

SUPREME COURT OF QUEENSLAND

CITATION: *Stumer Investments Pty Ltd v Azzura Holdings Pty Ltd* [2010] QSC 352

PARTIES: **STUMER INVESTMENTS PTY LTD (ACN 111 543 081)**
(Plaintiff)

v

AZZURA HOLDINGS PTY LTD (ACN 074 781 141)
(Defendant)

FILE NO: BS 8702/09

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 September 2010

DELIVERED AT: Brisbane

HEARING DATE: 12-13 August 2010

JUDGE: McMurdo J

ORDER: **1. The contract between the plaintiff and the defendant be terminated.**
2. The deposit paid by the plaintiff, together with any interest which has accrued upon that deposit, be repaid to the plaintiff.
3. The bank guarantee provided on behalf of the plaintiff be discharged and the instrument of bank guarantee be returned to the plaintiff or to Australia and New Zealand Banking Group Limited.

CATCHWORDS: TRADE AND COMMERCE – TRADE PRACTICES ACT 1974 (Cth) AND RELATED LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OF DECEPTIVE CONDUCT GENERALLY – GENERALLY – where the plaintiff agreed to purchase from the defendant an apartment in a building to be constructed at Surfers Paradise – where the plaintiff alleges that the defendant, through its agent, made certain representations as to the future value of the apartment – whether there were statements made in contravention of s 52 of the *Trade Practices Act 1974* (Cth).

Trade Practices Act 1974 (Cth) ss 51A, 52, 87

Property Agents and Motor Dealers Act 2000 (Qld) ss 366B, 367

Australian Competition and Consumer Commission v Universal Sports Challenge Ltd [2002] FCA 1276
Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199

COUNSEL: M R Bland for the plaintiff
 T Matthews for the defendant

SOLICITORS: QBM Lawyers for the plaintiff
 Ramsden Bow Lawyers for the defendant

- [1] By a contract dated 19 December 2006, it was agreed that the plaintiff would purchase from the defendant an apartment in a building to be constructed at Surfers Paradise. The plaintiff claims that its contract was induced by conduct of the defendant, through its sales representative, which was in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (“the Act”). The defendant denies that the alleged representations, if made, were misleading or deceptive or induced the plaintiff to enter into the contract.
- [2] The plaintiff is a company controlled by Mr Stumer. He was always intending to resell this apartment before the date for completion, which at the time of the contract was anticipated to be at least two years away. Clearly, the plaintiff made this contract in the expectation that the apartment could be resold for an amount which would yield a profit, allowing for the purchase price of \$472,500 and for the plaintiff’s costs of acquisition and resale. The plaintiff’s case is that, through Mr Stumer, it was made to believe by the defendant’s agent that the likely value of the apartment in December 2008 would be \$600,000. Mr Stumer’s evidence is that the agent, Ms Greenwood, made that prediction on 18 December 2006 and again on the following day immediately prior to his signing the contract.
- [3] Mr Stumer and Ms Greenwood had known each other for some years. Ms Greenwood’s fiancé (now her husband) was Mr Gaffney, who had for many years been a close personal friend of Mr Stumer. And shortly prior to the making of this contract, Mr Stumer and Mr Gaffney had become business partners as finance brokers on the Gold Coast.
- [4] Mr Stumer had worked mainly in insurance and finance. He had previous investment experience. He owned a share in a restaurant and a share in a farm and he had bought and sold two apartments at the Gold Coast prior to this transaction. Having known Ms Greenwood personally for about five or six years, he knew that she had prior experience of her own in apartments such as this one and that she and Mr Gaffney had also purchased properties together. He knew also that Ms Greenwood had only just started work with the real estate agency which was marketing the subject building, which was Azzura Realty Pty Ltd.
- [5] In December 2006, Mr Gaffney told Mr Stumer that he and Ms Greenwood were themselves looking to buy an apartment in this building. Mr Stumer’s evidence is that Ms Greenwood telephoned him on 18 December 2006 to discuss a possible purchase by Mr Stumer. He says that she then made the two representations which are pleaded in the plaintiff’s case. Firstly, she said to him that the developer had

“stuffed up the price” and that this provided an opportunity for Mr Stumer to buy a unit “\$40,000 under market price”, but that he would “have to buy it in the next 24 hours because the unit’s going up to the price that they should have been priced at”. Secondly, he says that Ms Greenwood told him that “upon settlement in December 2008, ... the units will be selling for at least \$600,000”. Mr Stumer claims that he gave those statements “a lot of weight” because on previous occasions Ms Greenwood had told him how well she had done in her own investments in these kinds of properties and because she was now “actually working in real estate”.

[6] Again according to Mr Stumer’s evidence, he and Mr Gaffney went the next day to the offices of Azzura Realty. They were met by Ms Greenwood and Mr Stumer was introduced to another person at Azzura Realty by the name of Oliver. It would appear that he was Mr Oliver Kemm who was the sales manager at that office. On this occasion, according to Mr Stumer, Ms Greenwood again said that he could “get the unit for \$40,000 under market price” and that “the units will be selling for at least \$600,000 at settlement”. There was also discussion as to which units were the most desirable before Mr Stumer decided to have his company contract to purchase apartment 89. As mentioned, the price was \$472,500, which was the then listed price, and the plaintiff paid an initial deposit of \$1,000 with a further deposit constituted by a bank guarantee in the sum of \$46,250.

[7] Ms Greenwood and Mr Gaffney contracted to purchase an apartment, lot 80, by a contract with the defendant dated 27 December 2006. Their contract specified a price of \$508,400. However, on a separate page it contained a special condition, handwritten by Ms Greenwood, which was as follows:

The settlement to be on forty-five (45) days, but if settlement occurs within thirty (30) days, there will be a rebate of one hundred thousand dollars (\$100,000).

Their evidence is that Mr Kemm asked them to contract in these terms, the mutual intention being that the price would be \$408,400, because he thought it desirable that it be represented that this apartment had sold for \$508,000, which Ms Greenwood said had become the list price by the time of their contract. Yet according to two price lists, respectively dated 19 and 24 December 2006, this lot 80 was shown as sold. There is no price list which is in evidence which postdates that of 24 December 2006. The reference to this apartment 80 as sold is explained by the fact that by 19 December it was treated as sold because of the intentions of Ms Greenwood and Mr Gaffney. The price list of 24 December shows an asking price for the equivalent apartment on the next floor (lot 92) of \$512,400 and for the apartment immediately above that (lot 104) of \$516,400. This is some indication that had Ms Greenwood’s apartment still been for sale after 24 December, its price would have been of the order of \$508,400. A curious feature is why the price was as low as \$408,400. According to Ms Greenwood, she and Mr Gaffney were allowed to purchase an apartment at a discount of \$25,000, because no agent’s commission would be paid. However, the asking price for this apartment, according to yet another price list dated 19 December 2006, was \$478,800. (The same list showed the price of the plaintiff’s apartment, lot 89, at \$472,500, which is the amount it agreed to pay.) Therefore, the difference between this price for lot 80 of \$478,800 and the price which Ms Greenwood and Mr Gaffney agreed to pay is not entirely explained by her evidence.

- [8] Whilst Mr Stumer knew that Ms Greenwood and Mr Gaffney were themselves buying an apartment, he was unaware of the price and of its significant discount upon the listed price. There is no specific complaint that the non-disclosure of her contract price was misleading and deceptive. However, that non-disclosure, in the circumstances of the long friendship between these individuals, does not enhance her credibility. More importantly, the fact that Ms Greenwood and Mr Gaffney were prepared to facilitate a misrepresentation of their contract price to other potential buyers is relevant to their credibility.
- [9] The listed prices of apartments in this development did rise after 19 December 2006. By comparing the two lists of 19 December 2006 with that dated 24 December 2006, it can be seen that in many cases the listed price of similar apartments rose by \$30,000.
- [10] Before going to the evidence of Ms Greenwood and others as to the events of December 2006, it is convenient to discuss what happened subsequently. In about December 2007, Mr Stumer was minded to put this apartment, which was still being constructed, on the market. He spoke to Ms Greenwood, who by then had left Azzura and was working at a real estate agency at Palm Beach on the Gold Coast. She suggested that he speak to somebody at Knight Frank, which he did. He told that agent that he was minded to list the apartment for sale in “the high 500,000s” and he was told that he would not be able to sell it for “anywhere near” that price. He says he then spoke to Ms Greenwood again and she said she would make some enquiries and call him back. She rang him back and said that he would be better off holding the apartment and not selling it until towards December 2008 when it would be close to completion.
- [11] In about April 2008, Mr Stumer was looking at the prices of Gold Coast apartments to see if they had increased. He again spoke to Ms Greenwood and after she had apparently “looked into it”, she advised him that apartments such as his (and presumably hers) were by then in the “high 500,000s”. Consequently, Mr Stumer went to Azzura Realty but he was told by someone from there that the apartments were not selling within that range.
- [12] At that point he obtained legal advice. He spoke to someone from Wockner Partners about “getting ... out of the contract because my financial position had changed in that period”. He explained that his restaurant business was going badly. The advice from Wockner Partners was that his best approach was to ask to be released from the contract on the basis of financial hardship. On 5 June 2008, Wockner Partners wrote to the defendant’s solicitors in these terms:

Due to financial difficulties currently experienced by our client we have instructions to write to you seeking a mutual release from and rescission of the Contract, on the basis that the deposit paid (by Bank Guarantee) will be refunded in full to our client.

The Contract dates back to 20th December 2006 and it may well be the case that your client will in fact benefit from the rescission in terms of capital gain in the interim period.

We would be obliged if your client could give our client’s request favourable consideration and look forward to hearing from you as soon as possible.

Importantly, there was no complaint here of any misrepresentation having induced the plaintiff to contract. Mr Stumer says that he did tell Mr Wockner something of what Ms Greenwood had told him when the contract was signed but because of his friendship with Ms Greenwood and Mr Gaffney, who had referred him to Mr Wockner, he did not go into much detail as to what Ms Greenwood had represented. He said that he did not want Ms Greenwood to get into any trouble by making a complaint of that kind. On 6 June 2008, the defendant's solicitors replied that the defendant was not agreeable to the plaintiff's request.

- [13] In cross-examination Mr Stumer agreed that by this stage, mid-2008, a number of banks had changed their lending guidelines for properties such as this, in consequence of the new circumstances from the global financial crisis. In short, it had become very difficult for a company such as the plaintiff, purchasing a property such as this for investment purposes, to obtain finance, at least without a substantial contribution of its own towards the purchase price.
- [14] According to Mr Stumer's evidence, he then went to other solicitors in these circumstances. He and Mr Gaffney had been staying with a friend at the Sunshine Coast and Mr Stumer discussed with him his predicament. This person recommended that he go to see Ferguson Cannon. He thinks this probably occurred in July or August 2008. That firm did write to the defendant's solicitors, but not until 19 March 2009. The delay was explained by Mr Stumer, again, by his not wanting to get Ms Greenwood into any trouble. In their letter of 19 March 2009, Ferguson Cannon made the complaints which are now the plaintiff's case. On the plaintiff's behalf, the solicitors elected, or purported to elect, to terminate the contract. They also alleged that the defendant had not complied with the requirements of s 366B(4) of the *Property Agents and Motor Dealers Act 2000* (Qld) ("the PAMDA"), and they purported to terminate the contract also pursuant to its s 367.
- [15] The defendant's solicitors replied on 31 March 2009. Interestingly, they seem to have mistaken the plaintiff, or more particularly Mr Stumer, for Ms Greenwood, as appears from the fact that the letter asserted as follows:
1. Your client was a former employee of Azzura Realty Pty Ltd;
 2. In light of your client's employment at Azzura Realty, our client offered to your client a special price for the purchase of the above, but at no stage made representations referred to in your letter ... when negotiating a Contract for the above with your client.

Clearly then, Ms Greenwood had not been consulted for the defendant's solicitors for the purpose of this response. The letter denied a non-compliance with the PAMDA and asserted that the apartment would now be priced at \$541,000 "representing an increase to the value given to your client's Contract of \$472,500". The defendant affirmed the contract.

- [16] On 20 April 2009, Ferguson Cannon replied, denying that Mr Stumer was a former employee of Azzura Realty and restating the contention of non-compliance with the PAMDA. On 10 June 2009, the defendant's solicitors wrote to say that they were then seeking to obtain statutory declarations from Ms Greenwood and Mr Kemm, who was said to have been the agent with respect to the sale and which would prove

that there was compliance with the PAMDA. On 16 July 2009, the defendant's solicitors wrote to Ferguson Cannon enclosing a statutory declaration made by Ms Greenwood. They also advised that the plans and the proposed Community Management Statement had been lodged for registration of the Scheme and that the defendant would soon be calling for settlement of the contract. Her statutory declaration was dated 22 June 2009. It contained four paragraphs, which were to the effect that she was present, together with Mr Kemm, when on or about 19 December 2008 (sic), Mr Kemm provided the necessary material in compliance with the PAMDA. The statutory declaration said nothing as to the alleged misrepresentations. Mr Stumer says that it was at this point that his friendship ended with Ms Greenwood and Mr Gaffney.

- [17] Mr Stumer's evidence is that probably the plaintiff would be unable to raise the necessary finance to complete this contract, especially given the evidence of the plaintiff's witness, the valuer Mr Hamilton, that the value of the apartment is now \$350,000.
- [18] Ms Greenwood and Mr Gaffney did not complete their contract. They were able to negotiate a rescission in consideration of a new contract under which Ms Greenwood's parents purchased that apartment at a price of \$395,900. The contract was dated 7 July 2009 and has been completed. Ms Greenwood and Mr Gaffney executed a so-called deed of rescission, which was dated 14 July 2009 and provided that their contract was rescinded effective from the execution of that deed and of the contract being made with her parents. Curiously, it refers to that new contract prospectively, ie as a contract to be made rather than one which had been made. As it happened then, this deed of rescission was dated two days prior to the date of the letter from the defendant's solicitors in which Ms Greenwood's statutory declaration was enclosed. It was suggested in argument for the plaintiff that Ms Greenwood became minded to assist the defendant's case in order to reach a settlement with the defendant in relation to her own contract. I am not persuaded by that argument. The statutory declaration said nothing about the alleged representations. It is not said that the truth of the statutory declaration, which dealt with the PAMDA complaint, was open to doubt. And Ms Greenwood was able to obtain a termination of her own contract, it would appear, only by the substitution of another contract for a price that was only about \$10,000 less than she and Mr Gaffney had agreed to pay.
- [19] I return then to December 2006 and to the other evidence relevant to what was said to Mr Stumer. Ms Greenwood's evidence is that she recalls a telephone conversation with Mr Stumer, after he had been discussing these apartments with Mr Gaffney, in which she gave a "general overview" of the project and arranged for him to come into her office the next day to "go through the paperwork". She said that "we did discuss that the purchase prices were going up and I did tell him that I had been told they were going to increase by \$40,000 in the near future, and they did". But she denied that she had said that "the developer had stuffed up" and she volunteered a further denial of ever having used the term "stuffed up" in her life. The use of those words is immaterial. More importantly, there is no significant difference between Mr Stumer's evidence and her evidence to the effect that she said that the list or asking price of the apartments was about to rise by \$40,000.
- [20] Ms Greenwood says that it was then expected that settlement would occur at the end of 2008 and that this was discussed with Mr Stumer. But she denied making any

prediction as to what would be the selling price of apartments at the end of 2008 “because you can’t predict what a property’s going to be worth in two years”. Her evidence continued:

The discussion was about the information from the reports, like the Midwood Report, looking at the population growth on the Gold Coast, the trends, that the market was positive, that there – the capital growth had been good in the past, other comparable properties. So forecasting forward everything looked positive.

- [21] She says that on the day after this telephone conversation Mr Stumer came to the office with Mr Gaffney. She and Mr Stumer discussed various apartments which were available in the different levels of the building. She believed that there was again a discussion that the price lists were about to change. She denies that there was any discussion as to future prices or values “apart from the general discussion about the market being positive”. But, as with her evidence of her telephone conversation with Mr Stumer, she recalls that there was again discussion about trends and growth. In particular, she gave this evidence in chief:

Did you say anything about values or values increasing from December 2006 into the future?-- Yes, that was part of the discussion.

Can you recall what it was that you said?-- Well, we were basically looking at other comparable properties that, you know, a couple of years previous people had bought off the plan and the growth that they’d had in the previous couple of years and then looking at the – like the trends from the Midwood Report, that that growth was continuing with the purchase of Elston, that we’d be hoping for that similar type of growth.

Do you recall anything about the Midwood Report having sales in apartments by name; it even went to that detail to identify the previous quarters-----?-- Yes, it did.

-----the number of sales in particular apartment blocks, so you could work out comparables?-- Yes, it did – it does, yeah.

And listing the selling prices at various levels of those other specific apartment blocks?-- Yes.

Is that what you went through with Mr Stumer?-- I can’t recall whether we went through the specifics of that in the Midwood Report, but that was where I was taking my information from.

Okay?-- So I would have definitely verbalised it. Whether I actually – you know, whether he actually looked at it, I can’t recall.¹

- [22] The so-called Midwood Report is in evidence. It is relevant for two reasons. The first is that, according to Ms Greenwood’s evidence, it was the source of what she did say as to trends and possible capital growth, although she denies making any prediction of a price or value of \$600,000. Secondly, it is now relied upon by the

¹ Transcript 2-12.

defendant as providing reasonable grounds for a prediction of \$600,000, if that is found to have been made.

- [23] The Midwood Report, dated November 2006, contained extensive historical information on sale prices and rentals for residential accommodation, including apartments, in various parts of Queensland. In the section dealing with the Gold Coast, there were statistics showing the then recent growth in the numbers of tourists and people moving to the region. It included these passages in the text:

Gold Coast's unit sales and average prices since 1978 show the extent of the 2001-03 property boom, and also the resilience of prices post-boom. Previous booms in 1981-82 and 1988-89 showed sharp post-boom reductions in prices, but not so post 2003. Why is this so?

One obvious reason is the long period of stagnation between 1989 and 2001, when average prices rose from \$200,000 to only \$250,000 over a 15 year period. Gold Coast Units were under-valued in 2001 that the boom was emphatic, and even during the post-boom phase values held up, in fact they increased, despite lower sales volumes being achieved. [Page 19]

...

We estimate the total population of the Gold Coast Statistical District in November 2006 to be approximately 526,300. The Gold Coast reached the 500,000 mark in February 2005. If the present growth rate of 3.3% continues, the population will reach 600,000 before 2010. [Page 20]

...

According to ABS figures, the Gold Coast's dwelling approvals rose an estimated 33% during the September quarter to almost 4,000 (quarterly figures are doubled for comparison).

It should be borne in mind that these are Approvals figures and not actual Commencements. There may be an anomaly in some large developments receiving approval in the September quarter.

The release of next quarter's figures will provide a more complete picture, and we may see a correction, but if this increase holds through the December quarter, this would represent dangerous 'boom level' figures similar to those experience in 2003.

September's 3,968 approvals are a long way above the 7 year average capacity of 3,181. [Page 21]

...

There has been a recovery in Gold Coast new high rise sales over the last two quarters, following a weak sales period between late 2005 and early 2006. ... [Page 23]

Perhaps most importantly there was a table headed “House price movements” showing the percentage of movements in the median price of units in various places, including specifically Surfers Paradise, over the five years and also over the year to June 2006. The five year increase was 101% and the one year increase was 13%. In the argument for the defendant, particular reliance was placed on those figures, which were said to have been a reasonable basis for a prediction, if made, that this unit would be worth \$600,000 by December 2008. Applying a 13% annual increase to the price of \$472,500 would result in a figure of \$603,335. It was apparently this to which Ms Greenwood was referring, in her evidence in the passage set out above, as the growth in the “previous couple of years”. So according to her own evidence, she is likely to have told buyers such as Mr Stumer something to the effect that looking at what she understood to be the trends indicated by this Midwood Report, growth was continuing and “we’d be hoping for that similar type of growth”. She was deriving her information essentially from this report and “verbalising it”. She also said that she had regard to that information on population growth from the Midwood Report and its details as to demand for rental properties. In cross-examination, she said that she was not able to make forecasts or predictions but that “the only way to discuss that with a potential buyer is to look at trends and that was why the Midwood Report was used”. When asked “What trend did you identify or was identified to you?”, she answered:

Well, in the past the market had been growing in value. ...

And the properties in the area that were similar that were a couple of years older, when they’d been purchased off the plan they’d grown in value quite a lot up until that period.

She was asked whether she was authorised by her principal to tell potential purchasers about the prospects of the future capital growth, to which she answered:

We were also asked to discuss the previous trends that happened in the market and using the Midwood Report to look at how that could be comparable.

[24] I come then to the other evidence as to what was likely to have been said by Ms Greenwood. First there is the evidence of Mr Gaffney who was also called in the defendant’s case. He said that he recalled the meeting immediately prior to Mr Stumer’s signing the contract. His evidence corresponded with that of his wife. When asked, in evidence in chief, whether there was any discussion as to what the price might be when construction was completed, he answered:

No specific figures were mentioned. It was just talking about the two years of capital growth. Of course, you know, we were in the industry – we were in the finance industry and we knew the way that property had been going and, you know, what we’d hoped it would continue to go to. We were investors.

In cross-examination he was asked whether anything had been said about future capital growth of the unit to which he answered:

Of course. You know, given the current market you could expect capital growth. That’s what we were all there to talk about.

[25] Over the defendant’s objection, I permitted the plaintiff to call two witnesses to whom, as prospective purchasers, Ms Greenwood is said to have made effectively the same representations as alleged by the plaintiff. One was Mr Moynihan, who

was also a long-standing friend of Mr Gaffney and remains a friend of Mr Stumer. Through Mr Gaffney he had known Ms Greenwood for about three or four years as at December 2006. He recalls that she telephoned him and told him that the units were being offered to him at effectively a cheaper price, specifically by \$40,000, and that the units would be worth over \$600,000 on settlement. He had the impression that the \$40,000 was some discount which was being offered to him because of their friendship. He did not enter into a contract because of his difficulty in arranging a bank guarantee in lieu of the deposit. The other witness was Mr Scaroni, who was also a long-standing friend of Mr Stumer and Mr Gaffney. He is also Mr Moynihan's brother-in-law. He heard about these apartments from Mr Gaffney after which he was telephoned by Ms Greenwood. According to his evidence, she said words to the effect that the units were being offered to him at \$40,000 to \$50,000 under what they were going to be sold for to other buyers and that "the units would be valued up at approximately \$600,000 at time of settlement". He paid a holding deposit but decided not to proceed to a contract.

- [26] As already noted, there is no significant difference between the evidence of Mr Stumer and Ms Greenwood as to a likely price increase of \$40,000. Mr Stumer's evidence was that he would not have bought the apartment absent the representation as to the \$600,000 figure, but with the representation as to the \$40,000. And in any case, the plaintiff's case in reliance upon that representation would have been unpersuasive, because of the fact that within a few days the prices of units did rise by about \$30,000. That fact demonstrates that there were reasonable grounds for a prediction of a substantial and imminent price rise. At one stage it seemed to have been suggested by counsel for the plaintiff that nevertheless this did not prove a sufficient basis for a predicted rise of \$40,000. I would have held otherwise. But in any case, nothing could come from a statement to the effect of a \$40,000 price rise if there was a reasonable basis for predicting a \$30,000 price rise: the difference would be inconsequential and could not be thought to have been productive of any loss or potential loss. In short, this case turns upon the alleged representation that the apartment would be worth \$600,000 in December 2008.
- [27] Ms Greenwood's evidence conceded that she made some comments which were relevant to the future value of the apartment. The effect of her evidence is that the history of values as detailed in the Midwood Report indicated the probability that such increases would continue within the next two years. She must have expected the capital values to rise because she and Mr Gaffney made their own contract, albeit at a discounted price. Her evidence is that whilst she felt comfortable enough to tell prospective purchasers about trends and of the likelihood of increases in capital values, she was careful to avoid any specific figure as a likely future value. In my view, it is unlikely that she adhered to such an approach. From the point of statements referring to quantified recent rises in values and their likely continuation, it was a relatively small step to apply those rates of increase to the price at which these apartments were being offered for sale. Had she done so, she would have arrived at an amount of about \$600,000.
- [28] The particular weakness in Mr Stumer's case is the relative lateness of his complaint. However, I am persuaded by his explanation that he did not wish to have Ms Greenwood "in trouble". Mr Gaffney and Ms Greenwood were married in 2008 and Mr Stumer was one of the few people invited to their wedding. Clearly they were then still close friends. I accept that Mr Stumer did not believe that he had been intentionally misled by Ms Greenwood, but saw that his predicament was

similar to her own in that she had made her own contract on information provided by the developer. And until well into 2009, the date for settlement was not imminent, so that the plaintiff had time to wait and see how the market and other relevant circumstances developed before making its complaint.

- [29] I have mentioned some factors which reflect adversely upon Ms Greenwood's credibility. Having regard to them, and what I see as the inherent probability that Ms Greenwood would have seen fit to venture the specific estimate of \$600,000 in the course of her more general predictions of increases in value, I am persuaded to accept Mr Stumer's account of what was said to him. The evidence of Mr Moynihan and Mr Scaroni adds some support to the probability of Mr Stumer's version. However, they are close friends of Mr Stumer and had his evidence otherwise not been persuasive, I would not have preferred it because of their evidence.
- [30] The next question is whether this prediction of a value of \$600,000 contravened s 52 of the Act. This was a representation with respect to a future matter which thereby engages s 51A of the Act. The representation was misleading unless the defendant had reasonable grounds for making it.² Unless it adduces evidence to the contrary, the defendant is deemed not to have had reasonable grounds.³ In *Australian Competition and Consumer Commission v Universal Sports Challenge Ltd*,⁴ Emmett J interpreted s 51A(2) as not reversing the ultimate onus of proof but simply providing that the deeming takes effect unless the corporation adduces some evidence to the contrary. A similar view has been expressed in many later decisions of the Federal Court. However, in several other decisions in that Court, the section has been interpreted as affecting the ultimate onus, so that to avoid the deeming that the conduct was misleading or deceptive, a corporation must establish on the balance of probabilities that there were reasonable grounds for making the representation.⁵ It is that second interpretation which must be adopted here, having regard to the judgment of the Queensland Court of Appeal in *Downey v Carlson Hotels Asia Pacific Pty Ltd*.⁶ Counsel for the defendant accepted as a result of that judgment that his client would have the onus of proving that there were reasonable grounds for this prediction of \$600,000 as the value in 2008. As it happens the point is immaterial, because I would be persuaded that there were no reasonable grounds for making this representation.
- [31] The defendant's case in this respect relied upon the Midwood Report. But it was argued for the plaintiff that its contents could not be used in this way, because it was not proof of the truth of the information which it provided: rather, it was evidence only of what had been considered by the defendant and specifically by Ms Greenwood. In that way it was relevant to the likelihood that Ms Greenwood made the critical representation, but it was said to be irrelevant to the question of whether, viewed objectively, there were reasonable grounds for making it. The plaintiff's argument, in my view, misunderstands the defendant's case. The defendant says it was reasonable to rely upon the fact of the Midwood Report having that content. I would accept, as the valuer called for the plaintiff accepted,

² s 51A(1).

³ s 51A(2).

⁴ [2002] FCA 1276, [46].

⁵ The decisions of the Federal Court, for each of these competing interpretations, are cited in *Miller's Annotated Trade Practices Act* (32nd Ed) at [1.51A.37].

⁶ [2005] QCA 199, [127] per Keane JA, with whom Williams JA and Atkinson J agreed.

that the Midwood Report is widely accepted as a reliable source of information. Accordingly, I accept that it was reasonable for the defendant to rely upon its contents as accurately recording the many transactions which it recorded.

- [32] However, the difficulty for the defendant's case is that the Midwood Report did not make any prediction which corresponded with that of Ms Greenwood. It did not predict that the value of apartments in Surfers Paradise would increase by something of the order of 13% per annum from December 2006 to December 2008. There were matters within that report which provided some basis for optimism for values: for example, there was the predicted population growth in the Gold Coast region. But not surprisingly, there was no statement in this report that the same increases which had been experienced over the previous year could be expected to continue through 2007 and 2008. The likelihood that values would increase was no doubt dependent upon many things, such as the circumstances of the economy more generally, particularly the availability and cost of credit as well as the extent of the supply of apartments within the relevant section of the market. There was no reason from this document for the defendant or Ms Greenwood to believe that a 13% increase would be repeated in the next two years. The Midwood Report did not provide reasonable grounds for making the representation.
- [33] In the plaintiff's case evidence was given by a valuer, Ms Hamilton. In his report he valued the apartment as at December 2006 and also as at December 2008 at \$375,000. In the same report, he wrote that in late 2006, it was anticipated that "flat market conditions would continue to prevail for a number of years, [and] this would follow the pattern of the market performing in a cyclical manner". He wrote that as of late 2006 he could not identify any "supporting data or commentary that would have provided a basis for a projected significant increase in high rise unit values in Surfers Paradise" and that "[t]he contrary view would have been preferred given the level of sales activity and value increases experienced up to early 2004". Although Mr Hamilton's understanding of the relevant market in the two or three years prior to this transaction seem to be somewhat at odds with the analysis in the Midwood Report, Mr Hamilton also commented that the Midwood Reports were a "wonderful resource". However, his opinion that there was no indication of a likely significant increase in values was not challenged by any cross-examination which referred to any prediction within the Midwood Report or anywhere else.
- [34] In the defendant's case evidence was given by a valuer, Mr Forbes. In August 2006 he prepared a valuation report for the defendant and its bank on an "as if complete" basis. This valued the subject apartment at \$490,000. In that report he described the Gold Coast residential market as having continued at "only a modest pace during 2005 and early 2006, with most property still achieving reasonable prices but over much longer sales periods". He described the market as having stagnated over the past 18 months, with developers experiencing "minimal price growth for new stock and an extension of marketing time frames since the peak of the boom period in mid 2003". He said that generally speaking, pre-sales had "dropped considerably as prospective buyers are now generally adopting a 'wait and see' type approach given that level of supplies are up and the feeling of urgency has most definitely left the residential property market". He noted that the area of Surfers Paradise then represented "a significant proportion of unsold high rise stock on the Gold Coast". But he said that the subject development would have relatively little direct competition. His valuation was an "as is" value which was said to be "current as at the date of valuation only", which was 31 August 2006. In other words, he was

making no forecast of the value of the apartments upon completion of their construction. Thus his report provided no grounds for Ms Greenwood's representation. And his description of the market in the two or three years to the date of that report was somewhat different from the impression which might have been gained from the Midwood Report. However, in his evidence in chief, he offered the opinion that in August 2006 the Gold Coast unit market was "very strong" and that "there was no hint that it was going to turn downward at any time soon". Still, there was no evidence from Mr Forbes which was to the effect that there were grounds to expect that this apartment would be worth \$600,000 by the end of 2008.

- [35] Accordingly, reasonable grounds for making this representation are not proved. Further, I would conclude that there were no reasonable grounds. I would accept Mr Hamilton's evidence on that point, which, as I have noted, was sought to be challenged only upon the basis of the Midwood Report. It follows that the representation as to the 2008 value was misleading or deceptive.
- [36] The next question is whether the plaintiff was induced to enter its contract by that representation. The nature of the representation indicates the likelihood of that inducement. However, there are other circumstances to be considered. Firstly, there is again the fact that the plaintiff was slow to complain of this representation. But as I have found, that is largely explained by Mr Stumer's friendship with Mr Gaffney and Ms Greenwood. There is the fact that Mr Stumer knew that Ms Greenwood had practically no experience in working in real estate and had only just commenced her employment with the agency marketing this development. She had had some personal experience in buying real estate. But that was no more extensive than his own experience. However, there was also the fact that she made that representation, as it would have appeared to him, upon the basis of information with which she had been briefed by her employer and its principal. That provided a reason to give her predictions some weight. In addition, because of their friendship and the fact that, to his knowledge, Ms Greenwood and Mr Gaffney were also purchasing an apartment in this building, Mr Stumer was likely to have been more persuaded by the representation. In my conclusion, the plaintiff was induced by this representation to enter into the contract. I conclude that absent the representation, it would not have done so.
- [37] The plaintiff seeks an order pursuant to s 87 of the Act for the termination of the contract. Upon its case, absent such an order it will suffer loss or damage because of the difference between the contract price and what it says is the value of the apartment. As noted already, Mr Hamilton valued the apartment, both at December 2006 and December 2008, at \$375,000. In a supplementary report, he gave it the same value as at 1 September 2009, being about the date when the contract was due for completion. And in a further report, Mr Hamilton valued the apartment as at 13 August 2010 at \$350,000.
- [38] In a report by Mr Forbes dated 13 August 2010, he valued the apartment as at August 2009 as in the range of \$425,000 to \$475,000. One significant difference between the valuers would appear to be that according to Mr Hamilton, prices obtained by developers usually exceed what he regards as a true market value because of the marketing which the developer is able to undertake compared with that of an individual vendor selling or re-selling the same apartment. Mr Hamilton's approach seems to be to ignore what it described as developer sales.

I was not persuaded by that approach. In my view, the value would be the result of the activity of all vendors in the relevant market. It would be inappropriate to value apartments upon some fictional exclusion from the market of developer vendors, especially in circumstances where they might hold most of the available stock. For this reason, Mr Forbes's evidence was more persuasive. In addition, he was able to point to sales of other apartments within the subject building, made between May and December 2009, of one bedroom apartments. The range of prices across these seven sales was \$395,900 to \$497,000. As Mr Forbes observed, that sale at \$395,900 appeared to be "out of line" in that the next lowest price was \$459,000. As it happens, that particular sale was of lot 80, which was the sale to Ms Greenwood's parents in July 2009.

[39] Accordingly, I would accept Mr Forbes's evidence that this apartment was worth between \$425,000 and \$475,000 as at August 2009. Nevertheless, that demonstrates a likely loss if the plaintiff is held to the contract. Furthermore, the evidence from Mr Hamilton indicates that the market has deteriorated in the past 12 months, and his opinion in this respect is not affected by his developer/non-developer point. This tends to confirm the likelihood that the plaintiff will suffer loss or damage if held to the contract. And the plaintiff would also have the costs of completing the contract and of re-selling the apartment, assuming that the plaintiff is now able to complete.

[40] The plaintiff has thereby established the likelihood of loss or damage so as to engage s 87. The question then is whether an order ought to be made which terminates the contract. The likelihood is that the loss which would be suffered by the plaintiff, if held to the contract, would be less than \$100,000. The purpose of an order under s 87 is to prevent, or at least reduce, the loss or damage suffered by the contravening conduct. Because the amount of that loss or damage cannot be precisely identified, depending as it does upon the precise value of the apartment, the better course is to simply relieve the plaintiff from performance of the contract, rather than to, for example, order completion at a reduced price. There will be an order pursuant to s 87 that the contract between the plaintiff and the defendant be terminated. It will be further ordered that the deposit paid by the plaintiff, together with any interest which has accrued upon that deposit, be repaid to the plaintiff and that the bank guarantee provided on behalf of the plaintiff be discharged and that the instrument of bank guarantee be returned to the plaintiff or to Australia and New Zealand Banking Group Limited. I will hear the parties as to further orders including costs.