SUPREME COURT OF QUEENSLAND

CITATION:	*Silkzoom Pty Ltd v Property Shop Port Douglas & Ors* [2010] QSC 343
PARTIES:	**SILKZOOM PTY LTD (ACN 061 483 967)** (Plaintiff) v **PROPERTY SHOP PORT DOUGLAS PTY LTD (ACN 088 457 596)** (First Defendant) **MARGARET SHARON CHARNLEY** (Second Defendant) **ALAN RYAN CROSSMAN** (Third Defendant) **ROBERT PALETHORPE** (Fourth Defendant)
FILE NO/S:	414 of 2006
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	10 September 2010
DELIVERED AT:	Cairns
HEARING DATE:	2-5 August 2010
JUDGE:	Jones J
ORDER:	**1. Judgment for the plaintiff against the first and second defendants in the sum of $41,035.76 together with compound interest on that sum at 5% per annum from 2 May 2006 to 10 September 2010.** **2. The plaintiff's claim against the fourth defendant is dismissed.** **3. Parties are allowed 21 days within which to make submissions on the question of costs.**
CATCHWORDS:	CONTRACT LAW - misrepresentation – misleading and deceptive conduct – scope of solicitors retainer – credibility of witnesses – whether there was a breach of duty on behalf of the solicitor – whether there was misrepresentation or misleading and deceptive conduct on behalf of the first and second defendants – whether the first and second defendants failed to qualify representations regarding their expectations for transfer of agent's appointment – whether there was a

failure by the first and second defendants to use their best endeavours to facilitate the sale

Property Agents and Motor Dealers Act 2000 (Qld)
Trade Practices Act 1974 (Cwth)

Roads and Traffic Authority (NSW) v Dederer [2007] 234 CLR 330
Kekatos v Samson [2009] NSWCA 171
Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177
The Queen v Credit Tribunal ex parte *General Motors Acceptance Corporation* [1977] 137 CLR 545
Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd 79 ALJR 83
Transfield Proprietary Limited v Arlo International Limited [1979-1980] 144 CLR 83
Hospital Products Ltd v United States Surgical Corporation [1984-1985] 156 CLR 41

COUNSEL:	Mr F G Forde for the plaintiff Mr M Jonsson for the fourth defendant
SOLICITORS:	Williams Graham Carman Solicitors for the plaintiff Miller Bou-Samra Lawyers for the fourth defendant

[1] The plaintiff corporation is a licensed real estate agent carrying on business in Port Douglas in the State of Queensland. On or about 10 April 2006, it agreed to purchase from the first defendant what was effectively its goodwill in a rent roll management of certain tenanted properties on behalf of the respective owners (the landlords). The properties were identified on a rent roll maintained by the first defendant and consisted of residential and commercial properties located in Port Douglas and in Mossman. The right pursuant to which a real estate agent manages properties is controlled by various provisions of the *Property Agents and Motor Dealers Act* 2000 (Qld) (hereinafter "PAMDA") and is dependant upon having an appointment to do so from the property owner. The form of the appointment is prescribed (Form 20a). The relevant forms are referred to throughout the evidence as "authorities".

[2] The second defendant ("Mrs Charnley") is a director of the first defendant and was the person mainly responsible for negotiating the sale on behalf of the first defendant. The first defendant was at the relevant time carrying on the business of Ray White Real Estate agency at three different locations in Port Douglas and in Mossman. As part of the business the first defendant managed a rent roll of 140 properties situated in these areas.

[3] The third defendant is a licensed real estate agent. The plaintiff alleged that he breached the terms of a confidential agreement which the third defendant had entered into with the first defendant. The plaintiff has compromised its claim against the third defendant by accepting from him the sum of $35,000. The third defendant gave evidence at the hearing but has no interest in the outcome of this trial.

[4] The fourth defendant ("Palethorpe") is a solicitor who was retained by the plaintiff to give advice to it in relation to the contract for its purchase of the rent roll. The scope of the retainer is in dispute as indeed is the issue of whether the fourth defendant breached any duty arising from his acceptance of that retainer.

Background facts

[5] On or about 7 February 2006, the plaintiff company purchased the business of Vista Real Estate at Port Douglas from a company, Tinwest Pty Ltd.[1] The principal actor on behalf of the plaintiff company is its director, Dante Di Salvo ("Di Salvo"). Prior to that date, he had had considerable experience in business matters. He worked for Westpac Bank for a number of years, ultimately in a managerial role associated with property loans. After leaving the bank he and his wife, Laura Di Salvo, ran successful newsagency businesses in Rockhampton and later in Port Douglas.

[6] At the time of the plaintiff's purchase of Vista Real Estate neither Di Salvo nor Mrs Di Salvo had the necessary real estate agent licence to allow them or a company under their control to conduct a real estate agency. To meet the statutory requirements of s 54 of PAMDA, Janelle Cole, a principal of Tinwest Pty Ltd, agreed to act as a director of Silkzoom Pty Ltd until Di Salvo gained the qualifications and obtained a real estate agent licence. The events with which this case is concerned occurred before he obtained that licence.

[7] I regard Di Salvo as being well equipped to run successfully a real estate business but it is clear that he had no actual prior experience in purchasing a rent roll apart from the inclusion of a rent roll as part of the transfer of the business of Vista Realty. That particular transfer did not occasion any significant change for either the landlords or the tenants who were listed on the roll. The transaction simply required a change of the corporate entity trading as Vista Realty. That contract nonetheless provided for special provisions relating to the rent roll. It had a claw back provision such that the loss of any property owner's authority (slippage) would result in a deduction from the purchase price. As well, the contract provided for the sum of $15,000 to be retained from the settlement to cover any such eventuality. As it happened, there was no slippage[2] and therefore no resort to the claw back and retention provisions.

[8] In March 2006, Janelle Cole became aware that the second defendant wanted to sell the Ray White agency and suggested to Di Salvo that the plaintiff should acquire it. In order to view the relevant records of the business, Ms Cole on behalf of Di Salvo signed a confidentiality agreement dated 11 March 2006.[3] After some consideration, Di Salvo decided not to proceed with the purchase.

[9] At about the same time the third defendant, Mr Crossman, was also considering whether to purchase the business. He too signed a confidentiality agreement with the first defendant. The issue for him was his capacity to finance the price for the whole of the business. Instead he offered to purchase part of the business excluding the subject rent roll.

[10] The first defendant was then anxious to find a buyer for the rent roll which was being offered at a price of $467,000 based upon a $2.50 mark-up for each $1 commission

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1 Ex 1 pp 62-99
2 T1-12/40
3 Ex 1 pp 5-8

received. Janelle Cole suggested to Di Salvo that the plaintiff should purchase the rent roll. Di Salvo was only prepared to consider a mark-up of $2.30 which calculated a rounded up price of $430,000[4].

[11] To pursue discussions, a meeting was arranged between Mr and Mrs Di Salvo, Janelle Cole and Mr and Mrs Charnley. This took place on either 8 or 9 April 2006. There are differing recollections as to whether the meeting was held during the morning or in the afternoon and there are differing recollections as to the calculation approach by which the final price of $415,000 was arrived at. Mr Di Salvo says that the reduction of $15,000 in price was to compensate for Mrs Charnley's insistence that there would be no retention from the sale price.[5] Mrs Charnley says there was an initial offer of $435,000 and a reduction of $20,000 because Mr Crossman would not agree to any restraint of trade. It is probable that both topics were discussed during the meeting. Essentially, each topic related to the same thing – the security of the rent roll. In the upshot nothing turns on this difference because, on 10 April 2006, the parties signed a written contract of sale which embraced the terms agreed between the parties as is evidenced by the separate handwritten notes made by Ms Cole and Mrs Charnley.[6] Significantly the terms were to include "cash unconditional, no finance no retention". These notes also set out an action timetable for the completion of the transfer which was to occur on Monday, 15 May 2006[7].

[12] Meanwhile on 11 April 2006, the first defendant and Mr Crossman executed a contract of sale for the remaining Ray White Real Estate agency business for a price of $435,000. A short time later Crossman indicated to Mrs Charnley that he would not be able to complete the transaction at that price. The first defendant again sought, through Janelle Cole, to interest Mr Di Salvo in purchasing the entire Ray White agency business but he was not prepared to reconsider. The first defendant and Mr Crossman ultimately agreed upon terms reflected in the contract of sale as amended on 21 April 2006.[8]

[13] The contract of sale of the rent roll was drawn up by the first defendant's solicitors, Paul Siemon. The plaintiff at the meeting had nominated Palethorpe as its solicitor for the transaction. The contract document was sent to Palethorpe on 10 April 2006.

[14] Palethorpe and Mr Di Salvo were well acquainted. Quite apart from their interaction in relation to the Tinwest contract, Palethorpe was customer of Di Salvo's newsagency and they met on a regular basis for morning coffee. Palethorpe had some experience in the transfer of rent rolls, having been involved in some 12 such transactions prior to this time. I accept that he was well aware of the risk of slippage and of the appropriate means by which a purchaser should be protected against such risks. He was in fact the author of the Tinwest contract in respect of which Di Salvo had the benefit also of being advised by a different experienced solicitor.

[15] Palethorpe received the unsigned contract directly from Paul Siemon. He received a phone call from Di Salvo in the morning confirming that Di Salvo wished him to act on behalf of the plaintiff and fixing the time to meet later that afternoon. Palethorpe

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4 [Factors affecting the choice of a mark-up figure are referred to in the report of Paul Brooks – Ex 2 at Annexure 6]

5 T2-87/10

6 Ex 1 pp 9-30

7 Ex 1 pp 100-101

8 Ex 1 pp 31-36

said that when he perused the subject contract he was immediately concerned about its inadequacy to guard against the risk of slippage. He made a handwritten list at the time which is in the following terms:-

> " 10/4/06
> 1. Non compete. 3 yrs 10 K
> 2. What about claw back
> 3. No finance
> 4. 15th May
> 5. integrity of roll. Who has it
> What protection"

Item 4 was a note of the intended settlement date. Items 1, 2 and 5 I accept are manifestation of Palethorpe's concerns about the lack of protection against slippage.

[16] The contracting parties assembled at Palethorpe's offices in the afternoon of 10 April 2006. There are some differences in recollections as to what was said and as to the terms of any advice given by Palethorpe to Di Salvo. Both Palethorpe and Mrs Charnley say the discussion took the form of Palethorpe voicing his concerns about slippage to the contracting parties. In the course of so doing he says he was advised that allowance for such risks had been made in the purchase price, that the contract reflected the terms agreed upon and that Mrs Charnley would not accept any change to them.[9] Di Salvo denies that Palethorpe raised any concerns about the guarantee of the rent roll, absence of claw back and retention.[10] He agreed that he told Palethorpe there was an adjustment in price to allow for a drift in the listings (i.e. slippage)[11] and he mentioned the amount of $15,000. Palethorpe said that the specific amount of the allowance was not stated. The only contemporaneous note of the discussion was made by Palethorpe after the meeting. That note reads:-

> "Attending Davey, Margaret and Chris to sign ….
>
> I asked Davey re spillage provision. He said they had allowed for this in the price.
>
> I asked Margaret about the integrity of the rent roll. She said that no one else had `it.
> She said it was on a separate computer in her office and that the ….staff did not have access to it.
>
> I made it known to her that I was concerned about its integrity because rent rolls were so easy to steal."[12]

[17] Whatever were the terms of the discussion at that meeting, they constitute the only advice given to the plaintiff about the contract. The outcome turns on the credibility of Di Salvo and Palethorpe to which later reference will be made.

[18] The period after the contract was signed was marked by delays in providing notices to landlords and securing executed forms 20a as required by PAMDA. The relevant forms were not, in fact, posted out to landlords for execution until 29 April 2006, a Saturday of a long weekend. Various explanations have been given for this delay, e.g.

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9 Di Salvo T1-28/50, 1-33/20; Charnley 3-19/40 et sec, 3-21/10; Palethorpe 3-59/30 et sec
10 T1-61/30
11 T1-61/55
12 Ex 1 p 169

incompatibility between the Ray White and Vista computers, lack of cooperation between the staff of the two agencies and the unavailability of certain forms. These issues do not require a specific determination by me. But the fact is that there was a serious delay which was known to the parties and which may well have justified extending the date for settlement. Somewhat surprisingly, what happened instead was that the contracting parties agreed to abridge the time for settlement. This occurred in the context of a meeting between Di Salvo and Mrs Charnley on 25 April 2006. By this date the first defendant had an unconditional contract for its sale of the agency business to Crossman.

[19] The problems for the plaintiff in agreeing to this change of settlement date without having the landlords' authorities are obvious. The problems were compounded by the fact that two members of the first defendant's staff who had the confidence of the landlords, elected to continue their employment in the Ray White agency rather than moving to the plaintiff's Vista Realty agency. The restraint clause in the Crossman contract prevented Mrs Charnley from continuing to engage in real estate activities after the date of its completion and she had to vacate the office where the rent roll business had been administered.

[20] The plaintiff's decision to abridge the time for completion and not to pursue the engagement of these two staff members were commercial decisions. The plaintiff also decided not to establish an office in Mossman where the tenants were accustomed to paying their rent. Di Salvo was advised that this might cause concern for some landlords and this concern was well founded. These commercial decisions were made by Mr Di Salvo for reasons he explains but there is little doubt those decisions adversely affected the decision of a number of landlords whose properties were on the list.

[21] The full impact of the landlords' responses to the notification of the proposed sale of the rent roll was not known by the time the settlement took place on the Tuesday, 2 May 2006 following the long weekend.

[22] On that day Di Salvo rang Palethorpe with a query about what he (Di Salvo) had to do for the balance of the purchase price on settlement.[13] He was told to pay with a bank cheque. A cheque for the balance was handed over to Mrs Charnley but this was handed back when it was discovered that a debenture over the first defendant's business had not been released. The release was duly attended to and the cheque was re-delivered on the next day, thereby completing the transaction.

[23] Between the signing of the contract on 10 April 2006 and its completion on 2 May 2006, Di Salvo did not have any relevant contact with Palethorpe about the contract. Over coffee one morning after 25 April 2006, Di Salvo informally told Palethorpe of the change in the settlement date but it appears there was no discussion about the delays in notifying the landlords[14] which had occurred by that time.

[24] On 3 May 2006 Palethorpe closed his file and rendered a memorandum of fees setting out the details of the work he had undertaken. This identified the terms of the retainer as he saw them.

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13 T1-35/55

14 T1-35/40

[25] The plaintiff identifies properties on the original rent roll for which authorities to act were not granted to the plaintiff[15]. The plaintiff calculates that the consequential loss of income multiplied by the 2.3 mark-up results in a diminution of the value of the rent roll of $268,381.80 and the plaintiff's loss therefore after deducting the price concession of $15,000 is $253,381.80. The plaintiff seeks this amount from all defendants in accordance with their respective contributions to the loss.

The issues

[26] I shall deal firstly with the **claim against the fourth defendant.** The first question relates to the scope of Palethorpe's retainer which on any view of the evidence, was somewhat informally arranged. Palethorpe contends that the retainer was determined by the specific requests for advice made by Di Salvo mainly involving the adequacy of the contract to protect the plaintiff's interests and the assurance that encumbrances over the business were released. The plaintiff contends that the retainer was more general extending beyond advice on the adequacy of the contract to advising on the statutory requirements for appointment of an agent and the notification for the assignment of appointments.

[27] The evidence concerning the discussion between Di Salvo and Palethorpe has not been the subject of a comprehensive diary note by Palethorpe. Consequently the determination of the adequacy of any advice given is based upon the current recollections of Di Salvo and Palethorpe and the credibility of these witnesses.

[28] Di Salvo, in his evidence-in-chief, described the discussions prior to the signing of the contract as taking place entirely in the presence of Mr and Mrs Charnley and that there was no separate private discussion with Palethorpe.[16] The topics he recalled being discussed was how the purchase price was arrived at and how the security of the rent roll would be achieved.[17] He expressed concern to Palethorpe that the third defendant, Crossman, might "white ant" the list.[18] The other persons present denied that those specific words were used but I accept that there was a general concern about the rent roll not being guaranteed and that there was a reference made to the prospect of restraining Crossman and to his character generally.[19]

[29] Beyond that, Di Salvo's evidence was confined to denying that he was taken through specific provisions of the contract. In particular, he said Palethorpe did not tell him that the contract did not contain adequate provisions to protect the plaintiff against slippage[20] and that the amount of $15,000 (the retention in the Tinwest contract) might not be sufficient to protect against all the potential losses.[21]

[30] That evidence is in direct conflict with the recollections of Palethorpe and the less detailed recollections of Mrs Charnley. Mrs Charnley stated that the purpose of the visit to the solicitor's office was to sign the contract. The terms were not to be renegotiated[22] and that those terms were all the first defendant was prepared to sign

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15 Ex 5
16 T1-28/20
17 T1-28/45-65
18 T1-28/50
19 Di Salvo T1-46/40; Charnley 3-5/40; Palethorpe 3-60/10
20 T1-31/55
21 T1-32/15
22 T3-18/58

on.[23] She recalls that Palethorpe went through the terms of the contract with Di Salvo, though she was not "listening intently".[24] She did recall Palethorpe asking what provisions were made for the loss of managements[25] and whether the rent roll was secure[26] and what access Crossman had to it.[27] She recalled also Palethorpe making a reference to the Tinwest contract.

[31] At some stage in the discussion, Mr and Mrs Charnley left and went onto the balcony outside the room. There are some differences as to whether the Charnleys took a phone call at this stage and whether indeed they stayed in the room whilst Palethorpe and Di Salvo went out on the balcony. These differences are of little consequence although I accept it as more probable than not that the Charnleys left the room, thus allowing Palethorpe to have a private conversation with Di Salvo.[28] In the absence of the Charnleys, Palethorpe said he gave direct advice to Di Salvo in these terms:-

> "Look, you know this is a really risky business. You haven't allowed enough in the – off the purchase price and if there's a run on the rent roll, there's really not a great deal you're going to be able to do to stop it – at the very least you should have a rental guarantee and at best you should have all those provisions that you had in the Tinwest contract."[29]

Palethorpe said that Di Salvo was happy with the amount that he allowed in the purchase price to cover all contingencies, that he wanted to sign the contract and that he "did not want any other agent in Port Douglas to be able to have a shot at that contract, at that rent roll".[30]

[32] Di Salvo said there was no conversation at all about relevant contractual matters when he spoke with Palethorpe in the absence of the Charnleys.[31] As to whether the reference to the Tinwest contract came up then or at some other time is not a matter of any significance. It simply reflects the differing recollections of the witnesses and does not colour their credibility.

[33] It is common ground that as part of his retainer, Palethorpe had the obligation to advise on the efficacy of the contract and its adequacy in protecting against any risks it posed for the plaintiff. In advising the plaintiff, he was effectively dealing with Di Salvo and the level of his awareness of the risks. The plaintiff contends that the retainer was more general – "to act in respect of the contract of sale".[32] That was to include advising on the statutory requirement that landlord authorities be in a certain form and be assigned within a certain time. The plaintiff refers to ss 133 and 135A. Palethorpe denies that the retainer carried any such obligations. Section 133 specifies a

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23 T3-21/10
24 T3-19/38
25 T3-19/50
26 T3-22/10
27 T3-23/1
28 Di Salvo T1-63/55; Charnley 3-6/30; Palethorpe 3-60/20
29 T3-60/25
30 T3-60/30
31 T1-28/20, 1-64/10
32 Further Amended Statement of Claim para [31]

requirement well known to real estate agents and s 135A was not material because it had not been enacted at the relevant time.[33]

[34] The plaintiff argues that Di Salvo's evidence as to the extent of the advice given should be preferred to that of Palethorpe's. It relies particularly on the fact that Palethorpe did not give direct evidence about each of the matters identified in the first handwritten note i.e. references to the restraint provision and the finance clause. These, I find, were peripheral matters which did not then, and do not now, raise concerns.

[35] Having regard to the handwritten list which Palethorpe made when he first perused the contract, I am satisfied that he did identify that the contract terms were inadequate to protect the plaintiff against the risks of slippage. Having taken that step, it is inconceivable that he would not transmit these concerns to Di Salvo prior to the execution of the contract. Palethorpe and Di Salvo were on friendly terms. This was the first occasion that Palethorpe had been retained to act on behalf of Di Salvo or his company. The relationship between a solicitor and a real estate agency in a community such as Port Douglas is one which each of them would be expected to foster. Even though his client was the corporation with an experienced directorate, Palethorpe was, I am satisfied, conscious also of Di Salvo's limited experience in managing a real estate business. At the same time Palethorpe was aware of Di Salvo's knowledge that it was possible by contractual terms to protect against slippage, having regard to his experience with the Tinwest contract on which he received advice from a different solicitor.

[36] Moreover, Di Salvo agreed that he was aware that the purchase of a rent roll is not straight forward and he was aware that contractual provisions might be included to protect against some of those risks.[34] Whatever Di Salvo's hopes were about gaining better protection against slippage, for example, by restraining Crossman, he was left with only such assurances that Mrs Charnley could give about how the rent roll was stored, who had access to it and the reputation of Crossman.

[37] Having regard to the relationship between Di Salvo and Palethorpe, and the fact that Palethorpe made a note of the contract's deficiencies, I prefer Palethorpe's evidence as to the advice that he gave to Di Salvo, namely that the purchase of a rent roll was a really risky business and that if there's a run on the rent roll there was not a great deal he could do to stop it. I accept that Palethorpe told Di Salvo he should have had all those provisions that he had in the Tinwest contract.[35] I accept also that Di Salvo signed the contract on behalf of the plaintiff aware that it was running a risk. I suspect that he misjudged the true extent of that risk having regard to his limited experience and his belief that by the time of settlement he would have secured the authorities from the bulk of the landlords. I am satisfied that at the time the contract was signed the plaintiff was prepared to run the risk in order to prevent the rent roll being offered to other real estate agents in Port Douglas.

[38] Having come to this view, I am satisfied that Palethorpe fulfilled the obligations of his retainer in his advice as to the inadequacies of the contract. There was no obligation

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33 The amendments by which s 135A was introduced came into force on 21 August 2006. It introduced the prospect of one agent assigning to another agent a clients appointment to act. The assignment required, inter alia, the giving of 14 days notice to a client.

34 T1-57/1-10

35 T3-60/20-30

on Palethorpe to advise in direct terms such as was contended for by counsel for the plaintiff, viz. "my advice to you is don't sign this contract".

[39] The duty on the part of a solicitor is to exercise reasonable care. In *Roads and Traffic Authority (NSW) v Dederer*[36], the High Court considered the concept of reasonable care. Gummow J said:-

> "[43] Although the existence of a duty of care owed by the RTA TO Mr Dederer was not in dispute, two points must be made about the nature and extent of that obligation. First, duties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question. Secondly, whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden."[37]

The court of Appeal in New South Wales applied the principle directly to the duty of a solicitor advising a client. See *Kekatos v Samson*[38]. There is no duty "to ensure" that a client avoids a known risk.

[40] In the context of this case, Palethorpe properly discerned the risks confronting the plaintiff and he made sure Di Salvo was aware of these risks and what needed to be done to avoid the risks. The plaintiff's decision to proceed to execute the contract was made notwithstanding that advice.

[41] As to the plaintiff's contention that Palethorpe's retainer was of a more general nature, i.e. to act for the plaintiff "in respect of the contract of sale", the argument is not made out on the facts. The task of preparing documents and notices to be sent to the landlords was always intended to be undertaken in the offices of the plaintiff and the first defendant. So much is clear from the check lists drawn up at the meeting of 8/9 April 2006.[39] The proposal to abridge the time for completion was never raised with Palethorpe. He was simply advised that a new date had been agreed. He was not advised of the delays in meeting the timetabled events nor is it suggested that he was even aware of the timetable. He was not involved in any of the processes provided for under the contract.[40] In such circumstances, I find that Palethorpe was not retained to have oversight of the events required to complete the transfer of the business.

[42] But for Di Salvo's telephone query about payment of the purchase price, the sale may have been completed without Palethorpe's knowledge. The retainer generated by that query was limited and was effectively performed by Palethorpe securing the release of any encumbrance over the business sold. The telephone query did not require a review of the activities of the contracting parties nor was Palethorpe put in a position to undertake any such review. I accept that the terms of the retainer were as set out by Palethorpe in the memo of fees which he rendered. I find that there was no breach of duty on his part. The plaintiff's claim against the fourth defendant fails.

The claims against the first and second defendants

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36 [2007] 234 CLR 330

37 Ibid at p 345; see also per Hayden J at p 408

38 [2009] NSWCA 171 at para [20]

39 Ex 1 pp 100-101

40 T1-65/40

[43] The claims against the first and second defendants are put on the following bases:-

(i) Misrepresentation or, alternatively, misleading and deceptive conduct with respect to whether the rent roll schedule was genuine, particularly in relation to properties owned by MFS Mirage Resorts Pty Ltd (MFS) and Mr Vic de Meio (de Meio).

(ii) Breach of contract by allowing Crossman to access the rent roll.

(iii) Failure to use best endeavours to achieve the transfer of authorities as required by Special Condition 4 of the contract.

Misrepresentation/misleading and deceptive conduct

[44] The substance of the plaintiff's claims against the first and second defendants is that they represented to the plaintiff that "all properties on the two rent roll lists were genuine and will be in place at settlement".[41] Mrs Charnley denied that the words "genuine" was used.[42] Whatever epithet might have been used it represented that the first defendant had a proper compliant authority from the respective landlords on the list and that there was compliance with all other related statutory requirements e.g. *Residential Tenancies Act, Trust Accounts Act* etc.

[45] The suggestion that the authorities will be in place at the date of settlement is more correctly a statement of expectation rather than fact because any authority could be withdrawn at any time. But what the first and second defendants were representing was that they held the expectation at the time of the signing of the contract that the landlords having been duly advised of the sale of the business, would provide the authorities required by s 133 of PAMDA to the plaintiff. The first and second defendants were to use their best endeavours to achieve this.

[46] The plaintiff adduced expert evidence from Mr Paul Brooks about the risks associated with the sale of rent rolls and how those risks might be averted. Mr Brooks is a consultant to the real estate industry and has had long experienced as a real estate agent and as a broker of residential rent rolls. He, in conjunction with solicitors, has developed draft documents to be used in rent roll transfers.

[47] In his report, Mr Brooks outlined the principal risks for the buyer of a rent roll is the attrition rate of landlords not making a new appointment in favour of the buyer. Commonly this attrition rate is between 4% - 8%.[43] He identified some 17 factors which affect the attrition rate. Apart from the appropriate contractual terms already discussed, these risks arise from –

> "10. If the vendor …sells or transfers the agency's sales business to continue operation under a different ownership and there is little or no restriction included in a contract that restrains or prevents the subsequent owner from operating a rent roll business for a period of at least 12 months or more.
>
> …
>
> 12. If the vendor's property management employees are employed by the buyer of the agency's sales business to continue operating a property management business instead of transferring employment to the buyer of the rent roll, the attrition rate can be greatly affected.
>
> …

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41 Further Amended Statement of Claim para 7(d); Further Amended Defence para 10; T 1-89/10

42 T3-48/55

43 See Ex 6

> 17. If the vendor withholds knowledge from the buyer prior to settlement, that a particular client or lessor has made the vendor or the vendor's employees aware of their intention to terminate an appointment of agent for any reason and the termination is likely to occur within the first 12 months from settlement and transfer of the property to the buyer. The obligation by the vendor to divulge such knowledge should be included in the contract terms."[44]

[48] Whilst these risks identified in the preceding paragraph could have been ameliorated by the inclusion of a claw-back or retention provision in the contract they were obvious risks. The matters of the sale to Crossman and the employment of Monica Stievano were raised in the course of discussions on 8/9 April 2006. But there was no reference to any concern about any landlord not being prepared to provide the required authority to the plaintiff.

[49] The rent roll schedule presented at the meeting of 8/9 April 2006 and reproduced as a schedule to the contract, identified the respective addresses of properties, the weekly rental, the commission rate, annual rental income and commission per annum as at 10 April 2006.[45] The plaintiff, had it so wished, could have carried out an audit of the list but he chose instead to rely upon the first and second defendant's representation. The second defendant claimed she had no reason to believe that the list was not genuine as at that date, save for the fact that three of the properties should not have been included, but there were three others that were inadvertently omitted.[46] The issue raised in respect of the three properties identified in para 10(f) of the Further Amended Statement of Claim was not pursued at trial and will be ignored in these reasons.[47]

[50] I accept that the plaintiff, through Di Salvo, was urged by Mrs Charnley to establish a presence in Mossman.[48] I accept that Di Salvo very clearly told Mrs Charnley that he had no intention of doing so.[49] He was relying on the tenants accepting a new method of paying rent by the use of a rent card. This new method of payment had not at that time been discussed with the landlords whose authorities were of critical importance. I am satisfied that Di Salvo took this risk into account when negotiating the purchase price down to $415,000.

[51] But there does remain, however, the issue about the three commercial properties in Mossman controlled by Mr Vic de Meio. The first and second defendants admit that de Meio had, on 27 March 2006, informed Mr Charnley that S and C No.1 Pty Ltd would not agree to the management of their properties being conducted by a business not situated in Mossman. Mrs Charnley was aware of this fact.[50] They however assert that di Salvo and Janelle Cole were advised to this effect. Di Salvo denies that he was given this information, and had he known he would not have agreed to the price of $415,000.[51] In her cross-examination of Di Salvo Mrs Charnley had the following exchange with him:-

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44 Ibid at pp 15-17
45 Ex 1 pp 111-112
46 Further Amended Defence para 10(a)
47 T1-44/40-50
48 T3-18/10-45
49 T1-43/35
50 Further Amended Statement of Claim para 10(d) and (e); Defence para 10(a)(i)
51 T1-43/50

> "Did the second defendant's husband discuss the fact that one or more local Mossman landlords, in particular Mr Vic de Meio, the owner of the storage shed, would be dissatisfied without a representative office in Mossman? – At the time that was not conveyed to me.
>
> Did the second defendant's husband explain that although the premises were small, there being only two in the sales team and one property manager, it was an essential part of the Mossman business? – No.
>
> Did the second defendant's husband impress upon you the fact that the majority of tenants in Mossman paid their rent as cash on a weekly basis to the local office? – That was discussed.
>
> And did Janelle Cole point out the benefits of taking the whole business, in particular Mossman and Fourmile operations? – I did not want to spend that extra money on that.
>
> So that was your commercial decision? – Yes."[52]

[52] Di Salvo further said that he made it clear to the first and second defendants that he would not establish an office in Mossman despite Mrs Charnley's urgings that it would be wise for him to do so. In giving her evidence Mrs Charnley was asked to elaborate about her discussion with Di Salvo about the Mossman office and the following exchange occurred:-

> " -- I said, "Wont you reconsider taking Mossman? – Mossman is a very important part of the business. You are taking on the Mossman rent roll. I really urge you to have a presence in Mossman."
>
> And was there any response to what you said? – Mr Di Salvo made it clear that they had …to my best recollection, Mr Di Salvo said that he wasn't interested."[53]

[53] It follows that in respect of these properties the first and second defendants had direct knowledge that de Meio would not appoint the plaintiff as agent unless he had a presence in Mossman. In circumstances where they knew that the plaintiff had no intention of establishing such a presence, the first and second defendants ought to have told the plaintiff of de Meio's attitude. Had they done so, Di Salvo claims he would have negotiated for a further reduction in the price.[54] The second defendant did not given any evidence which raised any assertion to the contrary.

[54] In upshot the authorities for the plaintiff to manage the three de Meio properties were not forthcoming. In my view, such authorities were never likely to be granted whilst de Meio maintained his stated position. I find that the first and second defendants knew that de Meio would not grant the required authorities, and, in those circumstances, they ought to have qualified the representation they made about their expectations. They did not do so.

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52 T1-90/5 – 1-91/15
53 T3-18/5
54 T1-44/1

[55] As a result, the plaintiff has paid for an outcome which it was never going to receive. I assess its loss as the stated value of those properties to the rent roll, namely the sum of $14,729.10.[55]

[56] Similarly, with respect to the 11 commercial and four residential properties owned by MFS included in the schedule of properties covered by the contract, the plaintiff did not receive authorities to take over the management of those properties. The plaintiff contends that the first and second defendants knew in advance that the required authorities would not be given by MFS. Nonetheless, they continued to represent to the plaintiff their expectation that the owner would do so. The plaintiff contends this was a misrepresentation or, alternatively, gives rise to circumstances constituting misleading and deceptive conduct.

[57] The first and second defendants deny that it had specific knowledge that MFS would not provide authorities. This part of the defendants' pleading, which descends into evidence rather than making allegation, suggests that information about the conflict was brought to the attention of Janelle Cole. But it does not particularise when, where and by what means this was done. By its Reply, the plaintiff simply admits para 10(c) but this does not resolve the issue. It seems to be suggested by the first and second defendants that the failure to gain the authorities of MFS resulted from the plaintiff's inability to manage the process.

[58] The evidence on this issue is limited and unsatisfactory. No one from MFS was called to explain why they did not give an authority to the plaintiff. Janelle Cole, who currently resides in Vanuatu was not called. Her role was rather conflicted as she was acting in her own interest as a commission agent rather than in the plaintiff's interest. Di Salvo did not offer evidence of any contact with MFS and Mrs Charnley never put to him the pleaded claim. When giving evidence Mrs Charnley stated, by way of background information, that in late 2005 or early 2006 there was an issue between MFS and L J Hooker which stemmed from some alleged mismanagement of an assignment of a rent roll from Vista Realty to L J Hooker. This ill-will of MFS towards Vista Realty was known to Mrs Charnley at the time of the 8/9 April 2006 meeting. Without some action being taken, these circumstances ought to have given rise to an expectation in the first and second defendants that MFS properties would not transfer to the plaintiff its authority to manage the property. Mrs Charnley gave no evidence of having expressed such concern to anyone associated with the plaintiff. She clearly had the opportunity to do so at the meeting of 8/9 April 2006 and subsequently. If that concern was not shared with the plaintiff, then any representation that the inclusion of the MFS properties in the rent roll schedule was genuine and expected to result in a transfer of authority, would be misleading and deceptive. Whilst the evidence on this issue is limited, partly because Mrs Charnley chose to represent herself, it is clear that Mrs Charnley had knowledge which ought to have precluded her from representing that the authorities of MFS would be likely to flow to the plaintiff.

[59] I find that Mrs Charnley did not communicate her knowledge of these matters to the plaintiff. I infer that, had these matters been drawn to the attention of Di Salvo, he would have sought, at the very least, to reduce the contract price by discounting entirely the value of the commissions to be earned from this source.

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[55] T1-43/20

[60] Those commissions based on a 2.3 mark-up result in the following calculations:-

Commercial properties (excluding Macrossan St)

Commission per annum		$ 7,761.28

Residential properties

1 Ashford Ave	910.00	
3 Ashford Ave	1,274.00	
5 Ashford Ave	1,019.20	
5a Ashford Ave	473.20	$ 3,676.40
Total commission		$11,437.68
Value on 2.3 mark-up		**$26,306.66**

Legal principles

[61] The plaintiff relies particularly on s 52 of the *Trade Practices Act* 1974 (Cwth) which provides:-

> "1. A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

[62] It is not in issue that the first defendant is a corporation engaged in trade or commerce such as to be subject to the provisions of the Act. The second defendant who is the director of the company in all material respects acted as its agent. The second defendant by her conduct was knowingly concerned in contravention of the provisions of the Act by the first plaintiff and is thus, by virtue of s 75(b) of the Act subject to the consequence of having an award of damages made against her.

[63] Whether particular conduct is misleading or deceptive is a question of fact to be determined in the context of the evidence as to the alleged conduct and the relevant surrounding facts and circumstances. *Taco Company of Australia Inc v Taco Bell Pty Ltd*[56]. "Misleading" is a word which is capable of expressing various shades of meaning sometimes signifying that which is subjectively misleading and at other times that which is objectively misleading. Its meaning therefore is apt to be influenced, indeed decisively influenced, by the context in which it is found. *The Queen v Credit Tribunal* ex parte *General Motors Acceptance Corporation*[57].

[64] It is clear also that silence may constitute misleading or deceptive conduct where there is a duty to reveal relevant facts. Such was determined by Lockhart J in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*[58] where he said (at p 595):-

> "At common law, silence can give rise to an actionable misrepresentation where there is a duty upon the representor to reveal a matter if it exists, and where the other party is therefore entitled to infer that the matter does not exist from the silence of the representor. The circumstances in which silence may constitute

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56 (1982) 42 ALR 177 at p 199
57 [1977] 137 CLR 545 at p 561
58 79 ALJR 83

> misleading conduct under the Act were referred to in *Rhone-Poulenc Agrochimi SA v UIM Chemical Services Pty Ltd*…the duty to disclose is not confined to cases where there are particular relationships, such as trustee and beneficiary or solicitor and client, principal and agent and guardian and ward. There is no useful purpose seeking to analyse the circumstances in which the duty to disclose will arise and this must depend on the facts of each case."

[65] In circumstances where the first and second defendants were aware that both de Meio and MFS would not provide the bargained for authorities in the conditions then prevailing, their failure to disclose that fact, in my view, constitutes misleading and deceptive conduct and, indeed, actionable misrepresentation.

[66] I find the plaintiff is entitled to recover from the first and second defendant damages equivalent to the value of the lost commissions in respect of both the de Meio properties and the MFS properties. These amounts total $41,035.76.

Crossman's access to the rent roll

[67] After completion of the separate contracts, Crossman carried on the business of Ray White Real Estate in the same premises as previously were occupied by the first defendant.

[68] The goodwill attached to the rent roll business which was transferred to the plaintiff had not, by that date, achieved the expected return of landlord authorities. It is evident that there was some anger amongst some of those landlords. Their responses are captured in ex 4 which show that a number of landlords preferred to authorise Ray White Real Estate now under the control of Crossman to continue to manage the properties.

[69] The reasons why individual landlords made this choice is not known. One anticipates that the reasons might be quite varied. But it has led to the plaintiff alleging that the first defendant allowed Crossman access to details of the rent roll in breach of its obligations to and representation to the plaintiff that the rent roll was secure.

[70] Crossman had access to the rent roll particulars in February 2006 when deciding whether to purchase the Ray White agency. On 25 February 2006 he entered into a confidentiality agreement by which he agreed not to use the confidential information thereby provided to him.[59] As part of his purchase of the Ray White agency he acquired ownership of that business' data base which no doubt included details of at least some, if not all, of the landlords. Much time in evidence was devoted to discussing the means by which this data base was set up and how it might have been accessed by Crossman. The simple reality is that Crossman used this resource, as he was entitled to do, to send out an email notice to various persons advising them of his takeover of the business. That email was sent on 5 May 2006, it contained terms that property management and holiday rentals were being attended to by Monica Stievano[60]

[71] In the end result authorities for the management of 48 properties previously on the rent roll schedule were granted to Crossman. Of that number, 30 properties were situated in Mossman where Crossman maintained an office. Crossman denied having any

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[59] Ex 1 p 1

[60] Ex 1 p139

resort to the rent roll information provided to him under confidential terms in order to contact the landlords. I accept the evidence of Crossman that he did not access the rent roll computer programme. When he acquired the business he had to purchase his own system.[61] Given the fact that he continued to carry on business in the same premises (including Mossman) where the property management business had been previously conducted and that he had on hand the same staff in whom the landlords obviously had confidence there was an obvious convenience for the landlords to continue with the Ray White agency. Additionally, the way in which the transfer of the goodwill attached to the rent roll was managed by the contracting parties clearly upset a number of the clients.

[72] The cause of the slippage to the extent that it occurred is readily explained for a number of reasons. There is nothing in the evidence before me to suggest that there was any breach of agreement on the part of the first or second defendant by which Crossman came to have been given the authorities of the landlords of those 48 properties. I find no substance in this allegation by the plaintiff.

Failure to use best endeavours

[73] The plaintiff makes a general claim based on an allegation that the first defendant failed to use its "best endeavours to ensure that the property management business is effectively transferred". In the context of what was really required, this meant best endeavours to obtain from the respective landlords an appointment for the plaintiff to act as their letting and property management agent compliant with the provisions of PAMDA.

[74] What is meant by "best endeavours" was considered by Mason J (as he then was) in *Transfield Proprietary Limited v Arlo International Limited*[62]. After citing the remarks of Sellars J in *Terrell v Mabie Todd & Co Ltd* he went on to say:-

> "A "best endeavours" clause thus prescribes a standard of endeavour which is measured by what is reasonable in the circumstances having regard to the nature, capacity, qualifications and responsibilities of the licensee viewed in the light of the particular contract."[63]

[75] In *Hospital Products Ltd v United States Surgical Corporation*[64] Gibbs CJ said:-

> "On the one hand, an express promise by an agent to use his best endeavours to obtain orders for another and to influence business on his behalf "necessarily includes an obligation not to hinder or to prevent the fulfilment of its purpose."[65] On the other hand, an obligation to use "best endeavours" does not require the person who undertakes the obligation to go beyond the bounds of reason; he is required to do all he reasonably can in the circumstances to achieve the contractual object, but no more."[66]

[76] The particulars on which the plaintiff relies to establish this breach, relate mainly to the provision of the rent roll to the third defendant which has been discussed above. In

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61 T3-14/24
62 [1979-1980] 144 CLR 83
63 Ibid at p 101
64 [1984-1985] 156 CLR 41
65 *Shepherd v Felt and Textiles of Australia Ltd.*
66 Ibid at p 64

addition, the plaintiff relies on the failure to give 14 days written notice of the assignment of authority in accordance with s 135A of PAMDA. As mentioned above that section was not in force at the relevant time. The plaintiff also alleges that the defendant failed to obtain the landlords' authority prior to settlement or at all. It is this latter allegation which requires consideration, having regard to the delay in approaching the respective landlords.

[77] It is clear that the task of gaining authorities from landlords in favour of the plaintiff was handled very badly. The timetable agreed upon by the contracting parties at the meeting of 8/9 April 2006 may have been unrealistic and it failed to take account of the public holidays which were to occur during that month. Even allowing for this, there were delays in the transfer of information held in the defendants' computers within software called Sherlock to the plaintiff's computers programme using Console software. It is not possible to say whether either party was at fault in this. The delay was exacerbated by the lack of consultation as to the terms of the joint letter notifying the landlords of the sale of the business.[67] The result of posting the letters on Saturday 29 April 2006, was that the majority of landlords would not have been made aware of the sale of the rent roll until after the sale had been completed. This lateness in notification and the lack of explanation caused resistance and sometimes hostility towards the change. Moreover, the notice incorrectly asserted that Monica Stievano would be employed at Vista Realty.

[78] The effect of this delay was compounded by the contracting parties' agreement to bring forward the completion date from 15 May to 2 May 2006. There does not appear to be any compelling reason why this should have been done. Mrs Charnley said this was done at the request of Crossman, who having only contracted in final terms on 21 April wanted to have settlement completed by 28 April 2006. Crossman denies that he initiated any such request and that the topic was raised in discussions as a convenience to the first defendant whose periodic accounting reconciliation was at the end of each month.

[79] The question of bringing forward the settlement date was raised with Di Salvo in the course of a meeting with Mrs Charnley on 25 April 2006. As at this date the magnitude of the delay was known to both of them. In a handwritten note made on that day[68] Mrs Charnley noted that tenants' letters and cards were to be sent out on 28 April. Her letter which was to be sent to landlords which were not in fact posted until 29 April ought to have been sent on 13 April in accordance with the original timetable.[69] There was no justification for either the contracting parties or Crossman to seek an early settlement of their respective contracts. I am satisfied that it was done at the request of Mrs Charnley. She had the most to gain because she was anxious to leave Port Douglas, it saved her the expense of maintaining an office structure for a further two weeks and the cost of having to undertake a mid-month reconciliation. The most adverse consequence was suffered by the plaintiff because it prevented the seeking of landlords' authority in an orderly way before settlement of the contract and it allowed Crossman to be available to landlords while their authorities were being sought.

[80] The plaintiff made the decision to abridge the time for settlement in good faith and in the full knowledge that Crossman would be commencing business in the former

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67 T3-11/10

68 Ex 1 p 98

69 Ex 1 p 100

premises with the former staff before he had the benefit of receiving the landlords' authorities. Much of the plaintiff's loss, I find, stemmed from that decision in which the plaintiff was a willing participant. I am not persuaded that the delays and failure on the part of some landlords to give their authorities to the plaintiff was due to any breach on the part of the first and second defendants.

Conclusion

[81] The plaintiff has succeeded against the first and second defendants to a limited extent. That success in the circumstances does not require the apportionment of contribution by any other person. It follows that the plaintiff is entitled to judgment against the first and second defendants in the sum of $41,035.76. The fourth defendant is entitled to judgment whereby the plaintiff's claim against him is dismissed.

Orders

[82] 1. Judgment for the plaintiff against the first and second defendants in the sum of $41,035.76 together with compound interest on that sum at 5% per annum from 2 May 2006 to 10 September 2010.

2. The plaintiff's claim against the fourth defendant is dismissed.

3. Parties are allowed 21 days within which to make submissions on the question of costs.