SUPREME COURT OF QUEENSLAND

CITATION:	*Hadgelias Holdings and Waight v Seirlis & Ors* [2014] QCA 177
PARTIES:	**HADGELIAS HOLDINGS PTY LTD** ACN 010 422 983 **PHILLIP JAMES WAIGHT** (appellants/cross respondents) **v** **IMOGEN ELISE SEIRLIS** (first respondent/cross appellant) **MARK STACEY BENGSTON** **JUDITH FAY BENGSTON** **ROBERT ALAN ZIRBEL** **LYNDIS ARRAN ZIRBEL** **VARGAN HILL PTY LTD** ACN 099 656 032 (second respondents/cross appellant)
FILE NO/S:	Appeal No 9351 of 2013 SC No 7430 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2014
JUDGES:	Holmes, Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appellants' appeal is dismissed.** **2. The first respondent's appeal is dismissed.** **3. The second respondents' appeal is dismissed.** **4. The parties are allowed two weeks from the date of this judgment to make submissions on costs.**
CATCHWORDS:	TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – PARTICULAR CASES – REAL ESTATE TRANSACTIONS – where the appellants were engaged as agents on the second respondent vendors' sale of an apartment to the first respondent – where the first respondent was induced to enter into the contract by false

representations made by the appellants on behalf of the vendors that there were three car parks allocated to the apartment – where, in fact, the apartment had only two car parks and one storage space which could not be converted into a car park – where two representations made collectively by the appellants were misleading and deceptive conduct contravening s 52 of the *Trade Practices Act* 1974 (Cth) – where one further representation made by the appellant Waight contravened s 38 of the *Fair Trading Act* 1989 – where the appellants contended that the trial judge had erred in finding that the appellant Waight had made any different and distinct representation so as to attract the application of the *Fair Trading Act* to his conduct – whether the appellant Waight was separately responsible for misleading conduct so that his liability could not be limited

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – PARTICULAR CASES – REAL ESTATE TRANSACTIONS – where the appellants were engaged as agents on the second respondent vendors' sale of an apartment to the first respondent – where the first respondent was induced to enter into the contract by false representations made by the appellants on behalf of the vendors that there were three car parks allocated to the apartment – where, in fact, the apartment had only two car parks and one storage space which could not be converted into a car park – where the vendors directed the appellants to make the representation as to the availability of the third car park – whether the appellants and vendors performed a single set of acts which caused loss – whether the appellants and vendors were "concurrent wrongdoers" within the meaning of s 87CB of the *Trade Practices Act* so as to attract the application of s 87CD of the *Trade Practices Act*, allowing apportionment of liability between them

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – ACTIONS FOR DAMAGES – ASSESSMENT OR AVAILABILITY OF DAMAGES – BASIS UPON WHICH DAMAGES ASSESSED – where the first respondent was induced to enter into a contract of sale for an apartment by false representations made by the appellants on behalf of the second respondent vendors – where the trial judge assessed damages as the difference between the price paid for the apartment and the actual value of the apartment on the date the contract settled – where the appellants and second respondents appealed the damages award submitting that the trial judge had erred by under-valuing both the existing

storage space and the unit as at the ultimate settlement date – where the first respondent cross-appealed alleging that the apartment had been over-valued – whether the value of the apartment was correctly assessed

TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – ACTIONS FOR DAMAGES – ASSESSMENT OR AVAILABILITY OF DAMAGES – WHAT LOSS OR DAMAGE RECOVERABLE – INTEREST – where the first respondent was induced to enter into a contract of sale for an apartment by false representations made by the appellants on behalf of the second respondent vendors – where the first respondent settled some months after the date stipulated in the contract in order to avoid a specific performance action – where the first respondent borrowed funds interest-free from a family trust prior to the original settlement date in order to settle the contract – where the family trust sold shares in order to provide the funds – where had the first respondent not had to raise funds for settlement at the original date the trust could have made a larger amount available because the shares had risen in value by the time settlement took place – where instead the first respondent incurred interest costs in borrowing that amount – where the appellant contended the trial judge erred in regarding an award of interest under s 58 of the *Civil Proceedings Act* as compensation for the interest she had to pay on the additional borrowings entailed in paying a higher price than the unit was worth – whether the interest paid on the sum which might have been borrowed from the family trust was sufficiently connected to the contravention of s 52 to be recoverable – whether the award of interest under s 58 in fact amounted to adequate compensation

Civil Liability Act 2003 (Qld), s 30(1), s 32F
Competition and Consumer Act 2010 (Cth), s 87CB, s 87CD
Fair Trading Act 1989 (Qld), s 38
Trade Practices Act 1974 (Cth), s 52, s 53A, s 82(1), s 84(2), s 84(4), s 87CB, s 87CD

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613; [2013] HCA 10, applied
Seirlis v Bengtson & Ors [2013] QSC 240, related
Tomasetti v Brailey (2012) 274 FLR 248; [2012] NSWCA 399, distinguished

COUNSEL: R Perry QC for the appellants/first cross respondents
D R Cooper QC for the first respondent/cross appellant
R Douglas QC for the second respondents/cross appellants

SOLICITORS: Carter Newell for the appellants/first cross respondents
Warlow Scott for the first respondent/cross appellant
Romans and Romans for the second respondents/cross appellants

[1] **HOLMES JA:** The appellants, Hadgelias Holdings Pty Ltd and Mr Phillip Waight, the latter an independent contractor engaged by Hadgelias Holdings to sell real estate, acted as agents on the second respondents' sale of an apartment to the first respondent, Mrs Seirlis. The trial judge found that Mrs Seirlis had been induced to purchase the apartment by false representations which Mr Waight and Hadgelias Holdings made on behalf of the second respondents (to whom I shall refer collectively as the vendors), to the effect that allocated to the apartment were three car park spaces that could be lawfully used as car parks. In truth, there were two such car parks and a third space for storage, which the terms of the relevant development approval for the building precluded from use as a car park. Two such representations made by Mr Waight and Hadgelias Holdings were misleading and deceptive and contravened s 52 of the *Trade Practices Act* 1974 (Cth)[1]. A further representation made only by Mr Waight was similarly misleading and amounted to a contravention of s 38 of the *Fair Trading Act* 1989.

[2] The learned judge assessed damages as the difference between the price Mrs Seirlis paid for the apartment ($2.5 million) and what he found to be the actual value of the apartment ($2.25 million) as at 27 September 2010, when the contract settled.[2] His Honour found that there was no basis for a reduction of Hadgelias Holdings' liability under the proportionate liability provisions of the *Trade Practices Act*, because its relevant acts and omissions were the same as the vendors'. Insofar as Mr Waight was liable under the *Fair Trading Act* for a further misrepresentation, s 32F of the *Civil Liability Act* 2003 made him severally liable for the damages.

The appeals and notice of contention

[3] Hadgelias Holdings and Mr Waight appealed the judgment on the grounds that the trial judge had erred in finding that Mr Waight had made any different and distinct representation so as to attract the application of the *Fair Trading Act* to his conduct. His Honour had further erred in deciding that liability as between Hadgelias Holdings and the vendors could not be apportioned. Alternatively, if he had exercised a discretion in that regard, he had erred in declining to apportion liability in circumstances where the vendors, unlike the agents, were aware of the falsity of the representations made, and he had made a finding that the agents were not negligent. The final ground of appeal was that the trial judge erred in assessing the value of the apartment at the date of completion at $2.25 million. The evidence did not support that conclusion; and, in particular, allowance should have been made for what was said to be the value of the storage space at $50,000.

[4] The vendors appealed against the damages award, effectively on the coat-tails of the agents' submissions, alleging error in the trial judge's assessment of the value of the unit as at the ultimate settlement date. They also filed a notice of contention to the effect that the trial judge should have found Mrs Seirlis entitled to succeed on the basis of a contravention of s 53A of the *Trade Practices Act*, arguing that a successful claim for damages under that provision would not have been apportionable. Mrs Seirlis cross-appealed on the ground of error in the assessment of damages, but in her case asserting that the unit had been over-valued. In addition, Mrs Seirlis alleged error in the trial judge's failure to award damages in respect of borrowings she was forced to undertake in order to settle the contract.

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1 Since repealed and replaced by the *Competition and Consumer Act* 2010 (Cth).

2 The trial judge recorded that it was common ground between the parties that the appropriate measure of loss was the difference between the price paid and the value of the apartment upon completion of the contract in September 2010.

The trial judge's findings on liability

[5] The trial judge's findings were as follows. The agents had advertised the apartment on three occasions as having three car parks. At an inspection of the property in April 2010, Mr Waight had told Mrs Seirlis that there were two parking spaces with a third area containing a plinth or platform on which a storage shed could be constructed; many apartment owners had removed the plinth and used the space for parking. At a later meeting, Mr Waight had assured her that he would personally see to the removal of the plinth, paying for it himself, upon which she committed to the contract by initialling changes made by the vendors on a contract document. The advertisements, statement and promise were likely to have caused Mrs Seirlis to believe that all that was required for her to have the use of three parking spaces was the physical removal of the plinth. Had she known the legal impediment, in the form of the development approval which precluded use of the storage space for parking, she would not have entered into the contract.

[6] The contract was due to settle on 22 July 2010, but on that date Mrs Seirlis unsuccessfully sought confirmation that the necessary body corporate and planning consents for the third car park had been provided. Some days later the vendors' solicitors responded by advising that the body corporate would not consent to the use of the storage area as a car park because that would breach the development approval. Ultimately, while maintaining that she had been induced to enter the contract by misrepresentation, Mrs Seirlis settled on 27 September 2010, in order to avert specific performance proceedings commenced by the vendors. Her decision to settle did not, the trial judge found, interrupt the chain of causation; she was obliged to perform the contract unless she obtained an order for its termination under the *Trade Practices Act*.

[7] The trial judge dismissed Mrs Seirlis' claim in negligence, holding that the agents did not owe her a duty of care to ensure she was fully informed about how the space could be lawfully used. They were not obliged to make their own enquiries, which might have involved seeking professional advice to confirm that the details given were correct. On the other hand, the three advertisements and Mr Waight's statement about other apartment owners having removed the plinth to use the space for parking were misleading conduct, contravening s 52 of the *Trade Practices Act*.

[8] Hadgelias Holdings was responsible for its publication of the three advertisements. Sub-sections 84(2) and 84(4) of the *Trade Practices Act* respectively deemed the corporate vendor, Vargan Hill Pty Ltd, and the vendors who were natural persons to have engaged in Hadgelias Holdings' conduct. The corporation thus contravened s 52, while s 82(1) made any loss also recoverable against the natural persons involved in the contravention. In making the statement that other apartment owners had removed plinths in order to park, Mr Waight was speaking for Hadgelias and for the vendors. His promise to remove the plinth, however, was in a different category: he had no authority from the vendors or from Hadgelias to make it. It was misleading and deceptive conduct, and had played a part in inducing Mrs Seirlis to proceed with the purchase. Mr Waight could not, as a natural person, contravene s 52, but he had contravened s 38 of the *Fair Trading Act*.

The trial judge's conclusions on apportionment of liability

[9] Section 87CB and Section 87CD of the *Trade Practices Act* respectively governed whether a claim was apportionable and if so how liability under it was to be apportioned. Section 87CB was in the following terms:

> "(1) This Part applies to a claim (an ***apportionable claim***) if the claim is a claim for damages made under section 82 for:
> (a) economic loss; or
> (b) damage to property;
> caused by conduct that was done in a contravention of section 52.
>
> (2) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).
>
> (3) In this Part, a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
>
> (4) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).
>
> …"

[10] Section 87CD provided:

> "(1) In any proceedings involving an apportionable claim:
>
> (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
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> (b) the court may give judgment against the defendant for not more than that amount.
>
> (2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
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> (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part; and
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> (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.
>
> …"[3]

[11] Mr Waight and Hadgelias Holdings submitted at trial that the vendors should bear the entirety of Mrs Seirlis' loss. The trial judge had found that the vendors had instructed them to promote the apartment as having three car parks, despite knowing of the legal impediment to the use of the third space, something of which the agents were not

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[3] Sections 87CB and 87CD now appear in similar terms as Sections 87CB and 87CD of the *Competition and Consumer Act* 2010.

informed. The second reason for apportioning responsibility entirely to the vendors was that they alone had forced completion of the contract in September 2010.

[12] Applying a decision of the New South Wales Court of Appeal, *Tomasetti v Brailey*,[4] his Honour rejected that argument. Although the parties were "concurrent wrong-doer[s]" for the purposes of s 87CD of the *Trade Practices Act*, the relevant acts or omissions were those of Hadgelias Holdings, which in turn were deemed to be the vendors'. Their conduct and corresponding responsibility for Mrs Seirlis' loss being identical, s 87CD required no apportionment between them. Mr Waight, on the other hand, was responsible for a distinct act, in his promise to remove the plinth, but s 32F of the *Civil Liability Act* 2003 (Qld) applied in his case:

> "Despite sections 31 and 32A, a concurrent wrongdoer in a proceeding in relation to an apportionable claim who contravenes the *Fair Trading Act 1989*, section 38 is severally liable for the damages awarded against any other concurrent wrongdoer to the apportionable claim."

(Under s 30(1) of the *Civil Liability Act*, a "concurrent wrongdoer" is

> "…1 of 2 or more persons whose acts or omissions caused, independently of each other, the loss or damage…")

That provision made Mr Waight severally liable for the damages ordered against the other defendants.

The submissions on apportionment of liability

[13] Mr Waight and Hadgelias Holdings contended, firstly, that the trial judge was wrong in finding that Mr Waight was separately liable under the *Fair Trading Act* because he had made a representation as to removal of the plinth without the authority of Hadgelias Holdings or the vendors. The only significance of Mr Waight's statement was in reinforcing the representation that the space could be used lawfully as a car park, a representation which was made with the vendors' actual authority. His Honour should not have regarded the statement as distinct from the other representations made on behalf of Hadgelias Holdings and on behalf of the vendors.

[14] Secondly, it was submitted that no liability should have been apportioned to the agents, whom the trial judge had found were not negligent in failing to ascertain the accuracy of the representation concerning the use of the space as a car park. The vendors, knowing that the representation was untrue, had directed the agents, who did not have that knowledge, to make it, and, ultimately and without any involvement of the agents, had forced the completion of the contract at a time when the apartment's value had significantly diminished. The direction and actions to enforce the contract were separate acts by the vendors which had caused Mrs Seirlis' loss. The facts of the case were materially different from those in *Tomasetti*, which involved the responsibility of an individual and a company of which he was the controlling mind for the company's acts.

[15] The vendors advanced by notice of contention an argument that the claim was not apportionable because Mrs Seirlis was entitled to success on the basis that their (and the agents') conduct was a contravention of s 53A of the *Trade Practices Act*. That provision read:

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[4] [2012] NSWCA 399.

> "(1) A corporation shall not, in trade or commerce, in connexion with the sale or grant, or the possible sale or grant, of an interest in land or in connexion with the promotion by any means of the sale or grant of an interest in land:
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> …
>
> (b) make a false or misleading representation concerning the nature of the interest in the land…the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land…".

Claims under s 53A were not, in contrast to those made under s 52, apportionable.

[16] Mrs Seirlis sought damages pursuant to s 82 of the *Trade Practices Act* for contraventions of s 52 and s 53A. Hadgelias Holdings conceded on appeal that the elements of and facts found in respect of the s 53A claim were identical to those in the claim under s 52. The vendors relied on decisions of trial judges of the Federal Court[5] to argue that claims for damage resulting from contraventions other than of s 52 were not apportionable.

Conclusions on apportionment

[17] As the trial judge found, Mr Waight's undertaking to have the slab removed was given entirely of his own volition; it was not a promise which either the vendors or Hadgelias had authorised him to make. It was conduct with the same misleading effect as the representations for which they were responsible, and it contributed with those representations in inducing Mrs Seirlis to purchase the apartment; but it was conduct performed by Mr Waight, and Mr Waight only. The trial judge was right to find him separately responsible for misleading conduct under the *Fair Trading Act*, and to find, accordingly, that his liability could not be limited.

[18] *Tomasetti v Brailey*, on which his Honour relied in declining to apportion liability as between Hadgelias Holdings and the vendors under s 87CD, concerned s 35 of the *Fair Trading Act* 1987 (NSW). Section 34(2) of that Act defines "concurrent wrongdoer" in identical terms to s 87CB of the *Trade Practices Act*, and s 35(1)(a) and (b), concerning apportionment of responsibility, are in identical terms to s 87CD(1)(a) and (b) of the *Trade Practices Act*. The New South Wales Court of Appeal[6] described Brailey's conduct in making representations as engaged in on behalf of another respondent, a company, which was thus vicariously liable for his actions; or, alternatively, as the conduct of the company itself. It did not matter which characterisation was correct: in either event, the court said, they were "jointly liable" and would be "concurrent wrongdoers". However, in considering whether their liability should in fact be limited, the court proceeded on the basis that the acts and mind of Mr Brailey and the company were in fact the same. They were thus both responsible for the appellants' losses and there was no occasion for apportionment.

[19] It is not apparent from the judgment in *Tomasetti v Brailey* whether there was any live issue before the court as to whether Brailey and the company were, as a matter of law,

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5 *Bennett v Elysium Noosa Pty Ltd (in liq) & Ors* (2012) 202 FCR 72 per Reeves J; *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (No. 2)* [2008] FCA 1656 per Finkelstein J; *Selig v Wealthsure Pty Ltd* [2013] FCA 348 per Lander J.

6 Per MacFarlan JA at [152] – [154], McColl and Campbell JJA agreeing.

concurrent wrongdoers, as opposed to how responsibility should be apportioned on the factual conclusions reached. Certainly, whether those parties fell within the definition of "concurrent wrongdoer" at all was not given any detailed consideration. However that may be, I do not think that the fact of parties' joint liability necessarily resolves the question of whether they are concurrent wrongdoers.

[20] The phrase "independently of each other or jointly" in the s 87CB(3) definition qualifies the verb "caused", rather than describing the acts or omissions. In other words, the issue is not whether acts or omissions are jointly undertaken but whether they either independently produce the same outcome or combine in their effect to do so. Thus, for example, although Mr Waight was not jointly liable with the other defendants for the statement found to have been made without their authority, it caused Mrs Seirlis' loss jointly with the statements they made to the same effect. In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*[7], on the other hand, the fraud of parties who had forged documents to obtain a mortgage and the negligence of the mortgagee's solicitors in failing properly to secure the loan were independent causes of the loss.

[21] The majority of the High Court in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees* observed that the equivalent definition of "concurrent wrongdoer" in the *Civil Liability Act* 2002 *(*NSW) posed two questions:

> "…what is the damage or loss that is the subject of the claim? Is there a person, other than the defendant, whose acts or omissions also caused that damage or loss?"[8]

Consistently with the form of the second question, I would construe the definition in s 87CB as concerned with distinct acts (or omissions) or sets of acts (or omissions) by different actors, combining or working independently to cause loss or damage, and consequently inapplicable where there is but a single act or set of acts causing loss, attributable to more than one person.

[22] In determining whether acts or omissions "caused" loss or damage, the question is one of fact rather than of the parties' legal liability for the loss, although the two are likely to coincide.[9] The loss which Mrs Seirlis suffered was, as identified by the trial judge, "the amount which she paid less 'the real value of the thing [she] got'"[10]. The first of the acts which Hadgelias Holdings relied on, the vendors' direction to make the representation as to the availability of the third car park, was no doubt the cause of the agents' actions and the source of the vendors' liability for them, but it was not, on any common sense approach, an act causing Mrs Seirlis to enter the contract and it was not the cause of her loss.

[23] Nor did the vendors' specific performance action produce the loss. Mrs Seirlis' loss was sustained because she incurred a contractual obligation to pay an amount for the unit beyond its worth. The submission that the specific performance action was significant turned on a notion that it resulted in a settlement some months after the time contracted for, over which period the value of the unit had diminished. But the logic of the argument is flawed. The specific performance action was not the cause of the delay in completion; to the contrary, it was no doubt designed to produce prompt settlement.

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7 (2013) 247 CLR 613

8 At page 627.

9 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 635.

10 *Seirlis v Bengtson &Ors* [2013] QSC 240 at [52].

[24] On my construction of s 87CB, the agents and vendors in the present case performed a single set of acts which caused loss. They were not "concurrent wrongdoers" so as to attract the application of s 87CD. If that view be wrong, however, I do not think that the same result as in *Tomasetti v Brailey* would necessarily follow. Although the acts causative of loss were those of both the vendors and the agents, determination of the extent of those parties' responsibility cannot be made solely on that basis:

> "The value judgments involved in that exercise differ from, and are more extensive than, those which inform the question of causation."[11]

This case is distinguishable from *Tomasetti v Brailey*: although the acts of Hadgelias Holdings and the vendors were the same, their minds were not. In circumstances where the vendors knew that the representation was false but procured its making nonetheless, there is a strong argument that their responsibility for the loss was greater.

[25] And, in my view, Mrs Seirlis' claim for damages was an apportionable claim, notwithstanding that it might equally have succeeded through the establishment of a contravention of s 53A. The two constraints under s 87CB(1) are that the claim must be made under s 82 and that it must be for loss caused by conduct done in a contravention of s 52. Here the claim was brought under s 82, and the conduct, as the trial judge found, contravened s 52. It does not alter the character of the claim as apportionable that it also constituted a contravention of s 53A. Section 87CB(2) provides for a single apportionable claim where the proceeding is for the same loss or damage, even though it may be based on more than one cause of action. If I had reached the conclusion that Hadgelias Holdings and the vendors could be regarded as concurrent wrongdoers within the meaning of s 87CB(3) of the Act, I would not have regarded the fact that the conduct which contravened s 52 also contravened s 53A as precluding the claim from being treated as an apportionable one.

The trial judge's assessment of the value of the unit

[26] Two valuers, Mr Kendall and Mr Hooper, gave evidence. They agreed that if the apartment had three car spaces as at the date of contract, its market value would have been $2.5 million (the contract price). They differed as to the significance of the fact that the car park was not available. The trial judge rejected Mr Kendall's view that the legal impediment to the use of the storage space for parking would be immaterial to a prospective purchase and consequently would have no effect on the value of the apartment. Mr Hooper, on the other hand, considered that the value of the missing third car space was $175,000, while the storage plinth, as such, was worth $5,000 - $10,000.

[27] Mr Hooper gave his opinion as to the extent to which the apartment had lost value by the September 2010 completion date by reference to some comparable sales of other apartments in the building. One of those was apartment numbered 4404, two floors above Mrs Seirlis' apartment, which had sold in January 2010 for $2.65 million. It had what was described as a "superior fit-out" and a third car space, the storage plinth having been removed; but it was not known whether the buyer knew that use of the third space was illegal. Another apartment, number 4804, had sold in October 2009 for $2.9 million and was re-sold in December 2010 for $2.35 million. It was six floors above Mrs Seirlis' apartment, and again had a "superior fit-out". It had two car spaces and a storage area, which Mr Hooper valued at $50,000.

[28] Mr Hooper allowed a $30,000 increase in value for each additional floor in an apartment's height. His view was that the value of the larger apartments in the

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[11] *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 638.

building was falling at a rate of $45,000 per month. Using apartment 4404 as a basis for valuing the Seirlis apartment in April 2010, he deducted the following amounts from its January 2010 sale price of $2.65 million: $135,000, to represent the three months which had elapsed to April 2010; $50,000 for its superior fit-out; $60,000 for its additional two floors in height; and $100,000 as the estimated value of the third car space. That brought him to a figure of $2.305 million for the value of Mrs Seirlis' apartment. From the sale price of apartment 4804 in October 2009, $2.9 million, he deducted $270,000 to represent the passage of six months, $180,000 to reflect the six floor difference, $50,000 for its superior fit out and $50,000 for the value of its storage facility. That gave a value for Mrs Seirlis' apartment of $2.35 million as at the date of contract.

[29] Taking $2.305 million to $2.35 million as the range, Mr Hooper fixed a value of $2.325 million, slightly under the half-way point between the two, as representing the value of the apartment at the date of contract. He subtracted that figure from what he regarded as the value of the apartment had it had three car spaces ($2.5 million) and arrived at a figure representing the value of the third (unavailable) car space as $175,000. On the basis of a further monthly reduction in value of $45,000 for five months until the completion date in September 2010, he arrived at a range for the apartment's value in September of $2.08 million to $2.125 million and fixed on a value of $2.1 million.

[30] There were, the trial judge observed, a number of flaws in Mr Hooper's reasoning. The calculation of $175,000 for the third car space was inconsistent with the figure of $100,000 Mr Hooper had used in arriving at a value for the Seirlis apartment from the sale price of apartment 4404. He had not allowed any amount for the storage area which Mrs Seirlis had acquired. The figure for the rate at which the value of the apartments was falling, $45,000 per month, was not consistent with the fact that apartment 4804 had sold in October for $2.9 million and 14 months later for $2.35 million; that was a depreciation rate of not quite $40,000 per month. There were other variables in Mr Hooper's calculations which raised some question as to the ultimate values at which he arrived, including his allowance of $30,000 per floor; although his Honour accepted that the apartment values would rise with higher floors. He regarded the figure of $100,000 as a better representation of the value of the third car space, so that the actual value of the apartment as at the date of contract was "no more than $2.4 million".

[31] As to ascertaining the value of the apartment at the completion date in September 2010, the trial judge said,

> "There is then a need to allow for the deterioration in values between the date of contract and the date of settlement. The rate of deterioration in values could well be somewhat less than Mr Hooper's figure, which was not based on a large number of sales. And the rate of duration (if any) from late September to early December 2010 is not demonstrated by his or other evidence. This means that the December 2010 sale of apartment 4804 has some particular weight. Ultimately, I am not persuaded that the value of the apartment was lower than $2.25 million."[12]

The submissions as to error in the assessment of the apartment's value

[32] The agents (and the vendors, adopting their submissions) argued that the trial judge had erred in allowing an amount of $100,000 as representing the value of the missing

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12 *Seirlis v Bengtson & Ors* [2013] QSC 240 at [70].

car park, because he had not taken into account the value of the storage space. That figure should have been allowed at the $50,000 which Mr Hooper had calculated in respect of apartment 4804. Secondly, all parties were in contention as to the value of $2.5 million his Honour ascribed to the unit in September 2010. Mrs Seirlis said it was too high and should have been, as Mr Hooper estimated, $2.1 million. The agents and vendors said it was too low, because the evidence did not support a conclusion that it had lost value since April 2010.

[33] Mrs Seirlis argued that his Honour should have proceeded on the basis that apartment 4804 would have been worth, on 27 September 2010, $2.457 million (its sale price of $2.35 million in December adjusted by allowing for its decrease in value over the intervening 73 days at $45,000 per month). To extrapolate from there to a figure for the value of Mrs Seirlis' apartment, $50,000 should have been deducted from that amount to recognise the existence of 4804's built storage unit; $180,000 should have been subtracted to allow for the height difference of six floors; and $50,000 should have been taken off to reflect the superior fit-out. Depending on whether allowance was made for the existing storage plinth at $5,000 or $10,000, that would give a value for the Seirlis unit in September of either $2.182 million or $2.187 million; close to Mr Hooper's valuation of $2.1 million.

[34] The agents' argument was that the trial judge had simply adopted the sale price of unit 4804 in December 2010 at $2.35 million and deducted the value of the missing car park from it to arrive at the figure of $2.25 million as the value of Mrs Seirlis' apartment in September 2010. He had thus concluded that the apartment had lost value since it was bought. But in doing so he had disregarded the deterioration in the value of unit 4804 between September and December 2010. Mr Hooper, in evidence, had agreed that allowing for that change of value, the value of unit 4804 in September 2010 "would be worth very close to $2.5 million".

Conclusions re valuation of apartment

[35] The complaint that the trial judge did not make sufficient allowance for the value of the storage plinth overlooks the fact that Mr Hooper's estimate of the 4804 storage area was based on its being a constructed facility. He explained, in a report given jointly with Mr Kendall, that he had adopted $50,000 for the storage component because while the plinth itself was worth only $5,000 to $10,000, there was a structure of masonry block with a roller shutter door erected on it at a cost of $40,000 to $50,000. It seems improbable that his Honour overlooked the value of the bare plinth, since he had already commented on the need to allow something for the storage area; but at $5,000 or $10,000 it was unlikely to loom large in calculations.

[36] The trial judge should perhaps have articulated his reasoning more fully in reaching a value for Mrs Seirlis' apartment, but his reasons make it clear that he did not take the crude approach which the agents attributed to him to the significance of apartment 4804's December sale price. It is plain that his Honour appreciated that there were differences in the features of the two apartments – 4804's better fit-out and its more elevated position – which had to be taken into account. He had observed that there was no evidence as to 4804's rate of loss of value during the particular period between September and December; not that there was no such loss. He had expressed some doubt about Mr Hooper's figure for the rate of deterioration in value of the apartments generally, noting that the difference between the October 2009 and December 2010 sale prices of 4804 indicated that it had depreciated at a rate of $40,000 per month. His

Honour clearly did not proceed on the basis that there was no drop in 4804's value between September 2010 and its December sale date, and was not correspondingly misled in the way suggested as to the value of Mrs Seirlis' apartment.

[37] While accepting the thrust of Mr Hooper's evidence as to the increase in value with each additional floor in height, the trial judge also doubted the figure of $30,000. In his report, Mr Hooper had, in fact, suggested a range of between $19,250 and $41,667 per floor, from which he had selected the $30,000 figure. In this regard, Mrs Seirlis' calculations provided to this court also raise questions, because they adopt the fixed rate of adjustment of $30,000 per floor; but of course, with a general drop in value for the apartments, that figure too was likely to be lower. An allowance at the lower end of Mr Hooper's range would mean an adjustment for the elevation factor of $120,000, rather than the $180,000 which forms part of Mrs Seirlis' figures, warranting a conclusion that the value of the apartment should not be put lower than $2.25 million. The point is that the valuation figures were not absolutes. The trial judge was entitled to decide which of them he would rely on, and to reach the conclusions which he did.

The decision on Mrs Seirlis' claim for interest costs

[38] Mrs Seirlis argued before the trial judge that she was out of pocket by the difference in borrowing costs between the price paid and the actual value of the apartment and by further interest costs occasioned by her having to be ready to settle on 22 July 2010. First anticipating settlement in July, she had had to borrow from her family trust, which in turn had to sell shares to provide her with the funds; those shares subsequently rose in value by $188,909.38. If the contract had required her to settle on 27 September 2010, rather than 22 July, she would have been able to obtain that amount interest free from the trust. Instead, she had had to borrow it from a bank on commercial interest terms.

[39] The trial judge rejected the submission, observing that the claim for interest on borrowing $188,909.38 attempted to place Mrs Seirlis in the position she would have been in had the settlement date been 27 September, not July. But it was not her case that but for the misrepresentation she would have purchased the apartment in September; rather it was that she would not have purchased it at all. An apparent claim in the statement of claim for the lost increase in value of the trust shares was not recoverable. As to the costs of additional borrowings generally, his Honour said, an award of interest under s 58 of the *Civil Proceedings Act* 2011 on the loss of $250,000 from the date of settlement to the date of judgment would compensate Mrs Seirlis for the costs during that period of paying too much for the apartment.

Mrs Seirlis' submissions as to the interest claim

[40] Mrs Seirlis contended that the trial judge had erred in regarding an award under s 58 of the *Civil Proceedings Act* as compensation for the interest she would have to pay on the extra borrowing. The damages should have been assessed as at September 2010 because that was when she obtained title; at that date she could have had available to her an interest-free amount of $188,909.38. The vendors' dishonesty was the cause of the failed settlement in July and ultimate completion in September. They should be made to bear the burden of the associated additional interest and expenses. The trial judge had made an error in thinking that Mrs Seirlis sought to recover the amount of the share gain foregone.

Conclusions on the interest award

[41] Mrs Seirlis would not have incurred the interest cost of borrowing the difference between the apartment price and its value ($250,000) had she not been induced to enter the contract by misrepresentation. That cost was in itself part of her loss, rather than interest of the kind awarded under s 58. That does not mean, however, that the trial judge was wrong in regarding an award of interest under s 58 as being effective to compensate her for her loss in that regard, or that he in some way mistook the exercise.

[42] There were three components to the funds which Mrs Seirlis obtained in order to settle the purchase of the property in September. About $1.75m was borrowed from Westpac Bank, and $213,877 from Mrs Seirlis' parents, who had in turn borrowed that sum from ANZ Bank; while $516,622 was generated by the sale of shares in the trust.

[43] The bank loan was not drawn down until the settlement in September 2010. The interest charged on that loan ranged between 5.51 per cent and 6.89 per cent. The loan from Mrs Seirlis' parents was made in July and on the basis that she would pay her parents interest at the rate they incurred. However, because that money was not then required for settlement it was moved from account to account in order to earn better rates of interest, so that the interest incurred by Mrs Seirlis between July and September was offset (at least in part) by the interest earned. The interest charged by ANZ from 27 September 2010 was between 5.6 per cent and 7 per cent. The trial judge's view that Mrs Seirlis would be adequately compensated by an award of interest on the damages at 6 per cent was, therefore, unexceptionable.

[44] The trial judge did refer to what appeared to be a claim in the statement of claim for loss of the increase in value of the trust's shares, which may have represented a misreading of that document. Any such mistake was irrelevant, however, to his conclusion as to the interest paid on the sum which might in other circumstances have been obtained interest-free from the trust. He regarded it as insufficiently connected with the contravention of s 52; a conclusion which in my view was properly reached. The damage claimed was simply too remote.

Orders

[45] I would

1. dismiss:
   (a) the appellants' appeal,
   (b) the first respondent's appeal,
   (c) the second respondents' appeal;
2. allow the parties two weeks from the date of this judgment to make submissions on costs.

[46] **GOTTERSON JA:** I agree with the orders proposed by Holmes JA and with the reasons given by her Honour.

[47] **MORRISON JA:** I have had the advantage of reading the reasons of Holmes JA and I agree with her Honour's reasons and the orders she proposes.