SUPREME COURT OF QUEENSLAND

CITATION:	*TRFCK P/L & Ors v O'Brien Holdings (Townsville) P/L & Ors* [2012] QSC 356
PARTIES:	**TRFCK PTY LTD ACN 109 510 938** (first plaintiff) and **TREVOR RODDICK** (second plaintiff) v **O'BRIEN HOLDINGS (TOWNSVILLE) PTY LTD ACN 003 461 952** (first defendant) and **TERRY O'BRIEN** (second defendant) and **DLA PHILLIPS FOX (A FIRM)** (third defendant) and **CRIDLANDS PTY LTD ACN 009 651 594** (fourth defendant)
FILE NO/S:	BS 5611/11
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	15 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	12 October 2012
JUDGE:	Jackson J
ORDER:	**(a) Paragraph 1 of the application is dismissed** **(b) It is adjudged that the part of the plaintiffs' claim against the first and second defendants contained in paragraphs 32 to 35 of the amended statement of claim filed on 8 August 2012 be dismissed** **(c) The costs of the application be costs in the proceeding.**
CATCHWORDS:	PROCEDURE — SUPREME COURT PROCEDURE — QUEENSLAND — PRACTICE UNDER RULES OF COURT — ENDING PROCEEDINGS EARLY — SUMMARY JUDGMENT — where defendant brought

application for summary judgment against part of the plaintiffs' claim — whether the plaintiff has a real prospect of succeeding — whether there is a need for a trial of the claim

TRADE AND COMMERCE — *TRADE PRACTICES ACT 1974* (CTH) AND RELATED LEGISLATION — CONSUMER PROTECTION — MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS — MISLEADING OR DECEPTIVE CONDUCT GENERALLY — GENERALLY — where plaintiff purchasers alleged that defendant vendors represented that there was or would be a duly executed legal, valid, enforceable and subsisting guarantee on completion of the sale and purchase agreement — whether the alleged representation was made — whether at the time it was made there were reasonable grounds for making it — whether the plaintiffs suffered any loss or damage by that alleged contravening conduct

Uniform Civil Procedure Rules 1999 (Qld), rr 171, 293
Trade Practices Act 1974 (Cth), ss 52, 53A, 87

Alati v Kruger (1955) 94 CLR 216, cited
Boulevard Pty Ltd v Spencer [2010] QCA 207, cited
Burke v LFOT Pty Ltd (2002) 209 CLR 282, cited
Chanel Ltd v FW Woolworth & Co Ltd (1981) 1 WLR 485, cited
Coldham-Fussell v Commissioner of Taxation [2011] QCA 45, cited
Dey v Victorian Commissioner for Railways (1949) 78 CLR 62, cited
Dowdle v Pay Now For Business Pty Ltd [2008] QSC 224, cited
Esso Petroleum Co Ltd v Mardon [1976] QB 801, cited
Eureka Funds Management Ltd v Freehills Services Pty Ltd (2008) 19 VR 676, considered
Federal Commissioner of Taxation v Montgomery (1999) 198 CLR 639, considered
Hanave Pty Ltd v LFOT Pty Ltd (1999) 43 IPR 545, cited
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, cited
HIH Casualty & General Insurance Ltd (in liq) v SGIC General Insurance Ltd [2004] VSC 519, cited
Interpharma Pty Ltd v Commissioner of Patents; Eli Lilly & Co (2008) 78 IPR 51, cited
Kellas-Sharpe v Psal Ltd [2012] QCA 135, cited
Koiso Finance Establishment Anstalt v John Wedge unreported, EWCA, 15 Feb 1994, Transcript no 94/387, cited
Krakowski v Eurolynx Properties Ltd (1995) 183 CLR 563, cited
Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd (2010) 241 CLR 357, cited
Svanosio v McNamara (1956) 96 CLR 196, cited

Traill v Baring (1864) 46 ER 941, cited
TRFCK Pty Ltd & Ors v O'Brien Holdings (Townsville) Pty Ltd & Ors [2012] QSC 203, considered
Webster v Lampard (1993) 177 CLR 598, cited

COUNSEL: J Sweeney for the plaintiffs
DA Savage SC for the first and second defendants
BT Cohen for the third defendant

SOLICITORS: MacGillivrays Solicitors for the plaintiffs
Connolly Suthers Lawyers for the first and second defendants
Bartley Cohen for the third defendant
Sparke Helmore for the fourth defendant

[1] The first defendant (O'Brien Holdings) and the second defendant (O'Brien) apply for summary judgment against part of the plaintiffs' claim pursuant to *UCPR* 293.

[2] The claim stems from events which occurred in about March 2005 to about June 2005, leading up to the making of and completion of a contract of sale of land on which there were improvements used to conduct the business of a licensed hotel. The first plaintiff (TRFCK) was the purchaser. The second plaintiff (Roddick) was a director of the first plaintiff. O'Brien Holdings was the vendor. O'Brien was a director of O'Brien Holdings. The contract was styled the "sale and purchase agreement".

[3] The hotel was purchased by TRFCK subject to a lease to Cashcow Pty Ltd, a company of which Ms Kahn and Mr Taylor were directors. Cashcow thereafter conducted the business of the hotel. The lease to Cashcow was granted shortly prior to completion of the sale and purchase agreement. At the same time that Cashcow became the lessee of the premises from O'Brien Holdings, it purchased the business of the licensed hotel from O'Brien Holdings.

[4] Cashcow's business was not successful. As a result, TRFCK's investment in the hotel was not successful. The plaintiffs allege that they suffered loss and damage by O'Brien Holdings misleading and deceptive conduct in connection with TRFCK's purchase of the land and that O'Brien was a person involved in the alleged contraventions. TRFCK also claims damages against O'Brien Holdings for breach of contract.

[5] The plaintiffs' claim against those defendants is (or is included in) the following:

> "1. The first plaintiff claims against the first and third defendants damages for breach of contract.
>
> 2. …
>
> 3. The first to fourth plaintiffs claim against the first to fourth defendants:

(a) damages under s 82 of the *Trade Practices Act* 1974 (Cwth) for conduct in breach of s 52 or s 53A(1) of the Act; alternatively

(b) compensatory orders under s 87 of the *Trade Practices Act* 1974 in respect of the loss suffered by conduct in breach of s 52 or s 53A(1) of that Act;

(c) interest as damages;

(d) alternatively statutory interest;

(e) costs."

[6] By paragraph 1 the application for summary judgment seeks an order that O'Brien Holdings and O'Brien have judgment against the plaintiffs "in respect of that aspect of the plaintiffs' claim against the first and second defendants as relates to the plaintiffs' claim that contrary to the sale and purchase agreement the first and second defendants did not provide compliant guarantees (that is to say, paragraphs [27] to [31] of the amended statement of claim)".

[7] By paragraph 2 the application for summary judgment seeks an order that O'Brien Holdings and O'Brien have judgment against the plaintiffs "in respect of that aspect of the plaintiffs' claim against the first and second defendant as relates to the plaintiffs' claim that contrary to the sale and purchase agreement the first and second defendants provided an 'undisclosed incentive' (that is to say, paragraphs [32] to [35] of the amended statement of claim)".

Long form guarantee representation

[8] Paragraph 16(d)(ii) of the amended statement of claim (ASOC) alleges that a written offer was made on behalf of TRFCK to O'Brien Holdings under which it was proposed that O'Brien Holdings would "represent", (by cl 11.2(c)) that "there is or will be a duly executed legal, valid, enforceable and subsisting guarantee by the directors of Cashcow and, if he is not a director, Chris Taylor in favour of the purchaser".

[9] Paragraph 17 of the ASOC alleges that the written offer was accepted by O'Brien Holdings, (which had the effect of making the sale and purchase agreement). Paragraph 19 alleges that O'Brien Holdings' conduct in notifying acceptance "constituted the making of representations of present fact in terms of clauses … 11.2 of the sale and purchase agreement" to the first plaintiff and the second plaintiff.

[10] Paragraph 27 of the ASOC alleges that the representation in clause 11.2(c) of the sale and purchase agreement was misleading and deceptive and contravened s 52 of the *Trade Practices Act* 1974 (Cth) (TPA). The plaintiffs allege that:

"(a) on a proper interpretation of clause 11.2(iii) [*sic*], the guarantee mentioned therein was the long form guarantee contained in the Dillons lease terms, which Dillons had provided to Phillips Fox by email attachment on 20 May 2005;

(b) at 26 May 2005 neither Ms Khan nor Mr Taylor had signed the long form guarantee and there was no reasonable basis

> for O'Brien Holdings to represent on 26 May 2005 that either Ms Khan or Mr Taylor would sign the long form guarantee;
>
> (c) neither Ms Khan nor Mr Taylor ever signed the long form guarantee and Mr Taylor, in 2006, denied to Mr Roddick that he or Ms Khan had ever signed a guarantee of the lease;
>
> …
>
> (g) during the period between 26 May 2005 and settlement on 1 July 2005 at no time did O'Brien Holdings in any way qualify the contract representation in clause 11.2(iii) [sic]"

[11] Paragraph 27 also refers to other guarantees, which it is alleged were provided a week after settlement by solicitors (presumably acting for Ms Khan and Mr Taylor) to O'Brien Holdings' solicitors but not in the "long form". I do not refer to them further because they seem to be immaterial to the allegations of misleading and deceptive conduct which, by paragraphs 27(a), 27(b) and 27(g), are directed to the alleged representation concerning the "long form" guarantee.

[12] Paragraph 1 of the application for summary judgment, as set out above, suggests that the plaintiffs' claim in paragraphs 27 to 31 of the ASOC is that contrary to the sale and purchase agreement O'Brien Holdings did not provide compliant guarantees. In my view, that is not an accurate statement of the cause of action for misleading or deceptive conduct alleged in those paragraphs.

[13] The conduct alleged is the making of a "representation", (also comprising a contractual warranty), that "there is or will be" (presumably on completion of the sale and purchase agreement) "a duly executed legal, valid, enforceable and subsisting guarantee" in a particular form by identified persons. In part, the plaintiffs characterise that as a representation of existing fact, namely that the relevant guarantees were in existence at the time of the making of the representation. That contention is misconceived. A statement and contractual warranty in a contract for the sale of land that a state of affairs "is or will be" in existence at completion is not a representation that the state of affairs presently exists. It is a statement as to what will be the state of affairs by the time of completion. Such a representation may be misleading or deceptive if there were no reasonable grounds for making it at the time it was made but not because the state of affairs did not exist when the statement was made.

[14] Accordingly, it does not seem to me to be necessary, for the purposes of considering this part of the application, to consider any potential questions other than whether the alleged representation was made, whether at the time it was made there were reasonable grounds for making it and, if not, whether the plaintiffs suffered any loss or damage by that alleged contravening conduct.[1] Those are the questions which will determine whether or not the plaintiff has a real prospect of success on its claim for damages (or s 87 relief) in respect of the long form guarantee representation.

[15] O'Brien Holdings and O'Brien specifically challenge whether the plaintiffs have a real prospect of success in establishing that the long form guarantee representation

---

1 There is no question that the alleged conduct was engaged in by a corporation in trade or commerce.

was made. They contend that any representation made in the form of the contractual warranty in clause 11.2(c) of the sale and purchase agreement was as to the provision of guarantees which answered the requirements of that clause and that was not limited to the "long form" guarantee attached to the draft lease provided by Dillons to Phillips Fox on 6 April 2005.

Incentive representation

[16] Paragraph 16(d)(ii) of the ASOC also alleges that clause 11.2(iv) [*sic*] of the sale and purchase agreement contained the representation that "no rent free period or other incentive has been given to Cashcow except as set out in the copy lease provided to the purchaser" – see clause 11.2(d). That may be described as the "incentive representation". As previously mentioned, paragraph 19 of the ASOC alleges that by notifying acceptance of the offer to the first plaintiff O'Brien Holdings engaged in conduct which constituted the making of a representation of present fact in terms of clause 11.2 of the sale and purchase agreement, which includes the incentive representation.

[17] Paragraph 32 of the ASOC alleges that the incentive representation was misleading and deceptive in contravention of s 52 of the TPA because at the date of acceptance of the offer (26 May 2005) an incentive (an inducement to enter into the lease) had been given to Cashcow which was not set out in the copy lease provided to the first plaintiff. In support of that allegation paragraph 32 of the ASOC alleges:

> "(a) The reference to 'the copy lease provided to the purchaser' in cl 11.2(iv) [*sic*] of the sale and purchase agreement was a reference [*sic*] the document which Dillons had provided to Phillips Fox by email attachment on 20 May 2005;
>
> (b) At 26 May 2005, the incentive to enter into the lease which O'Brien Holdings had offered Cashcow was the incentive later reflected in an agreement bearing date 24 June 2005 made between O'Brien Holdings as vendor and Cashcow as purchaser of the hotel business, in which those parties agreed as follows:
>
> (i) by cl 2.1, the vendor agreed to sell the Borroloola Inn business to the purchaser for $500,000;
>
> (ii) by cl 2.4, the vendor agreed to grant the purchaser a lease of the premises, in a form of a specimen lease annexed marked 'B';
>
> (iii) the purchase price was to be paid as follows:
>
> 1. $50,000 deposit upon execution of the contract;
> 2. $350,000 upon completion;
> 3. $100,000 by way of vendor finance, such sum to be lent upon the following terms and conditions: $30,000 prior to the first anniversary of the date of settlement; $30,000 prior to the second anniversary of the date of settlement; and $40,000 prior to the third anniversary of the date of settlement, with the $100,000 debt secured by a second rating [*sic*] registered mortgage debenture

> over the whole of the assets and undertaking of the purchaser company."

[18] O'Brien Holdings and O'Brien challenge whether the plaintiffs have any real prospect of success on a claim for damages (or s 87 relief) for contravention of s 52 based on the incentive representation. They contend that the vendor finance provided by O'Brien Holdings under the agreement for the sale of the business to Cashcow was not an incentive within the meaning of clause 11.2(d) of the sale and purchase agreement.

Summary judgment for part of a claim

[19] Each of the causes of action for contravention of s 52 based on the long form guarantee representation and the incentive representation is a claim for loss or damage alleged to have been suffered by the alleged contravening conduct. The claimed damages are alleged to have been suffered as a result of the first plaintiff completing the transaction of purchase under the sale and purchase agreement. In broad terms, the plaintiffs seek to be restored to the position they allege they would have been in had the contravening conduct not occurred and the first plaintiff not acquired the hotel, which is described in paragraph 44 of the ASOC as the reversionary interest in the hotel.

[20] However, the same loss is also claimed by reason of two other alleged causes of action for misleading or deceptive conduct based on representations made in clauses 10 and 1.3.5 of the sale and purchase agreement that the use of the property as a hotel was lawful and that O'Brien Holdings held all necessary planning and development approvals for the property. Paragraph 22 alleges that representations made in clauses 10 and 1.3.5 of the sale and purchase agreement were misleading or deceptive because six dongas (being improvements on the hotel premises) did not comply with all applicable laws. Paragraph 23 further alleges that clauses 10 and 1.3.5 of the sale and purchase agreement were misleading or deceptive because all necessary planning and development permissions had not been obtained.

[21] Consequently, if O'Brien Holdings and O'Brien's contentions that the parts of the plaintiffs' claim based on the long form guarantee representation and incentive representation must be dismissed are accepted, the only relief which might possibly be granted must be relief specific to those causes of action. The claim for relief for damages (or s 87 relief) would remain, based on the lawful use representations.

[22] An application under *UCPR* 293 is an application for judgment. Prior to 1999, there was no rule of court in this court which provided for an order for summary judgment in favour of the defendant. The procedure for summary judgment was limited to an application by the plaintiff against the defendant.[2]

[23] In the context of *UCPR* 293, or *UCPR* 292, "judgment" implies an order that disposes of a claim, or part of a claim, finally. Also in the context of the *UCPR*, "claim" usually means a claim for relief in the proceeding.

---

[2] Order 18 and order 18A of the *Rules of the Supreme Court*

[24] The application does not identify the form of order that is sought, beyond seeking an order that in respect of an "aspect" of the plaintiffs' claim, identified by reference to subject matter and paragraph numbers in the ASOC, O'Brien Holdings and O'Brien "have judgment".

[25] The question is thus raised whether *UCPR* 293 authorises the court to give judgment in respect of a challenge to the viability of a plaintiff's cause of action where that cause of action is only one of a number of alternatives said to justify the relief set out in the claim. That is, what is the "judgment" to be given in respect of what "part of the claim" in the terms of the rule? It might be said that the appropriate order, in such a case, is an order striking out the relevant paragraphs of the statement of claim, rather than the giving of any judgment.

[26] The width of the language of the rule may be important – as the unsuccessful defendant discovered in relation to the cognate Victorian rule.[3] But the contextual considerations which might affect the scope of the operation of *UCPR* 293 include that a judgment under that rule would operate as a final judgment and the condition of the court's power to give judgment under the rule is that the plaintiff has "no real prospect of succeeding on" the relevant part of the claim.[4] By way of contrast, the overlapping power of a court to strike out part of a statement of claim either in the inherent jurisdiction or under *UCPR* 171 results in an interlocutory order and the exercise of the discretion is guided by the well-known principles relevant to those kinds of applications.[5]

[27] This point was not raised by the parties and it does not appear to have arisen in previous decisions of this or other courts operating under similar rules.

[28] The problem would not arise in England and Wales because the comparable rule there, *CPR* 24.4, provides that the court may give "summary judgment against a claimant or defendant on the whole of a claim or on a particular issue". The words "particular issue" connote a "disputed point of fact or law relied on by way of defence", in the case of an application brought against a defendant.[6]

[29] There are decisions of this court under *UCPR* 293 and of the Federal Court of Australia upon the comparable provision applicable in that Court which support the conclusion that judgment may be given in respect of a particular cause of action by reference to paragraphs of a statement of claim.[7]

[30] In the result, and because the contrary was not argued, I do not propose to consider this question further and intend to proceed on the footing that within the meaning of *UCPR* 293(2) a "judgment" against a plaintiff for part of the plaintiff's claim may

---

3 *HIH Casualty & General Insurance Ltd (in liq) v SGIC General Insurance Ltd* [2004] VSC 519 at [27] – [33].

4 See *Coldham-Fussell v Commissioner of Taxation* [2011] QCA 45 at [98] – [102].

5 *Dey v Victorian Commissioner for Railways* (1949) 78 CLR 62. An interesting extension of those principles to a rule providing for summary judgment for a defendant may be seen in *Webster v Lampard* (1993) 177 CLR 598 at 602, but the relevant rule did not have a "no real prospect" condition of exercise of the power to grant summary judgment.

6 *Koiso Finance Establishment Anstalt v John Wedge* unreported, EWCA, 15 Feb 1994, Transcript no 94/387 (referred to in the *White Book Service 2012* at [24.1.1]).

7 *Dowdle v Pay Now For Business Pty Ltd* [2008] QSC 224 at [46]; *Interpharma Pty Ltd v Commissioner of Patents; Eli Lilly & Co* (2008) 78 IPR 51; [2008] FCA 1283 at [16] and Order (1).

be given in the form of a judgment that a part of the claim raised by particular paragraphs of a statement of claim be dismissed.

Second summary judgment application

[31] The plaintiffs submit that the application should be summarily dismissed because O'Brien Holdings and O'Brien applied for the summary judgment or an order that the statement of claim be struck out on a prior occasion, resulting in an order made by Applegarth J on 19 September 2011 that the statement of claim be struck out with leave to replead. In February 2012, the plaintiff applied for leave to amend the statement of claim, which was opposed by the third and fourth defendants but not by O'Brien Holdings and O'Brien. On 2 August 2012, Daubney J made an order granting leave to amend the statement of claim following which on 8 August 2012 the ASOC was filed.

[32] The plaintiffs submit that "a party cannot fight over again a battle which has already been fought, and which it lost, unless there has been some significant change of circumstances, or the party has become aware of facts which [it] could not have reasonably have known or found out in the meantime".[8]

[33] It is unnecessary to explore the application of that principle in the present case. That is because when it comes to a second application for summary judgment, specific provision is made by *UCPR* 294 which permits the application but requires a grant of leave. That requirement was reflected in the practice under the *Rules of the Supreme Court*, prior to the introduction of the *UCPR* in 1999.[9]

[34] However, it is also unnecessary to explore the principles informing the exercise of the discretion to grant leave in the present case. That is because although O'Brien Holdings and O'Brien's application which was heard before Applegarth J was in form an application for summary judgment or to strike out the statement of claim, it proceeded in argument only as the latter, based on the contention that the pleading disclosed no cause of action because the allegations of causation and damage by each of TRFCK and Roddick were untenable or not maintainable.[10] In my view, that is sufficient in this case to justify the grant of leave, as O'Brien Holdings and O'Brien did not in the earlier application pursue a wider summary judgment application.

[35] It is true that when the plaintiffs applied for leave to file an amended statement of claim before Daubney J the fourth defendant submitted that the guarantees were in any event provided by the identified guarantors[11]. However, whether the long form guarantee representation was made was a point not then agitated by O'Brien Holdings or O'Brien. Daubney J found:

---

8 *Chanel Ltd v FW Woolworth & Co Ltd* (1981) 1 WLR 485 at 492-493; *Boulevard Pty Ltd v Spencer* [2010] QCA 207 at [17] and *Kellas-Sharpe v Psal Ltd* [2012] QCA 135

9 *FCA Finance Pty Ltd v Spartan Holdings Pty Ltd* (1989) 1 Qd R 280 at 281-282

10 Compare the procedure adopted in *Bradshaw & anor v Secure Funding Pty Ltd* [2012] QCA 52 at [12] – [14]

11 *TRFCK Pty Ltd & Ors v O'Brien Holdings (Townsville) Pty Ltd & Ors* [2012] QSC 203 at [33](a)

"(a) there is clearly a factual dispute as to what guarantees were provided and to whom;

(b) whether the contract required particular forms of guarantee to be provided prior to settlement will require the terms of the contract to be construed in the context of the facts as found at trial"

Prospect of succeeding on the long form guarantee representation

[36] As previously stated, the basis of the alleged contravention of s 52 in respect of the long form guarantee representation was that, at the time of making the sale and purchase agreement, neither Ms Khan nor Mr Taylor had signed the long form guarantee and there was no reasonable basis for O'Brien Holdings to represent that they would do so. Therefore, if the plaintiffs have no real prospect of success in establishing that the long form guarantee representation was made, that cause of action will fail.

[37] Paragraph 19 of the ASOC does not specifically allege that the representation made in terms of clause 11.2(c) of the sale and purchase agreement referred to a guarantee in the "long form". However, that conclusion is alleged to follow from paragraphs 11 to 19 and 27(a) of the ASOC. The sequence alleged is that on 6 April 2005 O'Brien Holdings' solicitors provided TRFCK'S solicitors with a draft form of memorandum of the proposed lease to Cashcow, which contained the long form guarantee. Next, on 22 April 2005, the TRFCK's solicitors sent an offer to buy the reversion of the hotel premises to O'Brien Holdings' solicitors. The terms of that offer are alleged to have been "subject to the said lease to Cashcow" which is no doubt intended to pick up the draft lease, including the long form guarantee. Next, on 11 May 2005 negotiations between the parties ceased and all offers were withdrawn. Following that, on 23 May 2005, the TRFCK's solicitors provided O'Brien Holding's solicitors with a further signed offer to purchase the reversion, allegedly "in terms of the earlier offer", but with some relevant changes, including the representation in clause 11.2(c) "that there is or will be a duly executed legal, valid and enforceable and subsisting guarantee" by the directors of Cashcow including Chris Taylor "in favour of the purchaser". Nothing further was stated about the content of the guarantee.

[38] In these circumstances, O'Brien Holdings and O'Brien submit that whether or not the guarantee was required to be the long form guarantee is a simple matter of construction of the sale and purchase agreement. In my view, that is not strictly the correct question. That question is whether, by the conduct alleged in the identified paragraphs of the ASOC, the plaintiffs have any real prospect of succeeding on a claim that it was misleading or deceptive to make the representation set out in clause 11.2(c) of the draft sale and purchase agreement, when at the time of entering into that contract neither Ms Kahn nor Mr Taylor had executed the long form guarantee and in the absence of reasonable grounds to expect that they would do so.

[39] The point of distinction is that the operation of s 52 is not controlled or affected by the relevant common law principles which regulate the interpretation of a written contract or the interrelationship of a tortious claim for misrepresentation and the operation of contractual warranties.

[40] At common law, there is a long history of claims for damages in tort by disappointed purchasers of businesses, including claims based on misrepresentations which also form contractual warranties. Thus, the purchaser of a business could recover damages for the tort of deceit for a misrepresentation which also operated as a contractual warranty as to the takings of the business.[12] In the case of an innocent misrepresentation, equitable relief by way of rescission might be granted before completion, but there was no cause of action for damages for an innocent misrepresentation made in connection with a sale.[13]

[41] Following the landmark decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[14] there was at least some suggestion or indication that the law of negligence might develop to encompass damages for negligently made pre-contractual representations,[15] but it is unnecessary to say more about that fascinating subject matter or whether it could stand with more recent developments of principle of the common law of Australia as to the existence of a duty of care against economic loss in the High Court of Australia.

[42] In 1974, it was against this background that s 52 of the TPA was introduced as part of the law of Australia. A pre-contractual or extra-contractual representation made by a party or, more precisely, conduct of a party in that context which is misleading or deceptive or likely to misled or deceive may constitute a contravention of s 52, whether or not the relevant conduct alleged as a representation is conveyed by the terms of the contract, properly construed. In ascertaining the meaning of the terms of a written contract, the common law principle of the integration of the terms of the contract into the writing, which is reflected in the parol evidence rule, requires that primacy be given to the text, generally shorn of any evidence of the prior negotiations. Again, it is unnecessary to pursue the details of the limits or exceptions to the operation of those rules in this case.

[43] That is because, for the purposes of a cause of action based on s 52 and s 82 (or s 87) of the TPA, the question is whether the facts pleaded in paragraphs 11 to 19 of the ASOC are capable of constituting misleading or deceptive conduct in the manner alleged in paragraphs 27(a) and 27(b) of the ASOC.[16]

[44] O'Brien Holdings and O'Brien contend that they are not, relying on the break in negotiations on 11 May 2005, when all offers were withdrawn, coupled with the failure to make any subsequent reference to the long form guarantee in negotiations before acceptance of the offer in the form which included clause 11.2(c). They submit that has the consequence that there was no representation that the guarantees which would be executed would be in the form of the long form guarantee.

[45] The plaintiffs' submissions were directed to whether, by reason of s 51A of the TPA, O'Brien Holdings bears the onus of showing that on making the contract it had reasonable grounds for making the long form guarantee representation. But that

---

12 *Alati v Kruger* (1955) 94 CLR 216 at 221
13 See *Svanosio v McNamara* (1956) 96 CLR 196 at 207
14 [1964] AC 465.
15 *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 at 820, 827 and 833
16 No allegation is made that the conduct was likely to mislead or deceive.

does not answer the anterior question of whether a representation was made that the guarantee would be in a long form at all, to which s 51A does not speak.

[46] In my view, although O'Brien Holdings and O'Brien's contention may ultimately prove correct, it should not be accepted prior to a trial on the basis that the plaintiffs have no real prospect of success on that point.

[47] There are three reasons why I have come to that view. First, the answer to the question is not in my view obvious. In the negotiations, as pleaded, the only form of guarantee which was referred to and which might have informed the parties' expectations, judged from the view point of an hypothetical reasonable person, was the long form guarantee. Secondly, there may be admissible evidence as to the negotiations in the context of a s 52 claim which would not be received as a matter of interpretation of the terms of a written contract. And thirdly, although his Honour's reasoning was not precisely the same as mine, in substance Daubney J came to the view that the point was one to be decided at trial as between the plaintiffs and the other defendants – it would be undesirable in my view to decide it finally between the plaintiffs and O'Brien Holdings and O'Brien, on potentially different evidence in the same proceeding, particularly where the proceeding will go to trial as against O'Brien Holdings and O'Brien on at least the lawful use representations, in any event.

The incentive representation

[48] O'Brien Holdings and O'Brien submit that the incentive representation case is simply wrong and requires no more detailed consideration than the evidence presently allows.

[49] The contention is that no "incentive" of the kind contemplated by clause 11.2(d) of the sale and purchase agreement was given. In support of that, O'Brien Holdings and O'Brien also rely upon the fact that the agreement for the sale of the hotel business by O'Brien Holdings to Cashcow was dated 24 June 2005, and therefore was made after the sale and purchase agreement was entered into on 26 May 2005.

[50] Thus there are two questions: whether any "incentive" within the meaning of the incentive representation was given at all and, if so, whether it was given on or before the making of the sale and purchase agreement.

[51] As to the second question, a responsive point was raised by the plaintiffs' counsel, although I think it is not properly open on the current form of the ASOC, namely that even if the agreement as to vendor finance was reached after 26 May 2005, the representation that no incentive had been given to Cashcow was misleading "at all points after the vendor finance agreement was reached".[17]

[52] The primary question is whether or not the vendor finance given was an incentive within the meaning of the representation conveyed by clause 11.2(d) of the sale and purchase agreement. As to this point, the plaintiffs' counsel relied on the dictionary meaning of "incentive" and submitted that there is a "triable issue" that Mr Taylor

---

17 Reliance was placed on *Traill v Baring* (1864) 46 ER 941 at 946.

was "stimulated to agree to $250,000 rather than $200,000 rent by reason of an offer of part vendor finance". There was no evidence to support the last contention, only evidence that in negotiations Mr Taylor had made an offer (presumably on behalf of Cashcow) to pay rent at $200,000 per annum in April or May 2005 and later but before 17 May 2005 that Mr Taylor and Ms Kahn had agreed to pay $250,000 rent per annum.

[53] I accept that the provision of vendor finance could be described as an incentive given to Cashcow to enter into the agreement for sale of the business made between O'Brien Holdings as vendor and Cashcow as purchaser – a deferral of payment of the purchase price has a plain financial benefit which operates as an inducement to action.

[54] I also note that under clause 2.4 of the agreement for sale of the business dated 24 June 2005, O'Brien Holdings and Cashcow agreed to enter into the lease of the premises which is referred to in clause 11.2(d) of the sale and purchase agreement.

[55] However, the precise question is whether the provision of vendor finance to the extent of $100,000 of the $500,000 purchase price payable for the sale of the business was an incentive within the meaning of the representation conveyed by clause 11.2(d) of the sale and purchase agreement.

[56] Part of the relevant context of making the representation conveyed by that clause, known to both the parties to the sale and purchase agreement, was that O'Brien Holdings as vendor of the reversionary interest in the hotel to TRFCK was to enter into a lease of the premises to Cashcow before completion of the sale of the reversionary interest. As a matter of business common sense, a reasonable person would have expected that as the acquirer of the reversion, TRFCK had an obvious economic interest in the terms of the lease, commercial and otherwise, at least in so far as they might affect the lessor.

[57] But in the circumstances of this case it is a step too far, in my view, to say that a reasonable person in the position of a party to the sale and purchase agreement[18] would have understood that the commercial terms of the concurrent sale of the business by O'Brien Holdings to Cashcow comprising the payment of the purchase price for that sale would be of interest to the first plaintiff as an incentive to Cashcow to be set out in the draft lease. If vendor finance were such an incentive so would be any reduction in the purchase price conceded by the vendor in negotiations for the sale of the business. But these things are not incentives anyone would ordinarily expect to find set out in a lease.

[58] The view I have come to is that O'Brien Holdings' conduct in making the representation that there was no "rent free period or other incentive… except as set out in the copy lease…" was not misleading or deceptive,[19] assuming that at the time of making the representation O'Brien Holdings had agreed to finance the sum

---

[18] Cf *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]. The question in the present case is not what clause 11.2(d) means as a matter of contract law, but the process of interpretation in that context also calls up a reasonable person analysis.

[19] Again no reliance was placed on "or likely to mislead or deceive".

of $100,000 of the purchase price payable by Cashcow for the purchase of the business.

[59] The analysis of that question is assisted, in this context, by a "reasonable expectation" approach of the kind recently discussed by French CJ and Kiefel J in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd.*[20]

[60] It may be accepted, in my view, that lease incentives are a pervasive feature of the commercial leasing market in Australia and have been so for many years. The landscape was thus described in one of the cases dealing with the taxation status of a cash payment made by way of incentive to induce the recipient members of a firm of solicitors to cause their service company to enter into a lease:

> "So widespread was the use of leasing incentives, that, in the valuation of commercial leases, some informed people in the industry referred to the "face" rent as being the rental specified in the lease and the "effective" rent as being the rental discounted for incentives. The evidence does not establish that incentive payments and rents were uniformly calculated, or, either generally or in this case, that a particular proportion of the rent, whether reduced to a present value or otherwise, was to equal the amount of the incentive payment on any particular percentage of it. There was no question of the firm being offered a choice between paying a higher rent and receiving an inducement payment, on the one hand, and paying a lower rent and receiving no inducement payment, on the other."[21]

[61] Another case dealing with the effect of incentives in the determination of rental on review also explained the commercial market forces thus:

> "The broad legal and commercial context is explained in a detailed article by Squirrell and Hockley entitled **"**Lease Incentives and Rental Valuations" published in the *Australian Property Law Journal* in 1993. The continuing relevance of the article is indicated by the valuer's own reasons in this case, in which he reported that as at February 2004 incentives remained prevalent in the Melbourne CBD office rental market.
>
> Without necessarily accepting their pejorative remarks about the conduct and motivations of market participants, I note the authors' observations about the relevant market as it was in the early 1990s, as follows:
>
>> In the Australian capital cities the 1980s and the economic boom that characterised that decade ended with a marked economic decline, and this combined with the completion of a vast amount of commercial real estate in the form of major new office buildings has led to a dramatic increase in the variety and level of "lease incentives".
>>
>> …

---

20 (2010) 241 CLR 357 at [39] – [23].

21 *Federal Commissioner of Taxation v Montgomery* (1999) 198 CLR 639 at [11].

Real estate is a cash cycle enterprise where the first critical element for all parties is cash solvency. This is especially true for the developers and owners of recently completed large city office buildings. In these situations the landlord with considerable vacant space needs to obtain a tenant whose rent will provide some or all of the cash flow to at least pay for the ongoing costs and hopefully for the development. If a surplus can be generated, this will be a reward or profit arising from the development.

Victoria has been one of the States worst affected by the economic downturn that has occurred since 1989. In Melbourne there have been 37 major building projects completed in the 3 years from January 1990 to December 1992. J Hatcher, "Lease Incentives and Capital Valuation Methodology", *Victorian Real Estate Journal*, March 1992, p 6. These buildings have produced a total lettable area of more than 870,000 square metres which represents a 38% increase in the city's office stock. This has occurred in a market that for 10 years had a vacancy rate of from 2–4% and where new space produced each year ranged from 50,000–100,000 square metres. This huge increase in supply, exacerbated by the general economic recession and a decline in employment, meant that supply easily outstripped demand. The combination of these factors produced very considerable cash flow pressures on landlords; and the quest to obtain tenants became paramount and the cost of doing so became almost irrelevant.

In an effort to try to fill their buildings landlords offered inducements to attract tenants to move into the newly completed office space. These inducements ranged from gifts of cars to substantial, up-front, rent-free periods. While incentives and inducements have been a feature of the central business district (CBD) for many years, it is the level and the extent of the incentives offered in recent times that has become the focus of debate and controversy.

The particular difficulty is how to value the incentive offered. This has arisen because of the landlord's desire to maintain a property's value at a price level higher than that which would probably be obtained in a "falling" market. Landlords have also sought to retain the valuation practice approach of inferring selling price based on the price/income ratio.

To enable this mirage to occur, contract or nominal rentals are agreed and publicly reported at levels designed to sustain capital values at "appropriate, higher

than the market" levels while at the same time an inducement or incentive is accepted by the tenant so that the net or effective rent actually incurred is at a lower rate. For this system to work it is necessary for the incentives to be kept secret and confidential.

…

Reasons for Lease Incentives

The lessor

In the current market lessors are faced with the prospect of choosing between the alternatives of having their premises empty or accepting a lower rent or offering considerable lease incentives. Leaving the premises empty is not a viable alternative to a lessor with considerable holding and operating costs and would hardly appeal to the lessor's financiers. If the lessor accepted a lower rental it is likely that the capital value of the property would decline. This leaves the lessor with the only option of at least appearing to have obtained higher rentals. In this way the lessor appears to maintain or increase the capital value of the property by offering lease incentives together with a ratchet clause in the lease that maintains the initial rent and/or increases the rent by a predetermined amount each year.

Lessors claim that if lease incentives are considered by valuers in the determination of a rent review then they are disadvantaged twice, at the start of the lease and at the time of the rent review. Lessors also claim that the lease incentives are a one-off capital cost and that the incentive-influenced rent should be the relevant rent to be considered at rent reviews. In support of their contentions lessors have inserted secrecy clauses in lease agreements containing lease incentives. These secrecy clauses or agreements have worked to the advantage of lessors when dealing with lessees who are not fully informed or advised of the market conditions.

The lessee

The lessee seeks to maximise the benefits that can be obtained in entering into a lease. On a rent review the lessee will seek to have the true cost of the leased accommodation determined by the inclusion of all financial and other incentives obtained. The lease incentives given to any particular tenant may not reflect market conditions and thus may provide a poor indicator of current market rent at a rent review."[22]

---

[22] *Eureka Funds Management Ltd v Freehills Services Pty Ltd* (2008) 19 VR 676 at [38] – [39].

[62] As might be expected, the non-disclosure of incentives has been a regular source of litigation between vendors and purchasers of leased commercial properties. Important cases include a claim for misleading or deceptive conduct for misrepresenting in a contractual warranty that "all incentives for the benefit of the tenant under or in connection with the lease are disclosed in the lease or set out below" when there had been an incentive cash payment to the original holder of the lease which was not disclosed.[23] Another example concerned a misleading answer to a requisition on title as to "all sub-leases and agreements relating to the tenancy or occupation of the property" which did not disclose a side agreement that had been made with the lessee for a rent free period at the beginning of the term of the lease and payment of a cash amount on signing of the lease. The purchaser claimed that was misleading or deceptive conduct and fraudulent misrepresentation.[24]

[63] Accepting that historical commercial context as informing the ordinary understanding and expectations of a reasonable person in the position of vendor or purchaser of leased commercial premises, in my view the answer to the scope of the incentive representation in the present case is to be determined in the light of a number of particular facts, as follows.

[64] On 22 March 2005, Dillons (O'Brien Holdings' solicitors) provided a copy of a draft sale and purchase agreement to Phillips Fox (the first plaintiff's solicitors), attached to an email. Clause 22.1 of that draft specifically referred to an agreement for sale called "the business agreement" which was to be entered into between O'Brien Holdings and Cashcow for the sale and purchase of the hotel business.

[65] Roddick knew in March or April 2005 that the proposed sale and purchase of the business was to be for a price of $500,000 and discussed with Mr Taylor the sources of funds that the purchaser had for the acquisition. However, there is no suggestion that O'Brien Holdings knew of that conversation.

[66] The case pleaded by the plaintiffs is that "the copy lease provided to the purchaser" referred to in clause 11.2(d) of the final sale and purchase agreement was the document which Dillons (O'Brien Holdings' solicitors) had provided to Phillips Fox (TRFCK's solicitors) by email attachment on 20 May 2005. That draft lease contained no reference to the agreement for the sale and purchase of the hotel business.

[67] On 23 May 2005, when, as pleaded, the draft final sale and purchase agreement was provided by Phillips Fox to Dillons for acceptance by O'Brien Holdings, it still contained clause 22.1. That is to say, a reasonable person in O'Brien Holdings' position would have expected that the first plaintiff was aware that there was or was to be still a contract between O'Brien Holdings as vendor and Cashcow as purchaser for the sale of the hotel business to Cashcow.

[68] As well, a reasonable person in O'Brien Holdings' position would have expected that TRFCK was aware that the sale and purchase agreement was, by clause 3.1(b),

---

23 *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 43 IPR 545. The case went on appeal to the High Court upon a contribution question: *Burke v LFOT Pty Ltd* (2002) 209 CLR 282.

24 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 572 and 585.

subject to the condition that on completion the first plaintiff would become the lessor of the premises to Cashcow as lessee of the land and hotel premises.

[69] For the purposes of analysis, it may also be accepted that a reasonable person in O'Brien Holdings position would not have expected that the plaintiffs were aware of the terms of payment of the purchase price under the contract or proposed contract between O'Brien Holdings as vendor and Cashcow as purchaser for the sale of the hotel business to Cashcow, including the provision of vendor finance of $100,000 of that price.

[70] Having regard to those facts, in my view, the plaintiffs have no real prospect of success upon a claim that O'Brien Holdings engaged in misleading or deceptive conduct in making the incentive representation, by failing to disclose the vendor finance provision for payment of $100,000 of the consideration payable by Cashcow for the purchase of the business as an incentive in respect of the lease.

Costs

[71] Each of the disputants to the application has had a measure of success. It follows, in my opinion, that the appropriate order as to costs of the application is that they be made costs in the proceeding.

Orders

[72] It follows that the orders I propose to make are:

(a) Paragraph 1 of the application is dismissed

(b) It is adjudged that the part of the plaintiffs' claim against the first and second defendants contained in paragraphs 32 to 35 of the amended statement of claim filed on 8 August 2012 be dismissed

(c) The costs of the application be costs in the proceeding.