

# SUPREME COURT OF QUEENSLAND

CITATION: *Mirvac Queensland Pty Limited v Holland & Anor* [2010] QSC 330

PARTIES: **MIRVAC QUEENSLAND PTY LIMITED**  
**ACN 060 411 207**  
(Plaintiff)

**v**

**JENS LEESON HOLLAND AND KIM PATERSON HOLLAND**  
(Defendants)

FILE NO: BS 5780 of 2009

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 8 September 2010

DELIVERED AT: Brisbane

HEARING DATE: 31 May – 3 June 2010

JUDGE: McMurdo J

ORDER: **The counterclaim will be dismissed and there will be a decree of specific performance of the contract.**

CATCHWORDS: TRADE AND COMMERCE – *TRADE PRACTICES ACT 1974* (Cth) AND RELATED LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE CONDUCT GENERALLY – GENERALLY – where the plaintiff agreed to sell to the defendants an apartment in a building to be constructed on the riverfront – where the defendants allege that the plaintiff made certain representations as to the view to be expected from, and the security of, the apartment – whether there were statements made in contravention of s 52 or s 53A of the *Trade Practices Act 1974* (Cth).

*Trade Practices Act 1974* (Cth) ss 51A, 52, 53A, 82, 87

*Tenji & Anor v Henneberry & Associates Pty Ltd & Ors* (2000) 98 FCR 324

COUNSEL: M D Martin for the plaintiff  
D A Kelly SC with T J Bradley for the defendants

SOLICITORS: ClarkeKann Lawyers for the plaintiff  
Brian Bartley & Associates for the defendants

- [1] In 2007 it was agreed that the plaintiff (“Mirvac”) would sell to the defendants, Mr and Mrs Holland, an apartment in a building to be constructed on the riverfront at Tennyson. The building, together with an adjacent building within this first stage of Mirvac’s development of the site, was completed by about the end of April 2009. Mirvac then called for settlement of the contract. Mr and Mrs Holland refused to complete upon the basis that the contract had been induced by conduct in contravention of Part 5 of the *Trade Practices Act 1974* (Cth).
- [2] Mirvac seeks specific performance of that contract, the enforceability of which is not in question, save for the defendants’ case that it should be avoided by an order under s 87 of the Act.
- [3] The alleged misrepresentations involved two subjects. The first was the view of the river from the apartment which could be expected, having regard to what were at the time of the contract, extensive mangroves on the river bank immediately in front of the proposed building. Mr and Mrs Holland’s case is that they were told, in effect, that the mangroves would be cleared or trimmed to such an extent that the view would be equivalent to that which was had from Mirvac’s sales office, called the display centre, which was about the same distance from and height above the river, but which was several hundred metres upstream and where much more of the river could be seen. Secondly, they say that they were misled by what was said as to how secure would be the apartment against intrusion. The complaint here is that the height of the apartment, including its extensive terrace, was so close to ground level, at least towards that side of the apartment furthest from the river, that they would not enjoy the “ample security” which Mirvac is said to have represented.
- [4] Mirvac’s case is that its representative did say that there would be some cutting back of the mangroves, but nothing to the effect that the view would be equivalent to that enjoyed from the display centre. And Mirvac denies that any representation was made as to “ample security”.
- [5] Mr and Mrs Holland say that the alleged representations were important to their decision to enter into the contract. They say that they will suffer loss if they have to complete because, according to the unchallenged evidence of the valuer called in their case, the apartment has a present value of \$1,500,000, whereas the agreed price was \$2,455,000. The valuer does not attribute all of this difference to the matters of which the Hollands complain. Rather, he says that the apartment would now be worth \$1,750,000 had the mangroves been cut to the extent that he understands was represented by Mirvac. He does not quantify the impact of what is said to be the less than ample security.
- [6] The issues then are factual ones involving what was said by Mirvac’s representatives and whether any such statements were misleading or deceptive or likely to mislead or deceive in contravention of s 52 of the *Trade Practices Act*. The same case is pleaded as involving contraventions of s 53A, but there was no

argument that this might entitle the Hollands to succeed where they would not under s 52.

- [7] The relevant conversations are said to have taken place on two days. The first was 22 June 2007 which, it is common ground on the pleadings, was the day upon which Mr and Mrs Holland signed the contract. The second was 2 July 2007 which, again it is common ground, was the day upon which Mirvac signed the contract and each party became bound. Mirvac denies that there was any meeting or other exchange between any of its representatives and the Hollands on that second date. But it agrees that its sales representative, Mr Sanders, spoke to Mrs Holland on the morning of 22 June 2007 and to each of the Hollands that afternoon. It is also accepted that on both of those occasions Mrs Holland's mother, Mrs Yesberg, was present. These conversations were at the display centre to which I have referred. The Hollands also complain of things they attribute to other employees of Mirvac on that day, both at the display centre and at a viewing platform which had been erected near the site of the proposed building.
- [8] Prior to 22 June 2007, Mr and Mrs Holland, apparently through Mrs Yesberg, had expressed interest in this proposed development. Indeed, like many prospective purchasers, they had paid \$5,000<sup>1</sup> to Mirvac in order to obtain some priority in selecting an apartment. Mrs Yesberg had spoken to Mr Sanders enquiring about the various sizes of apartments to be offered and the prices. The Hollands and Mrs Yesberg knew Mr Sanders. He had been friendly with Mrs Holland's sister and he had also worked for some time for Mrs Yesberg in her then real estate agency. By 2007 Mrs Yesberg was retired, but she had worked for about 30 years as a residential real estate agent in Brisbane and Noosa.
- [9] On 22 June, there was a promotional event conducted by Mirvac at the display centre and the nearby development site. People such as the Hollands, who had paid a deposit, were invited to attend and interviews were arranged for each with one of the many Mirvac representatives. Mrs Yesberg arranged an interview with Mr Sanders for 8.30am and she and Mrs Holland met him then at the display centre. Mr Holland could not attend that morning because of work commitments.
- [10] The display centre was more than 500 metres upstream from the site of the proposed apartment. Stage 1 of this development, which included this apartment, was constructed at the downstream end of Mirvac's site. The area between stage 1 and the display centre was for subsequent stages, some of which have now been built. Mirvac's evidence is that the location of these successive stages explains the location of the display centre at the far western or upstream end of the site. As it happened, the location had a relatively good view of the river because there was little vegetation on the river bank at that point.
- [11] The display centre had an open plan design with representations of the proposed bathroom and kitchen fixtures and finishes. There was prominently displayed a scale model of the two buildings comprising stage 1. The parties in this case agree as to what was that model, photographs of which are in evidence and I was able to view the model itself. The model included the surrounding landscape and significantly it showed a thick layer of vegetation along the river bank in front of the buildings, to a height well in excess of the Hollands' proposed apartment on the

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<sup>1</sup> Which was to be refunded if a contract was not signed.

lowest floor. Significantly also, it showed the land adjacent to the apartment rising from the river side of the apartment towards the rear or southern side. The model substantially accords with what has now been built, in respect of both the mangroves and the height of the ground relative to the terrace of the apartment. Those two matters are depicted by several photographs which were tendered by consent. I have also had the advantage of a view of the apartment, the surrounding area and the display centre.

- [12] According to the evidence of Mrs Holland and Mrs Yesberg, it was not Mr Sanders who said anything on the morning of 22 June which is directly relevant. Rather, their evidence was that an unidentified saleswoman from Mirvac said to them, as they stood on the deck of the display centre overlooking the river, that the view was “typical of” or “similar to” the view to be expected from the apartment. They said that this did not occur in Mr Sanders’ presence, because Mr Sanders was then busy dealing with questions from other people. Mrs Holland said that she interrupted a conversation between the saleswoman and others to ask:

Could you please tell me how the view from [here] ... compares with [the] first floor unit?

to which the saleswoman replied:

This is in many ways very typical of a first floor unit. ... The display centre is a similar distance back from the river. The elevation is half a metre to a metre, the sales office was higher. ... This is a typical view for what you can expect.

- [13] Mrs Yesberg’s evidence was that it was Mr Sanders who introduced them to the saleswoman inside the display centre and that she then accompanied them onto the deck. Mrs Yesberg said that her daughter asked, “Is this the sort of view we can have from our apartment?”, to which there was this response:

These are the views that you can anticipate to have from an apartment over in Lushington [the subject building].

- [14] Neither Mrs Holland nor Mrs Yesberg was able to provide a good description of the saleswoman. The only description which they gave was that the woman had blonde hair. The unchallenged evidence of Mrs Madsen, a senior development manager of Mirvac, is that there were but two sales staff employed by Mirvac at the display centre that morning who would meet that description. Documents were tendered without objection summarising the recollection of each of them, which is that she did not tell anybody that the view from the display centre was that which could be expected from an apartment on the first (lowest) level of either of the proposed buildings. Neither of them was required for cross-examination.

- [15] Yet Mr Sanders gave evidence that he did speak to Mrs Holland and Mrs Yesberg on the morning of 22 June about mangroves and views. His evidence is that he told them that there would be “selected mangrove trimming and canopy lifting of the mangroves between [the buildings]” and that “[the view] was ... going to be a filtered view ...”. He was asked whether there was any conversation about who was doing the trimming work, to which he answered:

[Mrs Holland] had said, ‘What if it isn’t going to be as good as she expected?’ and I said, ‘Well, all I can do is try and talk to the people that are involved, I know who it will be, and see if I can ... help out there and have them trimmed a little bit more for you at the time’.

- [16] There are other differences between the respective accounts of Mrs Holland and Mrs Yesberg about this morning meeting. Mrs Yesberg agreed that she encouraged her daughter to buy the apartment by saying words to the effect that, “If you don’t agree to buy this now, the unit will be gone by this afternoon”. She says that her daughter signed something on the morning but she did not believe it was a contract. Mrs Holland said that she signed nothing in the morning meeting and denied that her mother made that statement. Mr Sanders said that Mrs Holland did then sign the contract which was signed by Mr Holland in the afternoon meeting.
- [17] Mr Sanders said that he set aside an hour and a half for his meeting with Mrs Holland and Mrs Yesberg of that morning. I cannot accept that their meeting took that long. On each of the accounts, the sales staff, Mr Sanders included, were very busy. Mr Sanders described the display centre as being crowded with very willing purchasers. He said there were more than 130 appointments which had been made with prospective buyers of 115 apartments and that in no case was there any negotiation as to the price. He described the day as follows:
- It was mayhem. People were turning up early before their appointments during the day. Everybody – a lot of people knew each other. They were all kind of talking about what they were all looking at buying. It was pretty – pretty much full on.
- He agreed with the suggestion put to him in cross-examination that “very expensive apartments were being sold like hot cakes”.
- [18] The fact that the meeting with Mr Sanders was very much shorter than he says he recalls does not particularly matter, except that it is one factor indicating that his evidence is not entirely reliable.
- [19] I go then to the afternoon of 22 June. Mrs Holland and Mrs Yesberg, this time accompanied by Mr Holland, returned to the display centre. They showed Mr Holland the model which Mr Sanders had shown to them in the morning. On all accounts Mr Sanders spoke to them. But he said that he was busy with other buyers and that he spoke only briefly to Mr and Mrs Holland, with Mr Holland saying simply that he had seen all that he needed to see and that he was happy to proceed, after which Mr Holland then signed the contract.
- [20] On that afternoon, Mr Holland and Mrs Yesberg were driven by another of Mirvac’s staff to a viewing platform which had been constructed on the site of the proposed stage 1. It had several levels corresponding with the levels of the proposed buildings. Mrs Holland did not go to the viewing platform and nor did Mr Sanders. Mrs Yesberg said that there was a conversation on the viewing platform with a salesperson from Mirvac in which Mr Holland asked about the height at which they were standing compared with the height of the proposed apartment and there was an answer to the effect that the apartment would be about a metre lower. Ultimately, there is no complaint about that statement, if it was made.
- [21] Rather, the Hollands rely upon statements which they say were made by Mr Sanders on that afternoon, both before and after the visit to the viewing platform. Prior to that visit, they say that Mr Holland asked Mr Sanders how the view from the display centre compared with what could be expected from the apartment. Mrs Holland’s evidence was that Mr Sanders replied by saying that it was typical of what could be expected. Mr Holland’s evidence was that Mr Sanders replied by saying that the

apartment was about half a metre lower than the deck of the display centre, but that the view was “exactly what [they could] expect”.

- [22] Mr Holland said that he also spoke to Mr Sanders about security in the same conversation. According to Mr Holland, after he enquired as to the height of the apartment, he asked Mr Sanders, “How would that work with our security aspect?”, to which Mr Sanders replied, “Due to the height of the unit above ground, you will have ample security”.
- [23] The Hollands said that they again spoke with Mr Sanders after the visit to the viewing platform. According to their evidence, and also that of Mrs Yesberg, Mr Holland said that he was concerned about the extent of the mangroves in front of the proposed buildings which he raised with Mr Sanders. On each of their accounts, Mr Sanders replied with words to the effect that there would be a boardwalk constructed through the mangroves and that there would be “clearing and trimming” (Mr Holland’s evidence), “extensive trimming” (Mrs Holland’s evidence) or “significant clearing” (Mrs Yesberg’s evidence). Each said that Mr Sanders added that he knew the person who would be doing this work and that he would make sure that he did “a good job” in front of their apartment.
- [24] As it happens, this evidence as to work to be done to the mangroves is much the same as Mr Sanders’s evidence as to what he said to Mrs Holland at the morning meeting. He said that he then referred to the proposed trimming and canopy lifting. But he said that this would result in “filtered” views, which the Hollands deny.
- [25] I go then to the alleged meeting of 2 July 2007. The Hollands and Mrs Yesberg say that they attended a meeting with Mr Sanders on that day. Mrs Holland claimed that the meeting was for the purpose of their signing the contract. But as already mentioned, it is common ground on the pleadings that Mr and Mrs Holland signed the contract, not on 2 July, but on 22 June 2007. Mrs Holland did not offer any evidence to the effect that there was any further representation made on 2 July. But Mr Holland said that they were then told by Mr Sanders not to be concerned about the mangroves, (again) because he knew the people doing the trimming and that he would make sure that they did a good job. Mrs Yesberg said that Mr Holland asked Mr Sanders at this meeting what was going to happen about the mangroves, to which Mr Sanders replied that there would be “significant clearing”.
- [26] On the premise that the Hollands signed the contract on 22 June, there is no explanation for a meeting on 2 July 2007. In particular, there is no document to which the Hollands could refer which was signed by them on 2 July. There is evidence of a meeting not long after the contract was made, at which there was a discussion about finishes in the apartment. But I accept that this was the meeting referred to in Mr Sanders’ appointments diary as occurring on 8 August 2007. It is not suggested that there was any misrepresentation in the course of that meeting.
- [27] In early March 2009, Mr Holland inspected the apartment, which by then was nearly completed. Shortly afterwards, he wrote to Mr Freeman of Mirvac this letter, which it is necessary to set out in full:
 

Only last week my wife and I received correspondence from Mirvac updating us on progress towards completion and a likely settlement date for our apartment. We, like most purchasers, were looking forward to the day where we could sit on our balcony and enjoy the

ambience of what Mirvac has created. I do have a serious concern however which I need to raise with you. It concerns the mangroves which grow on the riverbank immediately in front of our unit.

When my wife visited the sale office, along with my mother-in-law, to make initial enquiries about the unit she was advised by MIRVAC Sales Representative, Mr Paul Sanders in response to the specific question raised by her – which view she could expect from the unit. It was advised that the view was all but identical to that of the view of the river from the sales office. It was explained that the mangroves would be trimmed and cleared during construction of the proposed boardwalk.

So delighted was my wife with the unit and its supposed view that I accompanied her back to the sales office later that day with the purpose of observing a model of the proposed development and indeed the view from the sales office. We were taken to the viewing platform by your sales hostess, where we again raised issues of the view and mangroves. We had spent a couple of years living at a property on the river at Rosebery Terrace, pending construction of another residence in St Lucia, and were well aware of how thick the mangroves grew and what effect such growth has on river views. On the viewing tower, we were again advised that the mangroves would be cleared and trimmed during construction of the boardwalk so as to create a view commensurate with that from the sales office.

I inspected the unit the other week and it immediately struck me that the current view of the river from the balcony is very different to that of the sales office. I made contact with the sales office staff to confirm that the trimming and clearing of the mangroves would proceed as was previously explained to me. To my surprise, no one has been able to confirm this.

I am sure that you appreciate my concern, as the represented view of the river was a critical driver in my decision to purchase.

Would you please confirm by return email that the promised trimming and clearing of the mangroves will in fact be undertaken, and also provide a time frame for this work. I look forward to your reply.

- [28] Mr Holland had not received a reply by 7 April 2009 when he sent an email to Mr Freeman asking for a response. As it happened, a letter had been sent by Mirvac's Mr Krippner in reply to Mr Holland's letter. Mr Krippner wrote as follows:

Thank you for your letter of 9 March 2009 to Chris Freeman regarding the purchase of your apartment at Tennyson Reach.

The mangrove community growing on the bank of the river in front of Softstone and Lushington is different to that in front of the Sales Centre at Tennyson Reach. We confirm Mirvac has an approval from DPIF to undertake selected works (trimming and canopy

lifting) to the foreshore mangrove community in front of Softstone and Lushington. These works were initially undertaken in mid-2008 and will be undertaken again in April this year, in accordance with the terms of the approval.

As part of our preparation for the release of Tennyson Reach, we held detailed sales training sessions that all sales staff attended. Included in this training was the scope of works to be undertaken to the mangroves. Mirvac are aware of the significance of the views when purchasing an apartment off the plan, and given this, also provide a viewing platform and model for inspection.

Works to the mangroves will be undertaken in April, consistent with the information provided at the sales training and therefore your expectations. We look forward to showing you your completed apartment at your handover presentation in May prior to settlement.

- [29] Mr Krippner had replied on those terms, having spoken with Mr Sanders. Mr Holland's letter had been handed by Mr Freeman to Mrs Madsen, who passed it to him. An email from Mr Krippner to her of 24 March 2009 sets out what Mr Krippner said was Mr Sanders's recollection of events in these terms:

During initial discussions with the Hollands it was confirmed that the elevation of the courtyard apartments was some 600 mm below the level of the sales centre's deck. There were references made to the management plan regarding the mangroves in front of the Softstone and Lushington buildings confirming the 'thinning' of the mangroves and the lifting of the canopy (as per sales training) but no representation was made that the outlook would mirror that of the sales centre. The model clearly demonstrates the extent of such 'thinning' and does nothing to support the Holland's (sic) suggestion that they were somehow unaware of the extent of the mangroves and their impact upon views. Given they were accompanied to the viewing platform by a sales associate there could be a degree of uncertainty about who said what, however Iain Knight was in attendance during the tower inspections and presumably would have been deferred to with such queries.

- [30] On 14 May 2009, lawyers acting for the Hollands wrote to Mirvac's lawyers in terms including the following:

Representations were made to my clients before they contracted to purchase the unit to the following effect:

- (a) That the views of the river from the deck of the sales office were very similar to the views which would be available from the unit proposed to be purchased by my clients and that there was intended to be substantial clearing in front of that unit when a boardwalk was built into the mangroves; that representation was made:
  - (i) by a female member of the sales staff to Mrs Holland and her mother, Ms Laurel Yesberg, during their initial visit to the site on 22 June 2007;



- (ii) again that afternoon by Mr Paul Sanders to Mr and Mrs Holland in response to a further query by Mr Holland who explained that they had previously lived on the river in Roseberry Terrace, Chelmer but that mangroves had blocked out their view of the river and that they wanted to ensure that the view of the river from the unit they proposed to purchase would not be obstructed by the mangroves. Mr Sanders represented that the mangroves would be substantially cleared when the boardwalk was constructed; he also said that the view from the viewing platform would be very similar to the view from the unit.
- (b) Mr Holland and Ms Yesberg were then taken by a female member of the sales staff to the viewing platform. They were informed by that staff member to the effect that the viewing platform was approximately one metre higher than the terrace area of the unit they proposed to purchase. Whilst at the viewing platform, Mr Holland and Ms Yesberg checked the view from the level one metre below the platform; it was apparent that the mangroves were much more dense than those in front of the sales office and would require substantial trimming in order to provide the unobstructed views of the river available from the deck of the sales office. They were told by the sales representative that the mangroves would be cleared and trimmed during construction of the proposed boardwalk and that the view would be effectively the same as that from the deck of the sales office.
- (c) Immediately before signing the contract on 2 July 2007, Mr Holland again raised with Mr Sanders their experience with mangroves at Chelmer and enquired when it was planned to do the clearing. Mr Sanders was unable to provide a time, but said words to the effect that he knew the person doing the clearing and would make sure that he did a good job in front of my clients' unit.

On their return to the sales office, Mr Holland discussed with Mr Sanders whether it would be possible to have an all glass balustrade in the terrace area in order to take full advantage of the river views available once the mangroves were cleared. That request was noted and later implemented.

[31] There was no work done to the mangroves immediately in front of the apartment from June 2007 to the date for settlement of the contract, which became 29 May 2009. Mirvac had permission to do some work on mangroves in front of the development site, but not immediately in front of this apartment. In Mirvac's development application lodged in 2006, permission had been sought to undertake certain works in relation to mangroves by reference to 12 designated zones along the river bank. Almost the entire area immediately in front of the subject apartment

was designated as zone 8. Immediately upstream were zones 6 and 7, and the boundary between them and zone 8 was about opposite the western wall of the apartment. Beyond that wall is an extensive terrace which is part of the apartment. Downstream from zone 8 is zone 9 which is of lesser relevance to the view from the apartment.

- [32] There is evidence of email correspondence between Mirvac and an officer of the Department of Primary Industries in May 2007 which referred to the likely requirements of the Department for each of the 12 zones. In zones 6 and 7, there was to be permitted “mangrove modification – canopy lifting”, which the DPI officer defined as “initial and ongoing treatment of mangroves to provide for view of the Brisbane River and public safety through the removal of lateral branches ... and water shoots between two defined RL levels, the lower RL level being the level of the adjacent pedestrian and cycle path, with the higher RL level being approximately 2 to 3 metres above this level”. In zone 9 the permitted works were to be “mangrove modification – canopy lifting/thinning”. The term “thinning” was to be defined as the “initial treatment of mangroves to provide for view of the Brisbane River and public safety through the removal of mangroves with a trunk diameter [of less than] 5cm diameter at breast height” on the basis that “[n]o further thinning is to occur after this treatment”. But in zone 8, no treatment to the mangroves was to be permitted. Of the 12 zones there were four, including zone 8, in which any treatment was to be forbidden. But the only one of them in front of the proposed buildings in stage 1 was zone 8.
- [33] According to the photographs which are in evidence, the mangroves within zone 8 are not noticeably thicker than within, for example, zones 6, 7 or 9. Nor are they thicker than in front of the apartment at the eastern end of the other building within stage 1, which I viewed as well as the subject apartment. Perhaps it was thought that the mangroves within zone 8 did not warrant any thinning or canopy lifting compared with elsewhere.
- [34] Mr Cox, a valuer, inspected the site on 10 March 2010. He described the extent of the mangroves as fairly depicted by the photographs within his report. But there are other photographs which were tendered as having been taken in September 2009, and to his eye, they suggested a better view than he had seen on his inspection. He agreed that those 2009 photographs depict what could be described as a filtered view of the river.
- [35] There is nothing to suggest why the view would have been in 2009 materially different from the present view. No doubt, particular photographs might give impressions depending upon the angle and the brightness of the day. But overall, the view from the apartment is to a line of mangroves providing some visibility of the river. As I have said, the extent of the growth is not materially different from that represented by the model which the Hollands saw on 22 June 2007. As the argument for Mirvac accepts, the vegetation is significantly less immediately in front of the display centre where accordingly the view of the river is much better.
- [36] I return to Mr Holland’s letter of 9 March 2009. This was written without legal advice. I infer that the letter was written after discussing the events and circumstances with Mrs Holland. It would be remarkable had he not discussed the letter with her and it refers to conversations to which Mr Holland was not a party.

The letter itself is not sworn evidence and it is possible that Mr Holland did not express his recollection, and that of Mrs Holland, as clearly as he had intended.

- [37] His letter is different from the Hollands' case in several respects. Most importantly, it said nothing of representations by Mr Sanders to Mr Holland. According to his letter, it was in the morning of 22 June, when Mr Holland was not there, that Mr Sanders said that the view would be identical to that from the display centre and that the mangroves would be trimmed and cleared during construction of the proposed boardwalk. Next, according to the letter, there was a representation by a Mirvac representative at the viewing platform to the same effect: that the view would be effectively that from the display centre. But Mr Holland said nothing about that statement in his evidence in chief and Mrs Yesberg's evidence does not support it. Thirdly, the letter made no reference to the alleged representations of 2 July 2007. And fourthly, it made no complaint about representations in respect of security. By the time of this letter, I infer that the height of the apartment above the ground at all points was apparent.
  
- [38] A different version was put forward in the lawyers' letter of 14 May 2009. That version is substantially consistent with the evidence of Mr and Mrs Holland. However, it does refer to a representation by Mr Sanders that the mangroves would be "*substantially* cleared" on construction of the boardwalk. And it attributes to Mr Sanders a statement that the view from the "*viewing platform*" would be "very similar to the view from the unit". On the Hollands' case, the comparison was with the view, not from that location, but from the deck of the display centre. That deck is also referred to in the letter and it is clear that the author did not consider the two structures to be the same thing.
  
- [39] During the cross-examination of Mr and Mrs Holland, there was an attempt to make out a case that the Hollands were unable to complete this contract and that this explained their complaints about views and security. In response, the Hollands tendered a three page analysis prepared by their accountants dated 11 March 2009, setting out the Hollands' incomes and expenses and their ability to fund the payment of interest on a loan of \$2,300,000 for this purchase. The analysis shows that they were considering the alternatives of renting the apartment or renting their then existing house and moving to the apartment. This evidence does not demonstrate that they would have been able to borrow \$2,300,000 to complete this contract. The accountant estimated that, depending upon the rental which would be received for the apartment, the letting of the apartment with a borrowing of that order would result in a net loss of between \$95,000 and \$115,000, leaving the Hollands with combined taxable incomes of between \$10,000 and \$30,000. I infer that the Hollands would have found this purchase burdensome had they been able to raise the necessary funds, until they had sold their own house. But I am not persuaded that they were unable to settle.
  
- [40] Each of the arguments addressed in some detail aspects of the evidence which were said to favour one case or the other. The argument for Mirvac emphasised inconsistencies between the witnesses on the Hollands' side and between their case and the correspondence to which I have referred. The argument for the Hollands referred to, for example, some tension between the email from Mr Krippner, setting out Mr Sanders's then recollection, and his evidence, in that the email made no reference to the views being "filtered". But, none of the witnesses was clearly and entirely correct in his or her recollection. That is unsurprising, given that the events

occurred nearly three years ago and there is little documentary or other evidence to assist any witness to recall precisely what was said.

- [41] Notably, the respective recollections of Mr Holland, Mrs Holland and Mrs Yesberg were not in all respects identical. This indicates that they have not rehearsed a common version. But it also illustrates the difficulty which most witnesses would have in recalling the precise words of conversations.
- [42] Mr Sanders's version substantially accords with the response which Mirvac gave in April 2009. It is not fatal to Mirvac's case that the response made no reference to the filtering of views. Quite possibly, Mr Sanders said nothing about filtered views, but also said nothing to the effect that the views would be equivalent to those enjoyed from the deck of the display centre. The email from Mr Krippner refers to the training which representatives such as Mr Sanders had received as to what should be said on the subject. Representatives were instructed, not surprisingly, to emphasise the location of the buildings as adjacent to the river. Of course, most of the apartments were to be built above the top of the mangrove canopy. But the training manual provided to Mr Sanders and others informed them of the following in relation to mangroves:

#### **1.9.11 Mangroves**

Removal of some mangroves will be necessary to facilitate infrastructure, stabilisation and management works. The key components of the proposed mangrove management plan are as follows:

- a) Selected mangroves at the eastern end of the site in front of Softstone and Lushington will be selectively trimmed for construction, maintenance and safety purposes.
- b) Canopy lifting is proposed along sections of the river frontage to allow users of the parkland to interact with the river.
- c) An ongoing program of mangrove management will also be implemented in consultation with Brisbane City Council and the Body Corporate Managers.
- d) It is anticipated that the existing mangrove canopy will fitter views up to approximately Level 4 in Softstone and Lushington.

Approval in principle for the points b-d (above) have been received – subject to the submission and approval of a formal application. Final approval is anticipated on or about August 2007.

The word “fitter” was apparently intended as “filter”.

- [43] It is likely that Mr Sanders had read and understood that part of the manual. It is also likely that when he was asked for a response to Mr Holland's letter of 9 March 2009, he was referred to the manual and asked whether he had spoken to the Hollands about the mangroves consistently with it. In my view, it is probable that this is the basis for Mr Sanders's recollection of his conversations of 22 June 2007. Because he was so busy on the day in question, and spoke to so many prospective purchasers, it is improbable that he would recall precisely what he had said to either

of the Hollands. The fact that he knew them and Mrs Yesberg, would make the meetings somewhat more memorable. Nevertheless, it is more likely that his version was the result of reconstruction from this part of the sales manual. But I am not persuaded that he gave evidence which he knew to be untrue.

- [44] However the sales manual is relevant as an indicator of what he is likely to have been said. If he was being at all careful when speaking to Mr and Mrs Holland, the content of the manual makes it less likely that he would have added some statement to the effect that the view would be as good as that from the display centre. And there are other circumstances indicating the improbability that he made that claim about the view. The first is that the occasion was one on which there were very many enthusiastic purchasers signing contracts there and then in what appear to have been, for Mirvac at least, record numbers. There was relatively little incentive for a sales representative to make a claim of that kind. Secondly, he was speaking to people whom he had known personally for many years. Thirdly, one of those persons was Mrs Yesberg, for whom he had worked in her real estate agency and who impresses as an assertive and experienced person in business affairs, and certainly not one to be easily pressured. And the model of the development is significant, because it clearly depicted a heavy growth of mangroves across the front of each building, which would have made Mr Sanders's task in persuasively making the statements attributed to him that much more difficult.
- [45] I am prepared to accept that the Hollands were disappointed with the view upon completion of the apartment in 2009. Possibly, they had come to expect something which approached the view which they had seen from the deck of the display centre. But that does not mean that Mirvac, through Mr Sanders or anyone else, made a representation to that effect. It is not unlikely that a combination of other circumstances could have led to such an expectation, if indeed it was held. The Hollands understood that the apartment would be at about the same distance from and height above the river as the display centre. They had been told that there would be some work done to the mangroves. Perhaps they retained a recollection of the view from the display centre which, over time, they came to associate in their minds with the apartment which was being constructed.
- [46] As I have said, it would be unrealistic to expect any of the witnesses to precisely recall the words spoken during these conversations. However, there are some features of this case which, in my view, strongly indicate the unreliability of the evidence of the Hollands and Mrs Yesberg. In particular, if Mr Sanders had said to Mr Holland the things as claimed in their evidence, it is difficult to understand why that was not alleged in Mr Holland's letter of 9 March 2009. There is nothing in the letter about any statement by Mr Sanders to Mr Holland. The only explanation for that omission could be that Mr Holland had at that stage forgotten that he had received these assurances directly from Mr Sanders. I find it difficult to accept that he had then forgotten about these statements, but has accurately recalled them since. Then there are the other differences between, on the one hand, that letter and things said in the Hollands' lawyers' letter of May 2009, and on the other hand, the evidence of the Hollands. And their evidence of a meeting on 2 July 2007 is, I find, incorrect. For reasons which have been discussed it is quite unlikely that there was this meeting on 2 July 2007. That the Hollands and Mrs Yesberg gave the evidence they did of the meeting strongly indicates a level of reconstruction of events, at least on the part of Mr Holland and Mrs Yesberg.

- [47] In my view, the circumstances to which I have referred at [44] make it relatively unlikely that Mr Sanders, or anyone else from Mirvac, ventured the statement that the view would be as good as that from the deck of the display centre. Accordingly, the factors indicating the unreliability of the evidence of the Hollands and Mrs Yesberg leave me unpersuaded that in truth such a representation was made.
- [48] The Hollands' case about the view was effectively based upon the proof of the representation that the view would be the same as that from the display centre. Mirvac has conceded that Mr Sanders did make some representations as to trimming and lifting of the mangrove canopy and as to an intention to speak to the person who would do the work. Mr Sanders conceded that he had not spoken to that person and had done nothing to assist in that respect. In the course of oral submissions, there was some discussion as to whether the statements conceded by Mr Sanders to have been made were of themselves a breach of s 52. Like each of the statements relied upon in the Hollands' case, these were statements as to future matters so as to engage s 51A of the Act. They were misleading unless it is shown that there was a reasonable basis for them: s 51A(1). However, Mirvac has established reasonable grounds for those statements. As discussed, by June 2007 there had been correspondence with the DPI which indicated that Mirvac would be permitted to do work upon the mangroves. Although this did not include that area designated as zone 8 and therefore nearly all of the area directly in front of the proposed apartment, it was work which was to be permitted upon the immediately adjoining zones and which would be relevant to what would be ordinarily viewed, both from within the apartment and from the apartment's terrace. The fact that there was no actual approval existing as at 22 June 2007 does not mean that these statements lacked a reasonable ground.
- [49] Nor am I persuaded that Mr Sanders represented that there would be "ample security" or that, more generally, Mirvac engaged in any conduct which was misleading on that subject. No complaint as to security was made in the letter of 9 March 2009. It may be that in the haste of what occurred on 22 June 2007 the Hollands did not give sufficient consideration to that subject. But that is not to say that they were misled by Mirvac. The height of this apartment relative to the ground was clearly depicted within the model and I cannot accept that the Hollands understood that the terrace of the apartment at all points would be so far above the ground as to be inaccessible from it.
- [50] Had the Hollands proved that Mirvac represented that the view would be as good as that from the deck of the display centre, so far as visibility of the river was concerned, they would have established that they had suffered, or would be likely to suffer, loss if held to the contract. As already noted, Mr Cox values the apartment at \$1,500,000 and said that its value would have been \$1,750,000 had the view been the equivalent of that from the display centre. It may be that an assessment of damages under s 82 for the alleged contravention would warrant an assessment by a comparison between the price and the present value, rather than between those two values. However, on the basis that their loss from a breach of s 52 was of the order of \$250,000, the Hollands sought to terminate the contract in reliance upon *Tenji v Henneberry & Associates Pty Ltd*.<sup>2</sup> In that case, the trial judge found that a contract for the purchase of real estate had been induced by conduct contrary to s 52, by misrepresentations as to the worth of the property and as to its rental and other

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<sup>2</sup> (2000) 98 FCR 324.

income. He awarded damages of \$10,000 on the basis that had the conduct not occurred, the purchaser would have gone ahead but at a price of \$10,000 less than was agreed to be paid. The Full Court of the Federal Court allowed the purchaser's appeal and declared the contract void under s 87(2)(a). In the principal judgment, which was given by French J (as he then was), the purpose and breadth of the discretion under s 87 was described as follows:<sup>3</sup>

Avoidance under s 87 must serve a compensatory purpose but may serve other purposes in doing justice between the parties. There are cases in which a party who enters a contract as a result of misleading or deceptive conduct may be compensated in a pecuniary sense by an award of monetary damages but is left nonetheless with a continuing burden of unforeseen risk, a transaction soured by the events that surrounded it and a property, once the repository of hope for the future that is now an albatross around its neck. Absent misleading or deceptive conduct, an informed commitment to the acquisition and all its difficulties and shortcomings is easier to bear than one into which a party has been misled as was found to be the case here.

His Honour did not make a finding that the Tenjis would have made the same decision had the misleading or deceptive conduct not occurred. He found no more than that there was a possibility.

Those remarks would have been particularly relevant in the present case, had I been persuaded by the Hollands' evidence.

- [51] The outcome is that the counterclaim will be dismissed and there will be a decree of specific performance of the contract. I will hear the parties as to other orders, including costs.

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<sup>3</sup> Ibid, [20]-[21].