any of the damages which they would otherwise be awarded on their counterclaim and the plaintiffs effectively being relieved of that liability and receiving the amount of their loss as damages on their claim, as it would be appropriate that any award on the counterclaim be set-off against an award on the claim:[57] that is, the same result would occur as is achieved by simply setting aside the original contracts. As I have said, I find the latter to be the appropriate relief.

[81] But in any event, even if I were not to set aside Laurel Star's contracts because that relief had not been claimed in the proceeding, Mrs Marburg's claim to avoid the guarantees would remain – and was always claimed by her. I have found that she gave the guarantees in reliance on the defendants' misleading or deceptive conduct. I consider that the appropriate remedy for her is to set aside the guarantees by an order that they be void *ab initio*. Indeed, the defendants accepted that, if Mrs Marburg were to succeed on her claim for misleading or deceptive conduct, the guarantees should be set aside.[58] The same can be said for Laurel Star's contracts.

[82] I shall therefore order that the Rent Roll Contract and the Business Contract, including Mrs Marburg's guarantee under each contract, be deemed void *ab initio*.[59]

[83] In addition, I shall make again the orders that I made on 3 December 2020 for judgment for damages of $42,844.86 payable to Laurel Star and for the return of the deposit under the Rent Roll Contract ($41,500). The deposit under the Business Contract has been dealt with by the Court of Appeal's orders.[60]

The counterclaim

[84] Given my conclusion on the defendants' liability for their misleading or deceptive conduct and that the appropriate remedy is to declare the contracts void *ab initio*, it is strictly unnecessary to consider the defendants' counterclaim. However, it is

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57 See, for example, the interlocutory view of Carr J to this effect in *Lean v Tutmut River Orchard Management Ltd* [2003] FCA 269, [61].

58 Defendants' submissions on remitter, [21].

59 Although the Business Contract was dealt with by the Court of Appeal, for completeness and full clarity it seems to me appropriate now to deal with it in the same manner as the Rent Roll Contract.

60 As explained by that Court in the CA reasons, [53].

appropriate to do so on the assumption that I did not make such an order, so the contracts remained on foot until terminated by Babstock for Laurel Star's repudiation.

[85] The Court of Appeal held that the defendants did not breach the contracts. In that case, by purporting to terminate them, the plaintiffs repudiated them. The defendants at first sought to enforce them but, in the face of the plaintiffs' continuing repudiation, the defendants ultimately accepted that repudiation and terminated the contracts. It remains, therefore, to determine what relief should be granted to the defendants for those breaches.

[86] As the defendants did not appeal the orders concerning the Business Sale Contract, it is not appropriate to order any relief in respect of that contract. Indeed, to do so would be inconsistent with the extant order requiring repayment to the first plaintiff of the deposit under that contract. I shall therefore consider only the claims under the Rent Roll Contract.

[87] The defendants sought payment of the balance of the deposit under Rent Roll Contract ($41,500), damages of $80,581.40 for lost income (by way of incentive discounts made to landlords in order to retain their custom) and damages of $79,799.96 for loss of the capital value of the rent roll.

[88] These claims were made by both the first defendant and the second defendant (**WAG**) because the contracts were made by the first defendant as agent for WAG. The plaintiffs did not dispute that WAG is an appropriate claimant on the counterclaim, as well as Babstock.

[89] The plaintiffs accepted that, if either defendant succeeded on the counterclaim, it is entitled to be paid the balance of the deposit. However, they dispute the claims for the incentive payments and the alleged loss of capital value. The plaintiffs submitted that the only order that should be made in the defendants' favour if they succeed on the counterclaim is for the balance of the deposit on the Rent Roll Contract.

The incentive payments

[90] When the contracts were terminated, Babstock continued to manage the rent roll. However, it was unable to continue to operate from the office in Bellbowrie where it had previously operated, as the office was no longer available. The defendants' director, Mr Kenman, also said that it had an agreement to operate as a franchisee of LJ Hooker in another location, which required that they no longer operate in that area.[61] Upon taking back control of the rent roll, Babstock managed it from another office that it had, in Graceville.

[91] Ms Satherley gave evidence that these circumstances caused two problems in retaining the business of the landlords on the rent roll. First, most of them had previously been managed by a company trading as Ray White until Babstock bought the rent roll from that business. They were told that the Marburgs were to take over management of the properties and then they were told that that arrangement was not to proceed. Ms Satherley said that those events would indicate to landlords an

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[61] T3-30:35-39; T3-88-89. The agreement was not in evidence, so Mr Kenman's evidence about it was hearsay, but the plaintiffs' counsel did not object to him stating its effect.

instability in the management of the properties, which may cause some to move their management agreements to another real estate agent.

[92] The second problem, Ms Satherley said, was that some landlords preferred to have their properties managed by a real estate agent in the local area. As Babstock could no longer operate from the area, some landlords may wish to change to a local agent.

[93] Mr Kenman gave similar evidence.[62]

[94] Ms Satherley and Mr Kenman said that they discussed what to do to reduce any landlords' potential dissatisfaction with continuing to retain Babstock as their agent in these circumstances. They decided to offer an incentive to all landlords to stay with them, by offering not to charge a management fee on rent received for one month and not to charge a letting fee for the next new tenancy agreement. They did not offer the incentive only to landlords who indicated that they might leave, but to all landlords, in an attempt to ensure that the landlords continued to use their services for a period in which they may become comfortable in continuing further.[63]

[95] Exhibit 86 was prepared by staff of Babcock under the supervision of Ms Satherley. It is a list of the properties then being managed by Babstock, showing the weekly rent and the value of one month's management fee for each property. It does not take into account any future letting fees. The management fees total $19,102.40. Ms Satherley gave evidence that it represented the management fee component of the incentive offered to all landlords.

[96] The first thing to note about this figure is that the incentives did not total the claimed amount of $80,581.40. That figure is the total of the weekly rent on the properties and the management fee payable on that rent. The defendants did not lose the rent, but only the value of the management fees. Therefore, this component of their claim only amounts to $19,102.40.[64]

[97] The plaintiffs submitted that it was unnecessary for the defendants to offer the incentives, nor did the evidence demonstrate a causal connection between the plaintiffs' breach of the contracts and the need to offer the incentives. They also submitted that the need to move the management of these properties to another office was not caused by the plaintiffs' conduct but was the result of an unrelated contractual obligation owed by the defendants to another company. The offer was not a reasonable attempt to mitigate the defendants' loss, especially in the absence of expert evidence that it was necessary or appropriate in the circumstances.

[98] A party to a contract that has been breached by the other party is under a general obligation to take reasonable steps to mitigate its loss caused by the other party's breach. It is for the non-breaching party to decide what steps (if any) it can and should take in that endeavour, provided that it acts reasonably in doing so. Even if it turns

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62 Ms Satherley's evidence was at T3-118-119. Mr Kenman's evidence was at T3-45-47 and T3-90-94.

63 Ms Satherley at T3-119 to T4-2-3; Mr Kenman at T3-45-46. The offer was made to landlords in writing: exhibit 77.

64 I note that neither party drew this discrepancy to my attention.

out that the steps taken in fact increased the plaintiff's loss, it remains entitled to recover the costs of that attempt provided that it was reasonable.[65]

[99] If Laurel Star had not repudiated the Rent Roll Contract, the defendants would not have been faced with the possibility that, because they were no longer operating in the area and because of the uncertainty and instability in management that the changes of anticipated management may have caused, landlords would terminate their management agreements. They faced those circumstances because they were unexpectedly put in the position of continuing to manage the rent roll. Mr Kenman and Ms Satherley explained the rationale behind their decision to offer the incentives. I consider that it was a reasonable decision in the circumstances. I do not consider it necessary for the defendants to have called an independent expert to prove the reasonableness of the decision.

[100] Therefore, I accept that the total value of the incentives, in the amount of $19,102.40, comprised a loss to Babstock caused by Laurel Star's breach of the contract.

Capital value of lost landlord agreements

[101] Despite offering the incentives to landlords, some landlords terminated their letting agreements with Babstock. Ms Satherley gave evidence about the circumstances in which the agreements were terminated. Most of the landlords apparently told her (or told another employee, who told her) that they preferred to deal with a local agent or they had decided to manage the properties themselves now that Babstock was not operating in the area.[66]

[102] Notwithstanding her evidence, it is not clear, in my view, that several of the landlords would have continued to use Babstock for their ongoing rental management for much time, if at all, even if Babstock had continued operating in the area. For example, the owner of a property in Church Road, Bellbowrie, was proposing to occupy the property in the near future and the owner of a property in Weekes Road, Bellbowrie, had decided to sell the property. She also said she wanted to keep the costs down for the tenant and manage the property herself in the meantime.[67] The owner of a property in Essendon Road, Anstead, told Ms Satherley that he was not happy with Babstock's service and, as Babstock was moving, he would transfer to an agent who had been seeking his custom for some time.

[103] Exhibit 85 is a bundle of emails exchanged between a number of landlords and Babstock about the termination of the management agreements. It is apparent from some of those emails that some landlords had various reasons for terminating their agreements, not all of which arose from the changes of proposed management or Babstock's move from the area.

[104] I do not accept that all the lost management agreements arose from the issues the subject of this proceeding. The three particular properties to which I have referred

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65 *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, 506; *Motor Yacht Sales Australia (t/as The Boutique Boat Company) v Cheng* [2021] NSWSC 1141, [172]-[175]; *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* [1976] 1 NSWLR 5, 9; *Segenhoe Ltd v Akins* (1990) 29 NSWLR 569, 582; *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603, [134].

66 This evidence was, of course, hearsay (or in some instances hearsay on hearsay), but no objection was made to it.

67 Email from the owner to the defendants contained in exhibit 85.

above had little or no capital value in their circumstances. Of the others, the capital value claimed must be discounted to take into account other reasons why the landlords terminated their agreements, or may have later done so for unrelated reasons. Also, some did not terminate their agreements until March 2019 or later, which distances them to a considerable extent from the events in early to mid-2018.

[105] Exhibit 87 is a schedule listing 14 lost letting agreements. It shows the weekly rent, the agreed management rate and the yearly income to the rental manager for each property. It then calculates the capital value of the rental by multiplying the annual income by 3.1. Ms Satherley said that she checked the figures for the weekly rent, management fees and annual income. Neither she nor any other witness gave evidence about the calculation of the capital value.

[106] The method by which the capital value was calculated (annual management fees x 3.1) was, in fact, the method by which, under the Rent Roll Contract, the purchase price was to be determined.[68]

[107] The plaintiffs submitted that this part of the defendants' claim should be rejected because it was not causally connected with Laurel Star's breach, the value of a management agreement is evanescent as it can be terminated at any time on 30 days' notice, the defendants would probably have lost these agreements anyway because they were contractually bound to move from the area and there is no expert evidence to establish the capital value claimed.

[108] Not only the defendants, but also the plaintiffs did not call expert evidence of the commercial value of rental management agreements such as these. In the absence of any such evidence, the best evidence before the court is that of the contract itself, as that contract was negotiated between arm's length commercial parties, who agreed that an appropriate price for the rent roll was the annual income under each agreement to be transferred to the buyer, multiplied by 3.1.

[109] In any event, exhibit 99 is a bundle of correspondence between the parties' solicitors in which, among other things the plaintiffs' solicitors said the plaintiffs did not dispute the method of calculation of capital value of the letting appointments alleged to have been lost. They did dispute that 14 appointments were lost or that any loss was caused by the plaintiffs' conduct.

[110] However, as I have said, that capital value should be discounted for other reasons, particularly that I am not satisfied that the full value was lost in all cases as a consequence of the plaintiffs' conduct. Also, the three properties to which I have referred above were not lost because of the plaintiffs' breach. Taking into account those facts, I would not allow any sum for those three properties and the capital value of the remainder should be discounted by one third. That results in a loss of $43,633.83.

Conclusion on counterclaim

[111] I find that the counterclaim fails as a consequence of my order declaring the contracts and the guarantees void *ab initio*.

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[68] Definitions of "Income", "Purchase Price" and "Supply Right Factor" and item 6 in the schedule.

[112] Had I not made that order, I would have found that the defendants were entitled to damages on their counterclaim in the total sum of $62,736.23.

[113] However, I have also found that the plaintiffs were placed in the circumstances in which they decided that they did not want to proceed with the contracts and purported to terminate them, because they had entered into the contracts and did not terminate them under the due diligence clause, in reliance on the defendants' misleading or deceptive conduct. The result is that they have become liable for breach of the contracts as a consequence of that reliance. Therefore, their liability to the defendants on the counterclaim is a loss arising from the defendants' misleading or deceptive conduct, for which the defendants are liable to compensate them by way of damages. The plaintiffs' liability to the defendants on the counterclaim should be set off against the defendants' liability to the plaintiffs (which includes the plaintiffs' liability on the counterclaim), so the defendants are not entitled to recover their loss.

[114] I shall therefore dismiss the counterclaim.

Result

[115] The result is that I shall order that each of the Rent Roll Contract and the Business Contract be declared void *ab initio*, the defendants pay Laurel Star the balance of the deposit on the Rent Roll Contract ($41,500) and the defendants pay the plaintiffs damages for breach of the ACL, in the sum of $42,844.46.

[116] In their statement of claim, the plaintiffs seek interest on the deposit at 15% per annum. However, in their submissions in the original trial, they agreed with the defendants' submissions on damages, which included that no interest should be awarded. There is therefore no need to award interest on the plaintiffs' loss.

[117] The counterclaim will be dismissed.

Costs

[118] The Court of Appeal ordered that the costs of the proceeding be determined again in the remitted proceeding.

[119] I see no reason, at present, why I should not make the same order as to costs as I made on the first occasion. However, the parties may be aware of matters bearing on costs other than those before me on that occasion. I shall therefore give them the opportunity to make submissions for a different order but, if no such submissions are made within 14 days, an order to the same effect will prevail. To be clear, the costs of the proceeding include the costs of the counterclaim.