SUPREME COURT OF QUEENSLAND

CITATION:	*Makings Custodian Pty Ltd & Anor v CBRE (C) Pty Ltd & Ors* [2017] QSC 80
PARTIES:	**MAKINGS CUSTODIAN PTY LTD ACN 139 197 130** (first plaintiff) and **MAKINGS PTY LTD ACN 120 563 260** (second plaintiff) **v** **CBRE (C) PTY LTD ACN 003 205 552** (first defendant) and **ORCHID AVENUE REALTY PTY LTD ACN 093 431 595** (second defendant) and **STEPHEN GUY SOLOMONS** (first third party) and **DUNCAN IAN ROBERT McINNES** (second third party)
FILE NO/S:	No 7764 of 2014
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	11 to 19 August 2016; 24 and 26 August 2016
JUDGE:	Dalton J
ORDER:	**1. Judgment for the first defendant against the plaintiffs.** **2. Judgment for the plaintiffs against the second defendant in the sum of $1,640,252, together with interest to be calculated.** **3. Judgment for the third parties against the second defendant.**
CATCHWORDS:	TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE

REPRESENTATIONS – PARTICULAR CASES – REAL ESTATE TRANSACTIONS – where the plaintiffs purchased a shopping centre – where real estate agent made statements to the plaintiffs, and prepared and provided documents to the plaintiffs containing financial and other information about the premises – where the plaintiffs argue that the real estate agent misrepresented the net rent payable by tenants and the outgoings payable by the owner – where the plaintiffs argue that the second defendant misrepresented the likely yield of the premises – where the documents were prepared using information prepared by the first defendant – whether the real estate agent or first defendant engaged in misleading or deceptive conduct

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – CHARACTER OR ATTRIBUTES OF CONDUCT OR REPRESENTATION – EXCLUSION CLAUSES, DISCLAIMERS AND ACKNOWLEDGEMENTS – where real estate agent provided documents to the plaintiffs – where the documents included a disclaimer that real estate agent gave no representations as to the accuracy or truth of the information – whether the disclaimer exempted real estate agent from liability to the plaintiffs

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – DEFENCES – where the second defendant limited its contributory negligence case during the trial to the conduct of one of the directors of the plaintiffs – where the director failed to verify information provided by real estate agent with the first defendant – where the director failed to make further inquiries of the first defendant after vendor failed to respond to queries from the plaintiffs' solicitors – whether the plaintiffs contributed to their own loss

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – ACTIONS FOR DAMAGES – DEFENCES – PROPORTIONATE LIABILITY – where real estate agent argued that first defendant and vendor were concurrent wrongdoers – whether this was so where no act independent of real estate agent which caused loss

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES –

OTHER ORDERS OR RELIEF – CONTRIBUTION OR INDEMNITY – where the third parties were the sole directors and shareholders of the vendor –where the second defendant argued that the third parties knowingly provided inaccurate information to the second defendant – whether the third parties were liable to compensate the second defendant as persons involved in the contravention

Civil Liability Act 2003 (Qld), s 28(1)(a)
Trade Practices Act 1974 (Cth), s 52, s 53A, s 75B, s 82(1B), s 87CB(1)(a), s 87CD

Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592, applied
Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199, cited
Esanda Finance Corporation v Peat Marwick Hungerfords (1997) 188 CLR 241, cited
Hadgelias Holdings and Waight v Seirlis & Ors [2014] QCA 177, followed
HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640, cited
Merost Pty Ltd v CPT Custodian Pty Ltd [2014] FCA 97, applied
Nea Pty Ltd v Magenta Mining Pty Ltd [2007] WASCA 70, cited
Potts v Miller (1940) 64 CLR 282, applied
Razdan v Westpac Banking Corporation [2014] NSWCA 126, cited
Williams v Pisano [2015] NSWCA 177, considered

COUNSEL: P Roney QC, with J Green for the plaintiffs
D O'Sullivan QC, with M Steele for the first defendant
R Perry QC for the second defendant

SOLICITORS: Ramsden Lawyers for the plaintiffs
Thynne & Macartney as town agents for Kennedy's Law for the first defendant
Carter Newell Lawyers for the second defendant
The first third party appeared in person
The second third party appeared in person

[1] This proceeding concerns the purchase by the plaintiffs of a shopping centre named the Piazza in August 2009. The company from which they bought it has been wound up. The first defendant is the property manager who kept the financial records of the Piazza prior to sale. The second defendant is the real estate agent who acted for the vendor. The plaintiffs say that the defendants misled them about the Piazza's financial performance, and thus worth. The second defendant claims that the plaintiffs contributed to their own loss; relies upon proportionate liability provisions by way of

defence, and brings third party proceedings against the two directors of the defunct vendor.

[2] My findings are that the real estate agent did mislead the plaintiffs; the property manager did not. The second defendant's case as to contributory negligence fails. So do its proportionate liability and third party claims.

The Piazza is Built

[3] Stephen Solomons and Duncan McInnes, the third parties, were experienced property developers. In 2006 they bought land at Varsity Lakes and developed it as five separate lots: two sets of offices, a tavern, residential units and a small shopping centre (the Piazza). They undertook this activity through a company, Market Square No 1 Pty Ltd, now in liquidation. The five different lots were bound together by a Building Management Statement; they shared some land and the costs of some services. The Building Management Statement provided that the owner of the Piazza paid all the costs of shared services and then recovered a proportion of them from the other four lot owners – t 4-90.

[4] After the development was complete, in February 2007, Market Square engaged the first defendant, CBRE, to manage the Piazza. Messrs Solomons and McInnes planned to keep the Piazza for the medium term, although they had no experience in running such a centre and no time to devote to it.

The Piazza and its Owners Experience Financial Problems

[5] Every month CBRE sent two documents to Market Square: a Management Report and an Owner's Statement. On the first substantive page of each Management Report was an eight-line table showing that month's income and expenses against budget, and financial year-to-date income and expenses against budget. The last line of the table showed net income for the month against budget, and net income for the financial year-to-date against budget.

[6] This table in the June 2009 Management Report (ex 13) shows that net income for that financial year was $297,896 against a budgeted $501,507. The next page of the report gave details of those tenants owing arrears of rent, a total of $54,969 owing by five tenants. Another page of the report recorded that one tenant was in arrears and the subject of a breach notice, and that four other tenants reported poor trading. There were 13 shops and at that stage, 11 tenants.

[7] The Owner's Statements were intended to be appendix 2 to the Management Reports. The first page of each Owner's Statement was headed "Performance Summary". The pages which follow contain the details of receipts and payments in ledger form and then, again in ledger form, details relating to each tenant. There is an aged arrears report by tenancy and an income summary report. Lastly, there is a three page tenancy

schedule showing the amount of annual rent payable[1] under each tenant's lease (amongst other things).

[8] The Owner's Statement for June 2009 (ex 15) shows that net cash in that year was $203,611 or 40.6% below budget; receipts were $117,327 or 20.3% below budget and that statutory and variable expenses were respectively 94.5% and 81.8% above budget ($7,272 and $79,228 respectively).

[9] As the extracts above show, the Piazza was performing poorly as at June 2009. Moreover, its financial performance had never been good.[2] Furthermore, on the evidence before me I conclude that Market Square, quite apart from its ownership of the Piazza, was in a parlous financial condition by 2009.[3]

The Piazza is Sold to the First Plaintiff

[10] In about July 2009 Mr Solomons and Mr McInnes instructed Gregory Bell, who ran a Ray White Real Estate Agency through the company which is the second defendant, to sell the Piazza. David Djurovitch, an agent employed by the second defendant of 20 years' experience – t 8-30 – undertook the marketing campaign.

[11] The first plaintiff purchased the Piazza. It was the custodian of a superannuation fund. The second plaintiff was the trustee of that fund. The superannuation fund was a self-managed fund controlled by Mr Brian Makings. He had constructed residential housing and traded in power (energy) in the United Kingdom before retiring to the Gold Coast. By 2008 he had the view that stocks, shares and bank deposits no longer represented good investments. He formed the view that his superannuation fund ought to purchase a commercial property which would yield between 8 and 10% net return per annum. Mr Makings had bought eight residential properties in Australia before he caused his superannuation fund to buy the Piazza. He had never been involved in the purchase of a retail centre. By the time he received Information Memorandum about the Piazza, he had looked at several other such documents, and physically inspected three or four retail centres which were for sale – t 2-100.

[12] Mr Makings was a patient witness. My view is that he tried to give honest answers at all times. I think he found the process of giving evidence stressful, and he suffers from a medical condition which might at times have meant he was less able to cope with the demands of giving evidence.[4] I think this, and his polite disposition, meant that he agreed with propositions in circumstances where he did not mean to.[5]

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1 t 4-19-20, per Ms Tambour.

2 The December 2008 Management Report (ex 44) showed a net income of $131,008.18 against a budgeted $244,850, with total income well under budget and expenditure well over budget. The June 2008 Owner's Statement (ex 51) showed net cash 70% down according to budget, with receipts 52% down and variable expenses 58% up.

3 tt 5-12, 5-24, 5-25, 5-43, 5-43-45.

4 tt 2-39, 3-63, 3-64 and 4-3-4.

5 tt 3-99, 4-14, 4-21, 4-25, 4-38 and 4-54.

[13] The purchase of the Piazza had a significant negative financial effect on Mr Makings' superannuation fund, and he has personally been very active in attempting to retrieve that situation since the purchase. In that time he has become vastly better informed as to matters concerning small retail shopping centres and has, of course, thought many times about the issues which must be resolved in this litigation. In such circumstances he cannot help having reconstructed some of the events which are relevant to the litigation, and I thought that was obvious through some parts of his evidence.[6]

[14] Another matter affecting the reliability of his evidence was his evident continuing anger towards CBRE. It was plain that he regarded that company as the source of the plaintiffs' troubles. He had a tendency to dwell upon and emphasise matters which he thought illustrated this.

[15] Having made those qualifications as to reliability, I accept Mr Makings' evidence which I refer to below unless I say otherwise.

[16] Mr Djurovitch was not called as a witness, although he was available to be called, and it was apparent that until quite late in the trial the second defendant planned to call him.[7] No meaningful or satisfactory explanation was given as to why this man, who was central to the case joined between the plaintiffs and the second defendant and vital to the case the second defendant sought to make against the third parties, was not called. In these circumstances I am more comfortable in accepting Mr Makings' evidence where it involves his dealings with Mr Djurovitch.

Written Material Provided Prior to Purchase

[17] Sometime in around August 2009, Mr Makings made enquiries of Mr Djurovitch whether he had any properties listed for sale which would return 8-10% – t 2-13. In response, Mr Makings received an e-brochure on 18 August 2009 from Ray White which listed the Piazza for sale. He sent an email that afternoon asking for details. Mr Djurovitch telephoned him on 19 August 2009 and said the property was being auctioned the next day. Mr Djurovitch said that he believed that the property would "produce a yield of between 8 and 10%" – tt 2-18, 2-40 and 4-43. Mr Djurovitch sent Mr Makings four emails. The first attached the Information Memorandum, and the following three gave additional information, including copies of all the current leases. Mr Makings did not attend the auction.

[18] The Information Memorandum (ex 2) contained:

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[6] In particular I thought evidence about whether the rental guarantee included a guarantee of outgoings was reconstructed: tt 3-24, 3-41, 3-44, 3-55-56, 3-90-91, 4-6-7, 4-12-13. His assertions about this matter turned out to be correct notwithstanding they were inconsistent with all the contemporary documents. I think he must have confused knowledge he gained later with knowledge he had at the time of contract. I have the same view, for the same reasons, about his evidence concerning the rent-free period – tt 3-29-30, 3-32, 3-64, 4-67-69.

[7] He was still employed by the second defendant – t 8-32. His witness statement was exchanged as part of trial preparation, and see counsel's statement that he was planning to call him, t 6-111.

(a) on the first substantive page of text, the statement "The net rental for the 11 tenancies which has [sic] a total lettable area is [sic] approx. 1327m^2 is approx. $607,175p/a (see Tenancy Schedule)" (my underlining);

(b) as Annexure A, a tenancy schedule which listed the rent payable per annum under the lease for each tenancy and then totalled those amounts. The total $607,175, was described as "Total Net Rent";

(c) as Annexure B, a *Retail Shop Leases Act* notice to tenants of the annual estimate of outgoings for the financial year 2008/2009. The notice was not signed at the place provided for the lessor's signature. It listed various items of outgoings which totalled $106,140. It had the note "Rate PSM: $80.05", and

(d) on page 38, Annexure L, a formal disclaimer clause and a clause headed "Sources of Information".

[19] The Information Memorandum contained no information as to the poor performance of the Piazza as against budget which the Management Reports and Owner's Statements had revealed since its opening.

[20] On 21 August 2009 Mr Djurovitch contacted Mr Makings and told him that the Piazza had been passed in at $6.7 million at auction.[8] Mr Makings said he was interested in the property; would read the material which had been emailed to him on the night of 19 August 2009, and would meet Mr Djurovitch on 26 August 2009 at the Piazza so he could see it.

[21] Mr Makings said he spent about five hours going through the material which had been emailed to him – t 2-22-23. He noted the statement in the Information Memorandum, "the net rental for the 11 tenancies which has a total lettable area is approx. 1327m^2 is approx. $607,175 p/a (see Tenancy Schedule)". He noted that this figure corresponded with the tenancy schedule which was Annexure A. He noted other details about the tenancies which he thought were advantageous; he noted that the building was relatively new and in an area with which he was very familiar.

[22] He looked at Annexure B to the Information Memorandum and noted that it was prepared by CBRE. He had a view that CBRE was a well-respected firm; this meant he trusted the document – t 2-43. He noted that it was prepared pursuant to the *Retail Shop Leases Act* which he thought was an indication that the document was reliable – tt 3-12, 3-101 and 4-16. In his evidence-in-chief Mr Makings said he understood that the total outgoings shown in this document – $106,140 – were all the expenses the landlord had to bear in relation to owning the Piazza, and that these outgoings were paid by the tenants, not the landlord – t 2-32. This document cannot fairly be interpreted as saying either of those things.[9] He did note that the document was out of date – from the previous financial year. However, he saw that the $80m^2 rate shown compared closely with the $75m^2 rate on the Third Tenancy Schedule (see below) said to date from July

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[8] I accept that this was so and that the bids received at the auction were not vendor bids – t 5-123. The reserve had been set at $7.5 million, arbitrarily.

[9] It may be that Mr Makings deduced the second proposition from his reading of cl 4.2(b) of the leases – t 2-55. It may also be that he was giving evidence of his ultimate conclusions about these matters, after speaking to Mr Djurovitch on 26 August (see below), rather than answering the questions in accordance with their terms.

2009 and concluded that there had been little change in the outgoings since the estimate was prepared.[10]

[23] Mr Makings read the email sent to him at 20:32 on 19 August 2009. This email attached an "amended and current tenancy schedule to form part of the contract". The schedule was an updated version of Annexure A to the Information Memorandum. The email summarised the effect of the amendments:

> "It is important to note that the net revenue has risen substantially, due to the fact that the annual increases for six of the 11 tenancies have already had recent annual increases, which were not previously stated.
>
> Also it should be noted that the net income will rise further with the review of three more tenants on 26th August, 1st October and 29th December this year." (my underlining)

This amended schedule showed a new, "Total Net Rent $619,630.50", followed by a note "Additional Rent Reviews $7,485.97", giving a "Grand Total $627,116.47".

[24] Mr Makings read the email sent at 20:34 on 19 August 2009. The attached document was referred to in the trial as the Third Tenancy Schedule. Mr Makings noted it appeared to be a CBRE document from the word-processing marks and the footers on each page. It was in fact the tenancy schedule from CBRE's 2009 Owner's Statement. Mr Makings thought this schedule was consistent with what he had read before as to the outgoings and net rental – tt 3-38 and 3-40. I accept this was his honest view at the time: he took an approximate view of things, and read the figures in the Third Tenancy Schedule as roughly equivalent to those in Annexures A and B to the Information Memorandum – tt 3-38, 3-40-41, 3-42, 3-44.[11]

[25] However, objectively viewed, the Third Tenancy Schedule raised significant questions as to what the income and expenses of the Piazza were. It was inconsistent internally and inconsistent with the previous two tenancy schedules and the statement of outgoings. These matters were explored with Mr Makings at some length in cross-examination.[12] The first defendant submitted that Mr Makings must have recognised the discrepancies and in consequence I should find he did not rely on the document. However, I accept that he did not advert to the various matters which would no doubt trouble a more astute reader.

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[10] tt 3-13, 3-19-20, 3-21, 3-48, 3-49, 4-26 and 4-69.

[11] Broadly speaking, the base rental of $559,617, together with an amount of $60,000 abatement produces a total similar to the total rent in the previous two tenancy schedules – see p 885 of exhibit 2. The outgoings listed at Opex General – $67,216 – are certainly a long way from the $106,140 figure from the outgoings statement but Mr Makings thought that might be accounted for by the fact that there was a vacant tenancy and that two tenancies (Krish Indian Cuisine and Cucina Pizza) were the subject of a rent abatement. He was comforted by the fact that the Third Tenancy Schedule listed outgoings at a rate of $75 per square metre. He saw this as close to the $80 per square metre figure in Annexure B, and thus as evidence that outgoings had not changed much between the 2008/2009 year and the 2009/2010 year – tt 3-13, 3-19, 3-21, 3-48, 3-49, 4-26 and 4-69.

[12] tt 3-16-17, 3-23, 3-31, 3-33-34, 3-35, 3-36-37, 3-39, 3-40, 3-41-42, 3-42, 4-5.

[26] Lastly, Mr Makings read the email sent at 20:35 on 19 August 2009 regarding rental arrears. The plaintiffs did not rely on this email or representations as to arrears of rent as part of their pleaded case.

26 August Meeting

[27] On 26 August 2009 Mr Makings met with Mr Djurovitch at the Piazza. The two men walked around the site. Then they sat at the coffee shop. Mr Makings asked Mr Djurovitch some questions about the material with which I have just dealt. In answer to one such question Mr Djurovitch told Mr Makings that the estimate of outgoings (Annexure B) showed all the outgoings of the building – tt 2-59, ll 15-20, 3-18-19.[13] In answer to a similar question Mr Djurovitch said the Piazza's "contributions to shared services [under the Building Management Statement] were all reflected within the estimate of outgoings that was in the IM." – tt 2-57, 3-77-78, 3-80-81, 4-36 and 4-40. These oral representations go well beyond anything stated in the estimate of outgoings.

[28] Mr Djurovitch produced a copy of Annexure A and spoke about the rental increases which he said had come into effect since it was prepared. Mr Djurovitch used a calculator and totalled the net rent at $619,630, as opposed to the old figure of $607,175. Mr Makings wrote these figures on the copy of Annexure A which Mr Djurovitch produced. That document with Mr Makings' handwriting was exhibit 5 – tt 2-60-62 and 4-32.

[29] Then Mr Djurovitch gave Mr Makings a colour copy of the amended tenancy schedule (ex 4). It shows much the same information as Mr Makings had written on the sheet which is exhibit 5. By reference to this document Mr Makings asked Mr Djurovitch to tell him how he arrived at the net rental income shown on that sheet. Mr Djurovitch said that it was "after deducting all the costs, including the shared services, that are payable by tenants." – t 2-59. The only qualification to that was that the landlord would be responsible for land tax.

[30] Mr Makings told Mr Djurovitch that he wanted to achieve a 9% yield – t 4-32. Mr Djurovitch responded that the owners had turned down $6.7 million at the auction and that there were other interested parties. As to the calculation of yield, Mr Makings said he would only have regard to rental increases which had in fact come into effect, and not those which were due to come into effect later that year – t 4-32. Mr Djurovitch then did "a quick calculation and said the 9% would – would give you a purchase price of 6.9 million. So I – I checked that and I agreed with that. At that point, he asked me if I was prepared to purchase it at 6.9, which I said, yes, I would." – tt 2-62, 4-33. At this point Mr Djurovitch produced a draft contract and Mr Makings signed it.

[31] Mr Makings' evidence was that he assessed yield as being the net revenue expressed as a percentage of the purchase price – t 2-40. This is conventional enough in the

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[13] I find that Mr Makings did mean to say that Mr Djurovitch told him that all expenses (except land tax) were recoverable from tenants even though he wrapped this up with net income to some extent in his answer in-chief. He was definite about it in cross-examination (t 3-18-19) when challenged on the point - see t 3-48, ll 30-40, and on to 3-49. That was the plaintiffs' pleaded case – paragraph 32(b) of the statement of claim.

marketplace and there was no evidence that Mr Djurovitch understood anything different. In fact from the calculation performed during the conversation just discussed, it can be seen that Mr Djurovitch's understanding was the same as Mr Makings'.

[32] Mr Makings never understood that the figures he was given as to net rent ($607,175 and then later $619,630) and outgoings ($106,140) were not actual figures which the owners had respectively received and paid. In fact, it was apparent at trial that he still did not understand that – tt 3-50, 3-51-52, 3-93. In the context of all the information he received, Mr Makings understood the words "total net rent" in Annexure A and the amended versions of this schedule were used to signify actual income after all actual expenses (except land tax) had been deducted – t 2-28.

[33] Annexure A did not state expressly that the figures shown as "net rent" were the figures payable under the leases, rather than actual rent received. The expression "net rent" is ambiguous. If one is told that the document summarises the rent due under the arrangements with tenants without regard to outgoings, the expression "net rent" can be seen to mean the equivalent to base rent payable under the leases. But consistently with what Mr Djurovitch told Mr Makings (see [29] above), the expression "net rent" can be interpreted as Mr Makings understood it.

[34] The statement in the body of the Information Memorandum that the "… net rental … is approx. $607,175 p/a (see Tenancy Schedule)"[14] is an express (mis)statement that the actual net rent is about $607,175. So is the statement, "Net annual rent for the 11 tenancies … tops $607,000" made in Annexure I to the Information Memorandum.

[35] Another indication that the figures in Annexure A, and the amended version of it, were actual figures, rather than a list of rents payable, is found in the email sent at 20:32 on 19 August 2009. The text of this email describing the amendments to Annexure A says, "the net revenue has risen substantially".[15] This statement is in the part of the email which is written by Mr Djurovitch to Mr Makings. It was not shown to my satisfaction that Mr Solomons had any input into that statement – cf t 5-99, l 10.

[36] What Mr Djurovitch said to Mr Makings on 26 August 2009 put the matter beyond doubt. He explained that the word "net" meant the figure was after deducting all costs (except land tax) and he co-operated in the exercise of calculating yield from these documents, which exercise was not sensible if the figures did not represent net income – t 3-75.

The Case against the Second Defendant, Ray White

[37] On the basis of the discussion above, I find that Mr Djurovitch represented to Mr Makings that the Piazza Complex could be purchased for a price which would produce a yield of between 8 and 10%.[16] No doubt this fairly general representation was overtaken by the more specific information Mr Makings was given. However, it was the first relevant piece of information he was given, and became part of the context

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[14] My underlining.
[15] My underlining.
[16] Paragraph 21(b) of the third amended statement of claim.

in which he interpreted the information he then received. This representation was not based on information from the vendor.[17] Further, it was Mr Bell's evidence that Ray White had never taken any steps to assess the likely value of the property – t 8-54. Mr Djurovitch may well have made the statement to Mr Makings simply because Mr Makings had indicated an interest in finding a property which would produce that yield.

[38] I find that by its conduct in preparing the Information Memorandum; writing the text of the email sent at 20:32 on 19 August 2009; giving these documents, and exhibits 4 and 5, to Mr Makings, and by the things said by Mr Djurovitch at the meeting of 26 August 2009, the second defendant represented to Mr Makings that:

(a) the "total net rent" of $607,175.04 was the actual rent, net of expenses, which the owner of the Piazza had received in the year ending June 2009;

(b) since June 2009, actual net rent had risen to $619,630;

(c) all outgoings for the 2009 financial year for the Piazza were in the vicinity of $106,140 and at a rate of about $75-$80m^2;

(d) Annexure B included the Piazza's share of costs under the Building Management Statement;

(e) apart from land tax, all the outgoings of the Piazza, including under the Building Management Statement, were billed to, and recovered from, tenants.[18]

[39] The evidence did not support any finding that representations were made as to the future.

[40] I find that the representations were made by the second defendant itself, rather than it simply passing on information from Market Square to Mr Makings. In forming that conclusion I have regard to all the circumstances, including the agent's conduct, as a whole.[19]

[41] The second defendant traded under the name "Ray White Commercial". It was in fact – t 8-34, and was known to be by Mr Makings – t 2-30, one of the leading commercial real estate agents on the Gold Coast. The view taken by the majority in *Butcher v Lachlan Elder Realty Pty Ltd* of the suburban real estate agent in that case contrasts.

[42] The Information Memorandum states on the front page that it was prepared by David Djurovitch and displays a large "Ray White Commercial" banner with the address and contact details of Ray White Commercial. It is branded on every subsequent page with the logo "Ray White Commercial". An agent with considerable expertise in the type of real estate concerned was putting forward the information as its own. Again, these facts contrast with the facts in *Butcher*.

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[17] The agents were not given a reserve price for auction until 20 August 2009, tt 8-31-32, 8-53-54 and t 5-81.

[18] Paragraphs 23(d), (e)(i), (iv), 25(a), (b), (c), 26(b), (c) and 32(b) and (c) of the third amended statement of claim.

[19] *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 604-605.

[43] Annexure A bore no indication that it had been prepared by anyone but Ray White. Exhibit 4 contained the Ray White footer. Exhibit 5 contained nothing to indicate who prepared the document, but it was obviously very similar to Annexure A and exhibit 4.

[44] Annexure B showed the CBRE logo at its top and bottom, indicating that the document had been originally prepared by CBRE but, in much larger letters at the bottom of the page were "Ray White Commercial 'the Piazza', Varsity Lakes, Queensland". This was an indication that the second defendant endorsed the information therein.

[45] While Mr Makings understood that Annexure B had been compiled by CBRE, he thought that both it and Annexure A (which he understood Ray White created) were provided to him by Ray White because they both bore the "Ray White Commercial" logo on them – t 4-54-55. He believed that Ray White had verified the information presented in these schedules because they bore the printed footer "Ray White Commercial" – t 2-76.

[46] The way Mr Djurovitch used Annexure B to the Information Memorandum and exhibits 4 and 5 in discussing matters with Mr Makings on 26 August 2009 is significant in my conclusion that the second defendant did not just act as a conduit to pass on information to Mr Makings from either the vendor or CBRE. Mr Djurovitch made several statements that went well beyond the information in the documents. He amplified the information that was in them. Most importantly, Mr Djurovitch represented that the "net rent" figures in the schedules were actual income, net of all expenses received. In assisting Mr Makings to calculate a purchase price based on yield on that basis, Mr Djurovitch was endorsing that figure as an accurate actual figure fit for that purpose.[20] Mr Djurovitch was doing much more than simply passing information on without any representation as to its truth or falsity.

[47] The disclaimer in the Information Memorandum said that:

- all information in the document, and given orally, was given without responsibility;
- intending purchasers should not rely on the information but satisfy themselves as to it and as to any conclusions;
- the second defendant gave no implied or express representation, warranty or undertaking as to the truth, accuracy, relevance or completeness of the information supplied.

[48] The paragraph in the Information Memorandum headed, "Sources of Information", stated that information supplied in the Information Memorandum had been provided by the vendor, and that the second defendant had not independently checked the information, merely passed it on. It advised prospective purchasers to rely upon their own enquiries. It said that the agents made no comment on, and gave no warranty as to, the accuracy of the information.

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[20] cf [138]-[139] of *Butcher* (above).

[49] These two clauses are located in Annexure L to the Information Memorandum, at page 38 of 39. Mr Makings said he did not see them when he read the Information Memorandum. Although counsel for Ray White discussed these clauses with Mr Makings in cross-examination, he did not put to him that he had read them. In fact he proceeded on the basis that he had not read them – t 4-52-55. The clauses are in formal legal language. There is a great contrast between these clauses at the end of a long and detailed document, and the disclaimer which appeared on each page of the two page leaflet considered in *Butcher*. I do not think these clauses are effective to alert a reasonable person in Mr Makings' position that the information in the document was simply being passed on from the vendors "for what it is worth without any belief in its truth or falsity".[21] This is particularly so where very prominently, and repeatedly, the document is branded as having been prepared by Ray White Commercial. And where Mr Djurovitch orally on 26 August plainly did endorse crucial parts of the information. I do not think that the disclaimer in this case was sufficient in all the circumstances to erase the effect of the representations made.[22]

[50] Something further as to the "conduit point" needs to be said about the information supplied in the emails sent to Mr Makings on 19 August 2009:

- at 20:32 hours, as to rent increases; and
- at 20:34 attaching the Third Tenancy Schedule.

[51] The first of these emails contained information which supplemented that which had been endorsed by the second defendant as discussed. Mr Djurovitch did endorse the supplementary information in the text of his email to Mr Makings, [23] above, and during the conversation of 26 August 2009. I regard what was said in that email as part of the second defendants' representations.

[52] The Third Tenancy Schedule was attached to the email sent at 20:34. It is clearly a CBRE document and the email chain would have made it clear to Mr Makings that it had been passed to Mr Djurovitch from Mr Solomons on behalf of the vendor. I do not see that the second defendant specifically endorsed this information. Although the provision of it was in a context where it supplemented information it had endorsed, and would endorse again orally on 26 August, I do not regard it as information for which the second defendant is responsible. However, I do not see that this finding detracts from the plaintiffs' case that the second defendant otherwise engaged in misleading and deceptive conduct. When the second defendant's conduct is viewed as a whole, the provision of the Third Tenancy Schedule was only supplementary to the information in Annexures A and B, and the information provided on 26 August 2009.[23] And in fact because of the effect of the second defendant's representations to him, Mr Makings misunderstood the information in the Third Tenancy Schedule.[24]

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21 *Butcher* (above), [64] citing *Yorke v Lucas* (1985) 158 CLR 661, 666.

22 *Butcher* in the dissenting judgment of McHugh J, [151]-[152] and [158]-[159]; *Downey & Anor v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, [83].

23 See further at [24] above and [114] below as to the overall significance of the Third Tenancy Schedule to Mr Makings.

24 See [24] above and [114] below.

Reliance and Causation

[53] Because of difficulties with the plaintiffs' pleaded case as to falsity of the representations made, I will deal with the topics of reliance and causation slightly out of logical order, before coming to consider falsity, below.

[54] Mr Makings swore in a formal way that he relied upon the Information Memorandum; the information sent by email on 19 August 2009, together with the oral information Mr Djurovitch gave him on 26 August 2009 as the basis to enter into the contracts to purchase the Piazza – t 2-76. But more than this formal evidence, it was the overwhelming narrative substance of his evidence-in-chief that he relied upon these documents and the statements of Mr Djurovitch. Detailed cross-examination by counsel for the first defendant demonstrated overwhelmingly that Mr Makings did consider the information he received from the second defendant and that he relied upon it very trustingly. Indeed, he had little else to rely upon.

[55] Likewise it was overwhelmingly clear from Mr Makings' evidence that it was the information contained in Annexure A (understood by him as actual income) together with the amended versions of it and the oral statements of Mr Djurovitch which mattered most to him.[25] At times Mr Makings expressly acknowledged this.[26] As perhaps might be expected, this was the submission on behalf of the first defendant.[27] However, counsel for the second defendant also acknowledged this twice in his written submissions.[28]

[56] The conversation Mr Makings had with Mr Djurovitch on 26 August 2009 shows that Mr Makings was primarily interested in the income which the Piazza would produce, net of expenses. Once he was told that the tenants paid all the centre's expenses as outgoings, including amounts due under the Building Management Statement, he focussed on questions of what was the net rent, and the relationship between that figure and the purchase price he was prepared to pay (yield). Consistently with this, Mr Makings never analysed Annexure B – the statement of outgoings – in a line-by-line way; he was interested in the total – tt 2-32, 4-26, 4-40-41. It did not matter greatly to him (within reason) what those expenses were and how much they were.[29] The important thing for him was that all outgoings were recoverable. When asked about the estimate of outgoings in cross-examination he said (not quite logically), "I used this to confirm the net income in the IM." – t 3-13. Likewise he did not look carefully at the individual tenancy information in the Third Tenancy Schedule, he was interested in "the overall income the property would produce" – t 2-47.

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[25] tt 2-24, 2-28, 2-32, 2-34, 2-36, 2-38, 2-40, 2-47, 2-98, 2-99, 3-32, 3-38, 3-40, 3-47-48, 4-26, 4-27, 4-29, 4-36.

[26] tt 2-47, 2-58. At other times he was concerned to emphasise his misunderstandings about the outgoings. I find that this issue has become more prominent in his thinking because in 2012 he found that CBRE had failed to invoice and collect outgoings properly. He had continued to deal with, and focus on, this issue until trial. It has become unconsciously exaggerated in his mind, see [14] above.

[27] The first defendant's liability was said to rest on its creation of Annexure B, the outgoings schedule and the Third Tenancy Schedule, not Annexure A and its successors.

[28] Paragraphs 5 and 16.

[29] tt 3-47-8, 4-26.

[57] Mr Makings was attracted to the Piazza because it was in an area with which he was familiar, close to where his son attended university. But the purchase was to fulfil his aim of obtaining a better yield for his superannuation fund; it was an investment, not a flight of fancy. Mr Makings made the purchase after financial analysis. The analysis was simplistic and naïve. But it is logical to conclude, and I am very satisfied on the evidence, that the analysis he made was one which relied upon the information provided to him by the second defendant and in particular the representations which I have found were made.

[58] In the circumstances of this case, I have no doubt that had the second defendant not made the representations it did, Mr Makings would not have entered into the transaction to buy the Piazza. These representations were almost all the information Mr Makings had. Certainly had he known the truth about the Piazza's financial performance he would not have purchased it. He would never have paid anything like the asking price of something over $6.7 million. He would have thought it worth something in the vicinity of half of that. His conclusion was that such an offer would never have been accepted, and I find that that was so.[30] I think that the plaintiffs correctly characterise the case as a "no transaction" case.[31]

[59] The representations made by the second defendant caused the plaintiffs to buy the Piazza. While I think it fair to describe Mr Makings' conduct as overly trusting and naïve, I do not think that it was so unreasonable as to preclude the conclusion that it was his reliance on the representations made by the second defendant which caused the loss.[32] After all, the second defendant was hoping for someone as trusting as Mr Makings to come along; Mr Djurovitch had a contract with him on 26 August 2009, and it contained no due diligence clause.[33]

Representations False and Misleading

[60] The representations made by the second defendant were false. First, Annexure A and its successors were summaries of the rent payable on the face of the leases for the shops in the Piazza. The total $607,157 did not represent what was received in the year ending 2009 as net rent. Net income for that year was around $297,896 (ex 13). Second, exhibit 13 shows outgoings for that year were in the vicinity of $190,000, not $106,140. The plaintiffs' valuer originally recalculated this amount at $200,320 (ex 55, p 19). However, by trial she had discovered that figure included an amount of $41,638 which was not recoverable from the Piazza's tenants, but was costs under the Building Services Statement which the owner of the Piazza was obliged to pay and then recover from the other four lot owners.[34] I find outgoings recoverable from tenants (ie, the subject of Annexure B) for the 2009 financial year (including the Piazza's share of Building Management Statement costs, $13,879) were in the vicinity of $159,000. The

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30 tt 2-107-108 and 3-51-53.

31 See paragraphs 41(h) and 57(a) of the third amended statement of claim.

32 *Nea Pty Ltd v Magenta Mining Pty Ltd* [2007] WASCA 70, [128] and the cases cited there; *Razdan v Westpac Banking Corporation* [2014] NSWCA 126, [31].

33 cf *Gould v Vaggelas* (1984) 157 CLR 215, 252.

34 t 6-61-62 and exhibit 57. This left an amount of $13,879 which the landlord of the Piazza paid for the Piazza's share of costs under the Building Management Statement. On my reading of the leases this was recoverable from the Piazza's tenants.

rate at which outgoings were charged was not $75 or $80m^2. It was in the vicinity of $115m^2.[35]

[61] The following representations were also false: (1) outgoings properly chargeable to tenants included the amount paid by the landlord under the Building Management Statement, and (2) all outgoings, except land tax, were recoverable from tenants. The leases are in evidence – ex 3. They appear to provide for the tenants to pay most outgoings but only the landlord's share of costs under the Building Management Statement. The remaining amount of shared costs ($41,638) was payable by the owner of the Piazza who had a right to reimbursement from the other four lot owners.[36]

Plaintiffs' Case as to Falsity of Conduct

[62] The plaintiffs pleaded this aspect of their case poorly. It is pleaded that the second defendant represented that the total net rent figure in Annexure A and its successors was the actual net rent received by the landlord of the Piazza in 2009.[37] As discussed above, the plaintiffs proved this case at trial.

[63] At paragraph 50(b)(i) of the third amended statement of claim the plaintiffs pleaded that that representation was false because the net rent for the 2009 financial year was "much less" than was represented. That is, paragraph 50(b)(i), consistently with the preceding pleading, assumes the representation made was as to actual net rent for the 2009 year and says that representation was false. However, remarkably, paragraph 50(b)(i) continues not, as one might expect, to say that representation was false because in fact the Piazza's net income in the 2009 financial year was $297,896, as shown in exhibit 13. It continues instead to say that the representation was false because:

(a) CBRE was not invoicing and collecting all recoverable outgoings, and

(b) CBRE was not requiring other lot owners to reimburse to the owner of the Piazza their share of costs pursuant to the Building Management Statement.[38]

[64] CBRE could not locate many of the documents which bore on its management of the Piazza – t 4-111-112. The third parties made no disclosure in the proceeding. They claimed that they had no relevant documents; the liquidator had them all. That was never challenged by anyone at trial, although I must say I doubt it. This lack of documents and, it would appear, a disinclination by the plaintiffs, meant that they did not in fact set out to prove at trial, and did not make a submission, that the representations made were false only because of CBRE's failure to invoice and collect outgoings in the 2009 financial year. While outgoings recoverable from tenants for the year were around $53,000 more than stated in Annexure B, the fact remains that the representations as to the net rent were significantly (more than $200,000) incorrect independently of the difference between the figure for recoverable outgoings in

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35 By calculation, using the figure of $159,000 as outgoings.

36 For completeness it seems to me that the $106,000 figure in Annexure B did not include either the $41,638 figure or the $13,879 figure – t 7-6-7.

37 Paragraphs 23(d), (e)(iv), 23(e)(i) and (ii), paragraph 25(a), paragraph 26(d) and paragraph 32(a) and (b) of the third further amended statement of claim.

38 Paragraphs 50(b)(i), 50(a)(i), (ii), (iii)(1) and (2) and (iv). I disregard paragraph 50(a)(iii)(3) as I cannot make sense of it.

Annexure B and the actual figure for recoverable outgoings. Likewise, it can be gleaned from the particulars about these matters pleaded in relation to the separate loss and damage claim about CBRE mismanagement after 2010 that any mismanagement by CBRE would not account for the great discrepancy between the net income from the Piazza in 2009 and what it was represented to be. Lastly, as discussed below, [172] – [178], it was most unlikely that CBRE could have collected the rent and outgoings which were payable in terms of the leases: the tenants could not have borne the impost.

[65] The plaintiffs' written submissions were consistent with the way the trial was run and not with the pleadings. They read:

> "135. Contrary to the content of the representations set out above, the true financial position of the Piazza was very different. The yield obtained by Mr Makings was in the region of 4.3 per cent rather than 8 to 10 per cent, and the net rental for the 2008/2009 financial year was $297,896, not $607,175.
>
> 136. Further, the annual outgoings for the 2008/2009 financial year were $200,320, not $106,140.[39]
>
> 137. The effect of these facts, being contrary to representations made to Mr Makings, was that the Piazza was worth significantly less than $6.9 million at the time it was purchased …"

[66] Senior counsel for the plaintiffs did not seem alert to the problem in his pleading and thus the matter was not helpfully advanced in his address. This was notwithstanding that counsel for the first defendant and counsel for the second defendant had highlighted the problem during their addresses. Counsel for the second defendant stated in addresses that he relied upon the plaintiffs' pleading. He did not identify any prejudice should the plaintiffs not be held to their pleading. The plaintiffs' counsel did not seek leave to amend the pleadings in accordance with the evidence which had been led.

[67] Against that unsatisfactory background, I must decide whether fairness demands that the plaintiffs' case be determined in accordance with the evidence proved at trial or in accordance with their pleading. My conclusion is I should decide the plaintiffs' case in accordance with the course of evidence and paragraphs 135-137 of their written submissions, rather than in accordance with their pleaded case.[40] The matters which

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[39] This is an incorrect comparison. Annexure B was a list of outgoings recoverable from tenants. The figure $200,320 included $41,638 which was not chargeable to tenants – see [60] above.

[40] If I do not determine this issue this way, the plaintiffs' case must fail. The first difficulty is that the case as pleaded is illogical. Paragraph 50(b) of the statement of claim assumes the figure in Annexure A is recording actual net rent received and that it would be correct if in calculating it, actual outgoings and shared services had been used. But the evidence shows that the first assumption is wrong, ie, the figure in Annexure A is not recording actual net rent received. It becomes illogical to then continue with the pleaded notion that it is inaccurate because only $106,000 outgoings has been deducted from it, rather than $200,320. Overlooking the logical difficulty, as the written submissions set out above show, the plaintiffs never set out to make a case in accordance with paragraph 50(b) and Mr Makings gave no evidence as to what he would have done had he thought that the outgoings were at a rate of around $115m^2 and in an amount of around $159,000 per annum, and that the net rent figure in Annexure A and its successors ought to have been adjusted accordingly. (I disregard the amount of $41,638 here as the other lot owners did contribute when asked). There were indications in the evidence that such a high rate per square metre might have made Mr Makings disinclined to purchase – tt 2-33, 4-26, 4-69. One could also speculate about whether Mr Makings would

convince me to do this are the fact that the plaintiffs' pleading clearly did make a case that (1) the net rent figures were represented to be actual figures for income received, and that (2) these figures were not the correct actual figures. Further, that there was no objection taken by the second defendant to the plaintiffs proving reasons for the second of those propositions (other than the pleaded reasons) during the course of evidence.[41] The point was not raised at all until submissions. I regard the plaintiffs as having pleaded and proved that (1) the second defendant represented the total net rent as the actual figure for the 2009 financial year, and (2) the actual figure was inaccurate, but (3) having proved a reason in addition to the pleaded reason for that inaccuracy, namely that the total rent figure on Annexure A and its successors was not, and was never intended to be, a calculation of actual net rent for the 2009 financial year, but was simply a total of the rent which the leases obliged tenants to pay in that year.

[68] I turn to the rest of the plaintiffs' pleading as to falsity. At paragraph 50(a) of the statement of claim it is pleaded that the representations made were misleading and deceptive because "… the rental yield for the Piazza complex was not between 8% and 10% …". It will be recalled that this plea relates to a statement made by Mr Djurovitch at a time when he did not know what purchase price the vendor would ask for the Piazza. It is difficult to find that the representation taken in isolation was false, because the statement is almost meaningless in the absence of any statement of what the purchase price was. Nonetheless, it set the scene in a general way for what followed and, having regard to the conversation about yield between Mr Makings and Mr Djurovitch on 26 August, I find the making of this statement was part of a misleading course of conduct on the part of the second defendant.

[69] The pleading in relation to falsity of the representations as to outgoings was conventional enough – see paragraph 50(b)(ii) and (iii) of the statement of claim where it is pleaded that outgoings for the 2009 financial year were not $106,140 but in fact $200,230, and were not at a rate of $80 per square metre but were at a rate of $189 per square metre. As discussed above, the plaintiffs proved this case, with the qualification that the true figure for outgoings was about $159,000 per year;[42] a rate of about $115 per square metre, as explained above.

[70] Paragraphs 50(b)(iv) and (v) concerned future matters and I have not found there were representations made about future matters. The pleading at paragraph 50(b)(vi) adds nothing.

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have proceeded having regard to the conversation about yield on 26 August 2009. One could speculate about whether there may have been some productive negotiation and a lower purchase price – cf [58], above. But there is really no safe basis for a finding. I say this in circumstances where: (1) the decisions Mr Makings would have come to are not necessarily predictable having regard to his naïve approach to the whole purchase; (2) his evidence about outgoings rates suffers from his having learnt much about this topic since 26 August 2009 and in consequence having reconstructed memories about his state of mind at that time, and (3) these matters were simply not tested in the evidence.

41 Proof that Annexure A and its successors were merely a list of leases showing their annual total rent came from exhibit 3, which went in by consent, and Ms Tambour's evidence. Proof of actual net rent came from exhibits 13 and 15 which went in by consent, again supported by Ms Tambour's evidence.

42 Exhibit 55A, $211,800 less $11,480 land tax and $41,638 shared services costs.

[71] Paragraphs 51 and 53 of the pleading relate to the Third Tenancy Schedule[43] and my finding is that the second defendant was not responsible for the Third Tenancy Schedule. Perhaps paragraph 52 also relates to the Third Tenancy Schedule given its location. It is hard to tell. If it does not relate to the Third Tenancy Schedule it, like paragraph 50(b)(vi), adds nothing to the pleading.

Contributory Negligence

[72] The second defendant relied on s 82(1B) of the *Trade Practices Act* 1974. It was accepted by the plaintiffs that that section applied, and was to be interpreted as it had been in *Merost Pty Ltd v CPT Custodian Pty Ltd.*[44]

[73] The second defendant pleaded that any loss or damage suffered by the plaintiffs was: "caused or contributed to by the plaintiffs' own failure to take reasonable care with respect to their own interests, namely to undertake any, or any adequate, investigations with respect to the information provided to them in the [Information Memorandum and emails of 19 August 2009] ... by consulting Market Square, the first defendant, the tenants of the Piazza, or retaining their own consultants to advise them with respect to the rental yield for the Piazza."[45]

[74] Notwithstanding this pleading, counsel for the second defendant announced on day three of the trial that he confined his case on contributory negligence to the following:

> "(i) that Mr Makings, for and on behalf of the plaintiffs, ought to have contacted the first defendant and sought to verify the proper amount of, and the actual collection of, outgoings payable by tenants of the Piazza under their respective leases, following his analysis of the documents received by him from the second defendant on 19 August 2009;
>
> (ii) that Mr Makings, for and on behalf of the plaintiffs, ought to have sought to verify the proper amount of, and collection of, outgoings payable by tenants of the Piazza under their respective leases, during, or after, his conversation with the first defendant's representative, Anita Brown, on 23 September 2009;
>
> (iii) that Mr Makings, for and on behalf of the plaintiffs, ought to have made further inquiries of the first defendant with respect to the financial performance of the Piazza as a consequence of the content of, and lack of response to, the letter from the plaintiffs' solicitors, Quinn & Scattini, to the first defendant dated 17 September 2009, which is exhibit 9 in the proceedings."[46]

[75] Counsel for the second defendant never filed an amended pleading in accordance with his announcement, but it is only correct that I decide the case in accordance with it.

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43 See the definition of Tenancy Schedule at paragraph 23(d) of the pleading.
44 [2014] FCA 97, [138]-[139].
45 Further further further amended defence of the second defendant, filed 12 August 2016, paragraph 56(b).
46 t 3-4-5 and written submissions, paragraph 300.

[76] The amendment to the second defendant's contributory negligence plea occurred when counsel for the plaintiffs complained that counsel for the first defendant had recently adopted the second defendant's (pleaded) contributory negligence plea, but refused to provide particulars of it – t 3-2. My ruling on that was that it was too late for the plaintiffs to complain when the broader contributory negligence plea had been in the second defendant's pleading for years and particulars had not been sought – tt 3-4 and 3-6.

[77] At the time counsel for the second defendant made this announcement, he said:

> "Your Honour, having heard the evidence of Mr Makings on Friday, Mr Roney and I spoke this morning and having heard that evidence I told him that the contributory negligence claim, which is paragraph 56(b) of our defence, would be at this stage limited to these propositions …
>
> …
>
> Now, that arises, as I said, as a consequence of the evidence of Mr Makings on Friday." – t 3-4-5.

Further explanation was given in the written submissions at paragraph 301, "The plea centres upon contacting CBRE because, firstly, Mr Makings' own evidence highlights the extent to which he relied upon the documents produced by CBRE and, secondly, Mr Makings' assumption about outgoings was based upon his view of CBRE as a professional and competent organisation."

[78] Significantly, this change to the second defendant's contributory negligence plea was not based on some refined understanding of paragraphs 50-53 of the plaintiffs' third amended statement of claim.[47] In coming to the decision recorded at paragraph [67] above, I was particularly concerned to check that the second defendant's change of case as to contributory negligence was not linked to the plaintiffs' pleading at paragraphs 50-53 (as that would have been good reason not to let the plaintiffs depart from their pleading). I could find nothing to indicate that it was; as recorded, the reasons given for the change to the basis of the contributory negligence plea were to the contrary.

[79] It will be evident from what has gone before,[48] that I take a very different view of Mr Makings' evidence to the view expressed by counsel for the second defendant in the passage extracted at [77] above.[49] My view is that Mr Makings' evidence highlighted the extent to which he relied upon Annexure A and its successors; the oral statements made by Mr Djurovitch, and the extent to which documents produced by CBRE were secondary considerations to him.

[80] In order to understand the contributory negligence plea it is necessary to deal with some additional facts. On 11 September 2009, after contract but before settlement, solicitors

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[47] And indeed it involves much more than a change of focus from the Piazza's financial performance generally to a focus on outgoings. It involves a change from asserting that enquiries ought to have been made of relevant professional advisors to asserting that factual enquiries ought to have been made of CBRE.

[48] Paragraphs [54] – [56] above, and my discussion of the Third Tenancy Schedule below at [114].

[49] Although see footnote 28, above.

acting for the plaintiffs wrote to the solicitors acting for the vendor asking six questions. The first two were:

> "1. Does your client have a property manager managing the leases on the property? If yes, please provide contact details.
>
> 2. If the answer to question 1 is 'no', please advise us of rent and outgoing payments for all registered and unregistered leases as at 25 September 2009."

[81] Settlement was due on 25 September 2009. On 16 September 2009 the solicitors wrote again requesting a response to "the six points raised". The next day the vendor's solicitors wrote telling the plaintiffs' solicitors that the property manager was CBRE; the relevant person to contact was Anita Brown, and giving her phone number. On that same day, 17 September 2009, the plaintiffs' solicitors wrote to CBRE asking for: (1) rent and outgoings payments for each lease as at the settlement date; (2) copies of any unregistered leases; (3) advice as to any leases which would be terminated by 25 September 2009; (4) advice as to any unresolved rent reviews currently in progress, and (5) advice as to whether or not deductions had been made from any rental bonds held as at 25 September 2009 – ex 9.

[82] The answer to this letter was not tendered by counsel for the plaintiffs but was in the agreed bundle and I make it exhibit 81. It says that as CBRE will continue to manage the property on behalf of the plaintiffs, the parties agreed that any adjustments as to rent and outgoings were to be left to CBRE to make.

[83] Mr Makings met with Anita Brown two or three days before settlement and they agreed on a service contract according to which CBRE would continue to manage the property after settlement. Mr Makings did not ask Anita Brown whether CBRE was in fact collecting all the rent and outgoings due under the leases, or ask her what were the correct outgoings for the Piazza– t 4-49. Indeed it would have been strange if he had in all the circumstances. He had already satisfied himself about the financial performance of the Piazza. Settlement was due, and he was contracting with CBRE to manage the centre on his behalf.

[84] Nor was there any reason that Mr Makings ought to have made enquiries based upon "the content of or the lack of response to" exhibit 9. The letter which was exhibit 9 was answered within a reasonable time. It did not concern the proper amount of outgoings for the Piazza, or their collection generally. The letter merely sought to make proper arrangements for financial adjustments on settlement. Those were made.

[85] The only viable pleading of contributory negligence then, is that in paragraph [74](i) above.

[86] Mr Bell's evidence was that most people who sought to buy a commercial building would employ an accountant to look at the "actual financials". These would be sourced from the property manager. The potential purchaser would seek permission, through the real estate agent for the vendor then, "in normal cases the vendor has nothing to hide. He says yes, I'll provide that information, and away they go and do that

investigation." – t 8-18-19. I accept this evidence because it is so commercially obvious.

[87] By its contributory negligence plea the second defendant did not contend that the plaintiffs ought to have asked for the "actual financials", but just enquired of the first defendant to "verify the proper amount of, and the actual collection of, outgoings payable by tenants of the Piazza under their respective leases". I interpret the second defendant's case as being that it alleges it was Mr Makings personally, not an accountant or other professional on his behalf, who ought to have made the enquiry. I interpret the new contributory negligence case that way for it stands in contrast to the earlier pleading which was to the effect that consultants ought to have been engaged. Further, I think it is clear from the words which introduce (i)-(iii) – "that Mr Makings, for and on behalf of the plaintiffs," – that the second defendant means Mr Makings personally. It certainly does in (ii), and in my view does in all three paragraphs. There is nothing to contradict that in the second defendant's written submissions, see paragraphs 299ff.

[88] The difficulty is that there is no pleading, and no case made either in evidence or in submissions, as to what such an enquiry from Mr Makings to CBRE would have produced.

[89] Mr Bell's evidence was that enquiry ought to have been made to the second defendant for permission to approach CBRE. The second defendant did not explore with Mr Solomons or Mr McInnes whether permission would have been granted had such an enquiry been made. This is not in my view a technical point. Mr Djurovitch's notes on potential purchasers for the Piazza were in evidence – exhibit 49. They show that some potential purchasers asked Mr Djurovitch for more information as to tenant payment histories and proof of payment of rents. The schedule shows that in every case where that information was sought, it was not provided, despite some potential purchasers following up their enquiries. Mr Bell could not explain why that was. His response was that only Mr Djurovitch could say – t 8-62 – and of course Mr Djurovitch was not called.

[90] To be clear, I am not persuaded that had Mr Makings asked for permission to approach CBRE he would have been given it. The second defendant refrained from asking Mr Solomons and Mr McInnes, and decided not to call Mr Djurovitch. Of course had permission been sought to approach CBRE and been denied, it may be that most potential purchasers would have refused to contract – their suspicions would have been aroused. But the second defendant made no case about this, in pleadings, evidence, or in submissions, and I am not going to speculate in circumstances where in my view Mr Makings acted very naively and trustingly in purchasing the Piazza.

[91] More difficulties are encountered if it is assumed that Mr Makings was granted permission to enquire of CBRE, or if he took it on himself to do so without permission.

[92] It would appear that something was very wrong with the first defendant's system to estimate, budget for, collect and reconcile outgoings. It is difficult to know exactly what the problems were. In 2012 a new manager at CBRE, Mr Martin, discovered that

as far as he could see, the processes under the *Retail Shop Leases Act* of estimating, budgeting and reconciling outgoings had not been performed. He was quite certain these processes had not been performed post-September 2009, but was not entirely sure what the position was between 2007 and 2009.[50] Further, the owner of the Piazza was paying all the shared services under the Building Management Statement and not recouping amounts due from other lot holders – tt 4-90 and 4-98.

[93] Mr Otten was one of the relevant managers prior to September 2009. It was he who would have prepared the estimate which was Annexure B to the Information Memorandum. Unsurprisingly he had little recall of details of his management of the Piazza from the years 2007 to 2009, but his evidence was that he did prepare estimates and he could see from the Owner's Statements that the estimate which was Annexure B had been loaded into the CBRE system as the budget. That would normally not have occurred without the owner of the building (in this case Market Square) granting permission.

[94] It was clear that some CBRE documents had been lost, possibly when CBRE moved offices.[51] The estimate of outgoings which formed Annexure B was apparently one such document. Mr Martin could not find it – t 4-102.

[95] The first defendant's failure to call Anita Brown, who was the CBRE property manager immediately prior to the sale of the Piazza, was criticised. The failure to call her might let me feel more confident in drawing the inference that there were serious flaws in the management of the Piazza in the years 2007-2009. I do draw that inference. However, I could certainly not draw any inference that Anita Brown was aware of those faults in August and September 2009. Nor would I draw the inference that she would have made Mr Makings aware of them had he enquired. Nor can I draw an inference that if unaware of the faults, she would have made such strenuous investigations in response to an enquiry by Mr Makings that these faults would have been revealed, first to herself and then to him.

[96] There is no suggestion in the evidence that the first defendant was aware in August and September 2009 that it was failing in its duty to properly invoice and collect outgoings. I find that if Mr Makings had made general enquiries as to whether or not outgoings were being properly invoiced and collected, the likelihood is that he would have been told that they were.

[97] Had he gone further and asked in what amount outgoings had been collected for the previous financial year, I find it likely that he would have been told outgoings in a sum less than $106,140 had been collected. Possibly he would have been told that an amount of $65,286 was collected – this was what is recorded in CBRE's Owner's Statement (ex 15) as the "operating expenses income" (p 2453 of the exhibit). But even here I am speculating, for although three people who conceivably could have answered this question were called (Martin, Tambour and Otten), none of them was asked what answer the question would likely have received having regard to the CBRE financial statements for the 2009 financial year.

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[50] tt 4-85, 4-86, 4-94, 4-95, 4-96, 4-107.

[51] t 4-112.

[98] Even if the answer $65,286 had been given, I am still not persuaded that Mr Makings would have refused to go ahead with the purchase. He had the Third Tenancy Schedule which showed $67,261 as estimated operating expenses to be received for the 2010 financial year. He mistook this as an actual figure for the year ended June 2009,[52] yet he rationalised, as explained at [24] above, and came to the conclusion that the information in the Third Tenancy Schedule confirmed the representations in the Information Memorandum.[53]

[99] The second defendant's contributory negligence case is not made out.

The Case Against the First Defendant

[100] The plaintiffs' case against the first defendant was pleaded as a breach of the *Trade Practices Act* and alternatively as a breach of a common law duty of care. The plaintiffs sought to attribute the representations made by the second defendant, which I have already discussed, to the first defendant because the first defendant originally produced the estimate of outgoings (Annexure B) and the Third Tenancy Schedule. It was said that the first defendant ought reasonably to have contemplated that the information it produced might be used as it was in fact used by the second defendant. This case must fail.

[101] The plaintiff pleaded that Ray White asked CBRE for information to assist in the marketing campaign and CBRE would not co-operate in providing it. The second defendant denied this. There was no evidence to this effect from anyone. Further, there is no evidence that CBRE had any involvement in passing on their documents to the second defendant for the purpose of selling the Piazza. There is no evidence that CBRE knew of their use by the second defendant. In particular there is no evidence from which I could infer that anyone from CBRE read a copy of the Information Memorandum. The failure to call Anita Brown does not change that position.

[102] The first representation made to Mr Makings was that the Piazza was likely to be purchased at a price yielding an income of between 8 and 10% of the purchase price. There is no evidence that this representation was based on any information supplied by the first defendant, see [37] above.

[103] I turn to the representation that "the net rental for the [Piazza] … is approx. $607,175 p/a (see Tenancy Schedule)". There is no evidence that CBRE was involved in making the representation that the total shown as total net rent on Annexure A (and its successors) was in fact received as rental income, net of all expenses, in the financial year ended 2009.

[104] Mr McInnes thought that Market Square's lawyers produced the document which was Annexure A – t 6-18. I think it likely that lawyers produced the document which was exhibit 4 as part of their drafting the contract of sale – see its heading "Schedule 1"; it was in fact schedule 1 to the contract of sale. Mr Solomons thought that someone at

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[52] tt 2-41, 2-42, 3-50.

[53] tt 2-43 (twice), 2-45, 2-47, 2-48, 2-49, 2-50, 2-51, 3-31, 3-38, 3-40, 3-42, 3-49-50.

Market Square created the document – t 5-83. Maybe that is correct and it was produced for the solicitors who used it to draft schedule 1 to the contract. Whoever it was who produced the document which is Annexure A, there was no evidence that it, or its successors, were produced by CBRE.

[105] CBRE had nothing to do with the representation in the Information Memorandum that the schedule of rents payable under the leases was "the net rental for the [Piazza]" or that "Net annual rent for the 11 tenancies … tops $607,000" – (Annexure I). Nor did CBRE have anything to do with the statement made by the second defendant in the email sent at 20:32 on 19 August 2009; the oral statements made by Mr Djurovitch as to total rental on 26 August, or his conduct in using the total rental figure to calculate yield on 26 August 2009.

[106] The first defendant prepared the estimate of outgoings, Annexure B. It was created by CBRE in the course of its management of the Piazza.[54] Such a document was to be sent to the shopping centre's owners so that they could approve and sign it. It would then be circulated to the tenants as a basis for their liability for outgoings under the *Retail Shop Leases Act.* As discussed above, the estimate of outgoings was inaccurate, and the fault for the inaccuracy lay with CBRE. The estimate ought to have been in the vicinity of $159,000 and the rate should have been about 115m^2.[55] It was only an estimate of outgoings recoverable by tenants, so it was not a fault that it did not include the amount of $41,638 which related to shared services. Mr Djurovitch's representations that it showed all the expenses referable to the Piazza and that all the expenses of the Piazza were recoverable from tenants went well beyond the document.

[107] Mr Martin and Ms Tambour accepted that an estimate of outgoings under the *Retail Shop Leases Act* was commonly included in Information Memoranda produced if a building owner wished to sell a commercial or retail building. Ms Tambour also gave evidence that CBRE knew, the documents suggested by 22 July 2009 (ex 37), that the Piazza was being sold. The plaintiffs rely upon this evidence to say that the first defendant ought reasonably to have contemplated that its estimate of outgoings would be sent to a class (potential purchasers) of which Mr Makings was one, who would rely upon the document in buying the Piazza.[56] The alternative case was that these factual circumstances were sufficient to make the first defendant responsible under the *Trade Practices Act* for a false representation to Mr Makings as a potential purchaser of the Piazza.

[108] The second defendant took an out-of-date, unsigned estimate of outgoings recoverable from tenants and represented that the actual total outgoings for the Piazza in the 2009 financial year were in the vicinity of the amount of the estimate. Mr Djurovitch said these were the total expenses for the Piazza, and that all expenses of the Piazza were recoverable from tenants. These representations were part of a wider set of representations, the most important of which was that after paying those outgoings, the Piazza yielded net rent of around $619,630.

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[54] The evidence of Mr Otten establishes this, eg, t 7-54-55, and Ms Tambour t 4-115.

[55] See [60] above

[56] *Esanda Finance Corporation v Peat Marwick Hungerfords* (1997) 188 CLR 241, 252.

[109] Every month for over two years CBRE had given Market Square a set of financial statements which showed how poorly the Piazza was performing. They showed what the total outgoings for the Piazza were in fact for any given period, and what recovered outgoings were for any given period. These statements showed that in the 2009 financial year total outgoings were about $190,000[57] and recovered outgoings about $65,000. They showed the net rent for that financial year was about $297,000. In this context, there was no basis for CBRE reasonably to contemplate that a small, outdated part of the information it prepared on behalf of Market Square would be misused in the way it was by the second defendant as agent for Market Square. Nor could the first defendant be responsible under the *Trade Practices Act* for the representations made.

[110] CBRE produced the Third Tenancy Schedule. The representations said to be made by the Third Tenancy Schedule were that outgoings were at an average of $75 per square metre and that the individual tenancies were returning an amount of $619,617 together with recoverable outgoings of $67,261.[58] It was also pleaded there were implied representations to the effect that operating expenses were reimbursable to the lessor. I cannot accept that implication arose where the express representation was that recoverable outgoings were in an amount of $67,261 and where the schedule was handed over with other material, including Annexure B to the Information Memorandum. It was further pleaded that there was an implied representation that there were no further matters, of which Mr Makings ought to have been concerned, about the capacity of the Piazza to derive net income in an amount of $619,617. I cannot see that this was a fair implication either from the Third Tenancy Schedule itself, or from that schedule in the context of the other information provided in the Information Memorandum, and orally by Mr Djurovitch.

[111] There is no evidence that CBRE was a party to using the tenancy schedule to support either the representation that the actual net rental income from the Piazza was $619,617, or that outgoings were charged at $75 per square metre. It was Mr Makings who understood these things from his perusal of the document. Mr Makings' conclusions were no doubt strongly influenced by the information he had already from Ray White.[59] I do not think that any reasonable reader of the Third Tenancy Schedule would arrive at these conclusions in the absence of the earlier information.

[112] Dealing first with the figures, the Third Tenancy Schedule does not expressly state what the net income is, and does not contain figures which would naturally lend themselves to the conclusion that the net income was $607,175, $619,630 or $619,617.

[113] The Third Tenancy Schedule is ambivalent as to the rate at which outgoings for the Piazza are charged. So much was acknowledged by the plaintiffs' third amended statement of claim which pleaded representations of various rates per square metre from this schedule, ranging from $73.77 to $90. In fact, an examination of the document shows that Tenancy 12B was being charged $43.16 per square metre and Tenancy 9, $69.67 per square metre. It is true that the figure $75.21 per square metre is given in the last part of the Third Tenancy Schedule under the heading "Income Totals" and this is the figure which Mr Makings looked at. Mr Makings used this figure to confirm that

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[57] This included the amount of around $41,638 shared services costs.
[58] Paragraph 26(b) and (d) of the third amended statement of claim.
[59] See [24] above. And see also: tt 2-41, 2-44, 2-48, 2-51, 3-13.

outgoings were in the order of the estimate of outgoings for the year ended 2009, and in this sense it was important to him.

[114] The Third Tenancy Schedule showed, on the last page, that only $67,261 was expected to be recovered from tenants in the 2010 financial year. Mr Makings did not properly understand this second piece of information and rationalised the figures so it seemed to him that in an approximate way they accorded with his understanding of Annexure A.[60] I think it was clear from his evidence that he did not understand or attempt to analyse closely the information in the Third Tenancy Schedule.[61] I mean no disrespect in concluding that to do so was beyond him.

[115] Like the statement of outgoings already dealt with, I do not consider that there is any sensible basis to say that by creating the Third Tenancy Schedule, and passing it on to its client Market Square, the first defendant engaged in the conduct which misled and deceived Mr Makings. The Third Tenancy Schedule was part of the Owner's Statement for June 2009.[62] The document taken as a whole showed how poorly the Piazza was performing. In his evidence Mr Makings agreed that had he seen the whole document, the purchase of the Piazza would not have gone ahead.[63] The first defendant could not reasonably anticipate that one part of a document which it produced would be misused in the way the plaintiffs allege the Third Tenancy Schedule was – to represent actual rental income from the Piazza in the sum of $619,617 and to represent outgoings at $75 per square metre. In these circumstances the first defendant is not liable under the *Trade Practices Act* or at common law for having produced the tenancy schedule.

[116] Lastly, there is no basis on the evidence to make the first defendant responsible for oral statements made by Mr Djurovitch on 26 August 2009.

Second Defendant's Claims under Proportionate Liability Legislation

[117] The second defendant pleaded by way of defence that the claim made against it was an apportionable claim within s 87CB(1)(a) of the *Trade Practices Act* and s 28(1)(a) of the *Civil Liability Act* 2003 (Qld). That may be accepted.

[118] It pleaded that if the plaintiffs established their case against the first defendant then the first defendant was a concurrent wrongdoer – s 87CB(3) of the *Trade Practices Act* or s 30(1) of the *Civil Liability Act.* This claim must fail because my finding is that the first defendant is not liable to the plaintiffs.

[119] The second defendant also pleaded that Market Square was a concurrent wrongdoer.[64] The second defendant ran a case at a factual level which sought to establish the liability

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[60] See [24] above.

[61] tt 2-38, 2-47, 2-49, 3-40, 3-42, 3-49-50, 3-50-51.

[62] The Third Tenancy Schedule was at pages 2509-2011 of the exhibit; the Owner's Statement was at pages 2487-2011.

[63] tt 2-107-108 and 3-51-53.

[64] Paragraph 55(db) of the further further further amended defence of the second defendant gives some indication that an apportionment claim was essayed against Messrs Solomons and McInnes, but there is no express pleading that they are concurrent wrongdoers, cf paragraphs 55(c) and (d). I think that position is put beyond doubt by paragraph 325 of the second defendant's written submissions which is to the effect that only

of Market Square to the plaintiffs. For reasons I do not understand it did not rely on general principles of agency or s 84(2) of the *Trade Practices Act.* It seems to me that section does apply and deems acts of the second defendant to have been engaged in by Market Square. The second defendant was an agent of Market Square and at all times acted within its actual or apparent authority. So far as apparent authority of a real estate agent is concerned, see *Mark Bain Constructions Pty Ltd v Avis*[65] and the cases cited there. In this case the second defendant did no more than state facts or circumstances relating to the value of the property, ie, it acted, at least, with apparent authority. The result is that at law, the acts of the second defendant, for which I found it liable to the plaintiffs, are deemed to have been engaged in by Market Square.

[120] Whether that reasoning is relied upon, or the factual case run by the second defendant about the vendor's liability to the plaintiffs is relied upon, there is a difficulty for the second defendant. The facts of the case fall squarely within the ambit of the decision of *Hadgelias Holdings and Waight v Seirlis & Ors*.[66] The conclusion in that case was that where "… agents and vendors … performed a single set of acts which caused loss. They were not 'concurrent wrongdoers' so as to attract the application of s 87CD [of the *Trade Practices Act*]." – [24].[67]

[121] The Court of Appeal's judgment in *Hadgelias* sits in a somewhat unusual context. The appeal in that case was from a decision of McMurdo J, *Seirlis v Bengtson*.[68] The facts before his Honour were, for present purposes, identical to the facts here and the submission before him was, "that there must be distinct acts or omissions between those who are said to be concurrent wrongdoers" before the proportionate liability legislation could apply – [117]. At that time there was a decision to this effect: the decision of the New South Wales Court of Appeal in *Tomasetti v Brailey.*[69] It concerned whether or not a company and its sole director were concurrent wrongdoers. The decision in that case was that:

> "The acts and omissions of [the director] … were the corporate acts of [the company]. Accordingly, they were both responsible for the appellants' losses, their acts and mind being the same. I find nothing in the terms of [the apportionment legislation] that requires responsibility for a loss to be apportioned between concurrent wrongdoers of this type so that the total of the percentages for which they are liable is 100 per cent. The section simply limits the liability of the defendant to the proportion of the loss that the Court considers just having regard to the defendant's responsibility for the loss or damage. Here [the director] and [the company] were each fully responsible for the losses and it is just that each be liable for 100 per cent of the losses." – [154].

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the first defendant and vendor were contended to be concurrent wrongdoers. It is difficult to know what to make of the pleading at paragraph 55(db) of the further further further amended defence of the second defendant. I interpret those paragraphs and paragraph 338 of the second defendant's written submissions as referring to conduct by Messrs McInnes and Solomons as being relevant because it was on behalf of Market Square.

65 [2012] QCA 100, especially at [12] ff.

66 [2014] QCA 177.

67 The provisions of the *Civil Liability Act* are if anything less helpful to the second defendant.

68 [2013] QSC 240.

69 [2012] NSWCA 399.

[122] McMurdo J followed that reasoning, ie, that (implicitly) the director and the company were concurrent wrongdoers, but because their acts and omissions were the same, the legislation did not require an apportionment.

[123] The Court of Appeal in *Hadgelias* focussed on the anterior question: whether the real estate agent and vendor in that case were concurrent wrongdoers. It concluded that they were not. Holmes JA said:

> "On my construction of s 87CB, the agents and vendors in the present case performed a single set of acts which caused loss. They were not 'concurrent wrongdoers' so as to attract the application of s 87CD." – [24].

Further, that s 87CB should be construed:

> "… as concerned with distinct acts (or omissions) or sets of acts (or omissions) by different actors, combining or working independently to cause loss or damage, and consequently inapplicable where there is but a single act or set of acts causing loss, attributable to more than one person." – [21]

[124] Subsequently, the New South Wales Court of Appeal reconsidered these issues in *Williams v Pisano*.[70] The Court distinguished the earlier case of *Tomasetti* on its facts, but also commented that it did not contain any detailed consideration of whether or not the director and company in that case fell within the definition of concurrent wrongdoer – [79]. After a very detailed analysis of the relevant legislative provisions Emmett JA (with Bathurst CJ and McColl JA concurring) concluded that:

> "For the above reasons, s 87CB(3) should be construed as applying to a situation in which two or more persons contribute to the commission of a single act that causes the damage that is the subject of the claim under the *Consumer Act*. Thus [the wrongdoers] are concurrent wrongdoers for the purpose of Pt VIA." – [84].

[125] I am bound by the decision of *Hadgelias* in the Queensland Court of Appeal. Accordingly my decision is that Market Square and the second defendant were not concurrent wrongdoers and this defence fails. In light of the decision in *Williams v Pisano* I will go on to express my view that were they concurrent wrongdoers, I would limit the liability of the second defendant to 80 per cent of the plaintiffs' loss. I will now give my reasons for that *obiter* finding. In summary, on the evidence before me, the second defendant was far more culpable in making misrepresentations to Mr Makings than was Market Square, and the representations the second defendant made were far more powerful an influence on Mr Makings than anything said or done by Market Square. I will compare the culpability of the second defendant and Market Square by reference to the factual case the second defendant made against Market Square in its defence.

[126] It is difficult to discern from the pleading what is the legal basis upon which it is said Market Square would have been liable to the plaintiffs. It appears from paragraph

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[70] [2015] NSWCA 177.

55(da)(iii) of the second defendant's pleading that sections 52 and 53A of the *Trade Practices Act* are relied upon. Section 53A claims are not apportionable. It is implicit in the references to sections 30 and 31 of the *Civil Liability Act* that another basis for liability might be relied upon, but none is pleaded. The written submissions refer to "negligence", yet there is no pleading of duty. If the second defendant contended that the vendor owed a duty of care in tort to the purchaser, there was no proper pleading and no development of this case in submissions. In circumstances where the relationship of Market Square and the plaintiffs was governed by contract, it is inappropriate to allow a negligence case to be advanced when it is not pleaded and no proper arguments are made as to these issues. Many of the second defendant's submissions (see paragraph 338), seem designed to support a case of fraud or intentional misconduct on the part of the third parties as directors of Market Square. I will not countenance a fraud case when it had not been pleaded. In performing this *obiter* exercise, I have regard only to the viable part of the pleaded case, ie, that the liability in Market Square to the plaintiffs was a liability under s 52 of the *Trade Practices Act.*

[127] The pleaded facts relied upon to prove that Market Square would have been liable to the plaintiffs are:

(a) it provided a warranty to the second defendant at cl 7.1(3) of the written appointment of that real estate agent to the effect that "any particulars about the [Piazza] provided to the [second defendant] by [Market Square] are correct." (ex 38);[71]

(b) at the time of the execution of that appointment, Market Square instructed Messrs Bell and Djurovitch that there was no need for them to contact CBRE to obtain information to use in marketing and selling the Piazza and that all information required by the second defendant was to be obtained from them;[72]

(c) prior to the release of the Information Memorandum, Messrs Solomons and McInnes told Messrs Bell and Djurovitch that they were satisfied with the content of the Information Memorandum and they approved the information in it and its accuracy;[73]

(d) in the premises, Messrs Solomons and McInnes impliedly represented that all information provided, or to be provided, by them to the second defendant for the purposes of marketing and selling the Piazza was accurate;[74]

(e) Market Square was a company acting in trade and commerce with respect to the sale of the Piazza, including the provision of Annexures A and B to the Information Memorandum, and the amended version of Annexure A, to the second defendant;[75]

(f) Market Square "would have been, if the plaintiffs establish that the provision of the information [presumably that just described at (e)] constituted a breach of s 52 … liable to the plaintiffs for that breach";[76]

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71 Paragraph 55(c) of the pleading.
72 Paragraphs 55(c), 18(c)(iii), 6(ba), (c) and (ca) of the pleading.
73 Paragraphs 55(c) and 18(c)(ii) of the pleading.
74 Paragraphs 55(c) and 18(c)(iii) of the pleading.
75 Paragraph 55(da)(ii) of the pleading.
76 Paragraph 55(da)(iii) of the pleading.

(g) Market Square provided the information for the purpose of marketing the Piazza knowing of the warranty mentioned at (a) above.[77]

[128] This pleading puts the basis of liability of Market Square only on the provision of Annexures A and B to the Information Memorandum[78] and not on any wider basis. It appears from the evidence at trial (which was led without objection), and from the second defendant's written submissions, that its case included the provision of the Third Tenancy Schedule. I will decide the case in accordance with the way it was run, rather than the pleading in this respect.

[129] It might also be that the second defendant wished to rely upon Market Square's provision of the statement that there were (virtually) no arrears of rent owing at August 2009 (see [26] above). Counsel for the second defendant cross-examined Mr Makings to establish that he relied upon this statement. He did not however establish that it was not true according to its terms.

[130] Mr Makings gave evidence that he concluded from the arrears statement that:

> "… I had that confirmed the level of collection and that was the rental arrears statement produced in July which showed that there was $10,000 outstanding, but since all been paid apart from $59 and there was rental arrears included outgoings. So that confirmed to me that CBRE had invoiced and collected all that was due, both in the leases and under the statement – the statement of outgoings." – t 4-20

[131] I consider this evidence to be plainly a product of (unconscious) reconstruction. I cannot believe that at August 2009 Mr Makings thought there might be (as it turned out) an issue with CBRE's invoicing and collection of rents and outgoings. It was three years later that Mr Martin made him aware of this issue – t 4-85-86. During those three years Mr Makings was aware of the Piazza's poor financial performance but not the cause – t 4-56-57 and t 4-89.

[132] Even if there were no reconstruction involved, I cannot see that the statement that there were no current arrears of rental could be interpreted logically or reasonably to mean that there had been none in the past, or to say anything about whether outgoings were correctly invoiced and collected. In circumstances where the statement has not been shown to be literally untrue, I cannot see the provision of this statement as a potential basis of liability in the vendor. Accordingly, I shall disregard this part of the evidence in deciding whether the second defendant has proved that the plaintiffs had a case against Market Square.

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[77] Paragraph 55(db)(iii)A of the pleading and paragraph 15(d)(iii) of the third amended statement of claim, interpreted to mean that Messrs Solomons and McInnes were acting on behalf of Market Square.

[78] These are the documents to which paragraph 55(da)(ii) refers, even though it describes them as "the tenancy schedule" and the "outgoings budget".

[133] The sale of the Piazza by Market Square was activity which is regarded as being in trade or commerce.[79] I find that Market Square did provide the pleaded warranty to the second defendant. Messrs Solomons and McInnes signed the appointment on behalf of Market Square (ex 38). The warranty was contained in a schedule to the appointment to sell by auction. It seems to be assumed that the terms continued to govern the parties' relationship after the property failed to sell at auction. Neither Messrs Solomons nor McInnes initialled the pages of the schedule. There was no legal requirement to do so. Mr Solomons speculated that Mr Bell had not shown them the schedule and just attached it to the signed document later – t 5-91. There is no evidence to support this (including from Mr Solomons – cf t 5-32). In any case, quite apart from the warranty, Market Square knew that the information it provided was to be given to potential purchasers of the Piazza, and that is sufficient for this claim by the second defendant.

[134] The second defendant alleges that prior to the release of the Information Memorandum, Messrs Solomons and McInnes approved its contents. Mr Bell was argumentative when giving evidence, and one of his concerns was to advance a general defence along the line that Messrs Solomons and McInnes approved the Information Memorandum – see tt 8-47-48 and 8-51, and see t 8-37. This evidence was not led in examination-in-chief. However, he did assert it in cross-examination. I had the distinct impression that in fact Mr Bell did not recall any discussion in which the Information Memorandum was approved – see, for example, the answer at t 8-37, l 27 and at t 8-48, l 33. As well see the trite and unlikely responses said to have been given by Messrs McInnes and Solomons at these conversations – t 8-37, l 25, t 8-48, l 20 and t 8-51, l 27. See generally Mr Bell's reluctance to commit to specific recollections of things which happened in 2009 when giving evidence in 2017 – tt 8-12, 8-13, 8-15-16, 8-20-21, 8-22 (ex 2), 8-24, 8-31, 8-32, 8-43-44, 8-51, 8-52-53. I disregard his evidence on this issue as unreliable.

[135] Mr Solomons did not know whether or not he or Mr McInnes approved the Information Memorandum, but he expected that they would have checked it – t 5-47. Mr McInnes swore that he or Mr Solomons (he did not say which of them, and was not asked to) did approve the Information Memorandum in draft as accurate – t 6-32. I have some reservations about whether he actually recalled that – cf t 5-121.

[136] Although the evidence is of poor quality, I am prepared to find that Market Square probably approved the Information Memorandum in draft. A draft was sent to Market Square – ex 48 and t 5-96.

[137] The second defendant contended that it was instructed not to contact CBRE but to obtain its information from Messrs Solomons and McInnes. Mr Bell claimed to have a memory of this occurring (even though he did not think it was suspicious – t 8-39 – and even though he remembered very little other of his interaction with Mr Solomons and Mr McInnes). He gave two versions of this. In evidence-in-chief he said that there was a positive instruction not to speak to the property manager – t 8-14. Then he gave a version that it was just that the owner would provide information – t 8-31 – and consistently with that, denied at t 8-38 that he (or Mr Djurovitch) received a positive

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[79] *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325, 330-331; *WP Kidd Pty Ltd v Panwell* [2007] QSC 373, [92]; *Rasch Nominees Pty Ltd v Bartholomaeus* [2013] SASCFC 23, [70]. See *Williams v Pisano* [2015] NSWCA 177, [47] as to the contrary position regarding the sale of a home, albeit for investment purposes.

instruction not to speak to CBRE – see l 39. Then in seeming contradiction of that, he almost immediately repeated that there was a positive instruction, which at t 8-39, became even more specific and imperative than it had been to begin with.

[138] Mr Bell had a tendency to assert that he had a recollection when in fact I am persuaded that he had no recollection, but had formed a view based on his normal practices, and what he perceived to be his company's best interests in the trial – see the references at paragraph [134] above.

[139] Messrs Solomons and McInnes denied that any such instruction was given. Mr McInnes said that CBRE had failed to co-operate in providing information when a previous property had been sold, and for that reason the second defendant asked Market Square to provide any necessary information – tt 6-39 and 6-40.

[140] I am not prepared to find that the instruction was given. Mr Bell's evidence is not reliable in my view. Mr Djurovitch was not called. The allegation is a serious one for implicit in it is the proposition that the instruction was given so that the second defendant did not receive accurate information about the Piazza's trading performance.[80]

[141] I record there was an associated point run at trial by the plaintiffs that Messrs Solomons and McInnes instructed Ray White to sell the property rather than CBRE because CBRE knew, and Ray White did not, that the centre had never performed well financially. I am not actually persuaded that that was the reason for instructing Ray White. Mr McInnes said he had done "a tremendous amount of business" over the years with Ray White.[81] Mr Bell confirmed this – t 8-16. Further, I accept that Mr McInnes was frustrated with the managers who he dealt with at CBRE.[82]

[142] There is sparse information as to how the documents which became Annexures A and B to the Information Memorandum came to be provided to the second defendant. On 3 July 2009 Mr Djurovitch emailed Market Square. The email was addressed to the secretary, Lee O'Connell. It said:

> "Hi Lee,
>
> I am completing the information memorandum for property and require the following:
>
> 1. the corrected plans …
> 2. an image of the floor plan layout …
> 3. outgoings budget
> 4. profile of each tenancy …
> 5. UCVs
> 6. details on retail not permitted …
>
> Thanks." – Ex 39.

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[80] See paragraph 338 of the second defendant's written submissions.
[81] t 5-113.
[82] t 5-118.

[143] Ms O'Connell emailed back saying:

> "Hi David,
>
> 1. the registered plans that you have attached are the correct ones
> …
> 2. floor plan layout is attached
> 3. outgoings budget is attached
> 4. I have previously forwarded the tenancy schedule which outlines some details of the tenancies but a further profile as follows:
>
> …
>
> 5. UCV's – to be provided
> 6. details on retail not permitted – to be provided.
>
> Let me know if there is any further information outstanding." – Ex 40.

[144] The reference to the tenancy schedule in the second email above must be a reference to the document which became Annexure A to the Information Memorandum; the Third Tenancy Schedule was sent by Mr Solomons to Mr Djurovitch on 19 August 2009.

[145] Mr Solomons gave evidence that it was he who assisted in having the document which became Annexure B to the Information Memorandum sent to Ray White – t 5-24. Mr Solomons did not make any check to see that the document was accurate – t 5-97.

[146] Mr Solomons said he produced the document which was the immediate successor to Annexure A (found at p841 of Exhibit 2). That is, he produced the document that Mr Djurovitch sent to Mr Makings at 20:32 on 19 August 2009.[83]

[147] If Annexure A is simply regarded as a summary of the tenants' obligations to pay rent (not outgoings) under the leases, then it is an accurate enough summary. There is no evidence that Market Square provided Annexure A to the second defendant as being the actual rental income received from the Piazza in 2009, net of expenses. These same two things can be said of the second version of Annexure A, and the Third Tenancy Schedule. It was the use of these documents by the second defendant which was misleading. The second defendant represented that Annexure A and its successor showed the actual net rent for the Piazza in the financial year ended June 2009. The provision of the Third Tenancy Schedule to Mr Makings in this context was one reason he was misled about its nature and import.

[148] Market Square's liability to the plaintiffs, in accordance with the second defendant's proportionate liability case, must rest on: (a) its default in failing to correct the statements in the Information Memorandum that, "The net rental for the 11 tenancies which has [sic] a total lettable area is [sic] approx. 1327m^2 <u>is</u> approx. $607,175p/a (see Tenancy Schedule)" (my underlining), and "Net annual rent for the 11 tenancies … tops $607,000"; and (b) its provision of Annexure B to the second defendant as an outgoings statement which gave an accurate indication of the outgoings recovered from

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[83] t 5-83-84.

tenants, and the rate at which they were charged. I will deal with each of these bases for liability in turn.

[149] The first is a failure to correct a misrepresentation made by the second defendant. The second defendant must bear prime responsibility for having made the misrepresentation itself. The second of the two statements was contained in a newspaper article in one of the later annexures to the Information Memorandum, a rather obscure position. The first was prominently displayed towards the beginning of the Information Memorandum. However, it is a rather subtle misrepresentation. Someone who was used to buying and selling commercial property might not have been misled by it, but read it as just a statement of the face value of all the leases, net of outgoings, particularly having regard to the reference to the tenancy schedule. Mr Makings was commercially naïve and did not read it this way. However, he had the much more explicit words of the email sent by Mr Djurovitch at 20:32 on 19 August 2009 enclosing the successor to Annexure A ("the net revenue has risen substantially"). Even so, he still asked Mr Djurovitch on 26 August 2009 how he arrived at the net rental income shown on one of the successors to Annexure A. It was then that he was told that the net rental income figure had been arrived at, "after deducting all the costs, including the shared services, that are payable by tenants" – t 2-59.

[150] Looking at the relative culpabilities of the second defendant and Market Square, plainly the second defendant was far more culpable for making misrepresentations about the net rental income from the Piazza to Mr Makings, and for misleading him. Market Square simply failed to detect the first, and the least misleading, of a series of statements made by the second defendant.

[151] Turning to the second basis for liability, I regard the provision of the outgoings schedule, without checking whether or not it was accurate, as a more culpable act on behalf of Market Square. Mr Solomons had the monthly statements from the first defendant which showed what outgoings were in fact recovered, and it would not have been at all difficult for him to check this matter. They were listed as being only $67,261 in the Third Tenancy Schedule and more detail was provided in the report to which that schedule was annexed. It was readily available to Mr Solomons. I do not accept that he could not understand it. The information was presented in a very simple way and he had spent his life developing property, with all the associated dealings with financiers and contractors.

[152] The fact remains, however, that the contents of Annexure B were secondary in Mr Makings' mind to the representations about what the net rent was. I deal with this at paragraphs [54] – [56] above. It must also be recognised that Market Square, by Mr Solomons, did provide the Third Tenancy Schedule to the second defendant which showed an expected recovery of $67,261 from tenants in the 2010 financial year, very close to the actual figure for recovered outgoings in the 2009 financial year. Mr Makings had this and rationalised its contents away – [24] above. Mr Djurovitch's assertions to him on 26 August 2009 that Annexure B showed all the outgoings of the building; that all outgoings were recoverable from tenants, and that the net rent figure had been reached after deducting all the outgoings of the building must have played the major part in Mr Makings' thinking about outgoings. This was in a context where Mr

Djurovitch, with specialist qualifications and experience as a commercial real estate agent, also had the Third Tenancy Schedule.

[153] Again, looking at the relative culpabilities of Market Square and the second defendant, and at the impact of information on Mr Makings, I conclude the actions of Market Square were far less the cause of the plaintiffs' loss than the actions of the second defendant.

Second Defendant's Third Party Claim Against Solomons and McInnes

[154] The factual basis for the third party claims is almost identical to that which I have outlined at [127] above in the proportionate liability claim, with the exception that it is explicitly pleaded that the material was provided to the second defendant when Messrs Solomons and McInnes knew it did not "accurately or truthfully represent the actual outgoings recovered from tenants".[84]

[155] Against these factual premises then, it was pleaded that Messrs Solomons and McInnes:

(a) were persons liable pursuant to s 75B of the *Trade Practices Act* for any breach of the *Trade Practices Act* for which Market Square would have been liable and were therefore liable to compensate the second defendant because the provision of information to the second defendant by Market Square was conduct which was deceptive or misleading;

(b) owed a duty of care to the plaintiffs and to the second defendant to exercise reasonable care and skill in providing information to the second defendant and to take reasonable steps to verify its accuracy;

(c) breached that duty of care (it is not said how), or (presumably alternatively)

(d) knowingly misled the second defendant by providing the document which became Annexure B to the Information Memorandum when they knew it was not accurate, and that

(e) as a consequence, the third parties are joint tortfeasors for the purposes of s 6 of the *Law Reform Act* 1995 (Qld) or should indemnify or contribute to any damages the plaintiffs are awarded as against the second defendant pursuant to s 7 of that Act.

[156] Most of my factual findings as to the matters relevant to this claim are in the *obiter* discussion of proportionate liability, above. The third parties are of course sued individually, and the evidence available against each of them is considerably less than the total evidence against Market Square on the proportionate liability defence. In particular, the second defendant did not prove which of Messrs Solomons or McInnes sent the document which became Annexure A to the second defendant. The second defendant did not prove which of Mr Solomons or Mr McInnes it was who approved the Information Memorandum on behalf of Market Square.

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[84] Paragraph 4(cb) of the third party statement of claim.

[157] It was proved that Mr Solomons sent the document which became Annexure B to the second defendant. The evidence showed that both Mr Solomons and Mr McInnes neglected the affairs of Market Square. The financial information they needed to attend to its affairs was given to them every month by the first defendant in a form which I find they could readily have understood. They apparently made no effort to understand it. However, the second defendant did not prove that Mr Solomons knew that the schedule of outgoings conveyed an inaccurate or untruthful picture of outgoings actually recovered at the time he sent it to the second defendant. Mr Solomons said he assumed the leases were net leases because that is what his solicitors advised him originally – t 5-22. He said that he assumed the first defendant was collecting all the outgoings due under the leases – t 5-23. I accept that, because if he had known that CBRE was not invoicing and attempting to collect everything due to Market Square, he or Mr McInnes would have done something about it – cf t5-117. The pleaded allegation of fraud was not put to Mr Solomons by counsel for the second defendant. In these circumstances the pleading based on must fail.

[158] It could only be in the most extraordinary circumstances that the directors of Market Square could owe a duty of care either to the second defendant or to the plaintiffs. There is no pleading of any such circumstance. Submissions simply relied upon general principles in a textbook and made no effort to address the fact that the third parties were the directors of the company with which the second defendant and the plaintiffs had contractual relationships. In the circumstances the negligence claim against the third parties fails.

[159] Thus the second defendant has failed to prove that either Mr Solomons or Mr McInnes was a tortfeasor; I have no occasion to consider the contribution legislation.

[160] The only possible basis for a claim against Mr Solomons or Mr McInnes is s 75B of the *Trade Practices Act.* Given the matters the second defendant has failed to prove, the only conduct for my consideration is Mr Solomons' provision to the second defendant of the document which became Annexure B without checking it. There is no claim at all proved against Mr McInnes.

[161] There is no proof that Mr Solomons was the director who approved the Information Memorandum on behalf of Market Square. Thus there is no proof that he saw the misleading statements made as to Annexure A and total net rent, or saw how the statement of outgoings was used in the Information Memorandum.

[162] On 19 August 2009 Mr Solomons sent the Third Tenancy Schedule to the second defendant. That showed an expected recovery of only $67,261 as annual outgoings in the 2010 financial year. That was a much more accurate budget figure than the $106,140 figure in Annexure B.[85] And as the second defendant's counsel led from Mr Makings, he understood that the second schedule of figures was to update the first – t 4-31. So, looking only at Mr Solomons' conduct, he provided two sets of inconsistent information, where the second set was fairly accurate and updated the first.

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[85] See the amount of $65,286 actually collected the year before – (ex 15, p 2453).

[163] In fact, Mr Makings misinterpreted and failed to understand the information in the Third Tenancy Schedule, as I have found. This was in part due to the misleading statements the second defendant made to him about (1) total net rent, (2) total outgoings and (3) recoverability of outgoings. There is no evidence that Mr Solomons was aware of these misleading statements, or that the Third Tenancy Schedule had been given to Mr Makings in that context.

[164] In all these circumstances, I am not persuaded that Mr Solomons' act was an involvement within s 75B(1) of the *Trade Practices Act.*

[165] I dismiss the third party proceedings.

Calculation of Compensation

[166] The purchase price for the Piazza was $6.9 million.[86] The plaintiffs' valuer's evidence was that at 25 September 2009 the Piazza was in fact worth $4.91 million.[87] The plaintiffs' case was that it was entitled to the difference between value and purchase price paid. This is a conventional enough approach – *Potts v Miller.*[88] This amount is $1.99 million.

[167] The second defendant raised three matters in support of compensation in a lesser sum. I will deal with each in turn.

[168] **No Transaction Case.** As explained at [58] this is a no transaction case. The evidence is that the vendor had rejected a bid of $6.7 million at auction. To submit, as the second defendant did, that Mr Makings on behalf of the plaintiffs might have negotiated an acceptable purchase price with the vendor had he known the true financial performance of the Piazza is simply unrealistic.

[169] **The Basis of Valuation.** Two valuers were called in the case. I prefer the evidence of the plaintiffs' valuer Ms Lisa Murdoch from Jones Lang LaSalle. She presented a very impressive series of reports and was, I thought, very impressive in giving her evidence. She dealt very patiently with questions from all the parties, and indeed from me, but did not retreat in any substantial way from her position. Indeed her answers showed how well thought out her initial position was. The same cannot be said for Mr Michael Wright who was called by the first defendant. His credibility suffered due to his spurious attacks on Ms Murdoch in a report delivered prior to trial and his failure to retreat from them, or to justify them in his evidence.[89] He made false representations in his curriculum vitae.[90] Significant though these matters going to creditworthiness were, they probably do not bear directly on the issues I must determine.

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[86] The plaintiff submitted that compensation ought to be calculated using a different figure derived from exhibit 10. That figure included some costs associated with the purchase, but it seems to me they would have been necessary whatever the purchase price paid, except that stamp duty may have been in a slightly smaller amount. However, no alternative stamp duty amount was offered so I simply use the purchase price.

[87] Exhibit 56 and exhibit 55A, together with tt 6-74, 7-20, 7-30.

[88] (1940) 64 CLR 282; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640.

[89] See t 6-75-80 and t 7-33 ff.

[90] When compared with remarks made in *Warragamba Winery Pty Ltd v State of New South Wales* [2012] NSWSC 701 at t 3-4 ff.

[170] Both Ms Murdoch and Mr Wright adopted a capitalisation approach to valuation and used a direct comparison approach as a check, or secondary approach. Ms Murdoch reached a value of $4.91 million, and Mr Wright reached a value of $6 million. There were two main differences in their approach. I will deal first with the difference which affected the valuation obtained on the capitalisation approach.

[171] On instructions, Mr Wright assumed recovery of the face value of the rents payable on the leases for the Piazza as at 25 September 2009, together with all the outgoings for the Piazza, in calculating the income stream which the Piazza could be expected to produce as at 25 September 2009. The plaintiffs' share of the shared costs ($13,879) was chargeable to the tenants, along with all other expenses (except land tax) – see [60] above. However, the remainder of the shared expenses ($41,638, ex 57) was not. As a result the income stream used by Mr Wright was incorrect. Separately, I find it was not appropriate to assume such a high income stream, as I now explain.

[172] Ms Murdoch ascertained what she considered was a gross rent (rent and outgoings) for each of the Piazza tenancies which was in line with the market as at 25 September 2009. She explained that this was accepted valuation practice when dealing with a building such as the Piazza in order to obtain a realistic value. In her view, to simply accept the face value of rent payable under the leases together with the entirety of the outgoings in relation to the Piazza produced an income stream for use in the capitalisation exercise which was unrealistic because it was too high. Her view was that the tenants in the Piazza as at 25 September 2009 were paying a gross rent which was higher than market and was therefore not sustainable – t 6-59.

[173] Ms Murdoch began with the face value of the rents and the figure $76,261 which she took as being the outgoings actually received for the 2009 year.[91] This gave Ms Murdoch a gross total rent of $693,841 for the year ended June 2009. She reduced this to $637,165 to bring it back to where she thought the market was; that is, to produce a realistic figure representing the market value of the income stream available from the Piazza as at 25 September 2009. This description of Ms Murdoch's work oversimplifies it. It was clear from her evidence that she looked at each tenancy in the Piazza and each tenancy in a number of comparators in a very detailed way and analysed that information according to accepted mathematical models expressly designed for the purpose of performing such a valuation exercise.

[174] Thus Ms Murdoch concluded that what was shown on the leases (in terms of obligations to pay rent and outgoings) put the Piazza very much above market when compared with

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[91] I have some concerns with this figure. Ms Murdoch took it from the Third Tenancy Schedule and in particular the "OPEX – General" coded as 1610 – t 6-60. However, we know from Ms Tambour's evidence that was not in fact actual outgoings received in 2009 but a figure representing outgoings expected in 2010 – t 4-19-20. Further, there may have been a transcription error at some point for the figure against code 1610 "OPEX – General" in the Third Tenancy Schedule is $67,261, not $76,261. In saying this I am aware that Ms Murdoch does appear to have independently derived the figure as the sum of a column of numbers on p 5152 of exhibit 55. Further problems arise however, for when I add the figures on this page I get $68,535. Unfortunately no-one noticed these uncertainties while Ms Murdoch was giving evidence. In any event, the evidence establishes that the figure for outgoings received from tenants in 2009 was $65,268 – p 2453 of exhibit 15. While this is different from the figure Ms Murdoch used by about $12,000, I am not persuaded that this matters given the reduction to market ($693,841 to $637,165) she made – see further at [174].

other properties.[92] Even when the face rents and outgoings actually paid were considered, the Piazza was still above market.

[175] In more general terms, it was Ms Murdoch's evidence that the sale of the Piazza occurred at a time coincident with the Global Financial Crisis, when there was great pressure on all businesses, and high vacancy rates in retail and commercial properties – t 6-71.

[176] The idea that the tenants of the Piazza had obligations under their leases which were much greater than the market is not just the product of Ms Murdoch's research into comparative tenancies at the time. Mr Martin was appointed to manage the Piazza on behalf of CBRE in 2012. It was he who discovered the discrepancies in the budgeting, invoicing and collection of outgoings for the Piazza. In 2012 he assessed the position of the tenants having regard to what he had discovered. His view was that the tenants of the Piazza were financially stressed even though they were significantly under-invoiced – t 4-88. In fact, at that point some of the tenants had rent abatements which the landlord (the plaintiffs) had offered to retain them, rather than see them fail – t 4-89. Mr Martin was pessimistic about the landlord's chances of recovering any more from the tenants – t 4-100-101. On behalf of the plaintiffs he asked one tenant to pay what was owing due to under-invoicing by CBRE. That tenant refused and threatened to vacate.

[177] Running the Piazza cost almost $100,000 more per year in outgoings than was recovered in the financial year ended June 2009 – see exhibit 55A, p 1. Indeed it is evident from the history of the Piazza, as shown in the financial accounting documents of CBRE, that the tenants there always struggled, failed and vacated notwithstanding they were paying (as a group) about $100,000 less per year than the sum to which the landlords were entitled, see for example the documents referenced at [6] and [9] above.

[178] I notice that even now the plaintiffs do not charge all outgoings to the tenants. As well, Mr Makings and his son manage the Piazza without remuneration. His unchallenged estimate of the value of that work was between $100,000 and $150,000 each year.

[179] In these circumstances it seems to me the approach of Ms Murdoch is preferable as being realistic. The approach Mr Wright took, on instructions, is not realistic and I reject it in favour of Ms Murdoch's approach.

[180] The other major difference between the two valuers, when performing the direct comparison part of their valuation exercise, was that Mr Wright used leases negotiated in the previous two years in the Piazza as comparators. This is a most unusual approach and was one rejected by Ms Murdoch – t 6-70. I prefer her evidence on this point.

[181] **Settlement of Plaintiffs' Claim against First Defendant.** In this proceeding the plaintiffs brought a money claim against the first defendant for the amounts which it ought to have collected from the tenants of the Piazza in the years 2010-2013, according to the terms of their leases. This claim was settled in the first day or two of the trial.

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[92] tt 6-58, 6-62, 6-65, 6-68, 6-70, 6-92.

The settlement was in the amount of $349,748 on the claim, and $75,251 on account of interest, together with costs of that part of the claim paid on a standard basis.

[182] Ms Murdoch was of the view that this settlement did not affect her valuation – t 6-103. In my view, the correct way to regard this payment is as the plaintiffs having mitigated their loss. The basis of the assessment of compensation is that the Piazza will not produce a sufficient income stream to justify the price paid for it. It will continue to under-perform into the future. The plaintiffs' settlement with the first defendant has recouped some of that income stream.

[183] I record in regard to an argument advanced by the second defendant, that the settlement cannot be regarded as proof that the tenants in the Piazza between 2010 and 2013 could in fact have paid rent and outgoings in accordance with their lease obligations, or even that the first defendant acknowledged that they could have done so. There were no doubt numerous considerations which influenced the first defendant to settle this claim.

[184] Had the claim against the first defendant been for under recovery of moneys up to and including the date of this judgment, it is possible that there might be grounds to consider whether or not the current market value of the Piazza was relevant to the fair assessment of compensation under the Act. That is not the case. I deal with the settlement sum by deducting $349,748 from the judgment sum ($1,990,000 – $349,748 = $1,640,252), and ordering interest, less the sum of $75,251.

[185] Both valuers concluded that the present value of the Piazza was higher than its value in September 2009. There was not shown to be anything out of the ordinary in this. As I have noted, the centre still relies upon management from Mr Makings and his son for which they do not charge, and still subsidises outgoings of tenants. There is nothing shown which makes any other measure of loss more appropriate than that in *Potts v Miller*.

[186] I will hear the parties as to costs, and as to calculation of interest.