SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Read v Burns**
Citation:	**[2017] ACTSC 184**
Hearing Dates:	1-5 February 2016 and 16-20 May 2016
Decision Date:	27 July 2017
Before:	Burns J
Decision:	There will be judgment for the first and third defendants against the plaintiff. Unless any party applies for a different costs order within 28 days of publication of these reasons, I order the plaintiff to pay the first and third defendants' costs of the proceedings.
Catchwords:	**EVIDENCE** – credibility and the reliability of evidence – contemporaneous documents – recollection of events – plaintiff's evidence unreliable – expert evidence – expert code of conduct – partisan witness and not subject to the expert witness code of conduct – failure to call witnesses – *Jones v Dunkel* – cannot give rise to any inference. **TRADE AND COMMERCE** – trade practices – misleading and deceptive conduct – misrepresentations – s 12BB of the A*ustralian Securities and Investments Commission Act 2001* (Cth) – false representations and other misleading or offensive conduct – reliance on representations – *Corporations Act 2001* (Cth) – accessorial liability – whether defendant must have reasonable basis for statement – seminar – marketing document – plaintiff cannot establish liability – registrable bodies – registration of managed investment schemes – scheme was a managed investment scheme – required to be registered – scheme not illegal or unlawful. **NEGLIGENCE** – allegations of negligent acts and omissions in the provision of legal services – terms of retainer – solicitor's duty of care – failure to act with due skill, care and attention – failure to make necessary enquiries – no breach established – first defendant not liable in negligence. **DAMAGES** – suffered loss and damage – exemplary damages – consequential losses – reduced value of unit – reduced income – no evidence plaintiff suffered any loss or damage.
Legislation Cited:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12BB, 12DA, 12DC *Civil Law (Wrongs) Act 2002* (ACT) Chapter 4 *Civil Law (Wrongs) Amendment Act 2003 (No 2)* (ACT) *Civil Liability Act 2002* (NSW) s 5D(3) *Conveyancing Act 1919* (NSW) s 66W *Corporations Act 2001* (Cth) ss 9, 79, 601ED, 601FA, 601FB, 601GA, 601HA(1), 601HG, 601JA, 601JB, 601JC, 601KA(1), 601QA, 728(2), 765, 851, 995, 999, 1000, 1001, Part 5C.7, Chapter 5C

Court Procedure Rules 2006 (ACT) r 1202, Schedule 1
Legislation Act 2001 (ACT) s 73(1), Chapter 8
Trade Practices Act 1974 (Cth) ss 51A, 52, 53A, 75B, 82
Strata Schemes Management Act 1996 (NSW) s 13(3)

Cases Cited:

Agar v Hyde [2002] HCA 41; 201 CLR 552
Ali v Hartley Poynton Ltd [2002] VSC 113; 20 ACLC 1006
Astley v Austrust Ltd [1999] HCA 6; 197 CLR 1
Adamson v Williams [2001] QCA 38
Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd & Anor [2001] WASC 339
Australian Securities and Investments Commission v Rich [2009] NSWSC 1229; 236 FLR 1
Australian Securities and Investments Commission v Takaran Pty Ltd [2002] NSWSC 834; 170 FLR 388
Australian Softwoods Pty Ltd v Attorney-General (NSW) (1981) 148 CLR 121
Beach Petroleum NL v Kennedy [1999] NSWCA 408; 48 NSWLR 1
Brandi v Mingot (1976) 12 ALR at 551
Collen v Wright (1857) 120 ER 241
Cousins v Cousins [1991] ANZ ConvR 245
Crossley v Crowther (1851) 9 Hare 386
David v David [2009] NSWCA 8; Aust Torts Reports 91-993
Dawson v LNG Holdings [2008] NSWSC 137
Dew v Richardson [1999] QSC 192
Dominic v Riz [2009] NSWCA 216
Dow Jones & Co Inc v Gutnick [2002] HCA 56; 210 CLR 575
Dusun Desaru Sdn Bhd v Wand Ah Yu & Anor [1999] 5 MLJ 449
Equuscorp Pty Ltd v Wilmoth Field Warne (No 3) [2004] VSC 164
Fisher v Hebburn Ltd (1960) 105 CLR 188
Gallagher v Carman (1990) Aust Torts Reports 81-011
Geraldton Building Co Pty Ltd v May (1977) 136 CLR 379
Giorgianni v The Queen (1985) 156 CLR 473
Gray v Buss Murton [1999] PNLR 882
Griffiths v Evans [1953] 2 All ER 1364
Hatt v Magro [2007] WASCA 124; 34 WAR 256
Hawkins v Clayton (1988) 164 CLR 539
John Pfeiffer Pty Ltd v Rogerson [2000] HCA 36; 203 CLR 503
Jones v Dunkel (1959) 101 CLR 298
Karl Suleman Enterprizes Pty Ltd (In Liquidation) v Babanour [2004] NSWCA 214; 49 ACSR 612
Krambousanos v Jedda Investments Pty Ltd (1996) 64 FCR 348
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; 243 CLR 361
Le Serve v Great Wall Resources Pty Ltd [2010] NSWSC 1213
Munchies Management Pty Ltd v Belperio (1988) 84 ALR 700
Nixon v Philip Morris (Australia) Ltd [1999] FCA 1107; 95 FCR 453
Quinlivan v Australian Competition and Consumer Commission [2004] FCAFC 175; 160 FCR 1
Re Paine (1912) 28 TLR 201
Read v Burns & Ors [2016] ACTSC 1
Read v Burns (t/as Diana Burns Solicitors) and Prime Property

	Investment Pty Ltd and Knell [2013] ACTSC 83 *Regent Leisuretime Ltd v Skerrett* [2006] EWCA Civ 1184 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd* [2005] QCA 389 *Smith v Samuels* (1976) 12 SASR 573 *Stone James and Co v Investment Holdings Pty Ltd* [1987] WAR 363 *Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak* [1997] 5 MLJ 705 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 *Vella & Anor v Gustafson & Ors* [2004] QSC 424 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642 *West v Government Insurance Office NSW* (1981) 148 CLR 62 *Yorke v Lucas* (1985) 158 CLR 661
Texts Cited:	J D Heydon, *Cross on Evidence,* Australian Edition (Butterworths, 1996)
Parties:	Jeffery Maxwell Read (Plaintiff) Diana Mary Burns (First Defendant) Prime Property Investment Pty Ltd (Second Defendant) Sidney Knell (Third Defendant)
Representation:	**Counsel** Self-represented (Plaintiff) Mr MJ Walsh SC (with Mr WDB Buckland 1-5 February 2016) (First Defendant) Dr B O'Hair (Second and Third Defendants) **Solicitors** Self-represented (Plaintiff) Boettcher Law (First Defendant) S & T Lawyers (Second and Third Defendants)
File Number:	SC 350 of 2008

BURNS J:

1. In December 2001, the plaintiff, together with his daughter Susan Read and a friend Sharon Lim, attended a seminar or presentation given by the second defendant Prime Property Investment Pty Ltd (PPI) in Canberra. This seminar focussed on the potential for investment in serviced apartments, and in particular, in the Waldorf South Sydney development (the Waldorf development). The vendor of the apartments was FAI General Insurance Company Ltd (FAI), a company in liquidation. Because the vendor was a company in liquidation, some aspects of the sales arrangements had to be approved by the New South Wales Supreme Court and by the Australian Securities and Investments Commission (ASIC). The apartments were marketed by PPI on behalf of the vendor and they were offered for sale on the basis

that a purchaser could enter into a management agreement which offered a five year rental guarantee.

2. At this seminar the plaintiff obtained a booklet or brochure prepared by PPI and entitled "Investment Opportunities Through PPI Pty Ltd – Waldorf South Sydney". The plaintiff referred to this document as the "Waldorf Disclosure Document" because he wished to assert that it was a disclosure document for the sale of securities for the purposes of the *Corporations Act 2001* (Cth) (the CA). For the reasons I will give, I am satisfied that it was not a disclosure statement. I will retain the plaintiff's description of the document where I quote the plaintiff, but otherwise I will refer to it as the Waldorf marketing document.

3. In May 2002 the plaintiff purchased unit 206. The first defendant, a firm of lawyers practising in the Australian Capital Territory (ACT), acted for him, although there is a dispute about the terms of the retainer agreement. At the time of purchasing unit 206 the plaintiff also entered into a Unit Management Agreement (UMA) with Waldorf Apartments South Sydney Pty Ltd (WASS), a company associated with the vendor. Another company associated with the vendor, Rinbac Pty Ltd (Rinbac), had previously been appointed Manager of the Waldorf development.

4. The plaintiff asserted that misrepresentations were made to him by PPI concerning the property and the UMA before he purchased the property and entered into the UMA. In 2015, PPI entered into a Deed of Company Arrangement, and upon pleading the Deed in its Defence, the proceedings against it were dismissed. The plaintiff declined to participate in the Deed of Company Arrangement. The third defendant, Sidney Knell was a director of PPI in 2001 and 2002. The plaintiff claimed that the first defendant was negligent while acting as his lawyer on the purchase of unit 206. He also claimed that the third defendant is liable as an accessory to the second defendant with respect to misrepresentations made by PPI. He claimed to have suffered significant losses as a result of the negligence of the first defendant and the misrepresentations made by PPI.

5. The plaintiff was part of a group of people who were known to each other and who purchased apartments in the Waldorf development at about the same time. Ms Read purchased unit 220 and Ms Lim purchased unit 208. Both Ms Read and Ms Lim retained the first defendant to act for them in their transactions, but the plaintiff provided significant assistance and advice to them. They also commenced proceedings against the defendants, but those proceedings resolved at mediation.

6. The misrepresentations alleged by the plaintiff mostly fall into three categories:

    (a) the "mixed-use representation" – the plaintiff alleged that it was represented to him that units in the Waldorf development could be used as a permanent residence, as a serviced apartment or could be let out under a residential tenancy agreement;

    (b) the "no additional outgoings representation" – the plaintiff alleged that it was represented to him that for the period unit 206 was managed under a UMA he would not be required to pay outgoings for the unit except for land tax, any special body corporate levies and an annual contribution to the sinking fund; and

(c) the "ASIC approval representation" – the plaintiff alleged that it was represented to him that the management scheme comprised of the UMA was to be approved by ASIC as a managed investment scheme (MIS).

7. For the reasons that follow, the plaintiff's claims fail. Before addressing the plaintiff's claims, I will first outline the procedural history of the matter in some detail.

Procedural History

8. The plaintiff commenced proceedings by an Originating Claim and Statement of Claim lodged with this Court on 1 May 2008. At this time the plaintiff was represented by a legal practitioner. The claim was particularised as a claim for damages arising from negligence on behalf of the first defendant and from breaches of ss 52 and 53A of the *Trade Practices Act 1974* (Cth) (the TPA) by the second and third defendants.

9. On 23 May 2008, the first defendant filed a Notice of Intention to Respond. On 17 June 2008, the second and third defendants also filed a Notice of Intention to Respond.

10. On 13 October 2008, the Registrar made orders that the first, second and third defendants file their Defences on or before 24 November 2008.

11. On 27 November 2008, the second and third defendants filed their Defences. On 5 December 2008, the first defendant filed her Defence.

12. Between 24 November 2008 and 14 December 2009, the parties appeared before the Registrar and the Deputy Registrar on a number of occasions. During that period various orders were made to facilitate the progress of the matter. I note that while no formal order or direction was made, the present matter was often heard before the Registrar with the matters of Ms Read and Ms Lim.

13. On 22 June 2009, the third defendant filed an Amended Defence pursuant to a direction of the Registrar. Also pursuant to a direction of the Registrar, the first defendant filed an Amended Defence on 13 July 2009. The first defendant filed a Notice claiming contribution or indemnity to both the second and third defendants on 8 October 2009.

14. On 4 March 2010, the plaintiff's legal representatives filed an application in proceeding seeking leave to withdraw as his solicitors in the matter. On 15 March 2010, the Registrar granted leave, and the plaintiff's legal representatives filed a Notice of Withdrawal of Solicitor on 19 March 2010. On 31 March 2010, the plaintiff filed a Notice indicating that he was now acting in person pending the appointment of another solicitor.

15. Between 27 April 2010 and 11 July 2011, the parties appeared before the Deputy Registrar on a number of occasions for the purpose of case managing the matter. The plaintiff appeared in person during this period.

16. On 21 July 2010, the second and third defendants filed an affidavit detailing a list of discoverable and privileged documents. On 25 February 2011, the first defendant filed the same.

17. On 7 July 2011, the plaintiff filed a Notice of Appointment of Solicitor.

18. On 13 September 2011, the plaintiff filed an application in proceeding seeking that the matter be referred to mediation and consequential orders. An affidavit in support of that application was filed by the plaintiff's solicitor. On 16 September 2011, Uwe Boettcher, the lawyer for the first defendant, also filed an affidavit in relation to that application. In that affidavit Mr Boettcher stated that in or around the beginning of August 2010 the defendants and the plaintiff began exploring the possibility of attending formal mediation. The parties had agreed to mediation. During this period the plaintiff was self-represented. He then detailed the following events:

    (a) on 23 August 2010, the second and third defendants confirmed their attendance at the scheduled mediation conference in September 2010;

    (b) on 24 August 2010, the first defendant forwarded correspondence confirming the mediation;

    (c) on 25 August 2010, via telephone the plaintiff confirmed his attendance at the mediation;

    (d) on 25 August 2010, the plaintiff had a further telephone conference with Mr Boettcher and two other employees of that law firm. On that date, the plaintiff requested to meet the mediator prior to the mediation taking place. Mr Boettcher confirmed that he was happy to arrange a preliminary conference for the plaintiff to meet the mediator and noted that the mediator must be agreed upon for the mediation conference in September to take place;

    (e) on 30 August 2010, the mediator informed Mr Boettcher that he no longer wished to act as a mediator in the matter. On or about that date, Mr Boettcher arranged for an alternative mediator;

    (f) on 31 August 2010, Mr Boettcher, the plaintiff and another employee of Boettcher Law attended a preliminary conference with the alternative mediator appearing via telephone conference;

    (g) on 31 August 2010, Mr Boettcher sent a letter to the plaintiff referring to proposed mediation dates in November and the steps that needed to be taken prior to the mediation conference;

    (h) on 4 September 2010, the plaintiff sent an email stating he was not prepared to go forward with the mediation. He specifically objected to the mediator and "excessive extravegence [sic]" of the proposed arrangements. It seems that this is a reference to the proposed venue options and their associated costs in addition to the cost of the mediator. However, the plaintiff subsequently agreed to attend the proposed mediation in November;

    (i) on or about 9 September 2010, the plaintiff informed Mr Boettcher that he was no longer prepared to proceed with either the mediator or the mediation;

    (j) on 9 March 2011, Mr Boettcher attended a settlement conference with the plaintiff and two other employees of Boettcher Law;

    (k) on 27 May 2011, a further settlement conference was scheduled by the first defendant and at the request of the plaintiff. Robert Reis of the ACT Law Society was appointed to act as an independent chair;

(l) at the request of the plaintiff, the scheduled conference was postponed until 3 June 2011. The plaintiff subsequently withdrew his agreement to have Mr Reis act as an independent chair; and

(m) on 3 June 2011, Mr Boettcher, the plaintiff and two other employees of Boettcher Law attended a settlement conference.

19. Mr Boettcher stated that in the settlement conferences the plaintiff made claims beyond those pleaded in his Statement of Claim. Mr Boettcher stated that there was no basis for the first defendant to re-evaluate the plaintiff's position until all of the plaintiff's evidence had been filed and served. Mr Boettcher also noted that at this time the plaintiff was in breach of multiple directions of this Court to file and serve his expert evidence and he had continually failed to provide evidence in support of his claim made against the defendants.

20. Mr Boettcher stated that it was his opinion that any future settlement negotiations or mediation between the parties would fail without the plaintiff seeking leave to amend his claim to include other claims which were not included in the plaintiff's then Statement of Claim, and the filing and serving of all evidence that the plaintiff intended to rely upon.

21. On 19 September 2011, the plaintiff's application for mediation came before the Registrar. That application was dismissed. The Registrar directed that any application for the plaintiff to amend his Statement of Claim be filed by 31 October 2011. On that date the Registrar referred the matter to me, together with the claims by Ms Read and Ms Lim.

Matter referred to a judge

22. On 1 November 2011, the plaintiff filed a Notice indicating that he was acting in person in the proceedings pending the appointment of another solicitor.

23. On 2 November 2011, the matters first came before me for directions. On that date I adjourned the matters for further directions on 5 December 2011. I expected that by that date the other parties who were legally represented would be in a position to advise of any amendments to their Statements of Claim. On 5 December 2011, I directed the plaintiffs to serve any expert reports and/or statements on which they proposed to rely on by 30 March 2012.

24. On 2 April 2012, the plaintiff filed a Notice of Solicitor Acting. On that date, the matters also came before me again for directions, however, they were adjourned to allow the plaintiff's solicitor an opportunity to become better acquainted with the matter and to brief counsel. On 16 April 2012, the matter was before me for directions and again adjourned for further directions.

25. On 15 May 2012, the matters again came before me for directions. On that date, I granted leave for the plaintiff's solicitor to withdraw from the matter. An affidavit of Tracey Mylecharane dated 15 May 2012 was read on that date. Ms Mylecharane was instructed by the plaintiff. In that affidavit Ms Mylecharane noted that the plaintiff was yet to return the costs agreement provided to him on 2 April 2012. She also noted that she had briefed counsel in the matter and she and counsel had appeared before me for directions on 16 April 2012. She stated that she sent an email to the plaintiff detailing work that was required to be completed. On 20 April 2012, she also met with the

plaintiff in a lengthy conference and provided legal advice to the plaintiff in relation to the issues in the proceedings, the issues that did not currently form part of the proceedings and the appropriate way forward. She received correspondence from the plaintiff on 26 April 2012 in which the plaintiff put forth certain legal arguments and instructed her to adopt certain conclusions from legal authorities he had read. The plaintiff provided her with instructions as to how the law and the authorities applied to his case and how he would like his case run. She detailed an exchange of correspondence where the plaintiff refused to accept her legal advice and declined to provide her with instructions to enable her to properly conduct the case.

26. On 15 May 2012, I also gave directions in relation to two of the plaintiffs filing and serving any application seeking leave to amend their Statements of Claim and advised the parties that on the next occasion I would give directions designed to move the matter towards a hearing date.

The plaintiff's application to amend his Statement of Claim

27. On 18 June 2012, I ordered the plaintiffs to file and serve any application to amend their Statements of Claim within one month and directed that any such application was to be returnable on 18 July 2012.

28. On 28 June 2012, despite the orders I had made on 18 June 2012, the plaintiff filed an Amended Statement of Claim.

29. On 17 July 2012, the plaintiff filed an application seeking leave to amend his Statement of Claim. The next day, I made a number of orders in relation to the Amended Statement of Claim filed by the plaintiff. I note that on that date I directed that the plaintiff's Amended Statement of Claim be uplifted from the Court file and provided to the plaintiff to allow him to underline all proposed amendments. I noted that the proposed Amended Statement of Claim could be re-filed as part of the plaintiff's application to amend his Statement of Claim.

30. On 14 August 2012, the plaintiff amended his application seeking leave to amend his Statement of Claim and again filed an Amended Statement of Claim with the proposed amendments underlined.

31. On 15 August 2012, I directed that the plaintiff file and serve his draft Amended Statement of Claim by 17 August 2012 and that the defendants were to make any objections by 7 September 2012. From this date forward the proceedings involving Ms Read and Ms Lim parted ways with the plaintiff's matter. The proceedings involving Ms Read and Ms Lim matters resolved at mediation.

32. On 17 August 2012, the plaintiff filed a draft Amended Statement of Claim.

33. On 7 September 2012, the defendants filed their grounds of opposition to the plaintiff's application to amend his Statement of Claim. The plaintiff filed his Response on 11 September 2011.

34. On 11 September 2012, the plaintiff filed an application seeking leave to add Further and Better Particulars to his proposed Amended Statement of Claim. The plaintiff filed an affidavit in support of this application. He said that the further amendment was necessary as on 23 August 2012 the first defendant sought Further and Better Particulars in respect of his "lost opportunity" claim. The plaintiff said he provided those Further and Better Particulars in an affidavit filed on 27 August 2012 and sought to add

those matters in that affidavit to his Statement of Claim. On 11 September 2012, the matter also came back before me for directions. On that date I directed that the plaintiff file and serve any affidavits in support of his applications (being the application to amend his Statement of Claim and the application to add Further and Better Particulars to his Statement of Claim) by 19 September 2012. I also made consequential orders in relation to the defendants filing and serving any affidavits and the plaintiff filing and serving any affidavits in reply. I listed the applications for hearing on 19 October 2012.

35. On 19 October 2012, the matter was further adjourned to 16 November 2012 for the hearing of the plaintiff's applications. On this date I also directed that the plaintiff was not to file any further documentation in support of his applications to amend his Statement of Claim without leave of the Court.

36. On 16 November 2012, I heard the plaintiff's applications. At that time I reserved my decision with respect to those applications and made directions for the filing of submissions in relation to the applications. The defendants opposed the plaintiff's applications on the ground that the amendments pleaded new causes of action that were statute barred.

37. On 14 January 2013, the second and third defendants filed an Amended Defence and Counterclaim.

38. On 10 May 2013, I delivered my judgment with respect to the plaintiff's applications: *Read v Burns (t/as Diana Burns Solicitors) and Prime Property Investment Pty Ltd and Knell* [2013] ACTSC 83. I granted the plaintiff leave to file and serve an Amended Statement of Claim consistent with my reasons within 14 days. I also ordered that the plaintiff pay the defendants' costs of the application, but deferred that payment until the conclusion of the proceedings. In that judgment I also warned the plaintiff that he ran the risk of costs penalties if he were unsuccessful in pursuing the issues raised in the amendments, even if he succeeded in the proceedings (at [12]).

39. On 10 May 2013, I ordered the first defendant to request Particulars of the plaintiff's Amended Statement of Claim within 21 days of being served with a sealed copy of the Amended Statement of Claim and that the plaintiff answer the first defendant's request for Particulars within 21 days. I also directed that the defendants file and serve their Amended Defences within 28 days of receipt of the plaintiff's Particulars.

40. On 5 July 2013, the parties appeared before me again for directions. The plaintiff had not yet filed his Amended Statement of Claim in accordance with my orders of 10 May 2013. On that date I directed that any further application to amend pleadings be made within two weeks. I indicated on that date that if there was no movement in the matter within two weeks, I would give the matter a hearing date.

41. On 18 July 2013, the plaintiff filed an application seeking leave to file and serve an Amended Statement of Claim dated 18 July 2013, which was effectively a Further Amended Statement of Claim. The plaintiff also asked the Court to note that the Amended Statement of Claim was in accordance with the judgment of 10 May 2013 to the extent that the "[p]laintiff believes those reasons have not been compromised" by the Amended Defence and Counterclaim filed by the first and third defendants on 14 January 2013. That application was made returnable on 2 August 2013.

42. On 19 July 2013, I stayed the proceedings pending the plaintiff's compliance with my orders of 10 May 2013. I noted that the matter could be relisted on seven days notice upon compliance.

43. On 29 July 2013, the plaintiff filed and served his Amended Statement of Claim.

44. On 2 August 2013, the matter again came before me. On that date the defendants alleged that the plaintiff's Amended Statement of Claim was not in compliance with my orders of 10 May 2013. I directed the first defendant to file and serve any objections she had to the Amended Statement of Claim at least 14 days prior to 30 August 2013. I adjourned the plaintiff's application dated 18 July 2013 to 30 August 2013.

45. On 30 August 2013, I directed that the defendants file and serve documents setting out any objections to the Amended Statement of Claim and the amendments thereto proposed by the plaintiff by 12 September 2013.

46. On 24 September 2013, I ruled on the plaintiff's application to amend his Statement of Claim dated 18 July 2013. I allowed some of the proposed amendments. On that date I granted the plaintiff leave to file his Further Amended Statement of Claim (FASOC) by 27 September 2013. I also directed that the defendants request Further and Better Particulars by 4 October 2013 and the plaintiff to respond to that request by 11 October 2013. I directed that the defendants file Amended Defences by 25 October 2013. I ordered that the plaintiff pay the defendants' costs of the application to amend as that is the usual and appropriate order in cases of amendment to originating process.

47. On 27 September 2013, the plaintiff filed his FASOC. On 10 October 2013, the plaintiff filed the plaintiff's "Further and better particulars – Oct 2013".

48. Unfortunately, the plaintiff has chosen to repeatedly refer to this process of my ruling upon amendments he proposed to his claim, as one of me "approving" his claim, despite my repeated explanations to him that this was not the case. He has nevertheless continued to refer to the FASOC as "approved" by me, even up to his final written submissions. I reiterate that the FASOC has not in any sense been approved by me. My involvement in the drafting of the document has been limited to ruling upon objections made by the defendants to amendments proposed by the plaintiff. On 25 October 2013, the second and third defendants filed their Further Amended Defence.

49. On 29 October 2013, the matter again came before me for directions. On that date I directed that the plaintiff provide a response to the first defendant's request for Particulars by 8 November 2013. I also directed that the first defendant file and serve her Further Amended Defence by 15 November 2013 with the plaintiff to file and serve any reply by 6 December 2013. I noted on that date that the first defendant considered that further discovery may be required.

50. On 26 November 2013, the matter was listed for directions. I noted that the plaintiff's father's funeral had occurred on 14 November 2013. As such, I extended the time for the plaintiff to provide answers to Particulars to 17 January 2014. I also directed that the first defendant file and serve her Further Amended Defence by 31 January 2014 with the plaintiff to file and serve any reply by 14 February 2014. I directed that the third defendant file and serve any Further Amended Defence by 17 January 2014. I ordered that no party was to file any further request for Particulars without the Court's

leave. At this stage in the proceedings the second defendant was in administration and the third defendant was seeking to represent himself. On this date I also indicated that no further extensions for pleadings would be permitted at this stage of the proceedings.

51. On 16 January 2014, the plaintiff filed his "Further and better particulars – Jan 2014". On 31 January 2014, the first defendant filed her Second Further Amended Defence. The third defendant filed his Further Amended Defence on 4 February 2014

52. On 11 February 2014, the plaintiff filed a "Reply to the Third Defendant's Jan 2014 Fourth Further Amended Defence".

53. I note here that despite the first defendant raising the need for the plaintiff to amend his Statement of Claim as early as September 2011, this was not resolved until the beginning of 2014. This was largely due to the plaintiff's conduct of the matter and failure to comply with the orders of this Court.

54. On 11 February 2014, the plaintiff filed a Notice that he was acting in person in the present proceedings, although, he had in fact been self-represented since May 2012. I encouraged the plaintiff on numerous occasions throughout these proceedings to seek legal representation, however, he continued to be self-represented for the remainder of the proceedings.

Preparing the matter for mediation

55. On 25 February 2014, I referred the matter to mediation and directed the mediation to occur prior to 31 March 2014. I directed the parties to serve on each other any documents that had not yet been discovered in the proceedings within seven days to facilitate mediation. Also on that date, the plaintiff filed a "Reply to the First Defendant's Feb 2014 Second Further Amended Defence".

56. The first defendant filed an application in proceeding on 5 March 2014, which was made returnable before me on 21 March 2014. That application sought that time be extended for the mediation to occur prior to 30 April 2014, rather than 31 March 2014, as the parties had been unable to arrange a mutually convenient date. The first defendant also submitted that mediation should take place after the parties had completed proper discovery. In support of this application the first defendant filed a schedule of correspondence. This schedule outlined the documents sought by the first defendant from the plaintiff, in particular a copy of the plaintiff's personal and, if relevant, business taxation returns for the period 30 June 2000 to 30 June 2013.

57. On 21 March 2014, the plaintiff did not appear for the hearing of the first defendant's application. As such, I did not address the plaintiff's compliance with my direction that any documents that had not yet been discovered in the proceedings were to be served on the other parties. I directed the Registrar to notify the plaintiff that the matter had been adjourned to 28 March 2014 and that if he did not attend his claim would be struck out.

58. On 26 March 2014, Gary Weetman filed an affidavit on behalf of the first defendant. Mr Weetman asserted that the plaintiff had failed to discover documents that were or had been in his possession and which related directly or indirectly to matters in issue in the proceedings. To support this he particularised a number of letters and emails sent to the plaintiff requesting documents in addition to a number of Court orders that the plaintiff had failed to comply with.

59. On 28 March 2014, the matter again came before me for directions. On that date I ordered the plaintiff to produce personal and business taxation records for the financial years ending 30 June 2002 to 30 June 2013 within 21 days. I considered that these would be relevant to the question of damages. I also extended the time for mediation to occur to on 30 May 2014.

60. On 9 May 2014, the plaintiff told the Court that he had no documents to produce. I directed that the plaintiff swear and file an affidavit as to documents limited to discovery of his personal income taxation returns from 2002 to the present, being May 2014. On that date I also confirmed that the mediation was to take place on 28 May 2014.

61. On 20 May 2014, the plaintiff filed an affidavit verifying a list of documents. Attached to this document was a "List of documents". The only document that was listed, which was listed as "plaintiff's discoverable personal taxation returns not in possession of Defendant [sic]", was described as "Electronic lodgement data comprising the Plaintiff's personal taxation records from 2003-04 to present". It was described as not being in the plaintiff's possession upon signing and that the document's current status was "Accountant's [sic] – various interstate". Also in this affidavit the plaintiff affirmed the following:

    (a) I have made all reasonable inquiries about the personal tax returns of the plaintiff;

    (b) I believe there are no discoverable personal tax returns of the Plaintiff, other than those mentioned in the list of documents that have been in the plaintiff's possession;

    (c) I believe that the personal tax returns mentioned in the list as not in the Plaintiff's possession are not in the plaintiff's possession...

62. On 21 May 2014, I revoked the mediation order I had previously made, as I did not consider it appropriate for the mediation to take place without the relevant taxation records having been provided. I stayed the proceedings until the plaintiff complied with my orders of 28 March 2014. I also ordered that the plaintiff pay costs thrown away as a consequence of the mediation not proceeding within 14 days. I noted that if the plaintiff did not comply with the orders of 28 March 2014 by 28 September 2014, the proceedings would stand dismissed.

63. On 30 May 2014, the matter came back before me for directions. On that date I again explained to the plaintiff why the mediation was cancelled and noted that there was no reason the parties could not continue to negotiate or hold a mediation without a court order.

64. On 9 December 2014, I ordered the plaintiff to file an affidavit explaining the status of his tax returns. I gave the plaintiff specific directions as to what that affidavit should include and I relisted the matter for directions on 3 February 2015. I extended the plaintiff the indulgence of allowing six months to produce the relevant taxation records because he said this was the period of time that it would take him to collect the records.

65. On 22 December 2014, the plaintiff filed an affidavit verifying a list of documents. The plaintiff affirmed that his draft taxation returns for the years 2002 to 2013 were prepared by him in the period subsequent to 20 May 2014 and submitted to a registered taxation agent for finalisation and lodgement.

66. On 3 February 2015, I adjourned the directions to 9 February 2015. I noted that on that date I would deal with the issue of whether there had been non-compliance with my directions of 9 December 2014.

67. On 9 February 2015, the plaintiff did not attend. I noted that the first defendant was seeking to cross-examine the plaintiff on his affidavits. I listed the matter for the plaintiff to be cross-examined and directed the Registrar to notify the plaintiff.

68. On 19 February 2015, the plaintiff was cross-examined. On that date I indicated that I was not persuaded that there were taxation returns for the years 2002 to 2013 in existence prior to the plaintiff preparing his affidavit and lodging his returns in late 2014. As a result I decided not to dismiss the proceedings, as sought by the first defendant. On that date I ordered the plaintiff to file and serve an affidavit attaching all relevant documents within 28 days. I also made orders for inspection of those documents to take place. I relisted the matter for 2 April 2015 for directions, by which time I expected that the parties would have agreed to conduct a mediation and appoint a mediator. I indicated that if this had not occurred by that date, I would set the matter down for hearing. I also ordered that the plaintiff file and serve any expert valuation evidence prior to 2 April 2015, in default of which the plaintiff would be precluded from relying on any such expert testimony at the hearing without leave of the Court.

69. On 23 March 2015, the first defendant filed an application in proceeding seeking that the proceedings to be struck out as the plaintiff had failed to comply with a number of Court orders, including my orders of 19 February 2015 to file and serve an affidavit attaching all relevant documents within 28 days. On 2 April 2015, I set down the first defendant's application for 20 April 2015. I made it clear to the plaintiff on that date that if he did not provide the affidavit attaching all relevant documents by 20 April 2015 I would seriously consider entering judgment for the defendants.

70. On 20 April 2015, I adjourned the strike out application. I ordered the plaintiff to prepare an affidavit verifying and annexing lists of discoverable documents. I gave directions as to the process the plaintiff should undertake and made it clear that the matter could be relisted on short notice if at any stage he was uncertain about the orders I had made.

71. On 1 May 2015, the plaintiff filed an affidavit verifying a list of documents. Also on that date I indicated that if the parties did not agree on a mediator at the next appearance I would appoint a mediator. I also directed the Registrar to provide a Notice of Listing to the second and third defendants indicating that if they did not attend on the next occasion judgment may be entered against them, as they had failed to attend on a number of occasions.

72. On 21 May 2015, the parties had agreed on a mediator and I referred the matter to mediation, which was to occur on 24 June 2015. I also noted that the second defendant had entered into a Deed of Company Arrangement.

Preparing the matter for hearing

73. On 29 June 2015, the parties indicated that there was no resolution at mediation. I made orders on that date that the matter would be set down for hearing on 14 December 2015. This was subsequently vacated and the matter was brought forward for hearing to 26 October 2015.

74. On 20 August 2015, the matter appeared in the Deputy Registrar's non-compliance list, as the plaintiff had yet to attend to payment of the hearing or setting down fee despite the notice of fees payable being sent on 30 June 2015. The plaintiff failed to attend and the matter was adjourned.

75. On 3 September 2015, I made orders in chambers that the matter be listed before me on 11 September 2015 to address the plaintiff's failure to pay the hearing or setting down fee. On 9 September 2015, the second defendant filed an application to have the claims against it dismissed.

76. On 11 September 2015, the plaintiff advised that the hearing date of 26 October 2015 was unsuitable. The first and second defendants objected to any adjournment. I provided dates suitable to the Court to the parties and I adjourned the matter to 21 September 2015 to allow the defendants to obtain counsel's availability in relation to those proposed dates. I also indicated that on 21 September 2015 I would deal with the plaintiff's failure to pay the setting down and hearing fees. I noted that the question of costs thrown away as a consequence of any adjournment would also be dealt with on that date.

77. On 21 September 2015, I set the matter down for hearing on 1 February 2016 with a five day estimate. I ordered the plaintiff to pay the defendants' costs thrown away by reason of adjourning the hearing. I listed the second defendant's application, dated 9 September 2015, to have the claims against the second defendant dismissed for hearing on 10 November 2015 and made orders as to the filing of affidavits in preparation for that hearing. On 15 October 2015, the third defendant also filed an application to have the claims against him dismissed, which was made returnable before me on 10 November 2015.

78. On 10 November 2015, I heard both the second and third defendants' applications. I reserved by decision in relation to both applications.

79. On 25 January 2016, I handed down judgment with regards to the second and third defendants' applications: *Read v Burns & Ors* [2016] ACTSC 1. In relation to the second defendant's application, I granted leave for it to file and serve an Amended Defence pleading the Deed of Company Arrangement. I ordered that upon the filing of that Amended Defence the plaintiff's claim against the second defendant would be dismissed. I directed the parties to provide written submissions on costs. In relation to the third defendant's application, I ordered that the plaintiff was to provide Further and Better Particulars to the third defendant as required in the third defendant's letter of 13 August 2014. I otherwise dismissed the application and reserved the costs of the application.

The hearing

80. On 1 February 2016, the hearing commenced before me. I will address the evidence later in these reasons, however, I will first give a brief overview as to how the hearing proceeded. As I have already mentioned, the plaintiff was self-represented. On that date, I granted leave for the second defendant to file its Second Further, Further Amended Defence in Court. As a result of my orders of 25 January 2015 the plaintiff's claim against the second defendant was dismissed.

81. The parties consented to the first defendant amending her Second Further Amended Defence, which effectively deleted a limitation defence. I granted leave for the

first defendant to file her Second Further Amended Defence in Court. I also granted leave for the third defendant to amend his current Defence. The third defendant effectively sought to mirror the Defence of the first defendant. I was satisfied that there was no prejudice to the plaintiff in allowing those amendments at that time, albeit that they were made late because they raised issues between the plaintiff and the third defendant that had always been issues in the trial.

82. The first defendant also handed me a copy of a Notice to Produce taxation returns lodged by a company, Activate Strategic Partnerships Pty Ltd given to the plaintiff the Wednesday prior to the commencement of the hearing. The first defendant called on that Notice to Produce. This was subsequently stood over for the balance of the week.

83. Following those matters, the plaintiff and first defendant completed their opening addresses. Prior to the conclusion of the matter for the day I advised the plaintiff that the next day he would need to identify evidence, such that if he was relying upon affidavits that he had filed in the proceedings he would need to identify those affidavits so the parties would know what affidavit evidence is being relied upon. I also informed him he would be able to give oral evidence or he may wish to tender documents, and that as part of this process I would hear whether there were any objections raised by the other parties to any of that material.

84. The plaintiff requested that the matter commence at a later time the following day, as he had not received any sleep the night before as a result of preparing for the matter. As such, the matter was listed to recommence at 11.00 am the following day. I also directed the plaintiff to serve by email a list of affidavits that he had filed and intended to rely upon in the hearing by 6.00 pm on 1 February 2016 to the defendants.

85. On 2 February 2016, the plaintiff commenced giving evidence. At the invitation of the defendants, and in an effort to save time, he swore to the accuracy of his FASOC, Further and Better Particulars of October 2013 and Further and Better Particulars of January 2014. The plaintiff then gave some further oral evidence and the first defendant commenced cross-examination. It soon became clear, however, that there was other material upon which the plaintiff wished to rely and which had not been produced. I allowed him the opportunity to produce that material. The rest of the week proceeded with difficulty. The plaintiff, not being legally qualified, was unprepared to present evidence to support his case. At one stage, I adopted the somewhat unusual course of directing my associate to assist him by compiling bundles of documents that he sought to rely upon but had only sent through in an electronic form to the parties and the Court. The defendants also attempted to provide assistance to the plaintiff to allow the matter to proceed more expeditiously. Despite the assistance provided to the plaintiff, a lot of the hearing time was occupied by ruling on the admissibility of the documents the plaintiff sought to tender. On 4 February 2015, the plaintiff sought to tender affidavits that had been filed by him in the proceedings that contained numerous annexures, which occupied most of the day. The plaintiff made an application for the case to be divided in two parts, the first being liability and the second being quantum of damages. I refused this application as I considered it would be an inefficient way to proceed and that ample opportunity had been afforded to the plaintiff to prepare his case. I also noted that the question of quantum of damages had always been in issue in the hearing and that the plaintiff should have been aware that he was required to prove quantum. The plaintiff then applied for the matter to be adjourned for one month, which I also refused. I considered that the obligation on the plaintiff to produce

documents was not an onerous one, particularly since the documents that he had been required to produce had been specifically identified in affidavits the plaintiff had referred to. Also on this date the first defendant made an application for costs thrown away by reason of the plaintiff's conduct. I reserved my decision in relation to costs of that day, however, I warned the plaintiff that as a result of the way he conducted the trial he may receive an adverse costs order against him.

86. On 5 February 2016, it was evident that the matter was not going to conclude, as the plaintiff had not yet closed his case. The matter was unable to proceed the following week and was relisted for a further five days to commence on 16 May 2016. Also on this date, in relation to the first defendant's Notice to Produce, I ordered that the plaintiff produce within 28 days:

    (a) originals and/or copies of all taxation returns lodged by Activate Strategic Partnership Pty Ltd (ASP) for the period of 30 June 2001 to 30 June 2013;

    (b) all documents or records evidencing the lodgement and/or preparation and/or assessment by the Australian Taxation Office of the taxation return by the same company for the period of 30 June 2001 to 30 June 2013;

    (c) all financial records kept or maintained by ASP for the period of 30 June 2001 to 30 June 2013; and

    (d) any documents sent to or received from ASIC by ASP for the period of 30 June 2001 to 30 June 2013.

87. I also ordered that the plaintiff produce within 28 days any information which was provided to his registered taxation agent for the preparation of his personal taxation returns for the period of 30 June 2002 to 30 June 2014. I amended the order I made on 25 January 2016 in relation to the written submissions the parties were to provide on costs. I effectively removed the due date for those submissions to allow the plaintiff time to prepare for the continued hearing.

88. On 4 April 2016, the matter was relisted for directions as a result of the plaintiff's failure to comply with my orders of 5 February 2016. On that date the plaintiff said that he had none of the documents he was required to produce because the documents did not exist. I ordered that the plaintiff produce within 14 days any information which was provided to his registered taxation agent for the preparation of his personal taxation returns for the period of 30 June 2002 to 30 June 2014. I made no further orders with respect to the documents relating to ASP.

89. On 16 May 2016, the hearing continued and the plaintiff remained in cross-examination. On 18 May 2016, the first defendant finished her cross-examination and the third defendant commenced his cross-examination. On 19 May 2016, the plaintiff closed his case. The first defendant also closed her case.

90. On 20 May 2016, the hearing concluded and I indicated to the parties that I would reserve my decision once I had received written submissions from the parties. The plaintiff indicated that he would prefer to provide written submissions, and I made directions in relation to the filing of submissions. I ordered:

    (a) the plaintiff to file and serve his written submissions on or before 10 June 2016;

(b) the first and third defendants to file and serve their written submissions on or before 1 July 2016; and

(c) the plaintiff to file and serve any written submissions in reply on or before 15 July 2016.

The written submissions

91. On 20 June 2016, the matter was relisted for directions as a result of the plaintiff's failure to file his written submissions by 10 June 2016. On that date, I amended my order of 20 May 2016 to extend the timetable for the filing of written submissions. I directed the plaintiff to file and serve his written submissions by 4 July 2016 and made consequential amendments to the timetable I had set on 20 May 2016.

92. On 5 July 2016, the plaintiff sent an email to my associate advising that he was unable to meet the deadline and he sought a one month extension. The first defendant opposed this extension and the matter was relisted for directions on 18 July 2016. On that date I amended my order of 20 June 2016 to allow the plaintiff until 12 August 2016 to file and serve his written submissions and amended the timetable I had set on 20 June 2016.

93. On 16 August 2016, the plaintiff delivered his submissions via email and filed them on 19 August 2016. On 19 August 2016, the first defendant sought a minor extension for the filing of the defendants' submissions as a result of the plaintiff filing his submissions late. The plaintiff consented to the amendment and I made orders in chambers that the defendants file and serve their written submissions by 12 September 2016 and that the plaintiff file and serve any submissions in reply by 26 September 2016.

94. On 12 September 2016, I received the first defendant's submissions via email. On 14 September 2016, I received the third defendant's closing submissions. On 20 September 2016, the third defendant delivered via email the final copy of the third defendant's submissions. The third defendant provided an errata so that any corrections were transparent.

95. On 9 October 2016, I received the plaintiff's submissions in reply to the third defendant's submissions.

96. On 15 November 2016, the first defendant sought to have the matter relisted for directions as the plaintiff was yet to file his submissions in reply to the first defendant's submissions. I relisted the matter for directions on 22 November 2016.

97. On 22 November 2016, I directed the plaintiff to file and serve his final submissions by close of business on 15 December 2016. I warned the plaintiff that I would not receive any submissions after that date.

98. On 16 December 2016, the plaintiff delivered via email his submissions in reply to the first defendant's submissions.

99. On 19 December 2016, I informed the parties that I had received the plaintiff's submissions and had officially reserved my decision.

100. I have referred to the procedural history in such detail for two reasons. First, to explain the length of time that it has taken to resolve this claim since it was filed in 2008. Secondly, to emphasise the latitude shown to the plaintiff and the indulgences granted

to him to try to ensure that he had every opportunity, consistent with fairness to the defendants, to present his case.

The plaintiff's credibility and the reliability of his evidence

101. Before examining the plaintiff's case against the first and third defendants, it is appropriate to make general findings as to his credibility and the reliability of his evidence. There are a number of contemporaneous documents to which I will refer in due course, but the only affidavits filed in the plaintiff's case were those affirmed by him, and the only oral evidence in the plaintiff's case was given by him. As such, his credibility and the reliability of his evidence are important issues.

102. The essential events relevant to this claim occurred between late 2001 and May 2002. The plaintiff did not commence these proceedings until 1 May 2008, nearly six years after the relevant events. He prepared and filed, often without direction of the Court, numerous affidavits, but it was not until 2016 that he gave evidence of the relevant events. The defendants, not surprisingly, challenged the plaintiff's recollection of events, an approach which seemed to surprise the plaintiff. The plaintiff's approach to the whole case appeared to be that it was self-evident that he was in the right, and that it was equally self-evident that his evidence was both truthful and reliable. It is important to acknowledge the distinction between truthful evidence and reliable evidence in this context. After a gap of 14 years a witness, particularly one convinced that an injustice has been done to them, may give evidence which they believe to be the truth, but other evidence or contemporaneous documents may reveal that the witness's recollection is unreliable.

103. It is also important to acknowledge that the plaintiff holds the onus of establishing his case. His case is defined in his pleadings, and where he pleads facts essential to establishing a cause of action, he holds the onus of proving those facts unless they are admitted by the relevant defendant. Such facts must be proved on the balance of probabilities.

104. The plaintiff is clearly a very intelligent man. He has tertiary qualifications in theoretical physics, including a doctorate. He headed up "a biology research group of Macquarie University to a major national facility" and was also responsible for "commercialisation of a bionic ear". He testified to having worked in a number of capacities, often in the public sector, which involved him having to apply for grants, although he denied being meticulous in his approach to such matters. He described himself as more of an ideas person. After the plaintiff left Macquarie University in 1998 he conducted his own business as a technologist, which operated both in Australia and internationally.

105. The plaintiff is also a man confident in his own abilities. After the cases of his co-plaintiffs resolved at mediation, and his did not, he dispensed with the services of his lawyers and took over the conduct of his case himself. This started with a root and branch review of his pleadings, which he clearly considered did not adequately set out his case. The plaintiff was warned on a number of occasions of the difficulty of conducting such a case on his own and without legal representation, but he was determined to act for himself and not to engage lawyers. This, of course, was his right, and is irrelevant to whether he has proven his case, but it does demonstrate that he is a man who possesses great confidence in his own abilities and in his own judgment.

106. The plaintiff also had experience in purchasing property as an investment prior to December 2002; he had previously purchased a serviced apartment at the Paramount Serviced Apartment complex in Melbourne in 2001 through PPI.

107. The fact that the plaintiff is a man of considerable intellectual ability who has confidence in his abilities and judgment is not a criticism. Those qualities are, in general, admirable. Similarly, the fact that the plaintiff had experience in business or commerce is not a circumstance that is anything but admirable. I raise these matters because it is important to understand something of the character of the plaintiff in considering the likelihood of him having acted in particular ways at the time of the relevant events.

108. The defendants submitted that a number of circumstances or matters demonstrated that the plaintiff was not a credible witness, or that his evidence was unreliable. First, they submitted that he was argumentative and unresponsive in giving his evidence. The first defendant provided a list of transcript references of occasions where, she said, the plaintiff had been argumentative. No real purpose would be served by setting out that list here, or setting out the relevant parts of the transcript. I readily accept that the plaintiff was, from time to time, argumentative both with counsel and with myself, but whether I should draw an inference contrary to the plaintiff from that fact is a different matter. A witness, and particularly a party giving evidence, may be argumentative for many reasons. It may, for example, simply be a reflection of their personality, or it may reflect a deep (and perhaps justifiable) belief in the justice of their case. In my opinion, courts should be slow to draw an inference that a witness is not credible based solely upon their demeanour. There will of course be cases where it is clear that argument by a witness is part of a process of obfuscation, or has the object of avoiding addressing difficult issues, and in such cases the court may safely draw an inference that the witness is not credible based upon their demeanour.

109. In most cases it is preferable to determine the credibility of a witness based upon what they have said, rather than the way in which they said it.

110. One instance of argumentative behaviour by the plaintiff, and referred to by the first defendant, deserves a brief mention. In cross-examination of the plaintiff, the issue of his use of the honorific “Doctor” was raised:

> MR WALSH: Doctor, do you have before you a document with 36 p in the top right-hand corner?--- Yes, I do.
>
> Is it dated 18 March 2002?--- Yes, it is.
>
> And it’s unsigned?--- Yes, it is.
>
> It’s addressed to Mr Jeffrey Maxwell Read?---Well, it’s addressed to care of Prime Property Investment Pty Ltd.
>
> Doctor, is the letter addressed to Mr Jeffrey Maxwell Read or not?---The address that I can read is care of Prime Property Investment Pty Ltd.
>
> Doctor, is the first line of the address “Mr Jeffrey Maxwell Read”?---It is.
>
> Is that your name?---It is my name. Well, except for the doctor.
>
> You’re quite proud of the doctor, aren’t you?---Not at all. I never used it.
>
> You’re not? Never used it?---No. Once you get - no.
>
> No, that’s not right because you’ve used it constantly?---Rubbish.

Haven't you?---Rubbish. I've never used it in my life.

Is that so, doctor?---Yes.

Well, just hang onto that thought and we'll come back to it?---I will, yes.

111. In the above, the plaintiff forcefully asserted that he did not use the title "Doctor", going so far as to assert that he had never used it. Later in his evidence, the plaintiff was taken to a letter which he prepared in 2002 on his own letterhead in which he described himself, on the letterhead, as "Dr Jeffrey M Read". The plaintiff agreed that this was a letterhead which he used regularly in 2002. His acknowledgement that he regularly described himself on his letterhead in 2002 as "Dr Jeffrey M Read" is clearly inconsistent with his earlier assertion that he had never used that title in his life.

112. By itself, this may be thought to be a matter of trifling importance. It is not a matter directly relevant to any issue in the proceedings, but it does reveal something about the personality of the plaintiff which is relevant to determining his credibility, and the reliability of his evidence. What it reveals is a willingness on the part of the plaintiff to forcefully assert as factual matters based, at best, upon a faulty memory. There could be nothing discreditable about the plaintiff using the title "Doctor": he has a PhD and is entitled to use the title. One could understand the plaintiff not possessing a complete memory of those occasions in the past on which he described himself by use of that title, but to vehemently assert that he had never used the title, when clearly he had, suggests a willingness to assert questionable propositions as firm factual recollection.

113. A more significant example of this type of behaviour was the plaintiff's evidence concerning his need to purchase an apartment in Sydney in order to complete a contract and to perform a consultancy agreement in 2002 and 2003. It was the plaintiff's case that one of the reasons for his purchase of this apartment was because he was required by contract to work for extended periods in Sydney throughout 2002 and 2003, and he needed a base in Sydney to perform that contract. The contract to which he referred was a contract between his company, Activate Strategic Partnerships Pty Ltd (ASP), and another company Australian Surgical Design and Manufacture Pty Ltd (ASDM) which was effectively owned and operated by Dr Greg Roger. The plaintiff, in his Further and Better Particulars of 16 January 2014, claimed a sum of $100,000.00 for lost income as a consequence of not being able to complete the contract because he could not use unit 206 as his Sydney base. The plaintiff was cross-examined by counsel for the first defendant on this aspect of his claim.

MR WALSH: Before you read it would you just assist me. Do you recall the terms of Activate's agreement with ASDM?---Yes. We were going to commercialise a technology and I was going to get a very substantial grant for it and we were going to go ahead.

Well, when you say you it was in fact Activate that was doing the work on the grant, wasn't it?---No, it was me that was doing the work on the ground. The agreement was with Activate but it was actually me that was doing the work on the ground.

I'm sorry, the grant, g-r-a-n-t? Activate had agreed to do work for the submission of a grant to the government?---A very large one; $20 million or something.

$20 million?---Yes.

And, doctor, that was something called a Start Grant, wasn't it? ---Well, that's the name of the grant, yes.

Yes, and the period for the work to be performed by Activate in regard to consultancy work on the grant was in 2001, wasn't it? ---It was but it extended. It expanded over.

Well, doctor, under this agreement you would agree that the obligations upon Activate were to provide strategic consultancy services for the period of the calendar year?---Yes, but it extended. It extended over. It was a very big project and the reason we came apart was because I wasn't down there working at the company.

You say that the lack of a unit prevented you performing the requirements for [A]ctivate to fulfil its obligations of the grant? ---I didn't think that but Greg did.

Yes, and - - -? ---He wanted me on the ground every day.

You see the truth is that the agreement between Activate and ASDM was for the services provided by Activate to be provided for the purposes of the submission of a large start grant as early as possible in the calendar year 2001. That's the truth, isn't it?---No, the truth is that the date was the date that, you know, we sat down there but the fact is in a project of this size we had started it. We started the thing and we came apart because I wasn't there. He wanted me there. He opened a new factory. We had started the thing off and I wasn't there and that was the central dispute that went on over 2002 until we came to legal action over it.

Well, you and Dr Roger didn't come to legal action. Your company, Activate, ASDM, came to legal action? That's correct, isn't it?---My understanding was that we went to mediation and it was me and Roger's - - -

Just one moment. You would be aware that you are not permitted to reveal what happens at mediation? --- I forgot that, yes.

Now, the proceedings were commenced by your company, Activate, against ASDM?---They were, yes.

And they were the two parties to the proceedings in this court?---Yes, but the people who were - - -

No. Just one at a time please?---Yes.

Yes. Thank you, and the document before you makes it quite clear in paragraph 1 that the submission of the large start grant was as early as possible this calendar year being 2001. That's true, isn't it?---Yes, I am.

Do you agree with that?---I do, yes.

Do you have the document there? ---I don't need to. I mean it was very - - -

Yes, you remember? --- This was a big project. It was $20 million and I would have got $10 million out of it and the government had already put a reasonable amount in. The figure of $100,000 actually related to money that I put in that I didn't get paid back and it was – well, I'm not allowed to tell you that was the amount that was agreed at mediation and then - - -

Well, doctor, we'll leave that aside - - -? ---Yes.

- - - because that's a different dispute? --- But I'm just trying to put the context of the $100,000. That sounds - - -

We'll come to the context in a moment, doctor. Might I ask you - - -? ---Yes.

- - - to look to this document and particularly the fact that ASDM made payments to Activate during 2001? --- Yes, and Activate made payments to ADSM and was down a few hundred thousand dollars.

114. The plaintiff was then taken to a series of emails between himself and Dr Roger from 5 December 2001 until 16 January 2002, which revealed a breakdown in the relationship between the plaintiff and Dr Roger, culminating in Dr Roger telling the plaintiff in strong terms in an email dated 16 January 2002 that the START grant "is now history". The following cross-examination then took place regarding the plaintiff's assertion that the consultancy agreement with ADSM carried over into 2002:

MR WALSH: By the time that he wrote that email to you on 16 January 2002 the calendar year had passed in 2001?---Yes.

You knew in January 2002 that the consultancy contract was no longer on foot?---No, I didn't know that, but I'm not disputing the papers you've put forward. You know, this is a sort of, you know, to and froing that goes on. Unfortunately, money ruined a good relationship here.

Yes?---But I'm not disputing what you've put forward, but I guess all I can say is that this sort of thing is part of the toing and froing, and I would have – without the Waldorf we would have got back together. In fact, it is quite disappointing that it ended up here. But we did, through the legal process, find out the reasons, and what I've put to you is the truth.

Well, doctor, just one moment? ---Yes, okay.

You see, on 17 December 2001?---Yes.

Dr Roger had said to you, "It's too late"?---He did, and he wrote it. And I think you've got the uncensored versions. No, you've got the censored versions.

The consultancy agreement had come to an end?---That's what he said, yes.

Yes, and you knew that?---I knew that's what he said. I didn't - - -

Yes, and you knew that was the fact?---No, I knew that it was, you know, going to be a thing, and he really demanded I be down there.

You see, the truth is that if you told Ross Burns on 18 December 2001 that you needed an apartment to live in Sydney for the duration - - -? ---The timing would be almost perfect.

Please, let me finish?---Yes.

The ASDM consultancy contract, and that was untrue?---No, that was a sign that there was an urgent need to rectify the relationship. You know, absence doesn't make the heart grow fonder. I mean not that this was that sort of relationship, but we needed to interact on a day-to-day basis because it was an ideas – it was, you know a (indistinct) type of thing.

Under the terms of the contract - - -? --- Yes, you are correct. You've already been through that. I agree that's what the documents say, yes.

There was only 13 days to run until the end of the year?---Yes, that's what you've said on the thing. I guess the position I'm putting was that I would have thought that if I had got down there and lived – but everything you've said is correct factually.

Yes. Thank you. You were speculating that you might have been able to mend some bridges with Dr Roger?--- No, I'm not speculating, but I can't – you've pointed out that I can't explain to you that that was the absolute reason that it came down to.

115. The plaintiff agreed that START grants were administered by the Industry Research and Development Board, a part of the Department of Industry, Tourism and Resources, in 2001. He further agreed that the Board ceased approving grants from January 2002, and that an application for a grant which had not been submitted by the end of December 2001 would not have been approved. The following evidence then occurred:

MR WALSH: So, earlier, I took you to your further and better particulars, paragraph 51, in which you state that you lost income of a minimum of $100,000 on being unable to complete a contract which required work during the week in Sydney for extended intervals?---Yes.

And that was the contract between - - -?---With ADSM, yes.

And Activate?---Yes.

And you said that was for extended intervals throughout 2002 and 2003? --- Yes.

And you said that loss was due to your inability to occupy the Waldorf unit?--- Yes, I did.

> And the truth of the matter is the contract was at an end on 31 December 2001? ---Yes. There was in anticipation that there would be a long-term relationship in development of this technology and the contract that you've – the one-page contract that you've presented ended as you said.
>
> Yes? --- It ended there.
>
> So what you say in paragraph 51 of your particulars is false? ---No. No, I don't believe so. I believe that this was - - -
>
> All right. Thank you, doctor? --- This was a working relationship that would have extended on.
>
> All right. Doctor, I'm obliged to put these things as a matter of fairness to you? --- Well, you are.
>
> If you would go to MFI 17? ---Yes.
>
> HIS HONOUR: Show it to the witness.
>
> MR WALSH: If you would go to page 99. This is your further amended statement of claim. You've got that, haven't you?---Yes, I have.
>
> Please turn to page 9 at paragraph 13. I must formally put to you that what you say in the particulars that you told Mr Burns that you required a unit to be able to live and work in Sydney during the week to complete a large consultancy job and you say that took place, that conversation, on 18 December 2001 in paragraph (a) - - -?---I do, yes. Yes.
>
> - - - that that is false? ---No, it's not false.
>
> And if you would go to paragraph 15(b), which is on page 10? ---Yes.
>
> Your statement there that in the first week of April 2002 you instructed the first defendant that you, as you say in the particulars, required a unit to be available for residential use during the term or until you finished your consultancy job is likewise untrue? --- No. I had a belief that there would be a working relationship and that I, you know, we would continue on with this technology, as I pointed out, albeit for a period under a loan. But, you know, this was a fairly significant enterprise so my belief was that it wouldn't have ended if I was able to work there and re-establish our relationship. But, I mean, you've put the papers?> I accept the papers put that position and - - -
>
> You accept the accuracy of the papers, doctor, don't you? --- I accept that that's what the papers say, as you pointed out, but as I pointed out, I had been working for Greg for quite a long time. We had a very good relationship. It wasn't the first time that we'd had a biff and a bash but I expected that relationship to go on.

116. In the course of cross-examination the plaintiff asked whether he could address some of the issues raised by the first defendant about the START grant, and I advised him that he would have an opportunity to do so at the conclusion of cross-examination. The plaintiff had pens and paper with him throughout the hearing and made notes on a regular basis. When cross-examination concluded, the plaintiff did address a number of matters which had arisen in cross-examination, but gave no further evidence relating to the consultancy agreement or the START grant.

117. The plaintiff was ultimately forced to agree that the consultancy agreement between ASP and ASDN had concluded by the end of December 2001. There was no evidence from the plaintiff or Dr Roger, or by way of contemporaneous documents, of any further communication between the plaintiff and Dr Roger after 16 January 2002, or of any continued business dealings between them, or even of any attempt by the plaintiff to renew his company's business relationship with ASDN.

118. In the light of the above it seems improbable that the plaintiff was, in mid-December 2001, looking to purchase an apartment in Sydney as a base from which to perform his consultancy obligation for ASP in its contract with ASDN. It is, of course, possible that the plaintiff at that time held some hope that the consultancy agreement would be extended, but in the light of the emails from Dr Roger to the plaintiff on 17 December 2001 and 16 January 2002, it is not possible to believe that by the end of January 2002, at the very latest, the plaintiff held any belief that the consultancy between ASP and ASDN would be extended, or that he was continuing to perform obligations under that consultancy agreement.

119. Why, then, did the plaintiff continue between 2008, when these proceedings were commenced, and 2016, when they proceeded to hearing, to assert that he lost at least $100,000.00 by reason of his inability to perform his duties as a consultant under the agreement between ASP and ASDN due to his inability to use the Waldorf apartment as his Sydney base? Only two possibilities exist: either the plaintiff genuinely came to believe in the years between 2002 and 2008 that the consultancy between ASP and ASDN extended into 2002; or he did not hold such a belief and his assertion that he suffered such a loss was a dishonest statement made with a view to inflating his claim for damages against the defendants. If the first, and most generous, alternative is correct, it is another example of the plaintiff forcefully asserting an erroneous recollection as an historical fact. If the second alternative is correct, the plaintiff's credibility would be severely, adversely affected. Whilst I am loath to make a finding of dishonesty against the plaintiff, I find it very difficult to accept in the light of the documentary evidence that he ever held an honest belief that the consultancy contract had continued post-December 2001, such that he had lost a significant sum as he alleged.

120. This is a much more significant issue than whether the plaintiff had incorrectly testified to never using the title "Doctor". It is a central plank of the plaintiff's case that he told the first defendant from the start that he required the apartment for his own use for part of the year as part of his business arrangements. The only business arrangements the plaintiff identified in that regard was the consultancy between ASP and ADSM. If, in truth, there were no business arrangements in 2002 that required the plaintiff to have a base in Sydney, it is improbable that he would have instructed the first defendant that he needed such a base, or that he needed to occupy the apartment personally for periods of time during the year for such a purpose. There was no suggestion by the plaintiff that he purchased the apartment in the hope or belief that work other than with ADSM may eventuate, requiring him to spend time in Sydney.

121. If there was in truth no basis for the plaintiff to have believed or asserted in the period December 2001 to May 2002 that one of his requirements in purchasing the apartment was for his own business use, the probability that the apartment was purchased as a pure investment becomes quite high.

122. It is clear, and only to be expected, that the plaintiff has little actual recollection of the events in question in these proceedings, particularly with regard to his dealings with the first defendant; after all, there was little reason for the plaintiff to make an attempt to recollect them until many years after they occurred. In his response to the first defendant's written submissions, the plaintiff, after noting that the first defendant had submitted that he based his case on contemporaneous documents and not on a present recollection of events, said:

3. The Plaintiff admits this allegation and acknowledges that his claim is based on the contemporaneous documents...

123. The plaintiff's lack of recollection of the events of 2001 and 2002 is exemplified by his evidence regarding his dealings with the firm of Landerer and Co, the solicitors acting on behalf of the vendor of the apartment. The plaintiff gave evidence that he had been interested in purchasing a number of different units in the Waldorf complex before he settled on purchasing unit 206. As I understand it, his initial choice had been unit 208 but he had "lost" that unit. His second choice, unit 220, was also "lost". In fact, Ms Read purchased unit 220 and Ms Lim purchased unit 208. The plaintiff said that he did not proceed with his third choice, unit 304, because the first defendant identified that the unit did not include a car park. The plaintiff testified that the vendor sent the contracts, and particularly the proposed contracts for units 304 and 206, to the first defendant, and not to him, the plaintiff, personally. The plaintiff went so far as to testify that he "had no dealings with Lander [sic] and Co" and that he "was dealing with Ross Burns". In fact, the sales instruction prepared by the second defendant regarding the proposed sale of unit 304 to the plaintiff does not identify the first defendant as the plaintiff's solicitor, and by letter dated 18 March 2002 addressed to the plaintiff care of the second defendant, the contract for sale of unit 304 was forwarded to the plaintiff. After it was identified that unit 304 did not include a car space, the plaintiff moved his attention to unit 206. By letter dated 4 April 2002 (Exhibit AG) the plaintiff personally wrote to Landerer and Co in the following terms:

> Attention: Geoff Farland
>
> **YOUR CLIENT: FAI GENERAL INSURANCE COMPANY LIMITED**
> **PROPERTY: WALDORF APARTMENTS 47-49 CHIPPEN STREET**
> **PREMISES: UNIT 206 (LOT 40) STRATA PLAN 64972**
>
> I am purchasing the above property from the Vendor – your client FAI General Insurance Company Limited (in liquidation) – through its agent Prime Property Investment Pty Ltd. Enclosed is the signed Contract together with a cheque covering the full deposit of $17,765 being 10% of the purchase price of $177,650.
>
> Please note the agreed amendments as marked on the Contract. These are summarised for your convenience in the attached Table.
>
> - My Tax File Number is [redacted].
> - I wish to enter into a "Unit Management Agreement" (UMA) as provided for under Clause 58.1 of the Contract and hereby request the Vendor to procure the Manager to enter into such an Agreement in accordance with the provisions specified in that Clause.
> - I require the "Sum" to be invested by the Vendor as specified in Clause 58.8.
> - I request the "Information" indicated in Clause 60.1 be provided to me in due course as specified in that Clause.
>
> Yours sincerely
>
> Dr J M Read

124. This letter demonstrates that the plaintiff did have direct dealings with the vendor's solicitors concerning the proposed purchase of a unit in the Waldorf development. The forwarding of the contract directly to the plaintiff (via PPI) by the vendor's solicitors with respect to unit 304 suggests that Landerer and Co were of the belief, at that time, that the plaintiff was not represented by the first defendant. These direct communications with the vendor's solicitors are yet another example of the unreliability of the plaintiff's

memory regarding the events of 2001 and 2002. It also relates to an important issue, being the extent to which he personally dealt with the vendor as opposed to utilising the services of the first defendant, which is relevant to determining the terms of the retainer of the first defendant.

125. The evidence given by the plaintiff concerning the letter of 4 April 2002 to Landerer and Co was, as submitted by the first defendant, highly improbable. The plaintiff gave the following evidence about this letter:

> MR WALSH: Doctor, in the paragraph of this letter you say in paragraph 1, "I'm purchasing the above proprety [sic] from the vendor, your client, FAI General Insurance Co Ltd"?---Yes.
>
> Do you see that?---Yes, I do.
>
> Now, that's true, isn't it? That was your intention in writing that?---It was my intention, yes, that at some subsequent date, once the things were finalised, I would purchase that, yes.
>
> Well, just one moment there, doctor. Go to the next paragraph?---Yes.
>
> "Enclosed is the signed contract"?---Yes.
>
> That was true?---No. It can't possibly be true.
>
> Well, that's what you write in the letter?---No. As I explained to you, this was - - -
>
> Now, doctor, please. Do you or do you not put those words in the letter, "Enclosed is the signed contract"? --- The statement is not true. At the time there was no signed contract. At 4 April 2002 there was no signed contract for unit 206.
>
> Doctor, when you sent this letter it was a date other than 4 April, wasn't it? --- The letter wasn't sent on 4 April. It was sent at some future time when there was supposed to be a contract but I understand from the documents provided that it was sent at a time there wasn't a contract.
>
> You haven't got a recollection of whether there was or wasn't a signed contract with this letter?---I absolutely have. The signed contract never came into existence until 2 May 2002.
>
> And that's your evidence to his Honour today, isn't it?---That is my evidence to his Honour today.
>
> You never signed a contract until 2 May; is that true? --- Whether it was about 2 May, you know, or some time before that but not before Ross was involved in the whole thing. There was no way that I would accept Prime Property taking these contractual documents through. I remember that this was ridiculous, that they produced a contract which had a wrong date. It didn't have anything on it. It even had a wrong price.
>
> Doctor?--- I'm telling you there was no signed contract enclosed with this letter.

126. The cheque referred to in the letter of 4 April 2002 appears to be a Westpac Bank cheque for $17,765.00 dated 10 April 2002 which became part of Exhibit AG. The "attached Table" referred to in the letter is part of the same exhibit. The Table sets out some 20 amendments to the contract and the UMA. A draft contract for the sale of unit 206, unsigned and undated, was tendered as Exhibit AM. It contains each of the amendments in handwriting referred to in the table in Exhibit AG, and each amendment appears to have been initialled by the plaintiff; indeed, each page of the contract also appears to bear the plaintiff's initials. The plaintiff, notwithstanding the date on the deposit cheque, gave evidence that he gave the letter of 4 April 2002 to Tony Freese of PPI on 4 April 2002. As noted above, he denied that the letter was accompanied by a signed contract amended by him.

127. It is true that the contract, Exhibit AM, is unsigned, and as such is inconsistent with being a "signed contract" as referred to in Exhibit AG if such a contract was enclosed with the letter. On the other hand, the amendments to Exhibit AM were initialled by the plaintiff, although he did not accept that he made the alterations themselves, instead asserting his assumption that they were made by the first defendant at his direction.

128. The plaintiff testified that Mr Freese was present when he, the plaintiff, prepared the letter of 4 April 2002, and that he handed the letter to Mr Freese that day, notwithstanding that the cheque is dated 10 April 2002. This is highly improbable if the cheque did, in fact, accompany the letter.

129. There are other reasons concerning the contemporaneous documents that strongly suggest the plaintiff's evidence is unreliable. A draft contract for the sale of unit 206, tendered as Exhibit AM, is a pro forma document which has a space for the name of the purchaser's solicitor to be typed or written in. The draft contract does not specify the name of a solicitor for the plaintiff, and in particular does not nominate the first defendant. There are amendments made on the first page of the document, including changing in handwriting the reference to unit 304 to a reference to unit 206. The contract is not signed by the plaintiff, but the amendments have been initialled by him. The annexures to the draft contract also bear the plaintiff's initials on each page. The plaintiff could not give any convincing explanation as to how his initials came to be on the front page of that document acknowledging the amendments to it. He hypothesised that the annexures to the draft contract, as contained in Exhibit AM, may have been annexures to the contracts of either Ms Lim or Ms Read, both of which he said he initialled as a witness to the execution of those contracts. This explanation seems unlikely, as the initials of Ms Read or Ms Lim are not found on the annexures. There are amendments of some apparent significance made to the UMA annexed to the draft contract, which have been initialled only by the plaintiff. It is improbable that the plaintiff would have initialled the annexures as a witness to the execution of the contract by Ms Lim or Ms Read before that person executed the contract and initialled the amendments, and that the annexures to Exhibit AM were part of a contract not then executed by that person. In any event, there was no evidence of such an event occurring. The initialling of the annexures and amendments to the terms of the annexures by the plaintiff alone, strongly suggests that the annexures to Exhibit AM are annexures intended by the plaintiff to form part of a contract executed, or to be executed, by him.

130. The contemporaneous documents speak of only two contracts being prepared for a proposed purchase by the plaintiff of an apartment in the Waldorf complex. One is the final contract signed by the plaintiff on 2 May 2002. This is clearly not the document in Exhibit AM. The other is referred to in the letter of 18 March 2002 to the plaintiff from Landerer and Co, via PPI. This was a contract for the sale of unit 304, as the draft contract (Exhibit AM) was originally expressed to be. An email from "Tony" (semble Tony Freese) of PPI to "Avi" (semble, Avi Rubenstein) dated 4 April 2002 (Exhibit D, p 48) said:

> As discussed with Sid [semble Sid Knell] you need to look at apartments 302 and 304.
>
> Both of these have been marketed on the basis of Car park inclusion and priced accordingly.
>
> After looking at strata plan, neither has a car park and price needs to be adjusted down.

> One of our clients (Jeff Read) had contract on 304, have amended contract and moved him to 206, please advise / confirm with Landerer & Co.

131. This email suggests that it was PPI and not the first defendant that identified that unit 304, which the plaintiff intended to purchase, did not include a car space, and amended the contract by changing unit 304 to unit 206. This is consistent with the form of the draft contract in Exhibit AM and with the plaintiff's assertion that the handwritten amendments to the first page of the exhibit are not in his handwriting.

132. The plaintiff sought to explain Exhibit AG as a "contingent letter" which was to be held by PPI against the prospect that unit 206 may be allocated to him by the vendor's agent, PPI. He testified that he tore the first two pages off the draft contract provided to him by Mr Freese at this meeting on 4 April 2002, and threw them in the bin. This explanation, with respect, makes no sense. He testified that Mr Freese attended him personally on 4 April 2002 with a contract, pressuring him to sign the contract and to write the letter of 4 April 2002.

133. The email from Mr Freese to Avi Rubenstein dated 4 April 2002 referred to at [130] above established that by 4 April 2002 Mr Freese of PPI had allocated unit 206 to the plaintiff, in substitution for unit 304, and had amended the contract to that effect. It is probable, therefore, that Mr Freese did attend on the plaintiff in person on 4 April 2004 with an amended contract, but the assertion by the plaintiff that he tore off the front two pages of the contract, folded them and placed them in the bin is most improbable in the light of Exhibit AM. The only explanation for Exhibit AM is that it is the amended contract was given to the plaintiff on 4 April 2002 by Mr Freese.

134. It is incontrovertible that the original of Exhibit AM was seen by the plaintiff and alterations on the face of the first page were initialled by him. It is clear that the draft contract, Exhibit AM, was originally a contract for the sale of unit 304 which was subsequently amended to substitute 206 for 304. If this is not the contract referred to in the email of 4 April 2004 (Exhibit D) and given to the plaintiff that day by Mr Freese, then one is entitled to ask: what is it? The assertion by the plaintiff that he removed the front two pages of that document and put them in the bin is most improbable. It is probable that the plaintiff initialled the alterations to the front two pages of the draft contract, just as he accepts that he initialled the pages of the attachments to the contract, and provided them to Mr Freese.

135. As a last resort, the plaintiff suggested that Exhibit AM was a fraudulently altered document. The only alteration alleged by the plaintiff, however, was the "whiting out" of the name of the first defendant on the front page as the plaintiff's solicitor. This suggested alteration does not, of course, explain the remainder of the document. On the plaintiff's version of events, the remainder of the front page of Exhibit AM is simply unexplained.

136. The plaintiff's confused evidence concerning Exhibit AM is an example of the unreliability of his memory with regard to the relevant events in 2002. Of equal significance is the fact that, if the plaintiff is correct and he did not enclose a signed contract for the purchase of unit 206 and a deposit cheque with the letter of 4 April 2002 (Exhibit AG), the reliability of the contemporaneous documentation prepared by the plaintiff himself is also in doubt.

137. There is another matter to which I will refer. In his Reply to the first defendant's Second Further Amended Defence, the plaintiff asserted (at p 7, para 8) that "on

18 March 2002 the Vendor's Solicitors submitted the front 3-pages and the standard Waldorf Contract" to the first defendant. I am satisfied that this was not the case, and that the draft contract for the purchase of unit 304 was not sent by Landerer and Co to the first defendant, but directly to the plaintiff. A letter dated 18 March 2002 from Landerer and Co addressed to the plaintiff personally, care of PPI (Exhibit AF), refers to the plaintiff's proposed purchase of unit 304 and said "A contract for sale is enclosed". There is no evidence of a separate delivery of a contract for the sale of unit 304 to the first defendant on the same day; indeed, there would have been no point in Landerer and Co sending Exhibit AF to the plaintiff had they sent the contract to the first defendant as the plaintiff's solicitor the same day.

138. The plaintiff could not explain how he came to believe, and to assert in his Reply, that Landerer and Co had forwarded the contract for the purchase of unit 304 to the first defendant on 18 March 2002. He was not prepared to accept that this was an error, although he could not point to a document supporting the proposition. His evidence on that issue was:

> MR WALSH: You can read that to yourself. "On 18 March 2002 the vendor's solicitors submitted the front three pages from the standard Waldorf contract to the first defendant." That is false?---No, I would not believe so. I mean I have no first-hand knowledge but if I've written this here and initialled it and I've been through all the files of Lander [sic], all the files that were provided to me under discovery, there's no way that I would have come up with that without some justification. I mean obviously it can't be in my first-hand knowledge but I would certainly not think that's false. I mean I'm not sure what turns on it but I certainly would not think that was false.
>
> Doctor, you can't point to any basis for making that statement in this pleading that you have filed in the court?---I thought I just did point out a basis that I've been through all the documents on the file, ordered the documents in that and gone through the processes in the transaction and if that is written there - let me answer your question this way. I would not have put that in there without some basis, documentary basis. It clearly can't be first-hand knowledge but it would certainly be supported by the thousand or so documents off the file.
>
> Doctor, your memory has let you down when you wrote that information?---I could not have possibly wrote that from my memory because it's something that wouldn't be within my memory. The only way I know what transpired between Lander [sic] & Co, Ross over there, is what is on the file which was provided to me in discovery in about 2010 so in drawing this document up I've had access to that information so I would believe that there would be some documentary evidence. I mean I don't know what turns on this and I don't know what relevance it has because 304 was not proceeded with but it certainly would not have been created by me and I'm actually not seeing the purposes of why it would be created.

139. What this material reveals is that the plaintiff had little personal recollection of the relevant events in 2002, and to the extent that his narrative of events was based on memory, it is unreliable. This material also reveals that to the extent that the plaintiff asserted that his case was based on contemporaneous documents, that assertion is also unreliable.

140. In the course of cross-examination the plaintiff agreed that he may mislead someone in a letter, depending on the context. I place no weight on this answer as suggesting that the plaintiff should not be believed. No significance can be attached to such a general form of questioning.

141. Also in cross-examination, the plaintiff was taken to documents he prepared and delivered to the Colonial Commonwealth Bank with regard to an application for a home

loan dated 10 February 2006 (Exhibit AO). In that application he stated that he was employed by ASP as a company director and that his regular gross yearly income amount for his base income was $89,925.00. Ultimately, the plaintiff was obliged to agree that any assertion that ASP was providing him with a base income of $89,000.00 per annum in 2006 was false. The plaintiff sought to explain the representation in Exhibit AO that he was, in 2006, in receipt of an income from ASP of $89,000.00 per annum as a failure to "update my details". This is an unconvincing explanation. The plaintiff was the directing mind of ASP and was, I understand, its only employee. He would have been well aware of the financial position of ASP and whether it was, in fact, paying him an income of the magnitude suggested.

142. As part of this application to the Colonial Commonwealth Bank, the plaintiff also completed a document titled "Low Documentation Loan Declaration", which he signed on 14 February 2006 (Exhibit AP) and which stated that ASP had a net profit before tax of $175,000.00. The plaintiff agreed that this figure was "certainly false", but suggested that someone else may have written that figure on the form. It is unimportant who wrote the figure on the Declaration, as the plaintiff adopted it by signing it and there was no suggestion that the form was blank when he signed it.

143. I have no doubt that when the plaintiff completed Exhibit AO and signed Exhibit AP he was aware that the Bank would rely upon the information provided to determine whether to grant the loan he sought. The circumstances in which the plaintiff sought the loan were that he had exchanged contracts to purchase an apartment in another development, referred to as the Aurora Apartments, and he needed to arrange finance for settlement of the purchase. The plaintiff gave the following evidence concerning Exhibits AO and AP:

> MR WALSH: Settlement required you to pay an amount of money for the Aurora?---I don't think – no, we bought it off the plan – well, yes, but it was a fairly small amount.
>
> I'm sorry, Doctor, let me clarify. You are confusing settlement with the exchange of contracts, aren't you?---Yes, the exchange of contracts was very low.
>
> A modest amount?---Yes, $1,000 or something.
>
> But come the owner you had to settle the transaction, didn't you?---Well you had to get a loan, yes.
>
> You were prepared to sign this document to get a loan?---Yes, I was.
>
> You were prepared to sign it uncaring as to the contents were true or correct? ---Or a reasonable amount optimistic, yes.
>
> You didn't care, you just wanted to get the loan, didn't you?---Well I had my house on the line.
>
> You just wanted to get the loan?---I had to get the loan to pay the house, yes.
>
> But you didn't care whether the contents or the information and statements provided in the document were true and correct in every particular?---I had an agent acting for me and - - -
>
> I understand that, Doctor, I put it to you again - - - ?---It was put before me and I signed it.
>
> You were uncaring as to whether the contents of this document, that is the information and statements provided in the application were true and correct in every particular?---Yes.

144. I have given considerable thought to the extent that the plaintiff's conduct with regard to this loan application should be reflected in any finding about his general honesty, and therefore his credibility. This loan transaction was not part of the dealings relevant to

the events of 2002 with which these proceedings are concerned, but they nevertheless reveal a disregard for accuracy and truth on the part of the plaintiff where he has a personal financial interest in the outcome of events. I do not regard the plaintiff's conduct with regard to this loan transaction as demonstrating inherent dishonesty on his part, such that he should, on that basis alone, be rejected as a credible witness, but it is a matter which I take into account in assessing his credibility and the reliability of his evidence.

145. The defendants also submitted that the financial records produced by the plaintiff were unreliable. The plaintiff was required to produce his income taxation returns for the financial years ending 30 June 2002 to 30 June 2014. It would be fair to say that he was reluctant to produce these records and it transpired that they had not be prepared and lodged. The returns which were ultimately produced (Exhibit AU) were not prepared until November 2014, which was well after the plaintiff became aware that his taxation records were required by the defendants with regard to aspects of the damages claimed by him in these proceedings. The plaintiff was also provided with a Notice to Produce by the first defendant, requiring him to produce taxation returns for ASP for the period 1999 to 2016, but no documents were produced, with the plaintiff stating that that the company did not lodge any returns between 2001 and 2013, and nor was he in possession of any financial records for the company for that period.

146. There are indications that the personal income taxation returns produced by the plaintiff are unreliable. First, there was the sheer period of time between the relevant events and the preparation of the returns. Secondly, the plaintiff did not have accurate records of his affairs or that of ASP for the years after 2002 to use in preparation of his returns. As an example of this last proposition, the plaintiff was cross-examined concerning payments received by him from ASP in the years after 2002, and he initially stated that he had received $50,000.00 a year from ASP up until 2002, that he then received $25,000.00 for the first half of 2002, and thereafter he received a "notional salary" of $50,000.00 a year. This notional salary was not, he said, actually received by him, but he considered that the company owed him that notional salary. The only significant source of income revealed in the plaintiff's taxation returns is "rent", and in each return the rental deductions far exceed the gross rent received. For each of the financial years covered by the returns, the plaintiff is shown to have made large net income losses, raising the question how he was able to live day to day throughout this period. When it was suggested to the plaintiff that he had actually continued drawing money from ASP in the years following 2002, he replied "I don't know, I haven't got any records". The personal returns (Exhibit AU) were completed in their final form as a result of negotiations between the plaintiff's taxation agent and the Australian Taxation Office (ATO) on the basis that the ATO would not pay any refunds to the plaintiff. The basis of this resolution suggests that at some point a sum or sums were received by the ATO as withheld tax with respect to the plaintiff. Indeed, the plaintiff was adamant that he received $25,000.00 from ASP in the first half of 2002, and paid tax on that sum, but his tax return for that year discloses the receipt of no salary or wages.

147. The plaintiff agreed that his living expenses in 2001 were about $50,000.00 a year. There was no suggestion that they diminished thereafter. The plaintiff accepted that he had not worked for the last 13 or 14 years, and said that he had been "selling down" his assets to survive. The assets identified by the plaintiff were shares and an investment apartment in a complex called the Aurora in Brisbane. As I understand the plaintiff's evidence, the shares he referred to are $150,000.00 of Commonwealth Bank shares.

The plaintiff's taxation returns show no reference to him declaring any capital gains until the 2014 return, which appears to declare the plaintiff selling shares in three entities and making a modest capital gain. There appears to be no reference in any of the returns to a capital gain or loss being sustained on the sale of the Aurora apartment.

148. To summarise at this point, I am satisfied that the plaintiff has little actual recollection of the events surrounding the purchase of the apartment in question. I am satisfied that much of the evidence given by the plaintiff was reconstruction, based upon the contents of the limited number of documents available to him many years after the relevant events. The plaintiff's character is such that he is confident in his assertions, and his confidence is bolstered by his unshakable belief that he has been the subject of an injustice. A confident witness is, however, not always a reliable witness, and I am satisfied that the plaintiff's evidence is unreliable with regard to the events from late 2001 through until the purchase of unit 206 in May 2002. I am satisfied that the contemporaneous documents provide the only reliable evidence of the relevant events.

149. I am also satisfied that the evidence adduced by the plaintiff concerning his financial affairs from May 2002 until the date of the hearing, and that of his company ASP, was also unreliable. There were no taxation or other records produced by the plaintiff for ASP, and the personal taxation records produced by the plaintiff are clearly unreliable.

150. In his written response to the first defendant's written submissions, the plaintiff described the cross-examination of him by the first defendant on issues of credit and reliability as an exercise to "blame the victim". This reveals a lack of appreciation by the plaintiff of the onus of proof. The plaintiff's assertion that he is a victim is based upon the assumption that an actionable wrong has been done to him by one or both of the defendants, which is precisely what the plaintiff is obliged to prove in these proceedings. An assessment of the reliability of the proof adduced by the plaintiff is fundamental to determining whether he has discharged the onus which he assumed when he commenced these proceedings.

Evidentiary matters

151. A number of the plaintiff's exhibits were admitted provisionally on the basis that he would establish their relevance in the course of the hearing. I will now address those exhibits:

    (a) Exhibit L – this exhibit consists of an email from the plaintiff to "Tony" at PPI (presumably Tony Freese) dated 23 April 2002, an email from Mr Burns to the plaintiff dated 24 April 2002, a facsimile transmittal sheet from Mr Rubenstein to Geoff Farland at Landerer and Co dated 2 May 2002 and two copies of a facsimile message from Mr Farland to Mr Burns dated 3 May 2002. The documents concern proposals for settlement dates for the sale of unit 206, and discussions regarding a proposal that the plaintiff and vendor enter into a residential tenancy agreement with regard to unit 206, rather than the UMA. These documents have peripheral relevance and I confirm that they are admitted as an exhibit.

    (b) Exhibit M – this is a spreadsheet said by the plaintiff to have been prepared for him by PPI setting out financial projections for his purchase of unit 206, based upon nominated assumptions. The plaintiff's case is that the document

included misrepresentations as pleaded by him. I confirm the admission of this document into evidence.

(c) Exhibit N – this is the front page and execution page of a contract for sale of unit 206 to the plaintiff. It was originally prepared as a contract for sale of unit 304, but has been amended in handwriting to a contract for sale of unit 206. I confirm its admission into evidence.

(d) Exhibit O – this is a copy of an unamended UMA (Annexure J to the contract of sale). It had been crossed out on each page, and on the first page the plaintiff has handwritten "Replace with Unit Management Agreement as Amended for Susan Read/Sharon Lim and Make Minor Amendments as Indicated in Attached". There are other copies of this document in evidence, but I will nevertheless confirm its admission into evidence.

(e) Exhibit P – this is a s 66W certificate for unit 304 signed by Mr Burns and dated 24 April 2002. It is probable, as I will later demonstrate, that this was intended to be a certificate for the purchase of unit 206. I will confirm its admission into evidence.

(f) Exhibit Q – this is a facsimile transmission form from the first defendant to NAB dated 29 April 2002 and enclosing the front and execution pages for a number of purchasers. One of the purchasers is described as "Read" and is said to be purchasing unit 220. This is clearly Susan Read and not the plaintiff. This document is also irrelevant and its provisional reception into evidence is rescinded.

(g) Exhibit R – this is a two page document prepared by the plaintiff and purporting to show a "Cash Flow Analysis" for losses claimed by the plaintiff by reason of his purchase of unit 206, and a comparison with returns he could have expected if he had purchased a nominated property in Jerrabomberra NSW. I will confirm the admission of this document into evidence, on the basis that it shows calculations performed by the plaintiff, but not as evidence of the veracity or accuracy of the figures used by the plaintiff.

(h) Exhibit S – this is a "Capital Allowance Summary" for unit 206 prepared by Rider Hunt Canberra and printed 4 April 2002. The plaintiff has not demonstrated that this document is relevant and its provisional reception into evidence is rescinded.

(i) Exhibit T – these documents relate to the purchases made by Ms Lim and Ms Read. In my opinion they are relevant to determining the relationship between the plaintiff and the first defendant as at early February 2002, and the relationship between the plaintiff and Ms Lim and Ms Read. I confirm the admission of these documents into evidence.

(j) Exhibit U – this is an affidavit affirmed by the plaintiff on 21 November 2011 annexing an unsworn, draft affidavit. It is not relevant and its provisional reception into evidence is rescinded.

(k) Exhibit V – this is an affidavit affirmed by the plaintiff on 1 December 2011 setting out material concerning a number of serviced apartment complexes

other than the Waldorf development. The information is irrelevant and its provisional reception into evidence is rescinded.

(l) Exhibit W – this is an affidavit affirmed by the plaintiff on 28 March 2012 setting out the basis of the plaintiff's calculations of loss. I will confirm the reception of this document into evidence but for the limited purpose of demonstrating the calculations performed by the plaintiff. It will not be received as evidence of the appropriateness of the methodology adopted by the plaintiff or the figures used.

(m) Exhibit X – this is a further affidavit affirmed by the plaintiff on 28 March 2012 and also sets out the calculations performed by the plaintiff with regard to different areas of alleged damage. Its reception will also be confirmed on the same basis as Exhibit W.

(n) Exhibit Y – this is an affidavit affirmed by the plaintiff on 21 May 2012 and contains assertions by the plaintiff as to his belief that the first defendant was negligent in her dealings with him. The plaintiff's belief is irrelevant and the provisional reception of the document into evidence is rescinded.

(o) Exhibit Z – this is an affidavit affirmed by the plaintiff on 21 May 2012 and annexes documents concerning other units in the Waldorf development (Annexures A, B and J) and documents which the plaintiff has not demonstrated to be relevant (Annexures F and G). These annexures will be rejected. The balance of the annexures (Annexures C, D and E) will be confirmed as received into evidence in the limited way I indicated on 4 February 2016.

(p) Exhibit AA – this is an affidavit affirmed by the plaintiff on 27 August 2012 in which he sets out details of properties said to be directly relevant to assessing his claim for opportunity loss. The first such property, described as the Rozelle property, was considered for purchase by the plaintiff and Ms Lim jointly prior to their purchase of their units in the Waldorf development. The property was purchased by another purchaser in June 2001, well before the plaintiff was introduced to the Waldorf development.

(q) Exhibit AB – this is an affidavit affirmed by the plaintiff on 16 October 2012. The contents of this affidavit are largely submissions of fact and law. To the extent that the plaintiff refers to documents, they are either already in evidence or the plaintiff has not demonstrated their relevance. The provisional reception of this affidavit into evidence is rescinded.

(r) Exhibit D – a number of documents which form part of this exhibit were admitted provisionally. I confirm their admission into evidence.

152. On 5 February 2016, the plaintiff sought to tender a bundle of documents. Some of those documents related to other units in the Waldorf development purchased by individuals other than the plaintiff. Some were duplicates of documents already in evidence. Some were documents concerning hotels in other cities and countries. I refused to admit those documents because they lacked any relevance to the present proceedings, or were simply duplications of documents already in evidence. The balance of those documents were admitted as Exhibit AE.

The Plaintiff's Claim Against the First Defendant

153. The case pleaded by the plaintiff was based on the following propositions:

(a) the first defendant was a solicitor practising in the ACT;

(b) she, and in particular her employee Ross Burns, had knowledge of the managed investment provisions of the Corporations Law as they applied to serviced strata schemes including the requirement for ASIC approval and registration of serviced strata schemes where the units are not available for residential use;

(c) in January 2002 the plaintiff retained the first defendant to act for him on the purchase of a unit in a Waldorf development. The particular unit was ultimately identified as unit 206;

(d) as part of his instructions to the first defendant, the plaintiff advised his employed solicitor, Mr Burns, that he required a unit in which he could live and work in in Sydney during the week to complete a large consultancy job, and the flexible management arrangements in the Waldorf prospectus were particularly attractive to him as they would provide a long-term return after he had finished that job;

(e) he also told Mr Burns that he had not committed to the purchase of a Waldorf unit and required legal advice to "check out" the proposed purchase and management arrangements, and legal services relating to the negotiation and completion of the transaction if he decided to proceed;

(f) Mr Burns told the plaintiff that he had a full understanding of the purchase and management arrangements having already handled a number of other purchases of Waldorf apartments;

(g) the plaintiff told Mr Burns that the fee for the first defendant's services would not be an issue as the plaintiff would likely require more extensive advice and access to Mr Burns in respect of any specific matters he required to be addressed;

(h) the first defendant "negotiated and authorised" exchange of contracts on unit 206 with the vendor's solicitors on 2 May 2002;

(i) around the first week of April 2002, the plaintiff instructed the first defendant that in considering the purchase of unit 206 he required confirmation that he would be able to take advantage of the management scheme and place reliance on the undertakings given in the "Waldorf disclosure document";

(j) by an email dated 24 April 2002, the first defendant advised the plaintiff that he would be able to enter into a residential tenancy agreement for unit 206 rather than enter into the UMA, and based upon this assurance the plaintiff instructed the first defendant that he wanted to "proceed to settlement of Unit 206 as soon as possible";

(k) on 15 May 2002, the plaintiff and first defendant agreed that the first defendant would continue to act as the plaintiff's solicitor "in respect to the Waldorf matters", and would obtain confirmation of ASIC approval of the "guarantee

arrangements" as a prerequisite for the plaintiff proceeding to completion of the "Waldorf transaction";

(l) the first defendant acted for the plaintiff on the purchase of unit 206 and with respect to the management arrangements for the property;

(m) the first defendant was negligent in that:

(i) she failed to competently peruse the contract for sale and other associated documents concerning unit 206 which would have revealed "unusual features of the Waldorf transactions requiring solicitor inquiry and advice", being:

(1) the units which were being sold to "retail purchasers" as "home units" were units in a hotel or serviced apartment business;

(2) absence of any guarantees by the "Waldorf Management Group" in respect of the represented returns to owners under "the scheme"; and

(3) the apparent requirement for approval by ASIC of the transactions;

(ii) she failed to make enquiry of ASIC to confirm that "the Waldorf scheme" was an approved scheme, which would have revealed that it was an illegal scheme being operated in contravention of s 601ED(5) of the CA thereby depriving owners of the statutory safeguards laid down under Chapter 5C of that Act;

(iii) she failed to make enquiry of Sydney Council which would have revealed:

(4) the represented "mixed-use" of the units was not permitted under the "Central Sydney Development Plan 1999";

(5) the only permitted use of the units was as "short-term accommodation for persons who have their principle place of residence elsewhere"; and

(6) written warnings had been issued to FAI in 2000 and 2001 about the misleading marketing of the Waldorf apartments as residential flats;

(iv) she accepted and represented to the plaintiff undertakings given by third parties with vested interests in the Waldorf transactions, not being legal practitioners representing the vendor, knowing that the plaintiff would place reliance on those undertakings and without:

(1) advising or cautioning the plaintiff about the inherent risks of such reliance;

(2) seeking confirmation of those undertakings through the vendor's solicitors; and

(3) advising the plaintiff about the need for formal guarantees or instruments of director's performance in respect of the undertaking;

(v) she failed to execute with due skill, care and attention the plaintiff's written instructions of 15 May 2002 that the first defendant obtain confirmation of ASIC approval of the guarantee arrangements as a condition of the plaintiff proceeding to completion of "the Waldorf transactions";

(vi) she failed to act on settlement with due skill and care by failing to notify the plaintiff prior to the completion date about errors or misdescriptions in the Waldorf Contract, thereby depriving him of the protection provided under the standard Law Society of NSW contractual provisions including errors or misdescriptions in:

(1) description of the property as a "home unit" capable of being let under a "residential tenancy agreement", as one of "72 residential dwellings" and as one of "72 residential apartments";

(2) designation of Waldorf Apartments South Sydney Pty Ltd (WASS) as "manager" rather than Rinbac; and

(3) references to "consideration of this Agreement" by ASIC and the implied warranty "to comply with any specific requirements arising from the Australian Securities and Investments Corporation [sic]";

(vii) she failed to advise the plaintiff that "the Waldorf scheme" was an illegal managed investment scheme in contravention of s 601ED(5) of the CA and that the failure to register the scheme with ASIC as required by s 601ED deprived the plaintiff of essential statutory safeguards under Chapter 5C of the CA required to protect their interests from exploitation;

(viii) she failed to advise the plaintiff that the property could not be used or let as a permanent residence;

(ix) she failed to advise the plaintiff that the property could be used only as a short-term serviced apartment;

(x) she failed to advise the plaintiff that a third party had the exclusive right to manage the property as a serviced apartment;

(xi) she failed to advise the plaintiff that if he did not engage a particular third party to manage the property as a serviced apartment he would be unable to use or derive any significant benefit from the property;

(xii) she failed to advise the plaintiff that the same third party had the exclusive right to manage the Waldorf apartment complex with power to require the owners corporation to reimburse costs and pay administrative charges;

(xiii) she failed to advise the plaintiff that he risked substantial burdens or detriments as the Strata Title Management Agreement dated 22 March 2001 delegated statutory functions of the owner's corporation to Rinbac contrary to s 13(3) of the *Strata Schemes Management Act 1996* (NSW);

(xiv) she failed to advise the plaintiff of the inherent risks involved in proceeding with the Waldorf transactions because of the

second defendant's conflict of interest between its duty of care to prospective purchasers and its obligations to Rinbac as a sub-contractor of that company; and

(xv) she failed to advise the plaintiff of the inherent risks involved in proceeding with the Waldorf transactions because of the "related-party transactions" and the apparently excessive involvement or control of a director of Rinbac, Mr Rubenstein, over all facets of the Waldorf transactions.

154. The plaintiff pleaded that in reliance on professional legal advice from the first defendant, he agreed to purchase unit 206 and to enter into the UMA with WASS. In addition, relying on the first defendant's legal advice, he entered into a loan agreement with the National Australia Bank (NAB) on or about 16 May 2002 to finance the purchase of unit 206 and under the terms of that loan he incurred liability to repay the loan and to pay monthly interest thereon.

155. The plaintiff claimed that because of the first defendant's negligence he suffered loss and damage, indentified as:

(a) the reduced value of unit 206 as a serviced apartment compared with its value as a residential unit capable of being used or let as a permanent residence;

(b) reduced income by reason of utilising the property as a serviced apartment instead of letting the property as a permanent residence;

(c) reduced income by reason of engaging WASS as Manager of unit 206 as a serviced apartment;

(d) additional costs by reason of special levies imposed consequent on the exclusive rights granted to Rinbac to require reimbursement of costs, charges and expenses in relation to management of the building incorporating unit 206;

(e) additional costs incurred in respect of the period 1 June 2007 to 16 July 2009 consequent on breach of the representations about the outgoing on unit 206;

(f) loss of the benefit of performance of the representations in respect of the outgoing on unit 206 post 16 July 2009, being the date of the plaintiff's acceptance of the repudiation of the UMA;

(g) loss of income or earnings suffered by the plaintiff because of the property not being available for his use for a three month period each year with flexibility to swap between residential and serviced strata scheme options upon three months written notice;

(h) loss of opportunity to secure capital gains from purchase of a residential property in Jerrabomberra as an alternative to the Waldorf investment;

(i) loss of opportunity to secure the represented annual net income returns by action to register the Waldorf scheme with ASIC and thereby put in place enforceable undertakings in respect of the represented owners rights in respect of the outgoing on unit 206;

(j) incurred net contractual liability as of 31 May 2002 to pay all operational outgoings including WASS imposed fees and charges over the period

1 June 2002 to 31 May 2011 under the UMA licensing the management rights to WASS; and

(k) consequential losses.

156. By a Second Further Amended Defence dated 4 February 2014, the first defendant admitted that she was retained by the plaintiff, but denied the terms of the retainer as pleaded by him. She pleaded that on or about 19 April 2002 the parties agreed on a limited retainer whereby the first defendant would act for the plaintiff to provide a certificate under s 66W of the *Conveyancing Act 1919* (NSW) (the s 66W certificate) and to attend on settlement only, save as otherwise expressly instructed by the plaintiff. The first defendant also pleaded that before the plaintiff retained the first defendant he had already personally attended to all other aspects of the transaction himself, including:

(a) informing himself as to the content of the contract and UMA;

(b) drafting of a 50 point typed critique of the contract and UMA;

(c) informing himself as to the content of the South Sydney Council "Notice of Determination of a Development Application stating '*use Approved motel as serviced apartments*' and '*[t]hat at no time shall the building be used as a residential flat building...',* as attached to the Contract.";

(d) informing himself as to the content of a Land and Environment Court Order stating that Development Consent for the building was a "*three storey motel containing 72 rooms*";

(e) informing himself of a change of by-laws for strata plan 64972, clause 18 Permitted Uses of Lots, as attached to the Contract for Sale, which stated *"Lots 2 to 73 inclusive Serviced Apartments*";

(f) inspecting the Waldorf Hotel by way of a complimentary overnight stay which included check-in at the hotel reception and use of the cafe facilities;

(g) negotiating the terms of the contract via direct correspondence and meetings with the vendor's solicitors and/or agents;

(h) arranging for the seller's solicitors to forward the sale contract directly to himself via a letter dated 18 March 2002;

(i) forwarding a letter dated 4 April 2002 to the seller's solicitors which: provided the seller with the signed contract and initialled UMA and payment of 10 per cent deposit; confirmed 20 agreed amendments to the contract he had negotiated directly with the vendor's solicitors or their agent; enclosed a typed schedule of the agreed amendments; advised his tax file number; requested that the vendor procure the Manager to enter the UMA and requested that the vendor's solicitor arrange for the deposit to be invested; and

(j) continued to correspond and negotiate directly with the seller's solicitors via correspondence between them dated 10 April 2002, 18 April 2002 and 19 April 2002.

157. The first defendant pleaded that she provided legal services to Ms Read and Ms Lim prior to being retained by the plaintiff and had some dealings with the plaintiff in that

regard, but she was not retained by the plaintiff until 19 April 2002 upon receipt of written instructions from him.

158. Regarding the plaintiff's claim that on 24 April 2002 the first defendant advised him by email that he would be able to enter into a residential tenancy agreement for unit 206 rather than enter into the UMA, the first defendant admitted sending the plaintiff an email on 24 April 2002 but denied advising that the plaintiff would be able to enter into a residential tenancy agreement for unit 206. In that regard the first defendant further pleaded:

    (a) that any advice given or inferred from her email dated 24 April 2002 was not relied upon by the plaintiff;

    (b) that prior to seeking the legal services of the first defendant, the plaintiff conducted his own legal research and enquiries and relied upon same;

    (c) that the subject matter of her email dated 24 April 2002 was a reference to possible alternative management arrangements proposed by the plaintiff and the vendor, or the vendor's agents, which were subsequently confirmed by the vendor's solicitor to be a proposed commercial leasing arrangement between the plaintiff and the Waldorf serviced apartment scheme managers, WASS; and

    (d) that the plaintiff's purchase of the unit proceeded on the basis of a UMA which he negotiated and amended and as was attached to the contract which the plaintiff signed and initialled on or about 4 April 2002, prior to his initial instructions dated 19 April 2002 for the first defendant to act on his behalf.

159. With respect to the plaintiff's allegation that on 15 May 2002 he and the first defendant agreed that the first defendant would obtain confirmation of ASIC approval of the guarantee arrangements, the first defendant said:

    (a) she denied she was instructed in a telephone conversation, as alleged;

    (b) by letter, transmitted to her by facsimile on or about 15 May 2002, the plaintiff informed the first defendant that "*ASIC has now approved the guarantee arrangements proposed in the Contract for Sale*". The first defendant said that, in accordance with the plaintiff's instructions, she wrote to the vendor's solicitors on 15 May 2002; and

    (c) exchange of contracts had been completed, following correction of the plaintiff's error in failing to properly execute the contract and provision of a s 66W Certificate by the first defendant, prior to 2 May 2002, approximately two weeks prior to the plaintiff's letter of 15 May 2002.

160. The plaintiff provided the following Particulars of actions taken by the first defendant in accordance with the terms of the retainer with regard to the purchase of unit 206:

    (a) the first defendant provided advice to the plaintiff about the Waldorf purchase over the period from January 2002 to settlement including obtaining undertakings from the second defendant and Rinbac, and during this period negotiated various matters relating to the Waldorf sale contract with the vendor's solicitor;

(b) the first defendant issued a written instruction dated 2 May 2002 confirming that the vendor's solicitor could exchange contracts for purchase;

(c) the first defendant issued Requisitions on Title and received the vendor's solicitor's response on 14 May 2002;

(d) on 15 May 2002, the first defendant provided the NAB with the advice and documents the bank required to finalise the plaintiff's loan;

(e) on 28 May 2002, the first defendant forwarded to the vendor's solicitor the instructions for settlement including the s 118 Notice issued under its authority as the plaintiff's solicitor; and

(f) the first defendant, under cover of a letter dated 31 May 2002, sent the plaintiff the Settlement Statement and her Memorandum of Costs and Disbursements.

161. In response to these Particulars, the first defendant said:

(a) she denied subparagraph (a);

(b) in answer to subparagraph (b) she admitted taking steps on behalf of the plaintiff on or about 2 May 2002 to rectify a defect in the plaintiff's execution of (one page) of the contract thereby completing the exchange of contracts process initiated by the plaintiff on or about 4 April 2002;

(c) she admitted subparagraph (c);

(d) she denied subparagraph (d) and said that any documents provided to the NAB on or about 15 May 2002 by the first defendant was in respect to the Ms Lim and Ms Read purchases; and

(e) she admitted subparagraphs (e) and (f) but said that the purchase proceeded to completion on the basis of a UMA document which the plaintiff amended, negotiated, initialled and forwarded to the seller's solicitors prior to the first defendant's receipt of instructions to act on behalf of the plaintiff.

162. The plaintiff also provided Particulars of action taken by the first defendant in accordance with the retainer with regard to the management arrangements of unit 206:

(a) the first defendant provided advice to the plaintiff about the Waldorf management arrangements over the period January 2002 to settlement including obtaining undertakings from the second defendant and Rinbac, and negotiating various matters relating to the UMA with the vendor's solicitor;

(b) in a letter of 15 May 2002 the first defendant sought confirmation from the vendor's solicitor that the guarantee arrangements had been approved advising that, if this was the case, the plaintiff wanted to proceed to settlement;

(c) on 20 May 2002, the first defendant forwarded the amended UMA to the plaintiff for signature; and

(d) on 28 May 2002, the first defendant forwarded the UMA signed by the plaintiff to the vendor's solicitor for execution following transfer of the legal title to the property to the plaintiff at settlement.

163. The first defendant responded to these Particulars generally denying the allegations, and saying that the plaintiff negotiated directly with the vendor or the vendor's solicitor and/or agent regarding the terms of the UMA and sought to enter the UMA both prior to instructing the first defendant, on or about 19 April 2002, and subsequently.

164. The first defendant denied all allegations of negligence. She admitted that the plaintiff agreed to purchase unit 206 in reliance on whatever representations and collateral warranties may be found to have been made to him by the second or third defendants, but said that the plaintiff entered into the contract to purchase unit 206 without reference to or reliance upon any professional legal advice from the first defendant. She further denied the allegation that in reliance on legal advice from the first defendant, the plaintiff entered into a loan agreement with the NAB.

165. The first defendant denied that the plaintiff had suffered any loss or damage for which she was responsible. In the alternative, she pleaded that if the plaintiff had suffered loss or damage as he alleged, the plaintiff had failed to take reasonable steps to mitigate any loss occasioned by the alleged negligence or breach of retainer by the first defendant.

166. A lengthy reply was filed by the plaintiff, to which it is unnecessary to refer in detail. It essentially joined issue with the first defendant and asserted matters of evidence.

The law applicable to the claim against the first defendant

167. The first defendant submitted that the law applicable to the plaintiff's claim against her was the law of NSW, on the basis that the dispute concerns real property located in that State and the conveyance of the property was conducted in accordance with the *Conveyancing Act 1919* (NSW). The first defendant submitted that the "choice of laws rules" require this Court to apply the substantive law of the jurisdiction where the tort was committed, citing *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; 203 CLR 503 at [102], where Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said:

> Development of the common law to reflect the fact of federal jurisdiction and, also, the nature of the Australian federation requires that the double actionability rule now be discarded. The *lex loci delicti* should be applied by courts in Australia as the law governing all questions of substance to be determined in a proceeding arising from an intranational tort. And laws that bear upon the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws.

168. The first defendant submitted that, accordingly, the statute law of NSW applied, including the *Civil Liability Act 2002* (NSW) (the Civil Liability Act*)*, which commenced on 20 March 2002, prior to the date on which the first defendant submitted she was instructed, being 19 April 2002, to the exclusion of the *Civil Law (Wrongs) Act 2002* (ACT) (the Civil Law (Wrongs) Act). The significant difference between the two enactments, for present purposes, is that the NSW enactment prohibits the reception of evidence of any statement made by the plaintiff after suffering the alleged harm as to what he would have done but for the negligent acts (if any) of the defendant: s 5D(3) of the Civil Liability Act*.*

169. The plaintiff submitted that the laws of the ACT apply to the exclusion of the laws of NSW.

170. In my opinion, the law as it was in the ACT at the time of the events complained of applies, and to the exclusion of the laws of NSW. In *Dow Jones & Co Inc v Gutnick*

[2002] HCA 56; 210 CLR 575, Gleeson CJ, McHugh, Gummow and Hayne JJ said at [43]:

> Reference to decisions such as *Jackson v Spittall*, *Distillers Co (Biochemicals) Ltd v Thompson* and *Voth v Manildra Flour Mills Pty Ltd* show that locating the place of commission of a tort is not always easy. Attempts to apply a single rule of location (such as a rule that intentional torts are committed where the tortfeasor acts, or that torts are committed in the place where the last event necessary to make the actor liable has taken place) have proved unsatisfactory if only because the rules pay insufficient regard to the different kinds of tortious claims that may be made. Especially is that so in cases of omission. In the end the question is "where in substance did this cause of action arise"? In cases, like trespass or negligence, where some quality of the defendant's conduct is critical, it will usually be very important to look to where the defendant acted, not to where the consequences of the conduct were felt.
>
> (footnotes omitted)

171. In the earlier case of *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, the High Court considered whether an alleged tort by an accountant was committed in NSW or the State of Missouri in the USA. The appellant was an accountant practicing in Missouri and the first respondent was a company incorporated and resident in NSW. The appellant provided accounting services to a company related to the first respondent in the USA, but failed to advise the related company of a statutory requirement in the USA for the related company to deduct and withhold certain taxes, resulting in the related company being required to pay penalty interest on its tax liability in the USA, for which the first respondent claimed it was liable to reimburse the related company. In finding that any tort had been committed in Missouri, Mason CJ, Dean, Dawson and Gaudron JJ said at 568-569:

> The present case is one that may properly be described either as a failure to advise (i.e., an omission) or as a negligent misstatement of fact (i.e., a positive act). Strictly, the complaint is one of negligent omission, namely, failure to do various things, including failure to draw the attention of M.M.C. and the members of the Manildra Group (including the respondents) to the requirement to pay withholding tax on M.M.C.'s interest payments to the first respondent. However, there are cases where, when information is being imparted, the failure to draw attention to some particular matter is, for practical purposes, the same as a positive statement as to that matter. That was the situation in *Shaddock & Associates Pty. Ltd. v. Parramatta City Council* [No. 1]. And it would seem that that is also the present case, for, in a context in which the appellant was providing professional accountancy services on the basis that withholding tax was not payable, the failure to draw attention to the requirement that it be paid was, for all practical purposes, equivalent to a positive statement that it was not payable. When the case is approached on that basis it is clear that, in substance, the cause of complaint is the act of providing the professional accountancy services on an incorrect basis. The same is true if the matter is approached as an omission, for the omission takes its significance from that same act of providing those services.

See also *Agar v Hyde* [2002] HCA 41; 201 CLR 552 per Callinan J at 591.

172. In the present case the plaintiff's case against the first defendant is based upon allegations of negligent acts and omissions in the provision of legal services. Those services were provided in the ACT, albeit that they related to a purchase of property in NSW. The plaintiff's cause of action (if any) arose in substance in the ACT, because that is where the services were provided to the plaintiff by the first defendant.

173. The provisions of the Civil Law (Wrongs) Act which are potentially relevant are found in Chapter 4 of that Act. Chapter 4 was originally denominated Chapter 3A, and was inserted into the Act by the *Civil Law (Wrongs) Amendment Act 2003 (No 2)* (ACT), and

commenced on 9 September 2003. By that time, the plaintiff alleged that he had suffered loss as a result of the alleged negligence of the first defendant, as he alleged that immediately upon settlement of the purchase of unit 206 he suffered loss measured by the difference in value of the unit as a serviced apartment and its value as a residential unit capable of being used or let as a permanent residence.

174. In the absence of a clear legislative statement to the contrary, an enactment, including an amendment to an enactment, is presumed not to have retrospective effect. This principle was described by Fullagar J in *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194 in the following terms.

> There can be no doubt that the general rule is that an amending enactment – or, for that matter, any enactment – is prima facie to be construed as having a prospective operation only. That is to say, it is prima facie to be construed as not attaching new legal consequences to facts or events which occurred before its commencement.

See also *Geraldton Building Co Pty Ltd v May* (1977) 136 CLR 379.

175. The above principles are of course, subject to a demonstrated legislative intention to the contrary. Chapter 8 of the *Legislation Act 2001* (ACT) (the Legislation Act) deals generally with the commencement of legislation, and to that limited extent also addresses the issue of retrospective operation of legislation. The general rule is that an Act commences on the day after its notification date or at a different date or time if so provided by the Act: s 73(1) of the Legislation Act. The effect of these provisions is that the amendment to the Civil Law (Wrongs) Act affected by the *Civil Law (Wrongs) Amendment Act 2003 (No 2)* (ACT) did not take effect until 9 September 2003.

176. The plaintiff's claim against the first defendant accordingly falls to be determined under the common law and not under the Civil Liability Act or the Civil Law (Wrongs) Act. In truth, there is no practical difference between the relevant common law principles and those set out in the Civil Law (Wrongs) Act. The significant difference between the common law and the provisions of the Civil Liability Act is found in s 5D(3) of that Act, to which I have referred.

An illegal managed investment scheme?

177. A recurring theme in the plaintiff's submissions was that in purchasing unit 206 and executing the UMA he had been lured into participating in an "illegal managed investment scheme".

178. A managed investment scheme (MIS) is defined in s 9 of the CA, as it was at the time of these events, as:

> (a) a scheme that has the following features:
>
> (i) people contribute money or money's worth as consideration to acquire rights (***interests***) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
>
> (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the ***members***) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);

(iii) the members do not have day-to-day control over operation of the scheme (whether or not they have the right to be consulted or to give directions); or

(b) a time-sharing scheme;

...

179. Certain MISs were required by the CA to be registered; s 601ED of the CA relevantly provided:

When a managed investment scheme must be registered

(1) Subject to subsection (2), a managed investment scheme must be registered under section 601EB if:

(a) it has more than 20 members; or

(b) it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes; or

(c) a determination under subsection (3) is in force in relation to the scheme and the total number of members of all of the schemes to which the determination relates exceeds 20.

(2) A managed investment scheme does not have to be registered if all the issues of interests in the scheme that have been made would not have needed disclosure to investors under Part 6D.2 (see sections 706 and 708) if the scheme had been registered when the issues were made. ASIC may, in writing, determine that a number of managed investment schemes are closely related and that each of them has to be registered at any time when the total number of members of all of the schemes exceeds 20. ASIC must give written notice of the determination to the operator of each of the schemes.

(3) For the purpose of this section, when working out how many members a scheme has:

(a) joint holders of an interest in the scheme count as a single member; and

(b) an interest in the scheme held on trust for a beneficiary is taken to be held by the beneficiary (rather than the trustee) if:

(i) the beneficiary is presently entitled to a share of the trust estate or of the income of the trust estate; or

(ii) the beneficiary is, individually or together with other beneficiaries, in a position to control the trustee.

(4) A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.

(5) For the purpose of subsection (5), a person is not operating a scheme merely because:

(a) they are acting as an agent or employee of another person; or

(b) they are taking steps to wind up the scheme or remedy a defect that led to the scheme being deregistered.

...

180. A registered MIS was required to have a "responsible entity", whose function was to operate the scheme: s 601FB. The responsible entity was required to be a public company holding a "dealers licence" authorising it to operate a MIS: s 601FA.

181. Any application to register a MIS had to be accompanied by a copy of the scheme's constitution and a copy of its compliance plan. The constitution was required to make adequate provision for any consideration to be paid to acquire an interest in the

scheme, the powers of the responsible entity in relation to dealing with the scheme property, the method by which complaints made by members in relation to the scheme are to be dealt with, and winding up the scheme: s 601GA(1). If the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred, those rights must be specified in the constitution and any other agreement or arrangement which purported to confer such a right was to have no effect: s 601GA(2). Where the members were to have a right to withdraw from the scheme, the constitution was to specify that right and provide procedures for the exercise of that right: s 601GA(4).

182. The compliance plan of a registered scheme was obliged to set out adequate measures that the responsible entity was to apply in operating the scheme to ensure compliance with the CA and the scheme's constitution: s 601HA(1). This obligation included arrangements for:

    (a) ensuring that all scheme property is clearly identified as scheme property and held separately from property of the responsible entity;

    (b) if the scheme is required to have a compliance committee, proper functioning of the compliance committee including membership of the committee, how often committee meetings are to be held, reporting of the committee to the responsible entity, and access by the committee to relevant information and accounting records;

    (c) ensuring that the scheme property is valued at regular intervals;

    (d) ensuring that compliance with the plan is audited as required by s 601HG; and

    (e) ensuring that adequate records of the scheme's operations are kept.

183. The responsible entity of a registered scheme must ensure that at all times a registered company auditor is engaged to audit compliance with the scheme's compliance plan: s 601HG.

184. Not every registered MIS was required to have a compliance committee. The responsible entity of a registered scheme was obliged to establish a compliance committee if less than half of the directors of the responsible entity were external directors: s 601JA(1). A person was defined as being an external director by means of a series of criteria relating to their independence from the responsible entity or any related body corporate: s 601JA(2). It is unnecessary to set out in detail the nature of those criteria. The compliance committee must consist of at least three members, a majority of whom must be external members. External members are again defined by criteria relating to their independence from the responsible entity or any related body corporate: s 601JB. The functions of the compliance committee are to monitor the responsible entity's compliance with the compliance plan and to report to the responsible entity any breach of the CA or the constitution, to report to ASIC if the committee is of the view that the responsible entity has not taken appropriate action to deal with a reported breach, and to assess at regular intervals whether the compliance plan is adequate: s 601JC.

185. The constitution of a registered scheme may (not must) make provision for members to withdraw from the scheme: s 601KA(1). The CA also provides protection to registered

schemes by requiring members' approval for giving financial benefits to the responsible entity or its related parties that come out of scheme property: see Part 5C.7.

186. The term "scheme property", in relation to a registered MIS, is defined in s 9 of the CA as:

> (a) contributions of money or money's worth to the scheme; and
>
> (b) money that forms part of the scheme property under the provisions of this Act or the ASIC Act; and
>
> (c) money borrowed or raised by the responsible entity for the purposes of the scheme; and
>
> (d) property acquired, directly or indirectly, with, or with the proceeds of, contribution or money referred to in paragraph (a), (b) or (c); and
>
> (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b), (c) or (d).

187. The history of the provisions of the CA regulating MISs was set out by Pullin J in *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd & Anor* [2001] WASC 339; at [38]-[48]:

> Chapter 5C of the *Corporations Act 2001*, which relates to managed investment schemes, became part of the *Corporations Law* as a result of the passing of the *Managed Investments Act 1998* (Cth), which commenced on 1 July 1998. Managed investments schemes have been described as "residual investment opportunities remaining after shares and debentures are considered". See Ford's Principles of Corporations Law, par 22.470. The raising of capital via shares and debentures is governed closely by the law relating to companies which has developed over a long period of time. Other investment schemes where a number of investors contribute funds to be managed by a third party can, however, take many different legal forms. The regulation of investment interests, other than shares and debentures, began in the 1970s under the "prescribed interest" provisions, first in some of the State Companies Acts, and then later in the Companies Codes.
>
> There was discussion about reforms to the "prescribed interest" provisions over a number of years, and the "Financial System Enquiry Final Report" March 1997 (the Wallis Report) recommended in Recommendation 89 that there should be some changes to the regulatory framework in relation to "public offer collective investments", to harmonise it with the superannuation regulatory framework.
>
> The Australian Law Reform Commission and the Companies and Securities Advisory Committee report entitled "Review of the Law of Collective Investments: Other People's Money" (ALRC 65 1993), examined in detail the reforms which might be made to the regulation of "collective investment schemes" or "enterprise schemes". It was noted that:
>
> > "Collective investment schemes are a major way in which households … save and invest. They allow individuals and groups with relatively small savings to get better returns by pooling their money, giving them more investment opportunities. … "
>
> One of the points thought necessary to reform was that the law at the time of the report required each scheme to have both a manager and a trustee or investors' representative. The report considered that this led to unnecessary confusion, encouraged unsatisfactory commercial practices and sometimes resulted in neither taking responsibility for compliance with the law because each could blame the other. The report suggested that the split in responsibility presently prescribed by the law should cease and that the scheme operator should take responsibility for compliance with obligations under the law and the constitution of the scheme.
>
> When the Managed Investments Bill 1997 was introduced, the responsible Minister, in the second reading speech, noted the call for reform in the two reports referred to above. The bill provided for a single responsible entity in lieu of the split of duties between trustee and scheme operator. The explanatory memorandum to the Managed Investment Bill noted

that “managed investment schemes are currently regulated under the prescribed interest provisions of the Law. The complex and seemingly all-embracing definition of prescribed interest has been widely criticised because of its lack of precision”.

One of the changes brought about by the *Managed Investments Act 1998* was the introduction into the *Corporations Law* (now the *Corporations Act 2001*) of the expression “managed investment scheme”, which was defined in s 9 to mean:

> “ … a scheme that has the following features:
>
> (i) people contribute money or money's worth as consideration to acquire rights (**interests**) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not)[;]
>
> (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the **members**) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
>
> (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions) … ”

Although there is a change in defined term from “prescribed interest” to “managed investment scheme”, a number of the words or expressions which appear in the new definition, are words or expressions which appeared in the old “prescribed interests” legislation. In my view, the authorities defining the meaning of some of these words or expressions will be relevant to the new definition. I will mention a number of the authorities which assist in understanding some of the words used in the new definition.

All that the word “scheme” requires is that there should be some “program or plan of action”: see *Australian Softwood Forests Pty Ltd v Attorney-General (NSW)* (1981) 148 CLR 121 at 129. See also *Clowes v Federal Commissioner of Taxation* (1954) 91 CLR 209 at 225. I note that Owen J, in *Australian Securities and Investments Commission v Chase Capital Management Pty Ltd* [2001] WASC 27 at [57], and Douglas J, in *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* (1999) 33 ACSR 403, both considered that they could rely on what was said in the *Australian Softwood Forests* case (*supra*) about the meaning of the word “scheme”, for the purposes of considering the meaning of that word in the definition of “managed investment scheme”.

The word “pooled” and the expression “to be pooled”, as they appear in the present definition of “managed investment scheme”, have been considered in *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* (*supra*) and on appeal in *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* (2000) 35 ACSR 620. From those cases, it appears that the word has its ordinary meaning. In particular, it will apply to describe arrangements where there is “a common fund into or from which all gains and losses of the contributors are paid” or “a fund made up of numerous payments from participants and used for a purpose they contemplate”. The phrase “to be pooled … to produce” implies that the intention must be to pool the contributions and, by use of the pool, produce benefits. Pooling will occur where moneys are paid into or collected in an account: see *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd* (2000) 35 ACSR 620 at [8], [9] and [13].

The expression “common enterprise” was discussed in the *Australian Softwood Forests* case (*supra*) at page 133, where Mason J said:

> “The argument is that in order to constitute a ‘common enterprise’ there must be a joint participation in all the elements and activities that constitute the enterprise. I do not agree. An enterprise may be described as common if it consists of two or more closely connected operations on the footing that one part is to be carried out by A and the other by B, each deriving a separate profit from what he does, even though there is no pooling or sharing of receipts of profit. It will be enough that the two operations

> constituting the enterprise contribute to the overall purpose that unites them. There is then an enterprise common to both participants and, accordingly, a common enterprise."

Finally, I agree with what was said by the Court of Appeal in Queensland in *Australian Securities and Investments Commission v Enterprise Solutions 2000 Pty Ltd and Ors* (2000) 35 ACSR 620 at [17], that attempts to read down the broad words of the definition should be discouraged. The Court there agreed with, and I agree with, the comment made by Mason J in the *Australian Softwood Forests* case (*supra*) at page 130 where he said:

> "There are real difficulties in the suggestion that the court can read down the very comprehensive definition of 'interest' by reference to the supposedly unintended consequences of a literal reading on everyday commercial transactions."

188. The plaintiff frequently referred to the arrangements he entered into by purchasing unit 206 and entering into the UMA as an "illegal managed investment scheme". Assuming for present purposes that the arrangements constituted a MIS, it is not accurate to refer to the scheme as unlawful or illegal simply because it was not registered (assuming that to be the case). The CA does not make it unlawful to participate in an unregistered scheme, and nor does it make an unregistered MIS unlawful. The fact that penalties may apply to those who promote or operate an unregistered MIS does not change that situation.

189. In *Karl Suleman Enterprizes Pty Ltd (In Liquidation) v Babanour* [2004] NSWCA 214; 49 ACSR 612, the appellant conducted an unregistered MIS. The scheme was fraudulent, and was in fact a Ponzi or pyramid scheme under which funds received from new investors were used to pay out existing investors or to pay interest on money advanced by existing investors. The appellant operated the scheme through agents who were used to promote the scheme, one of whom was the respondent. The appellant brought a claim against the respondent, essentially arguing that the respondent knew of the fraudulent nature of the scheme and had misapplied monies that he raised by promoting the scheme. At first instance, the respondent was successful in having the appellant's claim struck out on the basis that the appellant was obliged to rely upon its own illegal and fraudulent conduct in order to establish its claim, and to the extent that the claim was equitable, it was tainted in accordance with the doctrine of unclean hands. On appeal, Beazley JA, with whom Spigelman CJ and Santow JA agreed, said at [48]-[51], with regard to unregistered MIS:

> In the present case, the illegality alleged arose out of the appellant's failure to register the scheme as required by ss 601EB and 601ED of the Corporations Act 2001. Section 601ED(5) provides:
>
> > "A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under s 601EB unless the scheme is so registered."
>
> Section 1311 provides that a person who contravenes a provision of the Act is guilty of an offence: s 1311(1)(c). Sub-section 1A provides that sub-section (1)(c) only applies if, relevantly, a penalty, pecuniary or otherwise, is set out in Schedule 3 for that provision. Schedule 3 specifies the penalties applicable to various offences under the Act. Item 163 of the Penalties List specifies a penalty for s 601ED(5) of 200 penalty units or imprisonment for five years or both. A penalty unit in a law of the Commonwealth means $110.00 (see s 4AA *Crimes Act 1914* (Cth).
>
> In addition, pursuant to s 601EE, the Court may wind up a scheme that is being operated in contravention of s 601ED(5).
>
> The registration requirement for the operation of a Managed Investment scheme is for the protection of investors. The legislation does not expressly make an unregistered scheme unlawful. Rather it impugns the conduct of the entity responsible for registration by

> imposing a penal sanction for a contravention of the registration provisions. The members of an unregistered scheme are protected by the provisions whereby the scheme may be compulsorily wound up. There is nothing, therefore, in the scheme of the legislation whereby an implication of an illegality would arise, nor is there anything that points to a legislative intention that contracts entered into as part of an unregistered scheme are illegal.

190. The word "scheme" is not defined in the CA, but all that the word requires is that there should be some "programme or plan of action": *Australian Softwoods Pty Ltd v Attorney-General (NSW)* (1981) 148 CLR 121 at 129 per Mason J, Gibbs CJ and Stephen J concurring. In *Australian Securities and Investments Commission v Takaran Pty Ltd* [2002] NSWSC 834; 170 FLR 388 at [15], Barrett J said:

> The essence of a "scheme" is a coherent and defined purpose, in the form of a "programme" or "plan of action", coupled with a series of steps or course of conduct to effectuate the purpose and pursue the programme or plan. In some cases, the scope of the scheme will readily be gathered from some constituitive document in the nature of a blueprint setting out all relevant matters.

191. In his written submission the plaintiff stated that the "Waldorf scheme" was "defined" by the following documents:

    (a) the PPI Disclosure Document first provided to him in or about December 2001;

    (b) correspondence which took place on or about 31 January 2002 providing "additional representations" concerning the income guarantee;

    (c) a "personalised" PPI Investment Report dated 10 April 2002; and

    (d) the UMA.

192. Commencing with the last of these documents, the units in the Waldorf development were marketed on the basis that purchasers of units could, if they chose, take advantage of the offered UMA, and the plaintiff negotiated with the vendor the form of the UMA that he entered into with regard to unit 206. The UMA was Annexure J to the contract for sale. One of the features of the contract for sale was that it provided that the vendor would guarantee a fixed rental (6.25 per cent of the purchase price per annum) for a period of five years where the purchaser entered into a UMA of the type annexed to the contract for sale. The UMA signed by the plaintiff provided that if the actual rental return for his unit exceeded the guaranteed return, the Manager was entitled to retain the difference. After the expiration of the rental guarantee period the plaintiff was entitled to the rental income generated as set out in the UMA.

193. The UMA also provided for the Manager to operate an "operating account" into which, inter alia, any income generated by the plaintiff's unit was to be paid. The Manager was empowered to deduct "ownership expenses" from that account "to the extent that funds are available for the Manager's use in respect of" the plaintiff's unit. Assuming that monies generated by a number of different units owned by different owners in the Waldorf complex and who had also entered into UMAs could be deposited into one operating account in its name by the Manager, the UMA suggests that these monies were nevertheless not "pooled", and the Manager was obliged to account to individual unit owners for the rental income generated by their unit, and could only withdraw funds to pay relevant expenses for a particular unit to the extent that there were funds in the operating account to the credit of the owner of that unit sufficient to allow the expenses to be paid. The UMA provided that funds would only be payable by the

Manager to the owner of a unit based upon the actual rental income earned by that unit, and not based upon a proportion of the rental income received in respect of all units that were subject to UMAs.

194. The evidence adduced by the plaintiff regarding the operation of the scheme created by the UMA was sparse. The plaintiff had concerns about a number of the terms of the standard contract for sale and the UMA, and he prepared a list of 50 issues for the vendor to consider (the 50 issues document). I will refer to this in greater detail later, but one of the issues he raised concerned clause 8 of the UMA which required the Manager of the apartment under the UMA (WASS) to "use its best endeavours to lease the Apartment on behalf of the Owner from time to time during the term". The plaintiff questioned in the 50 issues document whether this allowed WASS to "pick and choose" which units it rented, and asked how the Manager would choose which apartment to rent.

195. In a facsimile dated 1 February 2002, Mr Rubenstein on behalf of the vendor responded: "not relevant as we have a computerized [sic] reservation system which allocate units and we are pooling anyway". It is not clear whether the reference to "pooling" is to pooling of income from those units being managed by WASS under UMAs, or to pooling of the units themselves. As I have noted, the terms of the UMA suggest that the scheme was not one in which income from the scheme was pooled and then paid out in some proportion to unit holders. The issue is complicated, however, by the guarantee arrangements which provided for a return to a unit holder of a fixed sum, for a period of time, rather than an amount based upon the actual income generated by a particular unit. The underlying nature of the scheme, however, is found in the terms of the UMA which does not provide for pooling of unit income.

196. Not all schemes that may be defined as MISs for the purpose of Chapter 5C of the CA are required to be registered. Under s 601QA of the CA, ASIC may exempt a person from a provision of Chapter 5C.

197. I am satisfied that the scheme created by the UMAs entered into between unit holders at the Waldorf development and WASS was one whereby the unit holders pooled their units under the management of WASS for the purpose of generating an income return to individual unit owners based upon the income generated by their particular unit (subject, of course, to the period during which the income guarantee operated). As such, I am satisfied that the plaintiff and such other of the unit owners who entered into a UMA contributed money's worth to acquire a right to benefits produced by the scheme, and those contributions were pooled and/or used in a common enterprise to produce financial benefits for the members of the scheme. The scheme therefore falls within the definitions of a MIS found in s 9 of the CA.

198. Turning to s 601ED of the CA, there was no evidence of the number of members of this scheme in the period from December 2001 until the end of May 2002. On the basis of the PPI promotional material, and in particular the Waldorf marketing document, I am satisfied that the developer, FAI, was a company affiliated with other companies and forming part of the "Waldorf Group". That document noted:

> In order to enhance the performance of the property and to maximise the financial return to apartment owners, The Waldorf Apartment Group, a specialist apartment manager, has been appointed to manage the property following the strata titling and sale of the units. The Waldorf Apartment Group currently manages the Woolloomooloo Waters Apartments, The

Waldorf Canberra and The Waldorf Apartments in Sydney and Mount Bay Waters, Hovea, Caesia and Grevillia Apartments in Perth, WA.

199. Although the evidence is somewhat thin, I am satisfied that the scheme at the Waldorf South Sydney development was being promoted by a person who was then in the business of promoting MISs, or an associate of such a person.

200. The evidence does not allow me to determine with certainty whether the exemptions in s 601ED(2) apply. The plaintiff did not address this issue, but for the purposes of these proceedings I will assume they do not apply. Under s 601QA of the CA, ASIC has the power to exempt persons from the requirement of registering schemes under s 601ED, but there was no evidence that ASIC had exercised that power in any way that would affect the present proceedings. In a letter to the plaintiff dated 14 October 2008, ASIC stated "ASIC does not approve Unit Management Agreements and our records indicate that we do not hold any documents pertaining to the Unit Management Agreements". This letter is obviously part of a series of correspondence, and it is difficult to identify the context of the above statement, but I infer that ASIC has no record of any document relevant to the UMA entered into by the plaintiff. I infer, perhaps generously, that this would include an exemption under s 601QA applicable to the Waldorf development.

201. I am therefore satisfied that:

    (a) the scheme was a MIS;

    (b) it was required to be registered under the CA; and

    (c) it was not so registered.

202. For the reasons I have given I am not satisfied that the scheme was illegal or unlawful. Membership of the scheme brought with it the rights and benefits provided for in the contract for sale and the UMA. Those rights were enforceable.

The first defendant's failure to call Ross Burns

203. The first defendant was the principal of the firm engaged by the plaintiff and held an unrestricted practising certificate. She did not, however, undertake the work personally. The plaintiff dealt with her employed solicitor, Mr Burns, who, as I understand it, held a restricted practising certificate.

204. The first defendant did not call Mr Burns to give evidence in these proceedings. Although no issue regarding this fact was raised by the plaintiff in his written submissions, in the light of the fact that the plaintiff has no legal training or experience, I believe it is appropriate to consider whether some inference should be drawn from the first defendant's failure to call Mr Burns as a witness. In J D Heydon, *Cross on Evidence,* Australian Edition (Butterworths, 1996) at [1215] the relevant principles (for present purposes), compendiously referred to as "the rule in *Jones v Dunkel*" (referring to the case of that name reported at (1959) 101 CLR 298) are, in brief, expressed as:

    (a) first, unexplained failure by a party to give evidence, or to call witnesses, may (not must) in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case; and

    (a) secondly, if the trier of fact draws that inference, it may take into account the fact that a witness was not called in deciding whether to accept any particular

> evidence which relates to a matter on which the absent witness could have spoken, and the trier of fact may more readily drawn an inference fairly to be drawn from the other evidence.

205. The rule in *Jones v Dunkel* does not permit an inference that the evidence of the missing witness would have been adverse or damaging to the party who may have been expected to call the witness, but did not: *Brandi v Mingot* (1976) 12 ALR 551 at 559-560; *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; 243 CLR 361 at [64]. It is an important aspect of the rule that it cannot be used to fill gaps in the evidence: *West v Government Insurance Office NSW* (1981) 148 CLR 62 at 66.

206. In the present case, the failure of the first defendant to give evidence herself cannot give rise to any inference referred to in *Jones v Dunkel* and related cases, because there is no suggestion that she was in any way concerned with the relevant transactions. In any event, her absence was explained in an affidavit sworn by Mr Burns on 2 February 2016 which speaks of her ill health and unfitness to attend these proceedings. This was not challenged by the plaintiff. If any inference is to be drawn, it must be based upon the failure of the first defendant to call her then employed solicitor, Mr Burns, to give evidence regarding when he was retained by the plaintiff, and the terms of that retainer. One could speculate that Mr Burns may not have an independent recollection of what occurred in these transitions in 2002, which would be entirely understandable, but the onus of establishing that there is a legitimate reason for not calling the witness is on the first defendant: *Smith v Samuels* (1976) 12 SASR 573, referred to with approval in *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229; 236 FLR 1 at [457].

207. The rule in *Jones v Dunkel* is directed towards the drawing of inferences from evidence, but it is possible that in some cases the failure of a party to call a witness may affect whether the evidence by the other party should be accepted. Where the evidence of a party is uncontradicted, it is easier for the trier of fact to accept the evidence than if it were contradicted. This commonsense principle, however, directs the attention of the trier of fact to the evidence of the party, and in particular to the nature and quality of that evidence. If the evidence is by its nature lacking in probative value, the principles referred to in *Jones v Dunkel* and cognate decisions cannot be used to elevate unreliable evidence to the status of reliable evidence.

208. I should add at this point that the first defendant was not the only party who failed to call apparently relevant witnesses. As I will later demonstrate, there were witnesses one would have expected the plaintiff to call to give evidence and who were not called. For example, important conversations which the plaintiff said occurred between himself and the third defendant occurred, the plaintiff said, in the presence of Ms Read and/or Ms Lim. Neither of these persons were called to give evidence, and no explanation for their absence was provided.

The retainer

209. In *Beach Petroleum NL v Kennedy* [1999] NSWCA 408; 48 NSWLR 1 the NSW Court of Appeal said at [208]:

> "Retainer" is a word used to describe a contract between the solicitor and the client for the provision of legal services by the solicitor for a fee and must be proved like any other contract. Like any other contract a retainer may be implied from conduct: see generally, Greig and Davis, The Law of Contract

> (1987) Law Book Co, Sydney at 249 and Carter and Harland, Contract Law in Australia, 2nd ed (1991) Butterworths, Sydney at 205. If such a contract is proved it must then be examined to determine what legal services the solicitor agreed to provide.

210. The plaintiff's claim against the first defendant is pleaded in negligence, not contract. As such, the plaintiff must prove that the first defendant owed him a duty of care, the scope of that duty, and that the first defendant breached the duty thereby causing him loss or damage. This does not mean that the terms of the retainer are irrelevant; in fact the opposite is the case. It is the nature of the task or tasks the legal practitioner is retained to undertake, which principally determines the scope and content of their duty of care to their client. In *Gallagher v Carman* (1990) Aust Torts Reports 81-011 it was alleged that a solicitor had breached his common law duty of care by failing to advise experienced publicans about all aspects of the purchase of a liquor wholesale business. Williams J found that the plaintiffs had already made up their minds to purchase the land and business before they approached the solicitor, and they "did not seek the defendant's advice as to whether or not they should purchase the business..." (at 67,660). At 67,661 his Honour found that the solicitor's retainer was "merely to perfect the plaintiffs' intention of acquiring the land and the business". Similar statements of principle have been expressed in other cases: see *Krambousanos v Jedda Investments Pty Ltd* (1996) 64 FCR 348 at 365; *Regent Leisuretime Ltd v Skerrett* [2006] EWCA Civ 1184; *Cousins v Cousins* [1991] ANZ ConvR 245.

211. In relatively recent times a line of authority has emerged suggesting that in some circumstances the scope of a solicitor's duty of care may extend beyond the scope of their retainer. The existence of this so-called "penumbral" duty is usually traced to the comments of Deane J in *Hawkins v Clayton* (1988) 164 CLR 539 (*Hawkins v Clayton*) where he said concerning the duty of care owed by a solicitor at [579]:

> The content of the duty of care in a particular case is governed by the relationship of proximity from which it springs. It may, in some special categories of case, extend to require the taking of positive steps to avoid physical damage or economic loss being sustained by the person or persons to whom the duty is owed.

212. It is important to consider the factual context of those statements. The appellant was named the executor and residual beneficiary under the will of Mrs Brasier (the testatrix). The respondents were members of a leading Sydney law firm. The testatrix was a client of the law firm, and her will was prepared for her by a senior partner of the firm. After the will was executed, it was held on behalf of the testatrix by the law firm for safe keeping. In January 1975 the testatrix died, but the law firm took no steps to locate the appellant and inform him that he was named an executor and beneficiary under the will until March 1981. By that time the testatrix's property had fallen into disrepair and had been permitted, for a considerable period, to lie vacant. The decision of the majority in the High Court that the appellant was entitled to succeed in a claim for negligence against the law firm was based upon the relationship of proximity which existed between the testatrix and the law firm; the appellant succeeded in his capacity as executor of the will.

213. The facts in *Hawkins v Clayton* were highly unusual. The law firm had possession of the will, and knowledge of its contents. It was in a position to control the exercise of the appellant's rights as executor of the will, and could reasonably be expected to know that loss may ensue if the appellant's rights as executor were not exercised or their enjoyment was impaired.

214. The comments of Dean J in *Hawkins v Clayton* were referred to with approval by Kirby P in *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642, where his Honour stated that the scope of the duty of a solicitor to his or her client should be determined by ordinary tort principles, and should not be confined by notions of contractual liability. Although he was in dissent in the result, at 659 Mahoney JA agreed that the proper approach was to consider "the relationship of proximity between the parties".

215. The concept that a penumbral duty of care may be owed by a solicitor to their client, extending beyond the confines of a duty created by the ambit of their contractual obligation has, the first defendant submitted, been the subject of criticism: see *David v David* [2009] NSWCA 8; Aust Torts Reports 91-993 (*David v David*) and *Dominic v Riz* [2009] NSWCA 216. But even in these cases it was acknowledged that a solicitor may, in some circumstances, owe their client a duty of care which extends beyond competently carrying out their contractual obligations. Allsop P in *David v David*, after expressing the opinion that the notion that a solicitor may owe a client a penumbral duty of care that extends beyond the scope of the retainer was doubtful, said at [76]:

> If, however, the solicitor during the execution of his or her retainer learns of facts which put him or her on notice that the client's interests are endangered or at risk unless further steps beyond the limits of the retainer are carried out, depending on the circumstances, the solicitor may be obliged to speak in order to bring to the attention of the client the aspect of concern and to advise of the need for further advice either from the solicitor or from a third party.

216. It is unnecessary in the present case to resolve the question whether a solicitor owes a duty of care to their client extending beyond the terms of their retainer. It is sufficient to observe that much depends on the circumstances of each case, and that in every case the terms of the retainer will be critical to determining the scope of the solicitor's duty to their client.

217. In his submissions in reply to the first defendant, the plaintiff referred to the decision of the High Court in *Astley v Austrust Ltd* [1999] HCA 6; 197 CLR 1 as authority for the proposition that a plaintiff may sue a legal practitioner in either tort or contract. This may readily be accepted, but it does not answer the submission made by the first defendant: that the scope and content of the legal practitioner's duty to the client is primarily determined by the terms of the retainer. The plaintiff also submitted that a solicitor will be guilty of negligence where he or she fails to ensure that a contract, lease or mortgage complies with all requirements of the law, citing *Stone James and Co v Investment Holdings Pty Ltd* [1987] WAR 363 (*Stone James and Co v Investment Holdings Pty Ltd)*. This proposition may also be readily admitted, where the obligation to ensure such compliance is an express or implied term of the retainer. The solicitors in *Stone James and Co v Investment Holdings Pty Ltd* had been instructed to prepare a lease on behalf of a lessor for commercial premises. The lease they prepared did not comply with certain statutory requirements, rendering the lease void and unenforceable. The tenant vacated the premises during the term of the lease, and the lessor sued the solicitors. The failure of the solicitors to provide their client with an enforceable lease was a clear breach of their duty. The plaintiff also cited *Gray v Buss Murton* [1999] PNLR 882 (*Gray v Buss Murton*) as authority for the principle that a solicitor who fails to clarify the extent of his or her retainer and does not provide advice or assistance sought will be negligent. This proposition may also be accepted, but its application depends on the factual circumstances of the particular case. I should also

note that the allegation that the first defendant failed to clarify the terms of her retainer was not pleaded by the plaintiff as a ground of negligence.

218. The plaintiff referred me to a number of authorities which, he said, suggested that where there is a dispute concerning the terms or existence of a retainer, the version given by the client is likely to be given more weight: *Crossley v Crowther* (1851) 9 Hare 386 (*Crossley v Crowther*); *Re Paine* (1912) 28 TLR 201 (*Re Paine*); *Griffiths v Evans* [1953] 2 All ER 1364 (*Griffiths v Evans*). As far as I have been able to ascertain, the decision in *Crossley v Crowther* has only been followed in one subsequent decision, in the Malaysian High Court in *Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak* [1997] 5 MLJ 705. The decision in *Re Paine* has apparently never been followed and *Griffith v Evans* was followed in the same case that followed *Crossley v Crowther* and in another decision of the Malaysian High Court, *Dusun Desaru Sdn Bhd v Wand Ah Yu & Anor* [1999] 5 MLJ 449. The decision in *Crossley v Crowther* was also referred to by Rougier J in *Gray v Buss Murton*, but that case was decided on the basis that the solicitor had been negligent in failing to ascertain what advice the lay clients actually sought.

219. In my opinion the correct approach to determining the nature of a disputed retainer was expressed by Byrne J in *Equuscorp Pty Ltd v Wilmoth Field Warne (No 3)* [2004] VSC 164 at [61]:

> I now return to the disputed evidence of the 5 April conversation. On behalf of Equus Corp I was pressed, naturally enough, to prefer the evidence of Mr Russo. Reference was made to the dictum of Denning LJ in *Griffiths v Evans* in support of the proposition that, in the event of conflict between the evidence of a solicitor and that of the client with respect to an oral retainer, that of the client should be given greater weight. This dictum has been considered and explained recently by the Queensland Court of Appeal in *Adamson v Williams* where the court concluded that it should be understood as a reflection of the public policy which is against informality in a solicitor's retainer rather than as an a priori directive to prefer the evidence of one class of witness to that of another. If I may say so, with respect, this is the way I would prefer to understand his Lordship. I see my task as a trial judge to assess the evidence of the solicitor and that of the client on its merits and to resolve conflicts between them in the usual way in the light of my impressions of the witnesses and in the light of the surrounding circumstances. I do not approach this task with a predisposition to prefer either witness.
>
> (footnotes omitted)

220. The approach adopted by Byrne J was also adopted by Hamilton AJ in *Le Serve v Great Wall Resources Pty Ltd* [2010] NSWSC 1213 at [22]:

> It was pressed on me that in matters relating to a solicitor's retainer, in light of the absence of a file note, "the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it": per Denning LJ in **Griffiths v Evans** [1953] 1 WLR 1424 at 1428; and see per Young J (as his Honour then was) in **AW and LM Forrest Pty Ltd v Beamish** (27 August 1998, unreported) at 17. However, in my view it is not the rule that in such circumstances the client must be accepted rather than that the determination of the question must be based on a careful and objective examination of the evidence adduced: **Dew v Richardson** (Supreme Court of Queensland, Chesterman J, 18 August 1999, unreported) at [10]; **Equuscorp Pty Ltd v Wilmoth Field Warne (No 3)** [2004] VSC 164 per Byrne J at [10]. It is in accordance with this latter principle that I intend to proceed.

221. In *Adamson v Williams* [2001] QCA 38, the Queensland Court of Appeal (McMurdo P, Thomas JA, Mullins J) explained at [20] the context in which Denning LJ made his obiter remarks in *Griffith v Evans*:

> Such an approach originated in courts confronted with the task of deciding which affidavit to rely upon when there was a conflict between affidavits and no oral evidence: cf *Allen v Bone*; *re Gray v Coles*; *Morgan v Blyth*. The above statements are perhaps more reflections on matters of policy than directives to a court to favour one party over the other when such contests emerge.
>
> (footnotes omitted)

222. In *Dew v Richardson* [1999] QSC 192, Chesterman J, after noting that Denning LJ was in dissent in *Griffiths v Evans*, said at [10]:

> I cannot accept it is a principle of law that wherever a solicitor and his client disagree about the terms of a retainer (or advice) and a solicitor has not made a written note of the communication the client's evidence must be accepted. Findings of fact, especially those based upon an opinion as to the creditworthiness of witnesses are to be made from a careful and objective examination of the evidence adduced with respect to those facts.

223. The above passage was quoted with approval by Martin J in *Vella & Anor v Gustafson & Ors* [2004] QSC 424 at [27].

224. The terms of the retainer between the plaintiff and the first defendant are to be determined like any other disputed fact. The plaintiff has the onus of proving not only that there was such a retainer (which is admitted) but also the terms of that retainer. Whether the plaintiff has discharged that onus depends upon an analysis of the evidence relevant to that issue.

The claim in negligence - consideration

225. It is important to consider the contemporaneous documents concerning the plaintiff's purchase of an apartment in the Waldorf development in chronological order. As I noted earlier with regard to the plaintiff's credibility and the reliability of his evidence, his case depends upon the contemporaneous documents. I will examine the relevant documents in chronological order.

226. An email from the third defendant to employees of PPI dated 4 December 2001 advised that PPI "will be conducting its next two seminars on Wednesday 5th December and Wednesday 12th December" at the Waldorf Apartment Hotel in Canberra. It was noted that the seminars would focus on the "Waldorf South Sydney Investment Package" (Exhibit E, p 289).

227. A PPI document headed "Sales/Instructions to Proceed" dated 6 December 2001 nominated Ms Read as the proposed purchaser of unit 220. This suggests that this document was completed after the seminar on 5 December 2001 and before the proposed seminar on 12 December 2001. This document nominated the first defendant as the solicitor for Ms Read.

228. By a facsimile dated 14 December 2001, Mr Rubenstein forwarded the sales instructions of 6 December 2001 to the solicitors for the vendors, Landerer and Co, directing them to issue a contract for the sale of unit 220 to Ms Read's solicitors.

229. A document headed "Available Units – Waldorf South Sydney As At 16th Dec 01" records both units 208 and 220 as "Reserved" (Exhibit BJ). I take this to be a document setting out the sales status of the units in the Waldorf development as at 16 December 2001. It is unclear whether this is a document generated by the vendor or by PPI, but this is unimportant.

230. A letter from PPI and signed by the third defendant to Ms Read dated 19 December 2001 referred to her proposed purchase of unit 220 and offered suggestions for financing the purchase.

231. A further document entitled "Available Units – Waldorf South Sydney As at Jan 6/02" recorded the "client" for unit 208 as "Read 2" and for unit 220 as "Read 1". I take this document to be one setting out the sales status of the units in the Waldorf development as at 6 January 2002.

232. A further document entitled "Sales/Instructions to Proceed" was issued by PPI dated 11 January 2002 and nominated Ms Lim as the proposed purchaser of unit 208. This document also nominated the first defendant as Ms Lim's solicitor.

233. On 17 December 2001, Landerer and Co wrote to the first defendant enclosing a contract for sale of unit 220 to Ms Read. The letter noted that a s 66W certificate was attached to the contract and "must be given on exchange".

234. On 14 January 2002, Landerer and Co wrote to the first defendant enclosing the contract for the sale of unit 208 to Ms Lim. This letter was identical to the letter of 17 December 2001 regarding the sale of unit 220 to Ms Read and also required a s 66W certificate to be provided on exchange.

235. On 30 January 2002, Ms Read wrote to the first defendant concerning her proposed purchase of unit 220. In that letter, she said:

> Enclosed is a letter I have forwarded to FAI's solicitor/liquidator addressing a number of issues, as required under the terms of the purchase, to take advantage of the proposed Management Scheme (see attached "The Proposed Management Scheme").
>
> I note that the Management Scheme as outlined in the attached PPI/FAI investment memorandum is the major reason underlying my decision to purchase the property.
>
> ...
>
> I have spent considerable time going through the Contracts for the purchase since they were provided by your Office last Friday. Attached is list of issues which need to be addressed.
>
> I particular you will note a number of very significant issues in respect of Annexure "J", the "Unit Management Agreement". The Unit Management Agreement is in contradiction with the main body of the Contract as well as the basis of the purchase as notified in the investment memorandum and national advertisements.
>
> ...

236. The plaintiff testified that he assisted in writing this letter, and that he had spent the weekend prior to 30 January 2002 "going through all the documents" concerning the proposed purchase of unit 220 by Ms Read. It was the plaintiff who produced the "list of issues" referred to in this letter. The list set out 50 issues relating to the contract and its annexures which Ms Read asked the vendor to address.

237. On 30 January 2002, Ms Read also wrote to Landerer and Co directly indicating that she was purchasing unit 220 and advising that she wanted to enter into a UMA as provided for by the contract. The letter enclosed a cheque for $1,000.00 as a holding deposit, and confirmed that Landerer and Co had issued the contract for sale which was with the first defendant.

238. On 30 January 2002, Mr Freese of PPI sent a facsimile to Mr Rubenstein enclosing a "list of issues that client has raised in terms of the contract/management agreement". This was the same list of 50 issues prepared by the plaintiff (the 50 issues document) On 31 January 2002, Mr Rubenstein replied, providing responses to the 50 issues which had been raised.

239. On 31 January 2002, Mr Burns wrote to Mr Rubenstein saying, relevantly for present purposes:

> **Re: Units 208 and 220 Waldorf South Sydney Apartments – Purchase by Read and Lim**
>
> I advise that I act on behalf of Mr. Jeff Read and Ms. Sharon Lim in relation to their intended purchase of Units 208 and 220 at the Waldorf South Sydney Apartments.
>
> 2. Following representations made by Mr. Read raising a number of issues with respect to the Contract for Sale, Mr. Knell has suggested that I write to you in relation to my client's concerns.
>
> 3. I enclose a copy of the list of issues that Mr. Read has raised. However, I understand that Mr Knell has previously forwarded the list to you by email.
>
> ...

240. The plaintiff relied heavily upon the opening paragraph of this letter as an admission by the first defendant that by 31 January 2002 she had been retained by him to act on his behalf with regard to the purchase of a unit in the Waldorf development. The first defendant submitted that the letter contained an error by referring to the plaintiff instead of Ms Read.

241. The heading of the letter refers to purchases by "Read and Lim" and to units 208 and 220. The first paragraph refers to the units to be purchased as units 208 and 220. The plaintiff testified that he had originally been interested in purchasing unit 208. I accept that evidence because it is corroborated by contemporaneous documents, in particular the document titled "Available Units - Waldorf South Sydney as at Jan 6/02" (see [231] above) which records the "clients" for units 220 and 208 as "Read 1" and "Read 2" respectively. The evidence established that Ms Read was the person who had always demonstrated an interest in purchasing unit 220, so that I am satisfied that the reference to "Read 1" is a reference to Ms Read. The reference to "Read 2" as the client with regard to unit 208 supports the plaintiff's evidence that he was initially interested in purchasing unit 208. It is apparent that things changed quickly after 6 January 2002. By 11 January 2002, PPI had issued sales instructions for the sale of unit 208 to Ms Lim, and by 14 January 2002 Landerer and Co had written to the first defendant enclosing a contract for the sale of unit 208 to Ms Lim. No sales instructions were ever issued for the sale of unit 208 to the plaintiff, and no contract was ever issued by Landerer and Co for any such sale. I am quite satisfied that by 31 January 2002 the first defendant, through Mr Burns, was acting for Ms Lim on the purchase of unit 208. The assertion by the plaintiff that, as at 31 January 2002, he was still a prospective purchaser of unit 208 is simply not supported by the contemporaneous documents.

242. It is in this context, that the letter of 31 January 2002 must be considered. It is curious that the letter makes no reference to Ms Read, who was the prospective purchaser of unit 220. Neither the plaintiff nor Ms Lim were prospective purchasers for unit 220. If the heading to the letter of 31 January 2002 is correct, and if the plaintiff's evidence

about him still being a prospective purchaser of unit 208 at that time was also correct, the reference to the intended purchasers in the first paragraph should have been to the plaintiff and Ms Read. On the other hand, if the plaintiff's evidence is correct and the reference in the letter to the plaintiff as a prospective purchaser of unit 208 is correct, there is no explanation for the reference to unit 220 in the letter at all as neither the plaintiff nor Ms Lim were prospective purchasers for unit 220.The probable explanation for this conundrum is that advanced by the first defendant. It is probable that the reference to "Jeff Read" is an error, and the intended reference was to his daughter Ms Read. It is probable that this error occurred because of the plaintiff's involvement in assisting Ms Read with the purchase of unit 220, and in particular in drafting the 50 issues document which was the subject of the letter of 31 January 2002.

243. In any event, the evidence established that the letter of 31 January 2002 is unreliable as a source of information establishing that the first defendant was acting for the plaintiff as at 31 January 2002.

244. On 31 January 2002, Mr Burns sent an email to the plaintiff saying:

> Please find attached a copy of a letter that I have sent to Mr. Arvi [sic] Rubenstein concerning this matter. Sid Knell suggested that Mr Rubenstein would be the best person, at this stage, to contact.

245. The letter which is attached, is the letter of 31 January 2002 enclosing the list of 50 issues prepared by the plaintiff. As the plaintiff was, on any account, taking the lead with regard to the 50 issues document, this email is equally consistent with either the first defendant having been retained by the plaintiff or with her communicating with the plaintiff as part of his retainer with Ms Read and Ms Lim.

246. By facsimile dated 1 February 2002, Mr Rubenstein replied to the first defendant providing answers to a number of issues raised in the 50 issues document. This reply does not assist in determining issues concerning the plaintiff's retainer of the first defendant.

247. By letter dated 4 February 2002 to the first defendant, Ms Read said, regarding her proposed purchase of unit 220:

> Following up my letter of 30 January 2002 and the list of issues in relation to the Contract for Sale for the above property which I am purchasing through Prime Property Investment Pty Ltd from the Vendor – FAI General Insurance Company Limited.
>
> In a Fax to your Office dated 1 February 2002, Mr Avi Rubenstein of Waldorf Apartments Australia provided clarification in relation to the detailed issues raised. In light of that clarification I consider we are now in a position to proceed with the Contract appropriately amended consistent with the clarification provided by Mr Rubenstein.
>
> Accordingly, enclosed is a signed copy of the amended Contract for your consideration, further amendment as appropriate and submission to the Vendor's agents with a view to progressing the matter to completion. The Attachment lists the amendments made consistent with Mr Rubenstein's clarification.
>
> ...

248. In cross-examination it was suggested to the plaintiff that he had personally made the amendments to the contract referred to in this letter, but no clear agreement to that proposition was forthcoming. I am not satisfied that the plaintiff made any such amendments to the contract for the purchase of unit 220 by Ms Read at that time.

249. On 7 February 2002, Mr Burns completed s 66W certificates with regard to the purchases by Ms Lim and Ms Read.

250. By contracts dated 8 March 2002, Ms Lim purchased unit 208 and Ms Read purchased unit 220. By letter dated 11 March 2002 from Landerer and Co to the first defendant, the solicitors for the vendor confirmed that exchange had taken place with respect to the purchase of unit 208 by Ms Lim.

251. On 15 March 2002, PPI issued sales instructions for the sale of unit 304 to the plaintiff. These were the first sales instructions issued regarding a purchase by the plaintiff. Under the heading "Solicitor" in the sales instructions, the letters "TBA" are typed. I take that to mean "to be advised". Under the same heading the "Address" is described as "C/- Prime Property Investments P/Ltd, PO Box [redacted] Red Hill ACT 2603". If, as the plaintiff asserted, he had retained the first defendant to act on his behalf as the purchaser of a then undetermined unit in the Waldorf development, in mid-December 2001, and that retainer continued until 15 March 2002, it is curious that the first defendant is not specified as the plaintiff's solicitor.

252. By letter dated 18 March 2002, Landerer and Co wrote directly to the plaintiff, care of PPI, enclosing a contract for sale with regard to unit 304.

253. As noted above at [131], it is probable that on or shortly before 4 April 2002 Mr Freese of PPI identified that unit 304 did not include a car park. I am satisfied that the contract provided to the plaintiff via PPI undercover of the letter from Landerer and Co on 18 March 2002 was then amended, probably by Mr Freese, to substitute unit 206 for unit 304. I am satisfied that the plaintiff initialled the amendments and also initialled each page of the 14 annexures, marked A to N. The contract was not amended to nominate the first defendant as the plaintiff's solicitor.

254. By letter dated 4 April 2002 from the plaintiff to Landerer and Co, the plaintiff purported to enclose the signed contract for purchase of unit 206 together with a cheque for the deposit. While this letter is dated 4 April 2002, I am satisfied that it was not sent on that date. The deposit cheque, a Westpac bank cheque, is dated 10 April 2002. In addition, by letter dated 10 April 2002 to the plaintiff care of PPI, Landerer and Co said "We... have been instructed by our client that Mr Read will be purchasing Unit 206 instead of Unit 304. We now enclose amended front page of the Contract for Sale..." This letter strongly suggests that Landerer and Co had not, as at 10 April 2002, received the plaintiff's letter of 4 April 2002. It is not clear whether the letter from Landerer and Co crossed with the plaintiff's letter of 4 April 2002, or whether the plaintiff's letter was ultimately dispatched after receipt of the letter from Landerer and Co, but the former seems more likely. The front page of the contract that was ultimately signed by the plaintiff and dated 2 May 2002 (Exhibit N) was, I am satisfied, the same front page of the initialled but unsigned contract in Exhibit AM. What became of the amended front page of the contract referred to in Landerer and Co's letter of 10 April 2002 is unclear, and is probably unimportant. What is clear is that on 16 April 2002 Landerer and Co sent a facsimile to Mr Rubenstein saying that they had received a signed contract for sale from the purchaser together with a cheque for the 10 per cent deposit.

255. In his letter of 4 April 2002 to Landerer and Co, the plaintiff said that he was enclosing a table of agreed amendments to the contract. A copy of the plaintiff's letter and the table of amendments were forwarded to Mr Rubenstein as part of the facsimile on 16 April 2002.

256. By facsimile dated 18 April 2002 from Landerer and Co to the plaintiff directly (not via PPI), the plaintiff was advised that his letter dated 4 April 2002 had been received on 15 April 2002. He was further requested to forward "a section 66W" signed by his solicitor. I take this to be a reference to a s 66W certificate. Such a certificate avoided the operation of any statutory "cooling off" period during which the purchaser could avoid the contract. Such a certificate had to be signed by a barrister or solicitor not acting for the vendor, and had to certify that the barrister or solicitor had explained the effect of the contract to the purchaser.

257. On 19 April 2002 the plaintiff wrote to the first defendant in the following terms:

> **PROPERTY:** **WALDORF APARTMENTS 47-49 CHIPPEN STREET**
> **PREMISES:** **UNIT 206 (LOT 40) STRATA PLAN 64972**
> **PURCHASER** **JEFFREY MAXWELL READ**
>
> I am purchasing the above property through Prime Property Investment Pty Ltd from the Vendor – FAI General Insurance Company Limited.
>
> The Contract for Sale and Unit Management Agreement are to be identical to those for Susan Read (unit 220) and Sharon Lim (Unit 208) which I have been through in some detail. I have paid a deposit of $17,765 being 10% of the purchase price of $177,650 and finance is approved.
>
> The Vendor has agreed to settlement of Units 206, 208 & 220 next week as a special concession.
>
> To facilitate this I have received the attached Fax from the Vendor's Solicitor requesting:
>
> - Signed Section 66W Form in respect of Unit 206; and
> - My concurrence to minor amendments to the Schedule of Inclusions.
>
> Could you please submit the Signed Section 66W Form to Geoff Farland together with the attached amendments to the Schedule of Inclusions that I have initialled to signify my concurrence.

258. On 24 April 2002, Mr Burns sent a facsimile to Landerer and Co enclosing the s 66W certificate and "what I understand is the agreed inclusions list". The certificate forwarded by Mr Burns under cover of this facsimile was, in fact, the certificate for unit 304, presumably provided to the plaintiff with the contract for unit 304, but there is no doubt that the certificate was intended to be a certificate with regard to unit 206. The certificate was dated 24 April 2002, by which time the plaintiff was no longer intending to purchase unit 304.

259. On 23 April 2002 at 11.56 am, the plaintiff sent an email to Mr Freese at PPI saying:

> How are we going for settlement this Friday?
>
> I have given Fiona everything BUT have not been referred through to NAB to sign papers.
>
> I trust Ross has given Geoff Farland the 66W to exchange on 206.
>
> Can you ensure it is all happening please.

260. On 24 April 2002, Mr Burns sent an email to the plaintiff saying:

> I have just spoken to Geoff Farland concerning this matter. He advised that he will be forwarding a letter to us ASAP in relation to the proposal to now enter into residential tenancy arrangements instead of the current Unit Management Agreement.
>
> 2. He did not think that settlement on Friday was possible but said that next week was what he would be aiming for.

I infer from this email that there were communications between the plaintiff and Mr Burns, and between Mr Burns and Mr Farland of Landerer and Co, prior to this email concerning a proposal that a residential tenancy agreement be entered into rather than the UMA. There are no documents which evidence such communications, but it is highly probable that they occurred shortly before 24 April 2002, based upon the date of the email and the following correspondence. The plaintiff claimed that this email was an assurance that he could let the premises under a residential tendency agreement, rather than having to enter into the UMA. I am not satisfied this was the case. The email is not couched in the language of confirmation of a representation by the vendor that the unit could be let under a residential agreement. The contract for sale anticipated that in some circumstances WASS may require those entering into a UMA to enter into residential tenancy agreements with WASS in substitution for the UMA: see [303] below. It is probable that the plaintiff was at this point exploring entering into such an agreement with WASS rather than the UMA. This is supported by subsequent correspondence from the vendor to the first defendant on 3 May 2002: see [265] below.

261. On 30 April 2002, the plaintiff wrote to Landerer and Co in the following terms:

> **YOUR CLIENT:** **FAI GENERAL INSURANCE COMPANY LIMITED**
> **PROPERTY:** **WALDORF APARTMENTS 47-49 CHIPPEN STREET**
> **PREMISES:** **UNIT 206 (LOT 40) STRATA PLAN 64972**
>
> My Solicitor Ross Burns forwarded a copy of the Execution Page of the Contract for Sale for the above Unit which apparently was unsigned at the time it was forwarded to your Office by Prime Property Investment.
>
> I have signed the Execution Page and forwarded it to you by Australia Post Express Mail. A copy of the signed page is attached.
>
> I understand Ross Burns has provided the Section 66W Form you required.
>
> Please proceed with the Exchange at the earliest opportunity.

Attached to this letter, which was also sent by facsimile, was what appears to be a copy of the execution page for the contract for unit 206, signed by the plaintiff.

262. On 1 May 2002, the plaintiff wrote to Landerer and Co as follows:

> **YOUR CLIENT:** **FAI GENERAL INSURANCE COMPANY LIMITED**
> **PROPERTY:** **WALDORF APARTMENTS 47-49 CHIPPEN STREET**
>
> I am involved with purchasing a number of Units in the above property from the Vendor – your client FAI General Insurance Company Limited (in liquidation) – through its agent Prime Property Investment Pty Ltd. I understand settlement of these properties has been delayed awaiting NSW Supreme Court concurrence to the proposed Guarantee Rental arrangement involving 'investment' of 10% of Sale Price.
>
> The continued delays are imposing substantial economic costs on the purchasers including loss of revenue on their deposit, increased interest rates and potentially loss of taxation deductions in respect of the current financial year.
>
> In view of these exigencies, I understand you are prepared to contemplate an alternate arrangement whereby the Manager would assume responsibility for the Guarantee. In consideration of the Contract for Sale and Unit Management Agreement, I propose the amendments outlined in the Attachment as a means of allowing settlement of all existing properties.

> The proposed Amendments are of a very minor nature placing responsibility for the Guarantee arrangements on the Manager where they ultimately rest given that the "Vendor" is in Liquidation.
>
> The actual arrangements between the Vendor and the Manager can be resolved between the Vendor and the Manager involving a subsequent payment when the Manager has arranged a Bank Guarantee or just leaving the matter with Manager from the outset with appropriate financial settlement between the Vendor and the Manager outside of the Contract for Sale.
>
> The proposed Amendments would provide the flexibility for you to develop such arrangements with the Manager subject to any Supreme Court ruling if this is still required.
>
> Please consider!!

263. In this letter the plaintiff asserted that he was "involved" with purchasing "a number of Units" in the Waldorf development. This appears to be a reference to his own purchase of unit 206, and to his involvement in the purchases by Ms Lim and Ms Read. He proposed that the Manager take responsibility for the guarantee provision under the contract. Annexed to the letter is a schedule of proposed amendments to the contract which the plaintiff believed needed to be made to make this occur. From the proposed amendments it appears that the Manager referred to was WASS, the Manager to be appointed under the UMA.

264. On 1 May 2002, Landerer and Co sent a facsimile to Mr Burns saying "We confirm that we have received original signed execution page from your client and faxed copy of section 66W from yourself. Please confirm we may exchange contracts." In handwriting on this facsimile Mr Burns has written "2/5 Confirmed. Please exchange at your convenience." It is important to note that the facsimile from Landerer and Co speaks of receiving the signed execution page from the plaintiff and the s 66 W certificate from the first defendant.

265. On 3 May 2002, Landerer and Co sent a facsimile to Mr Burns, referring to the plaintiff's facsimile of 1 May 2002, and agreeing to FAI entering into a residential lease with the plaintiff. This makes it very clear that the correspondence between the plaintiff and the first defendant referred to above concerned the possibility of the plaintiff and WASS entering into a residential tenancy agreement.

266. The "Contract date" appearing on the front page of the contract executed by the plaintiff is 2 May 2002. I infer that exchange took place on or shortly after 2 May 2002.

267. By letter dated 15 May 2002, apparently faxed to the first defendant, the plaintiff wrote to Mr Burns on behalf of himself, Ms Lim and Ms Read, saying "You are handling the conveyancing of these properties", and confirming that they wanted Mr Burns "to continue acting for each of us in respect of the Waldorf matters". The plaintiff then goes on to say:

> I understand that ASIC has now approved the guarantee arrangements proposed in the Contract for Sale. Accordingly, we ask that you arrange settlement at the earliest opportunity on the basis of the Contracts of Sale and Unit Management Agreements as exchanged.
>
> Sharon and Susan are ready for immediate settlement – this Friday would be ideal if that can be arranged.
>
> I still need to sign papers with NAB to finalise my loan which I will do tomorrow.

> One important point is to ensure that Waldorf Apartments South Sydney signs the Unit Management Agreements that we returned with the Contracts for Sale at settlement.

The contents of this letter are curious if the plaintiff had, as he alleged, retained the services of the first defendant continuously from December 2001 to act for him on the proposed purchase of a unit in the Waldorf development. Why would he need to write to Mr Burns "confirming" that he was acting for the plaintiff in the purchase? The language of this document fits more comfortably with the proposition that the first defendant was initially retained for the limited purpose of supplying a s 66W certificate. It is also important to note that the plaintiff expressed his understanding that ASIC involvement in the Waldorf development transaction concerned approval of guarantee arrangements in the contract for sale, clearly a reference to the guaranteed rental returns to those entering into the UMA.

268. On the same day, the plaintiff faxed a further letter to Mr Burns complaining that NAB had not received copies of the necessary documents to allow it to process his loan application. By letter to the plaintiff of the same date, Mr Burns advised him that the exchanged contract for unit 206 had only recently been returned from the vendor, and had been forwarded to the bank. On the same day, and clearly referring to the first letter he received from the plaintiff that day, Mr Burns wrote to Landerer and Co as follows:

> I have been informed that the guarantee arrangements have now been approved. Could you please confirm?
>
> 2. If this is the correct position, my clients instruct that they wish to proceed to Settlement on the basis of the (already executed) Unit Management Agreement.
>
> 3. Could you please confirm the above arrangements and, in particular, whether the Unit Management Agreements have been executed by your client in readiness for Settlement.

269. Settlement of the purchase took place on 31 May 2002. The first defendant sent an invoice to the plaintiff by letter dated 31 May 2002 for work done on the purchase. The invoice identified the work done as:

> Taking instructions, perusal of the Agreement for Sale and associated documentation, attending to execution of same, attending upon Seller's Solicitors, execution of mortgage documents (where applicable), arranging exchange and settlement, due skill, care and attention.

The inclusion of the words "where applicable" suggests that this was a generic form of account for purchase of a property, but ultimately that is of no importance.

270. A number of things emerge from a consideration of the contemporaneous documents. First, there are no documents evidencing a retainer between the plaintiff and the first defendant before 19 April 2002, except for the letter from Mr Burns to Mr Rubenstein on 31 January 2002 which, for the reasons I have given, I am satisfied is unreliable as proof of the existence of such a retainer.

271. Secondly, the contemporaneous documents reveal the plaintiff engaging in conduct that positively suggests he had not retained the first defendant to act on his behalf in this transaction prior to 19 April 2002. By letter dated 4 April 2002, the plaintiff wrote directly to Landerer and Co enclosing the contract for unit 206 and the deposit cheque, which would be most unusual if the first defendant had been retained to act for and advise him on this transaction. In that letter, the plaintiff also included a table of agreed amendments to the contract, but there is no documentary evidence of those

amendments having been forwarded to Mr Burns before the plaintiff's letter was sent to Landerer and Co, and no evidence Mr Burns was consulted about them. If, as the plaintiff asserted, the first defendant had been acting for him since December 2001, it is curious that the sales instructions issued by PPI on 15 March 2002 do not nominate the first defendant as the plaintiff's solicitor; after all, the same documents issued by PPI with regard to the purchases by Ms Read and Ms Lim both nominated the first defendant as their solicitor. Similarly it is curious that the contract for the proposed sale of unit 304 to the plaintiff, later amended to refer to unit 206, does not nominate the first defendant as the plaintiff's solicitor. Even if one were to hypothesise that the plaintiff had retained the first defendant in December 2001, but PPI and Landerer and Co were not aware of that fact prior to 19 April 2002, there is no evidence that the plaintiff sought to inform either PPI or Landerer and Co of the fact that the first defendant was acting as his solicitor despite the contract having been forwarded to him directly and in a form not nominating the first defendant as his solicitor. What in fact occurred was that the plaintiff personally wrote to Landerer and Co enclosing a contract which he had intended (but neglected) to sign together with the deposit cheque. This can only be interpreted as an attempt by the plaintiff to personally exchange contracts for the purchase of unit 206. If the first defendant had in truth been acting for the plaintiff at this time, it is hard to believe that the plaintiff would not have provided the signed contract and deposit cheque to the first defendant with instructions that she arrange for exchange of contracts.

272. It is a significant matter that the first correspondence from the plaintiff to the first defendant concerning the purchase of unit 206, being the plaintiff's letter of 19 April 2002, came very shortly after the plaintiff had provided his letter dated 4 April 2002 and the deposit cheque to Landerer and Co. The plaintiff's letter to the first defendant came one day after he received a facsimile from Landerer and Co advising that his letter of 4 April 2002 had been received, but that the plaintiff would also need to forward a s 66W certificate. The timing of this correspondence strongly suggests that the plaintiff's letter of 19 April 2002 to the first defendant was prompted by the need to obtain the s 66W certificate.

273. I am not satisfied that the plaintiff retained the first defendant regarding his purchase of a unit in the Waldorf development until 19 April 2002. Contact, and correspondence, between them prior to that date was referable to the plaintiff's assistance of Ms Lim and Ms Read with their purchases.

274. Even after the plaintiff retained the first defendant, he continued to correspond personally with Landerer and Co, and to attempt to personally negotiate amendments to the terms of the contract.

275. A legal practitioner may be engaged to act in the entirety of a transaction, or only with regard to part of a transaction. He or she may be engaged to provide advice about a transaction, or simply to ensure that a transaction which the client has already determined to undertake is given effect. Having regard to the plaintiff's personal qualities and the contemporaneous documents, I am unable to be satisfied that the plaintiff retained the first defendant to do more than provide the s 66W certificate, and to ensure that the contract for sale and the UMA were given legal effect in the amended form that he proposed.

276. That, however, is not the end of the matter. The first defendant, consistent with the above, had an obligation to explain the contract for sale to the plaintiff. Mr Burns

certified in the s 66W certificate that he had explained the effect of the contract to the plaintiff, so there can be no doubt that the first defendant's retainer encompassed the obligation to explain the contract to the plaintiff. As part of that process, the first defendant would have been obliged to identify that what was being purchased was a serviced apartment which could not be used as a residence by the plaintiff or leased by him to a tenant under a standard residential tenancy agreement. These facts are clearly stated in the contract. At Annexure H to the contract for sale, amendments to the model by-laws applying to the Waldorf development are set out. These by-laws specify that the permitted use of Lots 2 to 73, including the plaintiff's Lot, is "Serviced Apartments". Annexure G includes a copy of the Development Consent which describes the proposed development as "Use approved motel as serviced apartments". One of the conditions subject to which the Development Consent was given is "That at no time shall the building be used as a residential flat building without the prior consent of Council".

277. I have already given reasons why I am not prepared to accept the evidence given by the plaintiff as reliable. There is therefore no reliable evidence that the first defendant breached its obligation to explain the contract for sale to the plaintiff, including drawing his attention to the permissible use of the premises as a serviced apartment. There is, indeed, every reason to suppose that the plaintiff was well aware that the permissible use of unit 206 was restricted to use as a serviced apartment before he purchased it. Before he signed the contract for sale the plaintiff initialled each page of the contract and the annexures. In his evidence, the plaintiff denied that he initialled each page of the annexures to show that he had read them; he suggested he initialled them "to signify that this is the document and that someone can't substitute a page". This does not make sense. If the plaintiff's concern was to identify each page of the contract and its annexure by means of his initials so that a page could not be substituted, this clearly indicates a concern on his part that the contents of each of the pages so initialled should form part of the contract. This implies knowledge on his part of the contents of the initialled pages. There would be no point in being concerned that a page, or an annexure, not be substituted if the plaintiff was not aware of the contents of that document.

278. The plaintiff did not impress me as a man who would have ignored the annexures to the contract. It is beyond doubt that he read some of the annexures, because the 50 issues document he prepared raised issues concerning Annexures I and J. The plaintiff's evidence that he thought that the other annexures were just "for historical purposes" is not credible. I am satisfied that the plaintiff spent a considerable amount of time reading the contract and determining how each part of the contract interacted with the other parts. It defies belief that he would not have read and familiarised himself with all of the contract. The plaintiff was an experienced property investor, with sufficient self-confidence and belief to critique the contract for sale and the UMA, and to negotiate amendments to these documents. It is true that his negotiations with regard to the annexures to the contract for sale were limited to Annexures I, J and N, but these were the only annexures which permitted of negotiation with the vendor.

279. Digressing for a moment, it is particularly difficult to accept that the plaintiff did not read Annexure "H" in his own study of the contract for sale. The by-laws of the apartment complex can impact upon the rights of unit holders, and it is difficult to believe that the plaintiff was indifferent as to any changes made to the model by-laws prescribed by statute.

280. I am therefore satisfied on the balance of probabilities that by the time the plaintiff retained the first defendant on 19 April 2002 he was aware of the fact that the permitted use of the apartment he was proposing to purchase was restricted to use as a serviced apartment.

281. I should note at this point that the plaintiff alleged that he relied upon representations made by PPI in its Waldorf marketing document in December 2001 in forming the belief that he was purchasing a property that he could live in or rent out using a normal residential tenancy agreement. I will refer to those representations in greater details when I come to consider the plaintiff's case against the third defendant, but it is sufficient at this point to note that I am not satisfied that the plaintiff did have any intention to reside in unit 206 when he purchased it, and I am satisfied that by January 2002, when he received and read the standard contract for sale of Waldorf development apartments, he was aware that the representations made in the PPI promotional material were wrong.

282. To summarise at this point, regarding the plaintiff's claim against the first defendant:

    (a) I am not satisfied that the plaintiff retained the first defendant before 19 April 2002;

    (b) I am not satisfied that the plaintiff retained the first defendant to do anything more than provide a s 66W certificate, and to ensure that the transactions which the plaintiff had already negotiated and had determined to proceed with were given legal effect;

    (c) I am satisfied that prior to 19 April 2002 the plaintiff had read the contract for the purchase of unit 206 and had initialled each of its pages, including the annexures;

    (d) I am therefore satisfied, bearing in mind the plaintiff's intelligence and experience, that he understood by 19 April 2002 that the permitted use of unit 206 was limited to that of a serviced apartment; and

    (e) I am not satisfied that the plaintiff has proven that the first defendant did not accurately explain to him the effect of the contract before providing the s 66W certificate.

283. I am not satisfied that the plaintiff told Mr Burns that he wanted an apartment to live in, or words to that effect. The clear focus of the plaintiff, as revealed in contemporaneous documents, was upon maximising his financial return from the purchase of unit 206. The evidence established that he was keen, as a part of that process, to enter into the offered UMA. I am also satisfied that by the end of January 2002 at the latest, the plaintiff no longer had any prospective business in Sydney which would require him to regularly reside in that city.

284. There is no reliable evidence that the plaintiff sought the first defendant's advice about the financial or commercial implications of entering in the UMA. It is clear that the plaintiff relied upon his own counsel with regard to those matters. It is, however, probable that Mr Burns was aware that the plaintiff proposed entering into the UMA; the form of the UMA was, after all, one of the annexures to the contract for sale, and Mr Burns verified that he had explained the contract for sale to the plaintiff. This knowledge on the part of Mr Burns, and so the first defendant, is relevant to

determining whether a duty existed on the part of the first defendant to provide advice to the plaintiff about whether the scheme created by the UMA was, or could be, a MIS.

285. The first defendant was experienced in acting for purchasers of serviced apartments. I have no doubt that she was aware of the fact that PPI was holding her firm out as having such experience and was content for them to do so. In my opinion, any reasonable, competent solicitor practising in the field of acting for purchasers of serviced apartments would be aware of the need to consider whether any proposed arrangement for managing the unit would constitute a MIS.

286. I am satisfied that in the particular circumstances that existed, the first defendant had a duty to tell the plaintiff that the proposed arrangements for the management of unit 206 may constitute participation by the plaintiff in a MIS, and to explain the implications of that advice to the plaintiff.

287. The onus lies on the plaintiff to establish that the first defendant breached this duty. As I have already stated, I am not satisfied that the plaintiff's recollections of events in 2001 and 2002 concerning the purchase of unit 206 are reliable. There are no contemporaneous records which assist. I am not satisfied that the first defendant did not provide advice to the plaintiff on this issue as part of explaining to him the contract for sale.

288. It may be suggested that the lack of any contemporaneous correspondence between the plaintiff, FAI, Landerer and Co, PPI and the first defendant concerning this issue may itself suggest that advice was not given to the plaintiff by the first defendant on this issue. As I have noted, the plaintiff is not a person who would neglect a potential advantage from these transactions if he thought it may be available. There are good reasons, however, to reject this line of reasoning.

289. By the time the plaintiff retained the first defendant to act for him on the purchase of unit 206, he had already been advised, in response to his 50 issues document, that it was unlikely that any significant change to the UMA would be contemplated. On 1 February 2002, Mr Rubenstein faxed the first defendant in response to Mr Burns' facsimile of 31 January 2002 annexing the 50 issues document. As part of this facsimile, Mr Rubenstein said (Exhibit BJ, Vol 1, pp 51-53):

> I have received a copy of the issues raised by the purchasers. Most of the comments are of point picking nature and I believe that will not cause any significant delay in exchange or settlements.
>
> Please be aware that the UMA have been designed to comply with ASIC requirements and therefore it seems complicated in certain aspects. Both of the UMA & The contract have been previously approved by ASIC & THE NSW Supreme Court and it is unlikely that the liquidator will be prepared to amend them again.
>
> As per my discussion with Sydney The Waldorf will consider minor amendment to THE UMA as long as there are no changes in the commercial term and the concept as approved by ASIC & The Court is not been affected. I believe the commercial deal for purchasers is excellent and is been proved by the unprecedented demand to the product since the new price list been introduced.

290. In addition, any advice given to the plaintiff with regard to the possibility that the proposed UMA constituted a MIS would have been to the effect that such a scheme is legal despite its non-registration, that the plaintiff's rights under the UMA were enforceable, and that appointment of a "responsible entity" would not have provided the plaintiff with any greater security than the UMA regarding financial returns on his

investment. One explanation for the absence of correspondence from the plaintiff on the issue would be that the first defendant did not advise him of the fact that the arrangements may constitute a MIS; equally it may be because the plaintiff saw no real prospect of altering the arrangement, and was not particularly concerned in any event.

291. Even if the first defendant breached its duty of care to the plaintiff by not advising him that the proposed management arrangements may constitute a MIS, I am not satisfied that the plaintiff would have acted any differently if he had received proper advice. The plaintiff's focus was on maximising his financial return on his investment and the fact that the management scheme was not registered was not going to have any impact on his return, and registration would not have provided greater returns or added financial security.

292. I will consider each of the Particulars of negligence as set out in the FASOC.

293. At paragraph 18(A)(i)(1) of the FASOC, the plaintiff alleged that the first defendant was negligent in failing to identify from the contract for sale, or make enquiries about, or advise the plaintiff that the units in the Waldorf development could only be used as serviced apartments. I am not satisfied that the first defendant, through Mr Burns, did not identify the permitted use of the units from the contract and communicate it to the plaintiff when explaining the contract to him for the purposes of the s 66W certificate. In any event, I am satisfied that the plaintiff was aware of the restrictions on the permitted use of the apartments by reason of his own reading of the contract, so that even if the first defendant had breached her duty of care to the plaintiff, that breach was not causative of loss.

294. At paragraph 18(A)(i)(2) of the FASOC, the plaintiff made the same claim about the absence of guarantees by the 'Waldorf Management Group' in respect of the represented returns to owners under the scheme. The "represented returns" referred to by the plaintiff are apparently the figures contained within financial projections for studio and one bedroom apartments in the Waldorf development found within the Waldorf marketing document. There are a number of things that can be said about this allegation. First, I find it difficult to believe that the plaintiff ever saw the contents of these financial projections as representations of returns to owners under the UMA. It is clear that the financial projections were based on assumptions set out in the document, including full occupancy. Secondly, there is no reliable evidence that the first defendant was ever provided with a copy of the Waldorf marketing document. Thirdly, it is clear from the contract for sale that the only guarantee to be provided was as to income for the first five years of the UMA and I am satisfied that the plaintiff was aware of this by reason of his own reading of the contract. Fourthly, I am not satisfied that a competent lawyer in the position of the first defendant, instructed in the limited way she was, would have drawn the plaintiff's attention to the lack of guarantees by third parties concerning the performance by WASS of its contractual obligations under the UMA. Fifthly, there is no reliable evidence of what the first defendant, through Mr Burns, said or did not say to the plaintiff about the UMA. Finally, there is no evidence that the plaintiff suffered any loss or damage by the absence of such guarantees.

295. At paragraph 18(A)(i)(3) of the FASOC, the plaintiff made a similar allegation concerning the "apparent requirement for approval of the transactions". By reference to paragraphs 8 and 12 of the Plaintiff's Further and Better Particulars dated 16 January 2014, it appears that the plaintiff alleged that by letter dated 15 May 2002 he required the first defendant "to make the referenced enquiries prior to completion of

the Waldorf transactions on 31 May 2002 to enable the Plaintiff to rely on the protection against loss afforded under Clause 6 of the Waldorf contracts". The relevant contents of the plaintiff's letter of 15 May 2002 are set out at [267] above. It is important to consider that letter within the context of other contemporaneous documents. The plaintiff was aware from at least early February 2002 that aspects of the contract for sale and the UMA were subject to approval by ASIC and the NSW Supreme Court because the vendor was a company in liquidation. The aspects that were subject to approval included the guarantee provisions by which the income return of a purchaser who signed the UMA was guaranteed for a five year period. The apparent suggestion by the plaintiff that in his letter of 15 May 2002 he was instructing the first defendant to seek confirmation from the vendor that he could rely on representations allegedly made in the Waldorf marketing documents, or in Mr Rubenstein's letter of 1 February 2002 replying to the 50 issues document, before he authorised settlement is unsustainable, and suggests, at best, a mental reconstruction of events by the plaintiff. The letter of 15 May 2002 specifically refers to "guarantee arrangements proposed in the Contract for Sale". In context, this can only be a reference to the guarantee arrangements for income for the initial five year period for those signing the UMA. I am satisfied beyond any real doubt that the letter of 15 May 2002 was not an instruction by the plaintiff to seek confirmation from the vendor that he could rely upon extra-contractual representations.

296. By paragraph 18(A)(ii) of the FASOC, the plaintiff alleged that the first defendant was negligent in failing to make enquiries of ASIC seeking confirmation that the Waldorf scheme was an approved scheme (by which I understand the plaintiff to mean a registered MIS). I am not satisfied that, in the circumstances which I have found existed, the first defendant had a duty to make enquiries of ASIC on this issue unless he was instructed to do so. I am satisfied that the first defendant had a duty to advise the plaintiff that the proposed scheme for managing his unit may constitute an MIS, and to explain to the plaintiff what that may mean for him. As there is no clear or reliable evidence of what conversations occurred between the plaintiff and the first defendant, the plaintiff has not established that the first defendant breached this duty.

297. By paragraph 18(A)(iii) of the FASOC, the plaintiff alleged that the first defendant was negligent in failing to make enquiries of Sydney City Council which would have revealed the mixed-use representation was incorrect. For the reasons that I have given I am not satisfied that the first defendant did fail to advise the plaintiff of the limited use to which unit 206 could be put and, in any event, I am satisfied that the plaintiff was aware of the restriction based on his own reading of the contract.

298. By paragraph 18(B) of the FASOC, the plaintiff claimed that the first defendant was negligent by "accepting and representing" to him "undertakings" made by third parties with vested interests in the Waldorf "transactions", knowing that the plaintiff would rely upon those "undertakings" and without advising him of the risks inherent in such reliance, without seeking confirmation of those undertakings through the vendor's solicitors, and without advising him of the need for formal guarantees in respect of those "undertakings". From the plaintiff's Further and Better Particulars dated 16 January 2014, I apprehend that the plaintiff is using the word "undertaking" as meaning a representation, and not in the sense that one would understand an undertaking between legal practitioners. The documents referred to by the plaintiff were the letter from Mr Burns to Mr Rubenstein dated 31 January 2002, the facsimile from Mr Rubenstein to the first defendant dated 1 February 2002 and the facsimile from

Mr Rubenstein to PPI dated 31 January 2002. These documents all concern the plaintiff's 50 issues document, and the response to that document by Mr Rubenstein.

299. The plaintiff's contention is that the first defendant should have cautioned him against relying on the representations made by Mr Rubenstein without having some form of guarantee in place that the representations would be fulfilled. First, there is no evidence that the first defendant ever received or saw the facsimile from Mr Rubenstein to PPI, so there can be no suggestion of negligence on the part of the first defendant in failing to provide the plaintiff with advice about the contents of that document. Secondly, while I am prepared to accept that the first defendant did receive the facsimile directed to her from Mr Rubenstein, I am not satisfied that the first defendant had been retained by the plaintiff at that time. It is beyond doubt that the plaintiff had dealings with the first defendant in January and February of 2002, but it is probable that those dealings concerned his assistance to Ms Lim and Ms Read regarding their purchases. It may well be that a motive for the plaintiff preparing the 50 issues document was to further inform himself before he committed to purchasing a unit, but I am not satisfied that he communicated that purpose to the first defendant when he provided Mr Burns with the 50 issues document in January 2002. There can be no doubt, based on the timing of the 50 issues document being provided to Mr Burns, and taking into account the fact that the plaintiff was assisting Ms Lim and Ms Read, that he provided the 50 issues document to Mr Burns for the purpose of assisting Ms Lim and Ms Read who were clients of the first defendant at that time. Thirdly, there is no reliable evidence of what advice the first defendant did provide to the plaintiff concerning the response by Mr Rubenstein to the 50 issues document, either as part of explaining the contract to the plaintiff for the purposes of the s 66W certificate or otherwise.

300. By paragraph 18(C) of the FASOC, the plaintiff alleged that the first defendant was negligent by failing to execute with due skill, care and attention his written instructions of 15 May 2002 that the first defendant obtain confirmation of ASIC approval of the guarantee arrangements prior to settlement on unit 206. The documents upon which the plaintiff relied are his letter to the first defendant dated 15 May 2002 (see [267] above) and the letter from Ross Burns to Landerer and Co on the same day (see [268] above). As stated in [295] above, I am satisfied that the letter of 15 May 2002 was not an instruction by the plaintiff that the first defendant seek confirmation from the vendor that he could rely on the suggested extra-contractual representations. I am satisfied it related to the guarantee arrangement for income for the first five years of those purchasers who entered into the UMA.

301. By paragraph 18(D) of the FASOC the plaintiff alleged that the first defendant failed to act with due skill and care on settlement of unit 206 by failing to notify him prior to the settlement date about "errors or misdescriptions" in the contract for sale thereby depriving him of the protections provided by clause 6 of the contract for sale. Specifically, the plaintiff alleged that there was an error or misdescription in the reference to the property as a "home unit" on the first page of the contract, by reference to WASS as the "Manager" rather than Rinbac, and by reference to an implied warranty that the contract would be varied to comply with any specific requirements of ASIC.

302. The contract for sale appears to be a standard 2000 edition contract prepared by the Law Society of NSW and the Real Estate Institute of NSW. On the front page of the contract there are two columns. The left hand column is headed "Term" and the right hand column is headed "Meaning of Term". In the left hand column, under "Term",

there are a number of boxes in which words have been printed. There are corresponding boxes in the right hand column with some printed words and what appears to be words that have also been typed into spaces left for that purpose. In the left hand column, about halfway down the first page is the word “Land”. Next to that, in the right hand column, is a description of the property to be purchased by reference to unit numbers, registered plan numbers, strata plan numbers and folio identifier. Immediately under the word “Land” in the left hand column is the word “Improvements”. Adjacent to that, in the right hand column there are a number of typed words: “House”, “garage”, “carport”, “factory”, “flats”, “home unit”, “carspace”, “none” and “other”. Each of these words has a box next to it. The contract for unit 206, signed by the plaintiff, has a cross in the boxes beside the words “home unit” and “carspace”. As I understand the plaintiff’s submission, the description of the improvements as including a “home unit” was an error or misdescription because the unit could only be used as a serviced apartment.

303. Further, the plaintiff submitted that clause 58.7 of the contract also contained an error or misdescription because it described the property as being capable of being let under a residential tenancy agreement. The clause in question provides:

> Despite any other provision of this clause 58, at any time during the Guarantee Term, the Manager is entitled to require the purchaser to enter into a residential tenancy agreement in respect of the property for the unexpired portion of the Guarantee Term on commercial terms and conditions substantially the same as (and in lieu of) the Unit Management Agreement.

304. The plaintiff also submitted that the reference to the units in the Waldorf development as “residential dwellings” in Annexure L to the contract, and as “individual residential apartments” in Annexure M were similarly errors or misdescriptions.

305. I will address these issues now. The contract for sale does not define the terms “home unit”, “residential dwelling” or “residential apartments”. If these were the only descriptions of the use of which the apartment purchased by the plaintiff could be put, there may be some force in the submission that there was, in a general sense, a misdescription of the property. These were not, of course, the only provisions of the contract in which the use to which the unit could be put was set out. As I have already observed, Annexures G and H to the contract set out accurately the use restrictions applying to the property, and I am satisfied that the plaintiff was aware of these restrictions by virtue of his own reading of the contract prior to him engaging the services of the first defendant.

306. There is no reliable evidence upon which I can be satisfied that the first defendant did not draw the plaintiff’s attention to these so-called misdescriptions. I have no doubt that if he did, this would have been a matter of no moment to the plaintiff because he knew the true character of what he was buying.

307. In my opinion, the terms of clause 58.7 referred to by the plaintiff contain no error or misdescription of the property. That clause related solely to a possible residential tenancy agreement between the Manager and the plaintiff as owner of unit 206, and was clearly inserted to guard against the possibility that the UMA, for whatever reason, may prove ineffectual. The clause itself does not describe the property in any way, or make any representation as to how the property may be used. The first defendant had a duty to explain clause 58.7 to the plaintiff, but there is no reliable evidence that she breached that duty. I am not, however, satisfied that the first defendant had a duty to

draw the plaintiff's attention to clause 58.7 as an error or misdescription to which the remedial provisions of clause 6 of the contract may apply.

308. The plaintiff's contention that there was an error or misdescription regarding the designation of either WASS or Rinbac as "Manager" is an apparent misconception on his part. In the FASOC he appears to suggest that the "Manager" named for the purposes of Annexure J to the contract for the sale of units 208 and 220, purchased by Ms Lim and Ms Read, differed from the Manager named in his contract. If this is so, it is hardly to the point. An alternative manner in which the plaintiff's claim may be read is that he asserted that the contract for his unit, unit 206, contained an error or misdescription as to who is nominated as the Manager, but, if so, this is also incorrect. The contract for sale permitted a "Manager" of the development to be appointed: Annexure I. The responsibilities of that Manager were, generally speaking, the management, caretaking, security, supervision and maintenance of the buildings. The Manager so appointed was Rinbac, by an agreement with the owners corporation dated 22 March 2001, and annexed to the contract as part of Annexure I. Individual unit owners, by executing the UMA, appointed WASS as Manager of their individual units for the purposes of the UMA. It is true that the UMA, which is Annexure J to the contract, is the subject of Special Conditions in the contract, for the purposes of which the "Manager" is defined as the "registered proprietor, from time to time, of the Management Property or a person nominated in writing by that proprietor": cl 57.1. The "Management Property" is defined as meaning Lot 1 in the proposed Strata Plan annexed to the contract. It is apparent from clause 57.1 that the "Manager" as defined in that clause, is also to enter into the Strata Title Management Agreement (Annexure I). In the plaintiff's contract, the Manager appointed for the purposes of Annexure I is Rinbac. In clause 57.1 the term "Unit Management Agreement" is defined as "an optional agreement, containing ... the terms and conditions under which the purchaser may appoint the Manager to manage the letting of the property, a copy of which is annexed marked "J". As I have already noted, the UMA at Annexure J nominated WASS as the Manager. There is thus a potential conflict between the terms of clause 57.1 and Annexure J. I use the term "potential conflict", because the definition of Manager in clause 57.1 includes a person nominated in writing by the proprietor of Lot 1. Assuming for present purposes that Rinbac was the proprietor of Lot 1, it may have nominated WASS as the Manager as permitted by clause 57.1. There is evidence that this occurred, found in Mr Rubenstein's response to the plaintiff's 50 issues document: see Exhibit BJ, Vol 1, p 52, cl 6. Where the plaintiff holds the onus of proving that the first defendant acted negligently, he must establish that there was an error or misdescription of the nature alleged to be found in the contract. He has not satisfied this onus.

309. In any event, for the reasons I have given, there is simply no reliable evidence about what conversations occurred, or did not occur, between the plaintiff and the first defendant on this issue.

310. By paragraph 18(D)(iii) of the FASOC, the plaintiff alleged that the first defendant was negligent in failing to notify him of an error or misdescription in "references to 'consideration of this Agreement' by ASIC and the implied warranty 'to comply with any specific requirements'" by ASIC, citing clause 7.4(a) of the UMA. It is, with respect, difficult to understand this allegation. It appears to rest on the proposition that the clause contained an implied warranty that ASIC would approve the contract, including the UMA, and require changes, presumably to make it comply with the CA or the law

generally. In my opinion, clause 7.4 makes no such warranty as suggested by the plaintiff and accordingly contains no error or misdescription.

311. By paragraph 18(E) of the FASOC, the plaintiff alleged that the first defendant was negligent in failing to advise him that the "Waldorf scheme" was an "illegal" MIS. For the reasons I have given, I am satisfied that it is probable that by executing the UMA the plaintiff participated in an unregistered MIS. The scheme was not, however, illegal in any relevant respect. I am satisfied that it would have been negligent of the first defendant not to advise the plaintiff that the scheme may have been a MIS, and of the need for further enquiries to be made to determine whether this was the case, but I am not satisfied that a conversation of that nature did not occur.

312. The plaintiff's paragraph numbering in the FASOC was somewhat idiosyncratic. The next allegation of negligence against the first defendant was found in paragraph 18(a) and alleged a failure on the part of the first defendant to advise that the property could not be used or let as a permanent residence. For the reasons I have given, I am not satisfied that the first defendant did not advise the plaintiff of this fact and, in any event, I am positively satisfied that the plaintiff was aware of the permitted use of the premises by reason of his own reading of the contract before he purchased unit 206.

313. By paragraph 18(b) of the FASOC, the plaintiff alleged that the first defendant failed to advise him that the property could only be used as a short-term serviced apartment. I repeat what I said in the previous paragraph.

314. By paragraph 18(c) of the FASOC, the plaintiff alleged that the first defendant was negligent by failing to advise him that Rinbac had the exclusive right to manage the property as a serviced apartment. I take this to be an allegation that the first defendant did not advise the plaintiff that Rinbac had been appointed as the Manager of the Waldorf development under the Strata Title Management Agreement found at Annexure I to the contract for sale. As I am not satisfied that the evidence of the plaintiff is reliable concerning his dealings with the first defendant, I am not satisfied that the first defendant is guilty of the alleged failure. I am also satisfied that the plaintiff was well aware of the contents of Annexure I before he executed the contract for sale. This is established beyond any doubt by the reference by the plaintiff in his 50 issues document to Rinbac being appointment Manager under the Strata Title Management Agreement (Annexure I to the contract): see Exhibit BJ, Vol 1, p 49 at para 26.

315. By paragraph 18(d) of the FASOC, the plaintiff alleged that the first defendant failed to advise him that, if he did not engage "a particular third party" (presumably WASS) to manage the property as a serviced apartment, he would be unable to use or derive any significant benefit from the property. I am, again, unable to say what may or may not have been said by the first defendant on this issue. I am also far from satisfied that it was any part of the first defendant's retainer to provide the plaintiff with advice concerning the commercial advisability of purchasing a unit in the Waldorf development and executing the UMA. While there was evidence that the first defendant was knowledgeable as to the contractual arrangement concerning purchasing units in the Waldorf development, there is no evidence that the first defendant possessed any particular knowledge relevant to the commercial advisability of such purchases, so that I see no reason to suppose that the first defendant had any duty to the plaintiff regarding this issue which extended beyond the terms of the retainer. Finally, there is no evidence to support the proposition of fact advanced by the plaintiff in this allegation.

316. In paragraph 18(e) of the FASOC, the plaintiff alleged that the first defendant failed to advise him "that the same third party also had the same exclusive right to manage the property comprised in Strata Plan 64972 with power to require the Owners Corporation to reimburse costs, charges and other expenses". Again, the plaintiff faces the difficulty that I am not satisfied, based on his evidence, as to what may or may not have been said to him by Mr Burns concerning the purchase of unit 206. In any event, I am satisfied that the plaintiff was well aware of the financial arrangements with the Manager provided for in Annexure I to the contract through his own reading of the contract.

317. In paragraph 18(f) of the FASOC, the plaintiff alleged that the first defendant was negligent in failing to advise him that he risked "substantial burdens or detriments" as the Strata Title Management Agreement delegated statutory functions of the owners corporation to Rinbac contrary to s 13(3) of the *Strata Schemes Management Act 1996* (NSW). Little, if anything, was said about this allegation in the course of evidence and in the written submissions. It is sufficient to note that there is no reliable evidence that these contractual issues (if issues they be) were not explained to the plaintiff by the first defendant.

318. By paragraph 18(g) of the FASOC, the plaintiff alleged that the first defendant was negligent in failing to advise him of the "inherent risks" created by PPI's "conflict of interest" to prospective purchasers as the vendor's agent and with its obligations to Rinbac as a sub-contractor of Rinbac. For the reasons I will give in my examination of the plaintiff's claim against the third defendant, I am satisfied that there was no such conflict of interest. PPI was never a "sub-contractor" of Rinbac, it was appointed as a sub-contract marketing agent by Mr Rubenstein in his personal capacity as the marketing agent appointed by the liquidator of the vendor. There was also no reliable evidence that these matters were not explained to the plaintiff by the first defendant.

319. Finally, by paragraph 18(h) of the FASOC, the plaintiff alleged that the first defendant was negligent in failing to advise him of the "inherent risks" involved in the Waldorf transaction due to the "related-party" transactions and the "apparent excessive involvement and control of Rubenstein over all facets of the Waldorf transactions". It is difficult to know how to approach this allegation. I do not understand what "inherent risks" the plaintiff alludes to, so it is impossible to determine whether the first defendant had a duty of care to advise or warn the plaintiff of these risks. Secondly, I observe that it was a selling point in the Waldorf marketing document that management of the Waldorf development would be undertaken by the "Waldorf Apartment Group", which was said to be highly experienced in such arrangements. The fact that this was a selling point, while making it likely that the plaintiff was aware of the relationship between the vendor and the Manager, does not, of course, mean that there could be no potential risks to investors in such an arrangement, or that the first defendant would not be under a duty to explain any such risks to the plaintiff, if any such risk were apparent. As I have said, there is no reliable evidence as to what advice or explanations the first defendant may have given to the plaintiff about the contract.

Conclusion – liability of the first defendant

320. For the reasons I have given, I am not satisfied that the first defendant is liable in negligence as the plaintiff claims. I should also note that I am not satisfied that the

plaintiff suffered any loss or damage as he alleged, but I will deal with the evidence of alleged damage later in these reasons.

The plaintiff's claim against the third defendant

321. The plaintiff alleged that at all material times the second defendant was a registered company and that the third defendant was a principal of that company. The plaintiff alleged that at all material times the second and third defendants had knowledge of the managed investment provisions of "the Corporations Law" as they applied to serviced strata schemes including the requirement for ASIC approval and registration of serviced strata schemes where the units are not available for residential use. This allegation was not admitted by the third defendant.

322. The plaintiff further alleged that in the latter part of 2001 the second defendant entered into an arrangement under which it acted as agent for the vendor in the sale of the Waldorf apartments. This allegation was also not admitted by the third defendant on the pleadings, but was not the subject of any denial during the third defendant's evidence. I am satisfied that at all material times, the second defendant was acting as the vendor's agent in the sale of apartments in the Waldorf development. I will consider the exact nature of that arrangement later in these reasons.

323. The plaintiff alleged that in late 2001 the second defendant, in the course of trade or commerce, made representations to him concerning the Waldorf development. It was alleged that these representations were in writing and were handed to him by the third defendant.

324. The representations which the plaintiff alleged that the second defendant made to him included a representation (the mixed-use representation) that purchasers of a unit in the Waldorf development:

    (a) would be able to occupy the unit themselves;

    (b) would be able to rent out the unit directly, via any independent real estate agent as fully furnished or unfurnished accommodation based on a standard real estate lease; or

    (c) would be able to rent out the unit directly, via the Waldorf Management Group ("the Manager") as fully furnished or unfurnished accommodation based on a standard real estate lease for a management fee of 6.5 per cent of the apartments gross revenue; and

    (d) that purchasers would be able to change to any of the stated use options on three months written notice to the manager.

325. In Further and Better Particulars filed on 10 October 2015, the plaintiff alleged that the mixed-use representation was made in a document he described as the "PPI Waldorf Disclosure Document" which he said was handed to him by the third defendant on behalf of the second defendant. The third defendant admitted the existence of documents entitled "Investment Opportunities Through PPI Pty Ltd – Waldorf South Sydney" (undated) and "The Waldorf Furnished Apartments Investment Package" dated February 2000, but did not know how those documents came into the plaintiff's possession and did not admit the content or veracity of the information contained therein. As I said at the outset, I will refer to this first document as the Waldorf marketing document.

326. The plaintiff further pleaded that on or about 31 January 2002 the second defendant made additional representations in handwritten annotations to a facsimile dated 30 January 2002 signed by the third defendant and "approved" on 31 January 2002 by "the Rinbac principal Mr Avi Rubenstein". A copy of the document referred to was Annexure C to the plaintiff's Particulars filed 10 October 2013. It is a copy of a facsimile dated 30 January 2002 from Mr Freese of PPI to Mr Rubenstein enclosing a copy of the plaintiff's 50 issues document: see [238] above. It appears that Mr Rubenstein has handwritten responses against each of the 50 issues, and that the amended facsimile has been faxed back to PPI using the same transmission from under which it was sent by PPI to Mr Rubenstein. The representations said to have been made in this document are:

    (a) the Waldorf marketing document is a "separate arrangement not part of the contract". In that regard one of the 50 issues raised by the plaintiff concerned clause 30.5 of the contract for sale, which provided that "The purchaser does not rely on any other letter document correspondence or arrangement whether oral or in writing, as adding to or amending the terms, conditions, warranties and arrangements of this contract". In his 50 issues document, the plaintiff wrote "Reliance on Waldorf Brochures and Advertisements re Reciprocal rights RCI and other Waldorf properties and returns – These are the basis of purchase – see prospectus and ad in Jan 2002 (Australian Property Investor)." Next to this someone, presumably Mr Rubenstein, has written "separate arrangement not part of the contract";

    (b) the "guarantee" only applied if the purchaser entered the UMA with WASS. In his 50 issues document the plaintiff enquired whether clause 58.3(a) meant that the income guarantee only applied if the purchaser entered the UMA. Next to that in handwriting is the word "Yes";

    (c) the UMA was to be signed with the "Letting Agent" (WASS) "as nominee of the owners of Lot 1 (Rinbac P/L – The Waldorf)". In his 50 issues document, the plaintiff enquired: "Manager – who is the Manager now – we need to know who owns Lot 1 and any nominations which have been made in writing is it Waldorf South Sydney Apartments?" Next to this is written "Waldorf Apartments s-s as nominee of the owners of Lot 1 (Rinbac P/L – The Waldorf)". The background to this exchange is found in clause 58 of the contract for sale, headed "Optional Letting Arrangements". This clause provides for certain arrangements where the purchaser chooses to enter into the UMA. The Manager of a property subject to a UMA was the registered proprietor of Lot 1 on this Strata Plan, or that person's nominee. As I understand it Rinbac was the proprietor of Lot 1 and the response to this issue in the 50 issues document was that as at 31 January 2002 WASS was the Manager as the nominee of Rinbac;

    (d) income "pooling" was being utilised via a computerised reservation system. In a typed response to the 50 issues document faxed from Mr Rubenstein to Mr Burns on 1 February 2002, Mr Rubenstein responded to the plaintiff's concern that clause 8.1(a) of the UMA only required the Manager to "use its best endeavours to lease the Apartment on behalf of the Owner from time to time during the Term". In the 50 issues document the plaintiff questioned whether this permitted the Manager to "pick and choose" which units it let. He

asked how the Manager would select whose unit to rent out. The handwritten response on the 31 January 2002 facsimile is "We are pooling this is not important". In the typed document sent to Mr Burns on 1 February 2002 (see [246] above), Mr Rubenstein said "not relevant as we have a computerized [sic] reservation system which allocate units and we are pooling anyway";

(e) there was an insurance policy for loss of income with respect to the guarantee. In the 50 issues document the plaintiff expressed concern about clause 58.6 of the contract for sale which provided that if the unit the subject of a UMA was for any reason not available for a period longer than three months, the guarantee amount would not be payable and the UMA would terminate. The plaintiff expressed an opinion that clause 58.6 imposed conditions that should be in the UMA or "Owners Corporations Agreement" (semble, the Strata Title Management Agreement, Annexure I to the contract for sale).The cryptic handwritten response to this by Mr Rubenstein is "There is an insurance policy for loss of income";

(f) the UMA was under consideration by ASIC and provisions had been made to vary the terms to comply with any specific ASIC requirement. This appears to relate to clause 7.4 of the UMA which purported to give the Manager a right to vary the UMA within a specified period in order to comply with any specific requirements arising from consideration of the UMA by ASIC and the NSW Supreme Court. In his 50 issues document the plaintiff questioned whether this was "legal" as it involved "entering into an unspecified Agreement". In his handwritten response, Mr Rubenstein said "We are waiting to [sic] ASIC final approval this is the reason for this clause"; and

(g) provisions in the UMA requiring owners to pay fees and expenses were not relevant since the guaranteed income is "the net income after all fees".

327. In answer to this allegation, the third defendant pleaded that he did not admit the facsimile dated 30 January 2002, the alleged handwritten annotations, the alleged approval of Mr Rubenstein, how the document came into the possession of the plaintiff or the content or veracity of the information contained therein. The plaintiff pleaded that the representations were in breach of "the misleading conduct provisions" and were misleading or deceptive, or likely to mislead or deceive. The FASOC defined "the misleading conduct provisions" as:

> (a) s52 TPA where conduct relates to real estate agency services **not** involving supply, or possible supply, of financial services; or
>
> (b) s12DA ASIC Act where conduct relates to financial services **not** involving dealings in interests in a managed investment scheme; or
>
> (c) s995, s999, s1000, and/or s1001 of CA where conduct relates to dealings in interests in a managed investment scheme **not** involving a misleading or deceptive disclosure document; or
>
> (d) s728(1), s999, s1000, and/or s 1001 of CA where conduct relates to offering interests in a managed investment scheme under a misleading or deceptive disclosure document.

The plaintiff also referred to other provisions under the general heading of "the misleading conduct in relation to land provisions". It is unnecessary to refer to these provisions as they add nothing to the plaintiff's claims.

328. The FASOC alleged that the representations were misleading or deceptive, or likely to mislead or deceive, by:

(a) wrongly representing or implying that a purchaser of the property could live in the property or rent out the property pursuant to a normal property lease;

(b) wrongly representing or implying that a purchaser of the property would make an excellent return by entering the optional managed apartment operation;

(c) wrongly representing or implying that a purchaser of the property could readily opt out of the managed apartment operation if the purchaser so chose;

(d) wrongly representing or implying that a purchaser of the property would be making an excellent long term investment; and [sic]

(e) wrongly representing that Ross Burns of the First Defendant was a skilled and competent solicitor with a full understanding of the contractual and other issues concerning the property[;]

(f) wrongly representing or implying that a purchaser of the property could rent out the property through any real estate agent of the purchaser's choice[;]

(g) wrongly representing or implying that a purchaser of the property would not be disadvantaged by the body corporate being charged any costs relating solely to the management of the property[;]

(h) wrongly representing or implying that a purchaser of the property who had his unit managed as part of the Waldorf management scheme would not have to pay any operational outgoings as all outgoings, other than capital contributions to the sinking fund and any special levies, would be paid by the Manager;

(i) wrongly representing or implying that a purchaser of the property who had his unit managed as part of the Waldorf management scheme would be assured of the increased annual net returns as indicated in the "Investment Analysis Spreadsheet" being a 50% increase in Year 6, above the fixed annual net return in the first 5-years, and indexed thereafter by 3% per annum[;]

and further, likely to mislead or deceive by:

(j) failing to disclose the Waldorf purchase and management arrangements constituted a "serviced strata scheme" of a type subject to the managed investment provisions of Chapter 5C of the CA including ASIC approval that the scheme meets the 'registration' requirements specified under 601EB of the CA; [and]

(k) failing to disclose that the Waldorf arrangements comprised an 'illegal managed investment scheme' by reason of contravention of the statutory prohibition s601ED(5) of the CA and this its non-compliance with the registration requirements deprived a purchaser of the property of the essential statutory safeguards required to protect their interest as laid down in Chapter 5C of the CA.

329. The case against the third defendant is expressed in paragraph 11 of the FASOC, which alleged that "The Third Defendant was, in terms of the accessorial liability provisions involved in the making of the representations, in breach of the misleading conduct provisions". The "accessorial liability provisions" are defined in the FASOC as:

(a) s75B TPA where contravention relates to (a) of those provisions; *otherwise*

(b) s79 of CA.

330. The plaintiff alleged that in reliance on the representations of the second defendant, the "collateral warranties" given in the Waldorf marketing document and professional legal advice from the first defendant he purchased unit 206 and entered into the UMA.

331. The plaintiff alleged that by reason of the misrepresentations by the second defendant, he suffered loss or damage, being:

(a) Reduced value of property as a serviced apartment compared with its value as a residential unit capable of being used or let as a permanent residence.

(b) Reduced income received by reason of utilising the property as a serviced apartment instead of letting the property as a permanent residence.

(c) Reduced income received by reason of engaging Waldorf Apartments Sydney South Pty Ltd as a manager of the property as a serviced apartment.

(d) [A]additional costs incurred by reason of special levies imposed consequent on the exclusive rights granted to Rinbac Pty Ltd to require reimbursements of costs, charges and expenses in relation to management of the building of which the property was a unit.

[F]urther or alternative particulars of loss and damage

(e) [A]dditional costs incurred in respect of the period 1 June 2007 to 16 July 2009 consequent on breach of the representations about the outgoings on the Waldorf unit.

(f) [L]oss of benefit of performance of the representations in respect of the outgoings on the Waldorf unit post 16-Jul 2009 being the date of the Plaintiff's acceptance of repudiation of the Waldorf UMA.

(g) [L]oss of income (earnings) consequent on the property not being available to the plaintiff for the represented flexible mixed-use or not being available for owner's use for a 3-month period each year with flexibility to swap between residential and serviced strata scheme options upon 3-months' written notice.

(h) [L]oss of opportunity to secure capital gains from purchase of a residential property in Jerrabomberra as an alternative to the Waldorf investment.

(i) [L]oss of opportunity to secure the represented annual net income returns by action to register the Waldorf scheme with ASIC and thereby put in place enforceable undertakings in respect of the represented owners "rights" in respect of the outgoing on the Waldorf unit.

(j) [I]ncurred net contractual liability as at 31 May 2002 to pay all operational outgoings including WASS imposed fees and charges over the period 1 June 2002 to 31 May 2011 under the UMA licensing the management right WASS.

(k) Consequential losses flowing from the First, Second and Third Defendant's breaches...

332. In addition, the plaintiff claimed exemplary damages in the sum of $200,000.00 from the third defendant based upon the "disgracefulness" of the third defendant's conduct.

333. In his Further Amended Defence dated 31 January 2014, the third defendant admitted:

(a) that the second defendant was, at all material times, a registered company engaged in trade or commerce as a real estate agent;

(b) that at all material times he was the principal of the second defendant; and

(c) a contract for the purchase of unit 206 by the plaintiff was entered into on or about 2 May 2002, and the purchase was completed on or about 31 May 2002.

334. A number of the allegations made by the plaintiff were not admitted by the third defendant, viz:

(a) the allegation that the defendants had first-hand knowledge of the managed investment provision in the Corporations Law;

(b) the allegation that in the latter part of 2001, the second defendant entered into arrangements to act as the vendor's agent in the sale of units in the Waldorf development. As I have said, while this was not admitted on the pleadings, it was accepted at the hearing that the second defendant had been retained to market the Waldorf development;

(c) the allegation that in late 2001 the second defendant in the course of trade or commerce made representations to the plaintiff concerning the Waldorf development;

(d) the allegation that the plaintiff approached Mr Burns of the first defendant to act for him in reliance on a representation made by the second defendant that Mr Burns was a skilled and competent solicitor with a full understanding of the contractual and other issues concerning the Waldorf development, and that as a result the first defendant acted for the plaintiff on the purchase of unit 206;

(e) the allegation that the first defendant was negligent in acting for the plaintiff; and

(f) the allegation that the UMA was entered into by the plaintiff on 31 May 2002.

335. In answer to the plaintiff's allegation that the representations allegedly made by the second defendant in late 2001 were in writing and handed to him by the third defendant on behalf of the second defendant, the third defendant admitted the existence of the Waldorf marketing document, but did not admit when it may have come into the plaintiff's possession and did not otherwise admit the content or veracity of the information contained therein.

336. With regard to the plaintiff's allegation that among the representations made in the Waldorf marketing document was the mixed-use representation, the plaintiff did not admit when or how the document came into the possession of the plaintiff, and did not admit the content or veracity of the information contained in the document.

337. With regard to the plaintiff's allegation that additional representations were made on or about 31 January 2002 in the responses to his 50 issue document, the third defendant did not admit the facsimile dated 30 January 2002, the alleged handwritten annotations to the facsimile, the alleged "approval" of the facsimile by Mr Rubenstein as principal of Rinbac on 31 January 2002, whether or how those documents came into the possession of the plaintiff, and the content or veracity of the information contained therein.

338. In answer to the plaintiff's allegation that the representations made by the second defendant were in breach of the misleading conduct provisions, the third defendant denied the allegation. The third defendant also denied the allegations that the representations were in breach of the misleading conduct in relation to land provisions, and that he was, in terms of the accessorial liability provisions, involved in the making of the representations. He also denied the allegation that in reliance on the representations the plaintiff purchased unit 206 and entered into the UMA.

339. The third defendant also denied that the plaintiff had suffered loss or damage as alleged.

340. In answer to the whole of the plaintiff's claim, the third defendant said that if any of the alleged representations had been made, they were made on the basis that the second and third defendants had acted in good faith and based upon information provided by FAI, that in passing any information onto the plaintiff it was made clear to him by the second defendant that the information was from FAI and that the second and third defendants did not endorse the truth or substance of the information. Further, the third defendant said that the plaintiff represented himself as a sophisticated investor who was carrying out due diligence enquiries of his own.

341. The third defendant also referred to disclaimer clauses set out in the "promotional material". It is not necessary to set those out in detail.

342. The third defendant asserted that the plaintiff carried out his own due diligence concerning the property and relied upon his own enquiries as opposed to any representation made by the second defendant in purchasing the property. The third defendant denied having conversations with the plaintiff as alleged.

343. The plaintiff then filed a lengthy Reply on 11 February 2014. Much of the Reply is repetitive and argumentative or simply joins issue with the third defendant. I will try to distil the essential elements. In paragraph 18 of the FASOC, the plaintiff alleged that the first defendant was negligent, inter alia, by failing to determine that the Waldorf scheme was a MIS. In his Defence of 31 January 2014, the third defendant essentially noted that allegations regarding the Waldorf scheme being an MIS were confined to the case pleaded against the first defendant. In his Reply, the plaintiff made claims "for the avoidance of doubt" that the third defendant had personally offered interests in a MIS and made false or misleading statements in the seminar on 12 December 2001. He also alleged that in disseminating the Waldorf marketing document, the third defendant had breached various provisions of the CA. The evidence is very clear that, to the extent that the third defendant personally did any of the things alleged by the plaintiff, he was acting as an agent for PPI, and the plaintiff was aware of that fact. During the course of the hearing in this matter, the plaintiff reiterated that his case against the third defendant was based on accessorial liability, consistent with the terms of the FASOC. Wherever possible, therefore, the terms of the Reply to the third defendant's Defence should be read consistently with the plaintiff's claim being based on accessorial liability.

344. The plaintiff then took issue with the third defendant failing to admit that in late 2001 the second defendant made representations to the plaintiff concerning the property, describing it as "unreasonable to the extent of constituting a deliberate attempt to mislead the Court". As it transpired at the hearing, there was no real dispute that the Waldorf marketing document was disseminated by the second defendant at the 12 December 2001 seminar, and one could, perhaps, be a little critical of the third defendant's lawyers for failing to admit this fact in the pleadings, but nothing turns upon it.

345. As an alternative, the plaintiff alleged that the third defendant had a duty of care as a real estate agent to make representations concerning the property. There is no need to refer to this any further, as no case was pleaded on the basis of a breach of any such duty.

346. The plaintiff then described further failures by the third defendant to admit matters pleaded in the FASOC as unreasonable and an attempt to mislead the Court. Whether

the failure of the third defendant to admit the matters referred to was unreasonable is open to debate, but I reject the proposition that any attempt to mislead the Court is evident in the third defendant's pleadings. The plaintiff also alleged various duties on the part of the third defendant, but in circumstances where it is unclear how they are said to be relevant to his pleaded claim.

347. The plaintiff then alleged that to the extent that the representations referred to in the FASOC were as to future matters, the third defendant is deemed to have "committed negligent misrepresentation" to the extent that those representations were unsupported by evidence.

348. The plaintiff also alleged that the third defendant was "involved" in making the representations because he was the managing director of PPI who had day to day management control of the company.

349. With regard to the first defendant's denial that the plaintiff agreed to purchase unit 206 and enter the UMA based on the representations said to have been made by the second defendant, the plaintiff pleaded that "as a matter of law a real estate agent is subject to liability to a third party for damages for loss caused by breach of warranty of authority", citing *Collen v Wright* (1857) 120 ER 241. The FASOC did not plead an allegation of breach of warranty of authority by either the second or third defendants, and nor did the third defendant's Defence make reference to it. The plaintiff's pleading of the issue in his Reply is therefore irrelevant.

350. At paragraph 31 of the Reply, the plaintiff purported to amend his claim against the third defendant to plead new bases of liability. No application was made by the plaintiff to amend the FASOC, and it would be unjust to the third defendant to allow such an amendment after the evidence had been given and the submissions made. I will ignore this part of the Reply. I will simply add that the proposed additional bases of liability have no merit, as the gist of the proposed amendment is that the second defendant lacked authority to bind the "Waldorf Management Group" to the representations made by the second defendant. There is no evidence that "the Waldorf Management Group" is an entity known to law; it appears to be a collective description of a number of companies. The companies involved in the Waldorf transactions were FAI, WASS and Rinbac. There is simply no evidence that the second defendant, or for that matter the third defendant, exceeded whatever authority may have been given to them by those companies.

351. At paragraph 34 of the Reply, the plaintiff joined issue with the third defendant's assertion that if he made any of the representations alleged by the plaintiff, he acted reasonably and in good faith. The plaintiff, however, seemed to go further and suggest that the third defendant owed him a duty of care as a real estate agent. On 10 May 2013, I published reasons for permitting the plaintiff to make some amendments to his claim, and for refusing to allow him to make other amendments. I disallowed an application to amend the claim to plead a case in negligence against the second defendant on the ground that it constituted a new cause of action and was apparently statute barred. No attempt was made at that time to amend the claim to plead a claim in negligence against the third defendant; undoubtedly if such an attempt had been made it would have met the same fate as the proposed claim in negligence against the second defendant. I will ignore this part of the Reply to the extent that it seeks to raise a new cause of action against the third defendant not pleaded in the FASOC.

352. In any event, the proposed claim in negligence against the third defendant could not succeed. For the reasons I gave when addressing a similar claim against the first defendant, even if the plaintiff established breach, he could not prove causation or loss.

353. The plaintiff took issue with any suggestion that the disclaimers in the Waldorf marketing document operated to protect the second or third defendants from his claims. This aspect of the defendant's Defence was not really pursued at the hearing, and I will not address it further.

354. At paragraph 54 of the Reply, the plaintiff asserted that as "he has particularised the Third Defendant's direct involvement in the making of the negligent misrepresentations ... KNELL is therefore liable for the loss or damage suffered ... i.e. proof of accessorial liability is not required as KNELL was 'involved' in the making of the misrepresentation in terms that he 'aided, abetted, counselled or procured' or 'induced by promises or otherwise'; or was 'directly or indirectly' 'by act or omission' 'party to', 'or conspired with others to effect' the making of the negligent misrepresentations". This reveals a misunderstanding on the part of the plaintiff. The basis upon which he said that the third defendant is liable as a person "involved" in the making of the representation all invoke the principle of accessorial liability. I will return to this issue later.

355. In paragraph 55 of the Reply the plaintiff again appears to attempt to expand his claim against the third defendant by asserting that the third defendant was liable personally for losses sustained by the plaintiff by virtue of s 729(1) of the CA, which addresses who may be liable for losses occasioned by misrepresentation in the offer of securities. I will address this allegation immediately; s 729 of the CA provides for recovery of loss or damage caused by a misstatement in or omission from, a disclosure document. The section permits recovery from a director of a body responsible for the misstatement or omission, without the need to rely upon accessorial liability. The problem for the plaintiff is that he has not established that the Waldorf marketing document, or any other document revealed in the evidence, is a disclosure document for the purposes of the CA. The term "disclosure document" is defined in s 9 of the CA as either a prospectus, a profile statement for an offer, or an offer information statement for an offer of securities, but in each case it must be such a document which has been lodged with ASIC. There is no evidence that the Waldorf marketing document, or any other relevant document in the case, was lodged with ASIC. In any event, PPI was not offering securities, even accepting that a MIS is a form of security for the purposes of the CA. PPI was advising of the availability of such an offer from another entity, in this case WASS. There is no evidence that PPI or the third defendant were acting as agents of WASS and no "offer" could be accepted by acceptance to PPI.

The Representations

356. A number of relevant representations were made in the Waldorf marketing document prepared by PPI, including:

    (a) "Purchasers will have the unique opportunity of utilising the apartments for their own use, renting out their apartments or assigning the apartments to a Management Company for inclusion in a furnished apartment management. The Developer has appointed the Waldorf Apartment Group to manage this particular property";

(b) "The Apartments' location represents an excellent combination of a convenient address for private and Government business travellers or holiday-makers visiting Sydney, or investors who wish to have a Sydney-based accommodation"; and

(c) "Apartment owners in the Waldorf, South Sydney will be able to:

- Occupy the unit themselves.
- Rent out the unit directly, via the Waldorf Group or any independent real estate again as fully furnished or un-furnished accommodation based on a standard real estate lease.
- Participate in the proposed furnished apartments management scheme by the Waldorf Apartment Group and to be subject to a five year rental guarantee underpinned by 10 % of the purchase price put into a trust account".

The plaintiff referred to this as the "mixed-use representation".

357. The Waldorf marketing document contained a section headed "The Proposed Management Scheme" which was in the following form:

> The proposed management agreement is based on the following general terms and conditions
>
> 1. **Term of the Initial Management Agreement:** 5 years.
> 2. **Termination Notice**: Each party can give the other party 3 months termination notice. Should the owner decide to sell his apartment, a four week termination notice will be required (the rental guarantee commitment ***will not*** be terminated if the manager terminates the proposed management agreement). Termination of the management agreement by a unit owner will terminate the guarantee agreement.
> 3. **Joining Fee:** No joining fee is required on the purchase of an apartment. Any apartment owner who wishes to join the Waldorf's management scheme at **a later stage may** be required to pay the joining fee, which will apply at that date.
> 4. **Management Fee:** Nil if being managed as part of the WALDOLF Management Scheme. If outside the scheme – *6.5%* of the furnished apartment's gross revenue.
> 5. **Representation on Body Corporate Council: Owners of apartments** under management will appoint the Manager as their representative on the Body Corporate Council (this appointment will not preclude the owner to represent himself personally in any of the Body Corporate Council's meetings).
> 6. **Outgoings** The only outgoings for investors who have their units managed as part of the WALDORF Management Scheme is land tax, any special body corporate levies and an annual contribution to the sinking fund (estimated to be no more than $300 in the first year). The WALDOLF Management Group will pay all other outgoings including rates, maintenance, and body corporate fees.
> 7. **Guaranteed Return: The** Manager has negotiated with the developer **a** rental guarantee contract which means that each investor with **a unit** in the management program will be assured of **a fixed net return of 6.00%** of the purchase price **for a period of** 5 years.

> The Manager will enter into **a Management Agreement with the Body** Corporate for a period of 20 years with 4 x 5-*year* renewal options. This agreement will enable the Manager to provide additional services both to the furnished apartments under management and to the Body Corporate. The Waldorf Apartment Group will not charge the Body Corporate any costs, which relate solely to the furnished apartments operation, a fact that will not disadvantage apartment owners who do not wish to participate in the management scheme.

The plaintiff referred to these statements as the "no operational outgoing representation". He claimed that the third defendant made similar oral representations during the seminar on 12 December 2001.

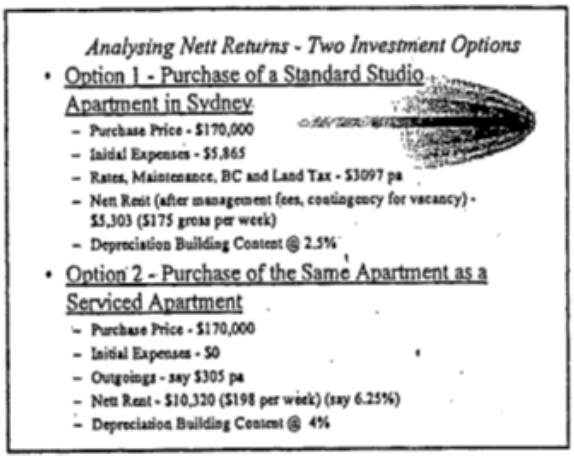
358. The plaintiff, at paragraphs 8(h) and (i) of the FASOC said that the "no operational outgoings representation" represented or implied:

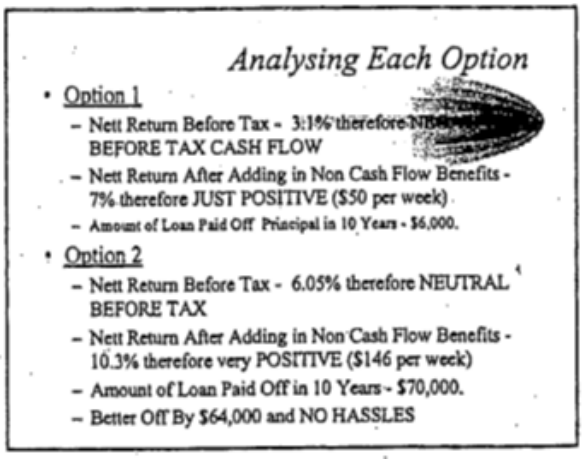
(a) that the purchaser of an apartment in the Waldorf development who had their property managed as part of the Waldorf management scheme would not have to pay any operational outgoings as all outgoings, other than capital contributions to the sinking fund and any special levies, would be paid by the Manager; and

(b) that the purchaser of an apartment in the Waldorf development who had their property managed as part of the Waldorf management scheme would be assured of the increased annual net returns as indicated in the "Investment Analysis Spreadsheet" being a 50 per cent increase in Year 6, above the fixed annual net return in the first 5 years, and indexed thereafter by 3 per cent per annum.

359. With regard to the "no operational outgoings representation" the plaintiff also relied upon the "investment analyses" said to have been presented by the third defendant at the seminar on 12 December 200,1 the "financial reports" included in the Waldorf marketing document, and "the personalised financial projections provided to clients by PPI": Plaintiff's Further and Better Particulars – Oct 2013, para 17.

360. The "investment analyses" referred to by the plaintiff for the purposes of the previous paragraph said to have been provided at the seminar on 12 December 2001 are found in two PowerPoint slides said to have formed part of the presentation. Those slides are in the following form:





361. The plaintiff also alleged that "additional representations" were made in handwritten annotations on PPI's facsimile dated 30 January 2002 "signed by Sid Knell" and

approved by Mr Rubenstein on 31 January 2002 (Exhibit BJ, Vol 2, pp 38-42): see para 7F of the FASOC. It is unnecessary to presently refer to those alleged representations in greater detail.

362. The plaintiff alleged that at the seminar on 12 December 2001, the third defendant said to those in attendance:

> Prime Property Investment is a one stop centre for residential investors. Prime has been appointed as Agent for the sale of Waldorf Apartments South Sydney. The developer is now in liquidation. This is a big opportunity for a bargain purchase.
>
> The flexible use afforded by these Apartments represents a unique opportunity to purchase residential property. This is undoubtedly one of the best inner-city residential developments in Sydney. We believe that no other residential property project in Sydney provides the flexibility and investment return afforded by the Waldorf South Sydney.
>
> Purchasers will be able to live in the units, rent them out in the normal way, or participate in the furnished apartment management scheme.
>
> The big plus of this scheme is you will get a guaranteed net rental until [sic] are ready to move in. It gets you over the initial financial hurdle in buying your own home unit. It takes all the uncertainty out of having to handle the renting out yourself or through an off-site agent.
>
> The management scheme offers lots of benefits including a high quality furniture and fittings package. The Manager meets all the non-capital outgoings for you if you keep your unit in the management scheme. You will be able to move in and take up residence in your apartment at any time just by giving three months notice to the manager.

363. In addition, the plaintiff said that immediately after the seminar the third defendant spoke to him and Ms Lim and said:

> Sharon, I can well understand why you have a special interest in buying one of these units at Waldorf Apartments South Sydney. They are ideally suited to your needs (including to have a place you and your son could live in). Here take this memorandum I have prepared. It outlines all you will need to know about this residential property opportunity. Come out to my office at Red Hill and I will go though it with you in person. If you want to buy to live there I will get you a special home-owners package with discounted interest rate loan from National Australia Bank. But you will need to decide very quickly. We already have a lot of interest and I have set a Sales Office up in the Waldorf South Sydney Apartments so it is not just Canberra buyers who will be in on this.

364. At the same meeting the plaintiff said that he told the third defendant that he was interested in an apartment in the Waldorf development because "I need somewhere to live in Sydney for a year or so for a large job I have on". It is alleged that the third defendant then said to the plaintiff and Ms Lim:

> Take this investment memorandum I have prepared which outlines all you need to know about these units at Waldorf Apartments South Sydney properties. I understand you are thinking of living there. Come out to my office in Red Hill. I will go through if with you if you are interested in pursuing. I will be able to get you a special residential-property discounted interest rate loan as we have special arrangement [sic] with NAB for our clients.

365. At a subsequent meeting, said by the plaintiff to have occurred at the office of PPI in Red Hill on 19 December 2001, attended by Ms Lim, Ms Read and the plaintiff, the third defendant was alleged to have said:

> Sharon, let me give you some more background about myself and Prime, the company I setup to help people like you get into the residential property market. I am involved in research on residential property investment. I am in the process of completing my PhD on housing research at Duntroon Military College and I also lecture at Duntroon College. As

well, I have unique practical experience in this area. I had a lot to do with selling properties for the Defence Housing Authority when it was first setup and that provides the model on which I based Prime Property. It allows you to buy a home unit and have someone pay it off for you until you are ready to move in or take the capital gain...

Well, you can be assured that it is an excellent deal for the Waldorf South Sydney manager Avi Rubenstein. He is getting big concessions from the FAI Liquidator. We have had a Canberra Solicitor of the Year Diana Burns go through the contract and lease documentation and that Solicitor has extensive experience with Mr Rubenstein with the sale and management of the Canberra Waldorf Apartments. They will be able to give you independent advice about whether you can rely on Mr Rubenstein to honour the arrangements and also about the first home owners grant. I certainly don't see any problem there since you have the intent to live in and that is what the grant requires as it is meant to help with the upfront costs and not just be a windfall for people who are going to buy anyway.

366. At the same meeting, the third defendant is said to have said to the plaintiff and Ms Read:

I have extensive experience in the residential property market dating back to privatisation of the Defence Housing Authority portfolio in the early 90's. I sold DHA's Brisbane stock so I have lots of unique first-hand experience with this model where you buy a house or home unit and lease it back as part of the sale arrangements at a guaranteed rent to the manager who then looks after everything for you. This allows you to end up with your own home after having it paid off by the returns until you are ready to move in. It is a long-term strategy but one offering substantial returns if you are prepared to plan for your future. I am lecturing in Management and Economics at the University of NSW and completing my Masters on residential property investment models so it is something I take very seriously.

As I said at the Seminar Prime has been appointed as Agent for the sale of Waldorf Apartments South Sydney by FAI General Insurance which is now in liquidation. So this is a real opportunity for a bargain purchase for our clients as these Apartments represent a unique residential investment opportunity.

Take this copy of the spreadsheet of "Available Units – Waldorf South Sydney As At 16th Dec 01" which shows the opportunities now available.

This opportunity comes with my personal recommendation as I am buying one for myself. You can have no better guarantee than that.

There are three main features that make this residential property opportunity unique. Firstly, the flexible mixed-use available with the Waldorf building, secondly, the furnished apartments management arrangements, and thirdly the outstanding returns available as indicated in the financial analysis I have prepared for Prime clients.

The flexible mixed-use available with these apartments will allow you to occupy the apartment yourself; or you will be able to rent it out directly via the Waldorf Group or any independent real estate agent as fully furnished or un-furnished accommodation based on a standard real estate lease; or you will be able to participate in the proposed furnished apartment scheme. The proposed flexible property management structure will enable apartment owners to change to any of the above options at any time based on written three months notice to the manager. The Waldorf apartment group will not charge the body corporate any costs which relate to the furnished apartment operation so that owners who do not wish to participate in the management scheme will not be disadvantaged in any way by the operation of the scheme.

In relation to the furnished apartment management scheme the only outgoings for investors who have their units managed as part of the Waldorf management scheme is land tax, any special body corporate levies and an annual contribution to the sinking fund estimated to be no more than $300 in the first year. The Waldorf management group will pay all other outgoings including rates, maintenance, and body corporate fees. Have a look at this financial analysis I have prepared for a one-bedroom unit. You will see that your annual expenditure on the apartment other than bank interest on the loan will be less than $400

per year and even up to year 11 it will only be just over $500 a year. That is a very good arrangement for you. We will be giving you the depreciation schedule which is all you will need to claim that building deduction shown there so you can put that in this years' tax return. In straight financial terms this represents an excellent long-term investment. Your total overall financial gain on this residential property investment will be around $200,000 after ten years. This is the superannuation you need to safeguard your future.

Sue, you can rely completely on the financial analysis I have just presented to you which is the same as in the spreadsheets in my Memorandum except the purchase price is up two thousand for the better type of one-bedder you have picked out. Without wanting to boast – I do consider myself an Australian expert in this model of residential investment where you get someone else to pay it off until you are ready to move in or take the capital gain. You won't find anyone with as much practical and academic knowledge in this type of residential property investment as me in Canberra. The only uncertainty in residential property investment is in having to sell in one of the market downturns. If you go over the 10- years of a complete property cycle then you can put that gain of $200,000 in the bank right now as all my assumptions are on the conservative side. But yes, you do need to have the legal side signed-off by professional advice. That is why that disclaimer is there, for the legal side. It is why I have had Canberra Solicitor of the Year Diana Burns Solicitors go over the contract and lease documentation to make sure that it is all the same as in the memorandum. Ross Burns has a full understanding of the contract and lease documentation. He also has experience with the apartment Manager Avi Rubenstein and so he can assure you about that as well. This is such a good opportunity I am buying one for myself. I had Ross Burns go over this not just for my clients but also for me. That should give you greater confidence about these apartments than if I was just an arm-chair residential property investment advisor or just a University academic expert.

367. At the same meeting, Mr Freese was alleged to have said to the plaintiff and Ms Read:

> If you can answer these questions I can make sure there is no problem from the loan approval side. You have the choice of 'Investor's Packages' or 'Home Loan Packages'. Since you are buying a residential property with the view to be an 'owner occupier' I think we can get NAB to agree to the 'Tailored Home Loan Package' for your Waldorf purchase. This gives you a substantial interest rate discount of one percent over the other packages, only 4.85% and we will rebate your application fees".

368. The plaintiff further alleged that at a meeting at the Canberra Waldorf on 8 May 2002 the third defendant said to him, Ms Read and Ms Lim:

> Yes, I do know what's going on with the Waldorf? Yes, I do know the changes that have been proposed? And yes, you will still be able to move in by giving the three month's [sic] notice just like I told you. But I haven't got time to go into it now. Put simply, nothings [sic] changed at all. You can live there when ready just by giving 3-months notice. Let me say it again. Nothings [sic] changed with the arrangements. All this concern and letters going back and forth is just confusing the situation. I tell you now Ross Burns will be writing to you in the next week telling you that it has been approved by ASIC and that will provide you with certainty on this. He will be asking you to re-confirm you still want to go ahead on the basis of the same arrangements as in the original contract. The March contracts have now expired because they weren't completed. Legally they need to be re-confirmed to now be used for settlement. Here's a copy of my latest Waldorf South Sydney document. You will see nothing has changed. Just cosmetic changes but all the same arrangements. If you haven't heard from Ross in the next week then I will arrange a meeting and sort it out. I am too busy to go into this now. I have a contract and I'm going to be an owner. Please remember I have a contract too. I will get Tony to send you a copy of that so you know that I am going to be an owner just like you. I will also get Tony to send you a copy of a letter from Treasury approving Waldorf South Sydney as residential dwellings suitable for overseas investors. You will have real assurance about this investment as you will have the certainty of knowing that it has been examined by the government and given the stamp of approval. So this is something I am going to get sorted out for sure. Do you think I would buy one if I thought there was something wrong here?

The evidence on behalf of the third defendant

369. Mr Knell gave evidence that he conducted a seminar on 12 December 2001 at which brochures such as that entitled "Investment Opportunities Through PPI Pty Ltd Waldorf South Sydney" (the Waldorf marketing document) were made available to those attending. Brochures for other properties were also available at the seminar. The brochures were prepared by employees of PPI, but not by Mr Knell. Mr Knell said, as far as he knew the brochures were correct, and he used his best endeavours to ensure they were.

370. Mr Knell said that he could not recall meeting with Ms Lim or Ms Read in the week of 18 December 2001 at his home in Red Hill. Initially he went so far as to say it definitely did not occur, but later said that he may have met them at a Christmas party.

371. Mr Knell said that at Christmas parties there would be 120 to 140 clients, and he would "make sure I got around every group and spoke to each of the groups". The implication from this evidence was that it would be unlikely that he would conduct detailed discussions about potential investments with any of the individual attendees at such a function. Similarly, Mr Knell said that he conducted the seminars, which went for three hours, and it was not his practice to personally hand out brochures at the end of the seminar.

372. Mr Knell was taken to Exhibit Y, an affidavit affirmed by the plaintiff on 21 May 2012. He was taken to Annexure C to that affidavit, being the facsimile transmission form dated 30 January 2002 from Mr Freese to Mr Rubenstein annexing the plaintiff's 50 issues document. Mr Knell said that the signature on the facsimile transmission form was not his, and he believed it to be Mr Freese's signature. Mr Knell said that he "very much doubted" that he had handed to the plaintiff a copy of the facsimile transmission form together with the 50 issues document bearing Mr Rubenstein's handwritten responses upon its return from Mr Rubenstein. He said that if anyone had handed it to the plaintiff, it would almost certainly have been Mr Freese, as he was responsible for "post reservation stuff."

373. Mr Knell said that as at December 2001 he was "pretty busy". He was employed full-time at ADFA as they were in the process of building up the business of PPI. He was also doing his doctorate at the time, and was a director and "heavily involved" in an air traffic control organisation in Fiji seeking rights for air traffic control throughout the Pacific. As a result, his wife handled all the marketing and administration for PPI.

374. In cross-examination by the plaintiff, Mr Knell agreed that he may have met the plaintiff or Ms Read or Ms Lim at one of his seminars in December 2001. He had no recollection of meeting Ms Lim, but he had a "limited recollection" of meeting Ms Read when she came to his office once. He believed this was in "May", presumably May 2002. Mr Knell had no recollection of dealing with the plaintiff, Ms Read or Ms Lim in the period mid-December 2001 through to the first week in February 2002, outside a seminar or a group situation like a Christmas party.

375. Later in cross-examination, Mr Knell gave the following evidence:

> DR READ: Could you just outline your role a little bit more in relation to individual clients say who were interested in a property like the Waldorf?---Yes. I focused on providing information to my clients and – through seminars and through individual appointments. And then I focused on work - sitting down with my clients and developing a strategy with them so that they weren't just buying an individual property, but they actually had an

> understanding of why they were buying that property, whether that be part of a capital gains strategy, whether that be part of a long term strategy to build up wealth for retirement. And so I focused a lot of my attention on that.
>
> On those thing, yes?---On those things. And I probably would have had a meeting with you, Jeff, at some stage on that and maybe Sharon and Susan, but I have - - -
>
> All right, Sid? --- - - - no recollection.
>
> I mean, I think you - - - ? --- And those meetings went about three hours, so quite extensive meetings.

376. The plaintiff prepared two volumes of documents for cross-examination of Mr Knell, containing the relevant documents he wanted to put to Mr Knell. These became Exhibit BJ, Volumes 1 and 2.

377. The plaintiff took Mr Knell to ASIC Regulatory Guide 140 (Exhibit BJ, Vol 2, pp 1-5). Mr Knell said that in 2001 he did not consider himself to be an expert in "management rights schemes". He agreed that in a letter to Waldorf unit owners in December 2006 he said he was an expert in such schemes, but by then he had had more experience than he had had in 2001.

378. Mr Knell agreed that in the relevant period in 2001 and 2002 he was a licensed real estate agent. He agreed that he was listed as the vendor's agent in the Waldorf contract for sale. At that time he held an individual licence, and PPI did not hold a corporate licence.

379. Mr Knell testified that during the relevant period he was acting as agent for the vendor, being FAI in liquidation. While Mr Knell said that he was acting as agent, I have no doubt that he was referring to PPI, while he was the holder of the individual real estate agent's licence. The plaintiff took Mr Knell to a letter from Mr Knell's lawyers, dated 27 May 2008, to the plaintiff's then lawyers (Exhibit BJ, Vol 2, pp112-113), in which they said:

> We enclose the discussed 'Investment Package' forwarded to Prime Properties by Mr. Avi Rubenstein. Mr. Rubenstein was, prior to external administration, the managing director of FAI Property Services Pty Ltd ACN 003 387 719. Upon the FAI/ HIH Group of companies going into external administration, Mr. Rubenstein was engaged as a consultant by the liquidator of the FAI/ HIH group of companies to sell the remaining Waldorf Apartments, the subject of the above proceedings.
>
> We are instructed by the second defendant that Mr. Rubenstein was the principal selling agent for the Waldorf Apartments at the time of purchase by your clients. We are instructed that he received the principal commission and prepared the enclosed document. Mr. Rubenstein in turn sub-contracted, for a lesser fee, the second defendant.

380. The plaintiff then asked Mr Knell whether Mr Rubenstein had been the "principal selling agent", and Mr Knell responded:

> It depends on the definition of principal selling agent. Certainly Avi was appointed by the liquidator as a person to handle all the sales and marketing at the Waldorf. He then sub-appointed me as one of the agents to sell the property.

381. The plaintiff then took Mr Knell to the Amended Defence of the second defendant dated 17 June 2009 (Exhibit BJ, Vol 2, pp 138-140) in which it was pleaded that the second defendant had at all times acted "in good faith as agent of Rinbac Pty Ltd, the proprietor and promoter of the development". He was asked whether this was correct. Mr Knell noted that Mr Rubenstein was also a director of Rinbac, and that he had been

told by the liquidator to deal with Mr Rubenstein, because the liquidator "didn't want to be bothered by it", presumably meaning the sale of the apartments.

382. Mr Knell was next taken to a letter from PPI, signed by Mr Knell, to the Waldorf Sydney Owners Committee and dated 10 November 2006. He agreed that in that letter he said:

> My position as principal of Prime Property Investment is that we were appointed as sub-agents of Mr Avi Rubenstein, the principal agent for sale of these properties. I understand that Mr Rubenstein was appointed by the HIH liquidators. As such, we relied upon information provided to us by Avi Rubenstein and through research that was generally available in the marketplace.

383. Mr Knell was asked about a tax invoice raised by PPI and forwarded to "FAI General Insurance co, Limited" for commission for the sale of unit 208 to Ms Lim. Mr Knell said that he had not personally raised the invoice, and it was raised by his staff, although it may have been presented to him for signature. The particular document (Exhibit BJ, Vol 2, p 69) refers to fees to be paid to PPI for introduction of "the following investor", being Ms Lim.

384. The plaintiff then took Mr Knell to a document entitled "Report Produced by Prime Property Investment Pty Ltd for: Typical Investor on Top Marginal Rate, For Property Situated at: Waldorf South Sydney" (Exhibit BJ, Vol 2, pp 23-25). On its face, the document said that it was produced on 18 December 2001. The plaintiff described it in the schedule of Exhibit BJ volume 2 as "'Financial Report' PPI/Knell to Lim personalised investment analysis for Waldorf Unit 208", but the heading suggests that the typed document was a generic report for a "typical investor" on a top marginal taxation rate. There are handwritten additions to the typed document, but it is not clear, at least to me, to what they relate. Mr Knell said that his meetings with clients "were about strategy, about going and establishing an overall strategy". He said that projections such as the "Financial Report" would have been prepared by staff. He testified that it was not possible that he had a three hour meeting with Ms Lim on 18 December 2001 because he would definitely remember if he did a "three hour strategy meeting" with someone.

385. Mr Knell gave evidence that he personally became involved in the sale of the Waldorf South Sydney apartments in October 2001. Mr Knell denied that, at that time, he was the "controlling mind" of PPI, saying that it was a "team effort".

386. Mr Knell was then taken to the sales instructions issued by PPI for the sale of unit 220 to Ms Read. He agreed that there was information on the document about the purchaser's solicitor, and said that PPI had a panel of solicitors it provided to purchasers if they cared to use them. He denied recommending particular solicitors to purchasers. He was then taken to the PPI Waldorf marketing document (Exhibit BI) which stated "You will need to make arrangements with a solicitor to attend to the purchase process on your behalf. Given the complexity of the lease and contracts, we would strongly advice [sic] that you use a solicitor who has already handled purchasers [sic] for Waldorf Apartment." The document then listed three solicitors who were said to have "a full understanding of the contract and lease documentation". The first defendant is one of the nominated solicitors. The plaintiff asked Mr Knell "on what due diligence did you apply [sic] to find out that Ross and Diana Burns have a full understanding of the contract and lease documentation?" Mr Knell, having previously testified that he did not prepare that document, said that he could not answer that question because he did not have a working knowledge of it.

387. In an effort to assist the plaintiff, I directed some questions to Mr Knell concerning this document:

> HIS HONOUR: In terms of that document, which is the investment opportunities through PPI Pty Ltd, how did that come into existence?---The staff would have prepared it, your Honour, as they prepared for each of the properties which we do. They would have looked at, I presume, the vendor information, which they would have got from the vendor, which I loosely say is FAI Property Services in liquidation. They would have done research, if you like, outside of that, seen if there's any other properties they can use for comparisons, and they would have then prepared off the template, probably used the same template that was prepared for the Canberra Waldorf property.
>
> What role did you personally have in preparing this document?---Well, I obviously made sure the template was right, I would have made best endeavours to read the document and make sure I was happy with the document to the extent that I would have had the time to do it. I mean, sometimes these documents are only prepared just in time, and sometimes – these documents are electronic. So sometimes these documents are updated too. There might have been different versions of this document.
>
> ....
>
> What role did you have in determining that Ross and Diana Burns were solicitors who had a full understanding of the contract and lease documentation?---I wouldn't have specifically sat down with them and asked them a whole bunch of questions in terms of I wouldn't have personally been involved in ascertaining that.
>
> So how did that come about that their names were in the document?--- Well, certainly I would have – I may have been – I might have asked Avi, I might have asked other people that are agents around town who they use as solicitors and I would have probably had initial meeting – I can remember an initial meeting with Ross and Diana Burns – or at least Ross Burns maybe a year prior to that because Ross was involved in the Waldorf Canberra property, which again had done I think – I'm not sure how many settlements of that, but I think he would have done at least 50 I guess or 40 of those (indistinct) so I would have - - -

388. The plaintiff then took Mr Knell to the document entitled "Available Units – Waldorf South Sydney As At Jan 6/02" (Exhibit BJ, Vol 1, pp 32-34). Mr Knell said that the handwriting on the document was not his. He did not know who was referred to as "Read 1" and "Read 2" in the document.

389. Next, the plaintiff took Mr Knell to a printed copy of what appears to be a PowerPoint presentation entitled "Seminar Featuring the Waldorf South Sydney Investment Package Presented by: Sid Knell (Exhibit BJ, Vol 2, pp 6-14). It was suggested to Mr Knell that these were copies of the slides he used in his presentation in Canberra on 12 December 2001. Mr Knell said that he could not say if they were the precise slides used in that particular presentation, but he had no reason to believe that they or similar slides were not used in that presentation. Mr Knell said that he did not always address each of the slides. One of the slides is entitled "Issues to be Considered with a Services Apartment Investment", and listed one of the issues as "Managed Investment Act". I asked Mr Knell if he could recall what, if anything, he had said at the seminar about the Managed Investment Act and he said "I wouldn't have said anything, your Honour, because I wouldn't have known anything about it other than a broad and basic understanding."

390. Mr Knell said the aim of the seminar was to get people to trust PPI, and they would then be dealt with by other employees including Mr Freese for issues such as property selection. The aim of the seminar was not to go through every aspect of property investment.

391. Mr Knell was taken to a document entitled “Capital Allowance Summaries” (Exhibit BJ, Vol 1, pp 163-168). This was described as a depreciation report for unit 206 prepared by a firm called Rider Hunt. The document appears to have been printed on 4 April 2002. It does not contain the name of the unit owner. On page two of the document it states “the unit is defined as short term traveller accommodation.” Mr Knell was asked whether his understanding was that this meant the unit was not residential, and he responded that he had not read the report and had no understanding of it. The report, he said, would have been commissioned by one of his staff.

392. Mr Knell was asked whether in 2001/2002 he accepted or realised that the Waldorf Apartments could not be used for residential purposes, and he responded that he did not accept it, as no one had asked him that question and he had not researched it.

393. Mr Knell was taken to a facsimile dated 23 July 2006 from Mr Rubenstein to the owners of units in the Waldorf development, in which he stated that the building could not be used as a “residential flat building” without the consent of council. Mr Knell agreed that he had seen that document.

394. The plaintiff then took Mr Knell to a letter from the Area Planning Manager of Sydney Council to FAI General Insurance Co dated 21 December 2000 (Exhibit BJ, Vol 1, p 220) expressing concern that the Waldorf development was being marketed as available for use as residential flats for occupation by permanent residents, and reiterating the development consent was for serviced apartments. Mr Knell said that he was not aware of that letter and had not been shown the letter by either FAI or Mr Rubenstein. He was also unaware of a further letter from the Area Planning Manager dated 26 February 2001 (Exhibit BJ, Vol 1, p 221) reiterating concerns that prospective purchasers were not being advised “adequately” that residential use of the apartments was currently prohibited.

395. Finally, Mr Knell was taken to the handwritten responses provided by Mr Rubenstein to the plaintiff’s 50 issues document (Exhibit BJ, Vol 2, p 38-42). He was taken to issue number 37, which addressed clause 7.4 of the UMA, and in which the plaintiff had questioned whether the clause was legal “since it means entering into an unspecified Agreement”. Next to that issue, Mr Rubenstein had written “we are waiting to [sic] ASIC final approval this is the reason for this clause”. Mr Knell was asked whether he was aware that Mr Rubenstein was awaiting final approval from ASIC at that time, and said “I thought it had been approved ... I never knew there were any issues with approval or non-approval”.

396. The third defendant’s wife, Alison Knell, also gave evidence. She was taken to Exhibit BI, the Waldorf marketing document, and said that she was familiar with it “because my team and I actually create these documents and created this document accompanying it”. She worked with a small team producing the material. She said that Mr Knell had no role in producing Exhibit BI. She was then asked about the suggestion that Mr Knell had handed the brochure, Exhibit BI, to the plaintiff at the seminar on 12 December 2001:

> Dr O’HAIR: Now, Dr Read has indicated that one of the occasions where that document was handed to him by Mr Knell was an information session conducted on 12 December 2001. What do you have to say about that?---At that information session and the same as at all information sessions, Sidney is the presenter at these events. I do all the admin and my team and I set the room up and all such brochures are placed at the table at the back. There’s multiple properties discussed at these events and they’re always put at the back

> because people would pick and choose and take them if they wanted to or not want them, and they were at the table as people leave, and that's where people acquired these brochures, there was no one on one going on at these large presentations.
>
> You were at the presentation? --- Throughout the whole – throughout all of it, yes.
>
> Specifically did Mr Knell hand that document to Dr Read? --- Definitely not.
>
> Mrs Knell was there a source document for document BI?---BI. This one. The source document for that would have been what the vendor provided us with. We have a template. The team create the template from the source document which was the Waldorf document, from the Waldorf themselves, the vendor.

397. Mrs Knell was then taken to Annexure C of Exhibit Y, the facsimile on PPI letterhead to Mr Rubenstein dated 30 January 2002, and confirmed that the signature on that facsimile was that of Mr Freese, and not her husband.

398. In cross-examination by the plaintiff, Mrs Knell said that on 12 December 2001 there was a table at the back of the presentation room on which brochures were placed containing information about available properties. She was then taken to an email from Mr Knell dated 4 December 2001 to other members of the team at PPI in which he referred to upcoming seminars in Canberra on 5 and 12 December 2001, and said that the seminars "will focus on the Waldorf South Sydney Investment Package" (Exhibit BJ, Vol 1, p 289). Mrs Knell nevertheless maintained that there would have been a range of properties offered to prospective purchasers at the seminar.

399. Mrs Knell was taken to the printed copy of the PowerPoint presentation (Exhibit BJ, Vol 2, pp 6-14. See [319] above), and she said they were part of a "library of slides" (presumably prepared and held by PPI) and she could not say which slides had been "picked" on 12 December 2001. She could not recall if anything was said about "the reputation of the operator", one of the topics set out on one of the slides.

400. Mrs Knell said that she had not read the contract for sale of apartments in the Waldorf development prior to the 12 December 2001 seminar.

401. In re-examination Mrs Knell stated that Mr Freese was paid a wage by PPI, and was not paid a commission on sales.

Consideration: the evidence of Mr and Mrs Knell

402. Mr and Mrs Knell appeared to me to be honest witnesses doing their best to recall the relevant events. Like the plaintiff, their evidence suffered from the difficulty of remembering events which occurred 14 or 15 years earlier, and in circumstances where they had no reason to pay any particular attention to the events at the time they occurred. In my opinion, their recollection of their personal roles in PPI, and in the conduct of seminars conducted by PPI, are more likely to be reliable than their recollection of particular events.

403. I accept the evidence of Mr Knell that he was engaged in a number of enterprises and activities in late 2001 and early 2002, such that some aspects of the business of PPI were left almost entirely in the hands of Mrs Knell and the other staff of PPI. I accept that Mr Knell's main roles were conducting seminars and participating in investment strategy meetings with individual investors when requested. I also accept that Mrs Knell and other PPI employees were responsible for the marketing aspect of the business of PPI, including creating the Waldorf marketing document, Exhibit Y. I further accept that

the Waldorf marketing document was prepared using information principally provided by the vendor, FAI.

404. It is improbable that either Mr Knell or Mrs Knell had seen or read a contract for sale of any of the apartments in the Waldorf development while PPI was acting as agent for the vendor; there is no cogent reason why they should have read such a document or been aware of its contents.

405. I am satisfied that the liquidator of FAI appointed Mr Rubenstein to oversee sales in the Waldorf developments. This would be commercially sensible as Mr Rubenstein, as a former director of FAI, would have a comprehensive understanding of the development. Mr Rubenstein then appointed a number of sub-agents, including PPI, to conduct the marketing of the development; PPI was acting, as such, as the agent of the vendor. As occurs frequently in such businesses, PPI probably had a number of prospective purchasers it could identify through prior dealings, but it is not important to determine whether the plaintiff fell into that category. The plaintiff submitted that PPI had some form of conflict of interest because of the fact that it was appointed by Mr Rubenstein as a sub-agent, rather than directly by the liquidator of FAI, and accordingly had an obligation to advise him of that arrangement. For my part, I cannot see any such conflict of interest or that PPI was under any obligation to reveal to the plaintiff or any potential purchaser its arrangements with the liquidator or Mr Rubenstein; after all, if FAI had not gone into liquidation, PPI would still have had to deal with Mr Rubenstein as a director of FAI. There is also no evidence of the basis upon which Mr Rubenstein may have been renumerated by the liquidator for his work in marketing the development while FAI was in liquidation.

406. There is no evidence that PPI, Mr Knell, Mrs Knell or any other employee of PPI were aware in the period December 2001 to May 2002 that the development consent for the Waldorf development restricted the use of the apartments to serviced apartments, and did not permit the apartments to be owner occupied as residences, or let long-term via a standard residential lease. There is no evidence that any such person or entity was aware at that time that the proposed unit management arrangements in the UMA constituted a MIS for the purposes of the CA; indeed, there is no evidence that PPI, Mr Knell, Mrs Knell or any other employee of PPI was ever provided with a copy of the proposed UMAs, or was in any other way made privy to its exact contents.

407. The cross-examination of Mr Knell concerning the reference in PPI's Amended Defence to it acting as agent of Rinbac was misconceived; in any event it was irrelevant. I am satisfied that the reference to Rinbac was a simple error, and that the arrangements under which PPI marketed the development were those that I have set out above.

Relevant statutory provisions

408. The plaintiff based his case against Mr Knell on the proposition that the second defendant, PPI, had made false or misleading representations to him and that Mr Knell was liable for any damage sustained by the plaintiff in reliance on those representations, by reason of accessorial liability. The plaintiff called in aid a number of statutory provisions prohibiting the making of false or misleading representations, including ss 52 and 53A of the then TPA, ss 12DA and 12DC of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act), and ss 995, 999, 1000 and 1001 of the CA. Each of these sections addressed misleading or

deceptive conduct, or the making of false or misleading statements in different contexts. It is not necessary to set out each of those provisions here, as if the plaintiff established that misrepresentations of the type he had alleged were made by PPI, and that he acted on those representations and suffered loss as a consequence, and that the third defendant is liable in an accessorial capacity for the representations, then it is clear that he must succeed in his claim against the third defendant under one or more of those provisions.

409. Each of the enactments cited by the plaintiff as a basis for liability on behalf of the third defendant has a provision dealing with representations as to future matters: s 51A TPA, s 12BB ASIC Act and ss 728(2), 765 and 851 of the CA. The effect of these sections is that a statement or representation made as to a future matter is taken to be misleading where at the time of making the statement there were no reasonable grounds for making the statement. The TPA and the ASIC Act provide that the maker of the representation has an onus to adduce evidence that there were reasonable grounds for the making of the representation. In the context of the present matter this is not a matter of importance.

410. Each of the enactments relied upon by the plaintiff, except the ASIC Act, has an accessorial liability provision: s 75B of the TPA and s 79 of the CA. There is no accessorial liability provision in the ASIC Act.

411. Each of the enactments relied upon by the plaintiff contains a provision entitling a person who has suffered loss or damage by reason of conduct that contravenes the relevant provisions of the enactment to recover their loss or damage. I will, for convenience, set out the accessorial liability provisions for each enactment below, except for the ASIC Act which does not contain an accessorial liability provision:

Trade Practices Act 1974 **(Cth)**

75B Interpretation

(1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB or V, or of section 75AU or 75AYA, shall be read as a reference to a person who:

(a) has aided, abetted, counselled or procured the contravention;

(b) has induced, whether by threats or promises or otherwise, the contravention;

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

Corporations Act 2001 **(Cth)**

79 Involvement in contraventions

A person is involved in a contravention if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced, whether by threats or promises or otherwise, the contravention; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

412. The bases of accessorial liability expressed in these provisions are derived from similar bases in the criminal law: *Yorke v Lucas* (1985) 158 CLR 661 (*Yorke v Lucas*) at 666-667. In *Yorke v Lucas*, the High Court addressed the proper interpretation of s 75B of the TPA, and in particular the state of mind which must be proved to have been held by a person said to be liable as an accessory under that provision. The plurality (Mason ACJ, Wilson, Deane and Dawson JJ) said regarding s 75B at 669:

> Notwithstanding that s 75B operates as an adjunct to the imposition of civil liability, its derivation is to be found in the criminal law and there is nothing to support the view that the concepts it introduces should be given a new or special meaning.

413. Earlier, at 667-668, the plurality said:

> If par.(a) of s.75B imports the requirements of the criminal law, it is clear in the light of *Giorgianni v. The Queen* that Lucas could only be brought within that paragraph if he intentionally aided, abetted, counselled or procured a contravention by the Lucas company of s.52 of the *Trade Practices Act*. Upon the findings of the trial judge, however, Lucas lacked the knowledge necessary to form the required intent. A contravention of s.52 involves conduct which is misleading or deceptive or likely to mislead or deceive and the conduct relied upon in this case consisted of the making of false representations. Whilst Lucas was aware of the representations - indeed they were made by him - he had no knowledge of their falsity and could not for that reason be said to have intentionally participated in the contravention.

414. The plurality then proceeded to consider s 75B(1)(c), concerning an allegation that a person was “knowingly concerned” or “a party to” a contravention by another, at 669-670:

> So far we have dealt only with par.(a) of s.75B which refers to involvement of persons who are accessories. The appellants also rely upon par.(c) of the same section which extends the definition of a person involved to a person who has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention. There can be no question that a person cannot be knowingly concerned in a contravention unless he has knowledge of the essential facts constituting the contravention. It cannot, therefore, be suggested that Lucas falls within the first limb of par.(c). It might be thought possible to construe the express requirement of knowledge as extending not only to being "concerned in" but also to being "party to" a contravention. However, there are two reasons, in our view, why it is inappropriate to do so.
>
> First, the natural construction of par.(c) is to regard the word "knowingly" as qualifying only the words "concerned in" which immediately follow it. The punctuation strongly suggests such a construction. Secondly, the word "knowingly" would be an unnecessary qualification of the words "party to". In the context of the paragraph, a person could only properly be said to be "party to" a "contravention" if his participation was in the context of knowledge of the essential facts constituting the particular contravention in question. Whilst it is not a contradiction in terms to speak of a person being "party to" something of which he is unaware, some indication is needed to convey such a meaning. There is nothing in the paragraph itself which would point to any conclusion other than that the words "party to" are used to refer to a participant in the nature of an accessory. Moreover, the wider context of the whole section leads to the same conclusion. We have already indicated why par.(a) requires knowledge. Paragraph (b), which speaks of inducing a contravention by threats, promises or otherwise, and par.(d), which speaks of conspiring with others to effect a contravention, both clearly require intent based upon knowledge and there is force, we think, in the observation made in the judgment of the Full Court below that there is
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> > " ... no reason why Parliament would have intended that a section which renders natural persons liable for a contravention by a corporation should require some mental element or absence of innocence in every case to which it refers except one which itself requires in its first limb that the person was 'knowingly' concerned in the contravention."

> In our view, the proper construction of par.(c) requires a party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention.

415. In *Giorgianni v The Queen* (1985) 156 CLR 473, the plurality (Wilson, Deane and Dawson JJ) said:

> For the purposes of many offences it may be true to say that if an act is done with foresight of its probable consequences, there is sufficient intent in law even if such intent may more properly be described as a form of recklessness. There are, however, offences in which it is not possible to speak of recklessness as constituting a sufficient intent. Attempt is one and conspiracy is another. And we think the offences of aiding and abetting and counselling and procuring are others. Those offences require intentional participation in a crime by lending assistance or encouragement. They do not, of course, require knowledge of the law and it is necessary to distinguish between knowledge of or belief in the existence of facts which constitute a criminal offence and knowledge or belief that those facts are made a criminal offence under the law. The necessary intent is absent if the person alleged to be a secondary participant does not know or believe that what he is assisting or encouraging is something which goes to make up the facts which constitute the commission of the relevant criminal offence. He need not recognize the criminal offence as such, but his participation must be intentionally aimed at the commission of the acts which constitute it. It is not sufficient if his knowledge or belief extends only to the possibility or even probability that the acts which he is assisting or encouraging are such, whether he realizes it or not, as to constitute the factual ingredients of a crime. If that were sufficient, a person might be guilty of aiding, abetting, counselling or procuring the commission of an offence which formed no part of his design. Intent is required and it is an intent which must be based upon knowledge or belief of the necessary facts. To the extent that *Reg. v. Glennan* suggests the contrary, it is not, in our view, in accordance with principle and does not correctly state the law.

416. While *Yorke v Lucas* concerned s 75B of the TPA, the same principles must apply to s 79 of the CA, which is in the same form as s 75B.

417. It follows from the above that in order to succeed in his claim against the third defendant, the plaintiff must prove as a minimum with regard to representations of present facts:

    (a) that there was a contravention of the provisions of the TPA or the CA by reason of the second defendant making to the plaintiff a misrepresentation concerning the purchase by him of a unit in the Waldorf development and/or the proposal that any such unit be managed under a UMA;

    (b) that the plaintiff relied on that representation;

    (c) that Mr Knell knew that the representation was made;

    (d) that Mr Knell knew that the representation was false; and

    (e) that the plaintiff suffered loss or damage by reason of the misrepresentation.

418. As the ASIC Act contains no accessorial liability provision, the third defendant cannot under that Act be found liable for any loss or damage sustained by the plaintiff by reason of misrepresentations made by the second defendant. In the present case this is of no moment, as proof of conduct by the second defendant contravening the ASIC Act would, at the least, also establish a contravention of the TPA.

419. The position with regard to the plaintiff's claim against the third defendant based on an allegation that the third defendant was a person involved in the making of future matters representations by PPI is slightly more complicated. In his submissions the

plaintiff contended that the effect of the "future matters" provisions in the respective statutes he relied upon was that the third defendant "is taken to have made a misleading representation about a future matter (e.g. mixed-use, no operational outgoings) unless he was able to evidence [sic] that he had reasonable grounds for making the representations i.e. the evidentiary burden is on Knell, not the plaintiff". This analysis is incorrect. The FASOC pleaded that the second defendant, PPI, made the relevant representations. The case pleaded against Mr Knell was based upon him being liable for loss or damage sustained by the plaintiff by reason of representations as to future matters by PPI, and on the basis that Mr Knell was a person involved in the making of the representation pursuant to the accessorial liability provisions: ss 75B and 82 TPA; s 79 CA. The submission made by the plaintiff would be correct if one were considering a claim against the maker of the representation, that is, PPI; PPI would bear the onus of adducing evidence that it had reasonable grounds for making a representation as to a future matter, but the position is different with regard to a person said to be liable as an accessory to, or person involved in, the making of the representation.

420. The question whether the reversal of the onus provided by s 51A(2) of the TPA applies to a person said to be liable as a person involved in the contravention of the TPA by reason of s 75B was considered by the Full Court of the Federal Court of Australia in *Quinlivan v Australian Competition and Consumer Commission* [2004] FCAFC 175; 160 FCR 1. After setting out both s 51A(2) and s 75B of the TPA, the Court (Heerey, Sundberg and Dowsett JJ) said at [8]-[13]):

> The leading case on s 75B is *Yorke* v *Lucas* (1985) 158 CLR 661. The High Court held that the section imports the requirements of the criminal law. The person sought to be made liable must be shown to have had knowledge of the essential matters which go to make up the contravention. This contrasts with the rule as to primary liability under s 52 where liability may attach even though a corporation acts honestly and reasonably: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228, *Parkdale Custom Built Furniture Pty Ltd* v *Puxu Pty Ltd* (1982) 149 CLR 191 at 197.
>
> In *Yorke* 158 CLR 661 itself the alleged accessory, an employee of a corporate respondent, was held not to be liable because although he was aware of the representations made – indeed they were made by him – he had no knowledge of their falsity. Therefore he could not be said to have intentionally participated in the contravention: *Yorke* 158 CLR at 668. "Knowledge" means actual and not constructive knowledge: *Compaq Computer Australia Pty Ltd v Merry* (1998) 157 ALR 1 at 5. What is said in *Yorke* 158 CLR 661 about s 75B is applicable to s 80(1)(c), (d), (e) and (f).
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> From the interaction of these provisions three conclusions emerge. First, s 51A does not detract from the Yorke principle that actual knowledge of the essential elements of the contravention is required if s 75B or s 80 is to apply. Where the contravening conduct involves misrepresentation, whether as to a future matter or not, this principle requires actual knowledge by the accessorial respondent of the falsity of the representation. This is an essential matter which must be alleged and proved: *Su* v *Direct Flights International Pty Ltd* [1999] FCA 78 at [38], *Fernandez* v *Glev Pty Ltd* [2000] FCA 1859 at [18].
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> Secondly, the reversal of onus in s 51A(2) does not apply where the accessorial liability of s 75B or s 80 is relied on. This question was considered by Emmett J in *Australian Competition and Consumer Commission v Universal Sports Challenge Pty Ltd* [2002] FCA 1276. The Commission had proceeded against Universal Sports Challenge Pty Ltd (Universal) for contravention of s 52 and, on the basis of s 75B, against a Mr Michael Kotawicz. Universal consented to certain orders and the matter continued against Mr Kotowicz. In that context his Honour said (emphasis in original):

> 43 In the present case, Universal is no longer a party to the proceeding because, as I have said, the proceeding has now been dismissed as against Universal. Accordingly, it is no longer possible for Universal to adduce any evidence in the proceeding. On one view, if s 51A(2) applies as against Mr Kotowicz, it would give rise to an irrebuttable presumption so far as he is concerned. That is to say, since Universal cannot adduce evidence to the contrary, it is deemed, as against Mr Kotowicz not to have had reasonable grounds for making any relevant representation. No evidence led by Mr Kotowicz would lead to any different conclusion.
>
> 44 One view of s 51A is that it provides that a corporation is deemed, as against *any party* to a proceeding, not to have had reasonable grounds for making a representation unless *that party* adduced evidence to the contrary – see *King v GIO Australia Holdings Limited* [2001] FCA 308 paras [28]-[30]. That, however, is not what the section says. There could well be good policy reasons for imposing on a person who makes a representation with respect to a future matter the evidentiary onus of demonstrating that the representation was not misleading. It is a different matter altogether, however, to impose such a burden on a person who did not make the representation, albeit a person who was knowingly involved in the making of the statement.
>
> 45 That is a good reason for construing s 51A as giving rise to a deeming only as against a principal contravener of the Act. That is to say, it does not have any relevance as regards a claim against a person who is only alleged to have been involved in or to have been a party to a contravention by another person. That is the present case.
>
> (Emphasis in original.)
>
> The case of *King v GIO Holdings Limited* (2001 184 ALR 98 referred to by his Honour was a decision of Moore J on a pleading strikeout application. Moore J at [30] held it was arguable that "it" in s 51A(2) could extend to a person treated by s 75B as being involved in a corporation's conduct. Thus his Honour declined to strike out a pleading in which the applicant did not assume the initial burden of proving that the misrepresentations with respect to future matters were misleading. This was in a context where counsel for the applicant had made it plain that it was not part of his case that the respondent alleged to be liable under s 75B knew the representations were false, misleading and deceptive; see *King* 184 ALR 106 at [17].
>
> Moore J of course did not have to reach a final conclusion on this point. However Emmett J did. We find his Honour's reasoning persuasive.

421. This approach to the interpretation of the operation between future matter provisions and accessorial liability provisions appears to have been widely, if not universally, adopted: see *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd* [2005] QCA 389 at [36] per Keane JA; *Dawson v LNG Holdings* [2008] NSWSC 137; *Hatt v Magro* [2007] WASCA 124; 34 WAR 256 at [42].

422. It follows that where it is alleged by the plaintiff that the third defendant is liable by reason of an accessorial liability provision for a representation made by PPI as to a future matter, the onus falls on the plaintiff to prove that the third defendant had actual knowledge that PPI had no reasonable grounds for making the representation.

Plaintiff's Claim Against Third Defendant – Consideration.

423. I am satisfied that the Waldorf marketing document, viewed objectively, contained a number of misleading and/or deceptive statements. The document clearly suggested that those who purchased apartments in the Waldorf development would be able to reside in those apartments as owner/occupiers. This was incorrect because the relevant development consent restricted their use to that of serviced apartments. I am also satisfied that the document suggested incorrectly that an owner had the option of

renting a unit under a "standard real estate lease", implying that the property could be leased as a long term residence under a standard residential lease. This was in fact not a permitted use of the apartments. Based upon the slides prepared by PPI for its seminars marketing the Waldorf development, I am unable to be satisfied that this mixed-use representation was made orally by the third defendant in the course of his presentation on 12 December 2001. I accept that the Waldorf marketing document, in which the representations were clearly made, was available to attendees at the seminar, and it is probable that the plaintiff obtained a copy at this seminar.

424. I am not satisfied that the third defendant knew that the mixed-use representation, found in the Waldorf marketing document, was made to the plaintiff. I am not satisfied on the evidence that the third defendant had any role in preparing that document, or had at any relevant time knowledge that the document contained the mixed-use representation.

425. I am satisfied that while the focus of the seminar on 12 December 2001 was on the Waldorf South Sydney development, it is highly probable that the seminar provided general information about property investment and in particular investment in serviced apartments. It is also highly probable that the presentation referred to properties other than the Waldorf South Sydney development, and that brochures which were made available by PPI to attendees at the seminar also referred to other properties.

426. I am not satisfied that the oral representations said to have been made by the third defendant to the plaintiff immediately after the seminar were, in fact, made by the third defendant. Bearing in mind his role at these seminars, it is unlikely that he would have engaged in a conversation with the plaintiff of this level of particularity. I am also not satisfied that Mr Knell handed a copy of the Waldorf marketing document to the plaintiff after the seminar. I accept the evidence of Mr and Mrs Knell that this was not part of his role at such seminars.

427. The evidence of Mr Knell was equivocal as to whether he conducted a three hour strategy meeting with the plaintiff or Ms Read or Ms Lim before they purchased apartments. His final position seemed to be a concession that this was possible. There is, however, in my opinion no reliable evidence of the nature of any discussions that occurred at that meeting. It is material to observe that in his 50 issues document the plaintiff raised an issue about clause 30.5 of the contract for sale, which provided that "[t]he purchaser does not rely on any other letter document correspondence or arrangement whether oral or in writing, as adding to or amending the terms, conditions, warranties and arrangements of this contract". The plaintiff was astute to the implications of this clause, and at issue II of the 50 issues document wrote: "Reliance on Waldorf Brochures and Advertisements re Reciprocal rights RCI and other Waldorf properties and returns – These are the basis of purchase – see prospectus and ad in Jan 2002 'Australian Property Investor'". This, of course, is a contemporaneous document and it makes no reference to the plaintiff having relied on oral representations made by the third defendant. It is unlikely, in my opinion, that the plaintiff would have neglected to include reference to the alleged oral representations made by Mr Knell if they had in fact been made.

428. One of the PowerPoint slides said to have been used at the 12 December 2001 seminar is headed "Issues to be considered with a Serviced Apartment Investment", and one of the dot-point issues is "Flexibility/Alternative Use". This is apparently part of a generic presentation on "Understanding Risk" in serviced apartment investment.

There is no reliable evidence that Mr Knell discussed this issue during the seminar either generally or in the context of a purchase in the Waldorf development. The presence of this dot-point does not establish either that Mr Knell made a mixed-use representation during the seminar or, if he did, that he knew it was incorrect.

429. The other representations alleged by the plaintiff are the "no operational outgoings" representation, and the "ASIC approval representation". The plaintiff alleged that the no operational outgoings representation was made in the Waldorf marketing document and was complied with by the Manager for the purposes of the UMA (WASS), until about 31 May 2007 when it started charging "the body corporate costs" of the scheme which owners had to meet. I will assume for present purposed that this was the case, and that in charging such costs to individual unit owners the Manager was acting contrary to representations made in the Waldorf marketing document. As the plaintiff acknowledged in his submissions, the representation was as to a future matter. There is no evidence that the third defendant had actual knowledge that PPI had no reasonable grounds for making the representation. I should note in passing that while the Waldorf marketing document may have been misleading as to the period during which the no operational outgoings representation was to operate, the contract for sale was not. The contract for sale made it clear that the period during which WASS as the Manager of the UMA was to be responsible for the majority of the outgoing was the "guarantee period" of five years from the date of completion of the sale. I have no doubt the plaintiff was aware of this from his own study of the contract. This finding is supported by the contents of a letter written by the plaintiff to Jameson & Associates Unit Services Pty Ltd dated 15 February 2008 concerning alleged arrears of strata levies for unit 206. In that letter the plaintiff stated "up to and including 31 May 2007 Waldorf Apartments was required under the terms of the Unit Management Agreement to '***pay***' all '***property expenses***' ..." (emphasis as per original). He then went on to say "Under the terms of the UMA I became responsible for payment of levies from 1 June 2007": Exhibit AE, p 93. For this reason, I am satisfied that the plaintiff did not rely upon the no operational outgoings representations when he purchased unit 206.

430. With regard to the ASIC approval representation, assuming it to be a representation as to a future matter, making the same assumptions that I made regarding the no operational representation, I make the same finding that there is no evidence that the third defendant had actual knowledge that PPI had no reasonable grounds for making the representation.

431. The plaintiff alleged that the facsimile from Mr Rubinstein to the first and third defendants dated 1 February 2002 contained the ASIC approval representation. The relevant portion of that document relied upon by the plaintiff reads:

> Please be aware that the UMA have [sic] been designed to comply with ASIC requirements and therefore it seemed complicated in certain aspects. Both the UMA & The contract have been previously approved by ASIC & THE NSW Supreme Court and it is unlikely that the liquidator will be prepared to amend them again.
>
> As per my discussion with Sydney The Waldorf will consider minor amendments to THE UMA as long as there are no changed in the commercial term and the concept as approved by ASIC & The Court is not been [sic] affected.

Later in that document, when addressing the plaintiff's concern that clause 37 of the UMA may make the agreement uncertain, Mr Rubinstein said:

> We have now almost finalized [sic] agreement, any changed will be to comply with ASIC & The Supreme Court.

432. The plaintiff appeared to suggest that this was a representation that ASIC was in the process of approving the UMA for the purpose of it being registered as a MIS. I do not accept that the documents relied upon by the plaintiff can be read that way and I am certain that the plaintiff himself did not read them that way. It is clear from the context in which these statements were made that the need for ASIC approval concerned issues arising from the liquidation of the vendor, and was not a representation that ASIC was approving the UMA for the purpose of registering a MIS. In that regard, I note that the alleged representations refer to approval by ASIC and the NSW Supreme Court, and that the latter body has no role to play in the registration of an MIS.

433. In any event, to the extent that the ASIC representation was one of present fact, there is no evidence that the third defendant knew that any such representation was false.

434. The plaintiff also relied on statement made in Mr Rubenstein's response to his 50 issue document as reiterating the no operational outgoings representation. For the same reasons I have given when addressing that representation as found in the Waldorf marketing document, the plaintiff cannot establish liability on the part of the third defendant based on the statements by Mr Rubenstein in this response.

435. For completeness, I should add that I am not satisfied that the plaintiff relied on the mixed-use representations when he purchased unit 206, as I am satisfied that he was well aware of the nature of his purchase and the relevant limitations upon the use to which it could be put.

436. For these reasons the plaintiff's claim against the third defendant fails.

The Evidence Concerning Loss and Damage

437. I have found that the plaintiff's claims against the first and third defendants fail. I will nevertheless consider the evidence adduced by the plaintiff concerning loss and damage, proof of which, of course, is an integral part of proof of his claim in negligence against the first defendant. I will consider both whether the plaintiff has established that he suffered a loss and whether the evidence allows for any such loss to be quantified. The plaintiff adduced no expert evidence of any losses he said he suffered as a consequence of purchasing unit 206 and entering into the UMA. It is consistent with the plaintiff's confidence in his own abilities and judgment that he ignored advice about the need for such evidence and proceeded to attempt to assess his own losses. The difficulties in adopting such a course are manifest.

438. An expert is required to abide by the expert code of conduct set out in Schedule 1 to the *Court Procedure Rules 2006* (ACT) (the CPR). The expert must not give oral evidence unless they have acknowledged in writing that they have read the code of conduct and agree to be bound by it. Expert reports must contain similar acknowledgments: r 1202 of the CPR.

439. The expert witness code of conduct set out in Schedule 1 of the CPR provides that the expert:

    (a) has an overriding duty to assist the court impartially on matters relevant to the expert's area of expertise;

(b) has a paramount duty to the court and not to the person retaining them; and

(c) is not an advocate for a party.

440. In any report prepared by an expert, he or she must state their qualifications for forming the opinions stated in the report, all material facts and assumptions on which the report is based, reasons for each opinion expressed, whether particular question or issues fall outside their area of expertise, and any reference to literature or other materials relied upon to support their opinions.

441. It is obvious that the value of expert evidence is derived from their demonstrated expertise in a particular field and from their independence. A judge or jury will not ordinarily possess expertise in fields such as valuation of property or businesses and will need to reply upon expert evidence.

442. In paragraph 23 of the FASOC, the plaintiff pleaded the heads of damage he alleged he sustained by reason of the actions of the defendants. The first such head of damage claimed that he sustained loss by reason of the reduced value of unit 206 as a serviced apartment compared with its value as a residential unit capable of being used or let as a permanent residence. In support of that claim the plaintiff filed an affidavit affirmed by himself on 28 March 2012 (Exhibit X). In this affidavit, he said that calculation of economic loss under this head of damage required determination of the "actual capital values" of unit 206 as at settlement date, 31 May 2002. He then asserted, based upon his "research in the context of the present proceedings" that there are three main approaches to calculating the value of short term accommodation: the income capitalisation approach, the sales comparison approach and the cost approach. In addition, the plaintiff asserted that the "lodging industry" has a "well-known rule of thumb", known as the average daily rate rule (the ADR). The plaintiff then purported to apply each of these approaches and the ADR to unit 206, resulting in an asserted loss of $92,250.00 being the supposed difference in value of unit 206 as a serviced apartment as opposed to its value as a residential unit capable of being used or let as a permanent residence.

443. I will not set out the processes by which the plaintiff arrived at this figure, because there would be no point in doing so. I am not a valuer, and I do not purport to know whether the methods adopted by the plaintiff are appropriate, or have been validly applied. I do not know what research was undertaken by the plaintiff and it would be improper for me to undertake my own research on the matter. The plaintiff referred to various publications in his affidavit which are not in evidence, and there is no evidence that the contents of those publications are generally accepted by expert valuers.

444. The plaintiff demonstrated no qualifications or expertise in valuation. He did not demonstrate that he was entitled to give expert evidence as to the value of unit 206 at the time he purchased it, or the value of a hypothetical similar unit which could be used or rented out as a permanent residence. He is also a partisan witness and not subject to the expert witness code of conduct. His valuation evidence is worthless.

445. In a second affidavit also affirmed on 28 March 2012 (Exhibit W), the plaintiff addressed two other pleaded heads of damage, being reduced income by reason of utilising the property as a serviced apartment instead of letting the property as a permanent residence, and reduced income by reason of engaging WASS as Manager of the property as a serviced apartment. In this affidavit the plaintiff again referred to documents not in evidence and manipulated the data according to processes the

validity of which was not subject to any expert evidence. He purported to determine the amount he would have received if the property had been let as a permanent residence by reference to the document titled "Report Produced by Primary Property Investment Pty Ltd for: Typical Investor on Top Marginal Rate, For Property Situations at: Waldorf South Sydney" which was part of the Waldorf marketing document prepared by PPI for use at the 12 December 2001 seminar. In my opinion, it is clear that the document in question is a financial analysis based on assumptions and not a representation as to what future returns the property will yield. In any event, in using the "Weekly Rent" figures in the way in which he has, the plaintiff has treated these figures as the equivalent of an admission in the proceeding by the third defendant that this is the income the property could have generated as a permanently let residence. This, of course, is incorrect. To the extent that the figures in the analysis could constitute representations, they were made by the second defendant which was responsible for the preparation and distribution of the document. For the reasons I have given, the third defendant was not a person "involved in" the making of the representation. In short, the document is not the third defendant's and no representation made in that document can be relied upon by the plaintiff as an admission by the third defendant in these proceedings. The consequence is that there is no evidence of what income the property may have generated as a permanently let residence. The plaintiff has also treated figures in the document in the same way, e.g. Waldorf management fees, discount rates etc. There is no reliable evidence of what unit 206 may have returned if let as a permanent residence.

446. There is similarly no reliable evidence of reduced income being received by the plaintiff by reason of WASS being engaged as Manager of the property. It was of course inevitable that the plaintiff would be required to pay fees to WASS at some point, and to this extent would receive reduced income by reason of him retaining WASS, but I do not understand the plaintiff to allege that he suffered damages in this way. I understand the plaintiff's claim to be that if the property could be let as a permanent residence he would not have been required to retain WASS to manage the property and accordingly would not have been required to pay its fees. It must be accepted that this would be the case, but in determining what loss, if any, the plaintiff may have suffered in that regard, it would be necessary to bring to account any costs that may arise from the property being let as a permanent residence and there is simply no reliable evidence whether there are any such costs or, if so, their amount.

447. The plaintiff also claimed damages for additional costs incurred by reason of special levies imposed "consequent on the exclusive rights granted" to Rinbac to require reimbursement of costs, charges and expenses in relation to the Waldorf development. The plaintiff would have been required to pay such levies even if the unit he purchased was capable of being let as a permanent residence, and there is no evidence that such levies were improperly levied, or were for inflated amounts. To the extent that the plaintiff may allege that he would not have proceeded with the purchase of unit 206 but for the alleged wrongdoing of the defendants, it would be necessary to bring to account any capital gain made by the plaintiff on his purchase of unit 206, which would require a valuation of that unit. The plaintiff has steadfastly declined to provide the Court with evidence of any such valuation, asserting instead that the unit simply has no value. There is simply no reliable evidence to establish that the plaintiff has sustained the alleged loss, or, if so, the quantum of that loss.

448. The plaintiff also claimed damages for additional costs in respect of the period 1 June 2007 to 16 July 2009 consequent upon an alleged breach of the no additional outgoings representation. No reliable evidence was adduced by the plaintiff to establish these losses.

449. The next claim by the plaintiff was for loss of the benefit of performance of the representations in respect of the outgoings on unit 206 post-16 July 2009, the date upon which he purported to accept repudiation of the UMA. There is again no reliable evidence that the plaintiff sustained such losses, or, if so, to what extent. The plaintiff further claimed loss of income or earnings consequent upon the breach of the mixed-use representation. Regrettably, there is again no reliable evidence that the plaintiff sustained such losses or, if so, the extent of those losses.

450. The plaintiff then claimed damages for loss of opportunity to purchase a residential property in Jerrabomberra for $300,000.00 as an alternative to unit 206. There are a number of problems with this claim. There is no reliable evidence that the plaintiff did not have the financial capacity to purchase the Jerrabomberra property in 2003, when he said that the opportunity arose for him to buy it. In 2006, the plaintiff purchased an apartment in Aurora Towers in Brisbane, borrowing $430,000.00 to do so. The plaintiff's taxation and other financial records were not reliable so that I cannot be satisfied that the plaintiff missed the opportunity to purchase the Jerrabomberra property because he lacked the financial means to purchase it. There is also much to be said for the proposition that the temporal difference between the purchase of unit 206 and the plaintiff having the opportunity to purchase the Jerrabomberra property makes it entirely speculative whether if he had not purchased unit 206 he would have been in a position to purchase the Jerrabomberra property. There is also no reliable evidence of the comparative variations in value of either the Jerrabomberra property or unit 206, so there is no means to determine whether the plaintiff suffered any such loss.

451. The next claim made by the plaintiff is that he suffered the loss of an opportunity "to secure the represented annual net income returns by action to register the Waldorf scheme with ASIC and thereby put in place enforceable undertakings in respect of the represented owners 'rights' in respect of the outgoings on" unit 206. I take this to be an allegation that the plaintiff lost the opportunity before settlement of insisting that the MIS constituted by the UMA be registered in accordance with the CA. The plaintiff may well have lost that opportunity, but there is no evidence that he suffered any loss or damage as a consequence. I also note that registration of the scheme as an MIS would not have had the effects he suggests.

452. The plaintiff also alleged that he suffered loss as a result of incurring a net contractual liability as at 31 May 2002 to pay all operational outgoings including WASS imposed fees and charges over the period 1 June 2002 to 31 May 2011. I understand this claim to be that he suffered losses by reason of entering into the UMA. There can be no doubt that by entering into the UMA the plaintiff incurred financial liabilities. I am simply not satisfied that there is reliable evidence as to the extent of those liabilities.

453. Finally, I will address the plaintiff's claim for exemplary damages against the third defendant. That claim fails for two reasons. Firstly, I am satisfied that exemplary damages are not available under the provisions of the TPA or CA relied upon by the plaintiff: see *Nixon v Philip Morris (Australia) Ltd* [1999] FCA 1107; 95 FCR 453 per Wilcox J at [96]-[103]; *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700 at

713. The case cited by the plaintiff as authority for the proposition that exemplary damages may be awarded, *Ali v Hartley Poynton Ltd* [2002] VSC 113; 20 ACLC 1006, a decision of a single judge of the Supreme Court of Victoria, is not clear authority for the plaintiff's proposition. The way in which the decision is set out makes it, with respect, difficult to follow, but it appears to me that the trial judge awarded exemplary damages with respect to common law causes of action. Secondly, even if such damages were available, the present case is not one where the making of an award would be appropriate. At its highest, the case against the third defendant may suggest some carelessness on his part, but nothing like the "conscious and contumelious disregard for the plaintiff's rights" that would justify such an award: see *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

454. For completeness, I also note that by taking no steps to sell unit 206 after the plaintiff said he became aware of the true nature of his purchase in 2003, he failed to take reasonable steps to mitigate his losses. Insofar as the UMA constituted an unregistered MIS, the plaintiff had the option of having the scheme wound-up under s 601EE of the CA which would probably have provoked WASS to take steps to register the scheme.

Orders

455. There will be judgment for the first and third defendants against the plaintiff. Unless any party applies for a different costs order within 28 days of publication of these reasons, I order the plaintiff to pay the first and third defendants' costs of the proceedings.

I certify that the preceding four hundred and fifty-five [455] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Burns.

Associate:

Date: 27 July 2017