

SUPREME COURT OF QUEENSLAND

CITATION: *Nifsan Developments Pty Ltd v Buskey & Anor* [2011] QSC 314

PARTIES: **NIFSAN DEVELOPMENTS PTY LTD**
(ACN 010 795 561)
(plaintiff)
v
MARCUS DAVID BUSKEY
(first defendant)
and
RAAKEL ELISABETH TUOMINEN
(second defendant)

FILE NO: 6482 of 2010

DIVISION: Trial Division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 27 October 2011

DELIVERED AT: Brisbane

HEARING DATE: 10-13 October 2011
Supplementary written submissions 19 and 20 October 2011

JUDGE: Applegarth J

ORDERS:

- 1. The plaintiff's claim is dismissed.**
- 2. Judgment for the defendants on their counterclaim.**
- 3. Order pursuant to s 87 of the *Trade Practices Act 1974* (Cth) that the contract entered into between the plaintiff and the defendants on or about 12 February 2008 to purchase proposed Lot 3469 on SP 211908 in the Parish of Gilston County of Ward be declared void.**
- 4. Order that the initial deposit of \$1,000 and the balance deposit of \$78,750, together with all interest that has accrued thereon, be paid to the defendants.**
- 5. Order that the plaintiff pay to the defendants the amount of \$3,000 together with interest of \$1,110 pursuant to s 47 of the *Supreme Court Act 1995*.**

CATCHWORDS: TRADE AND COMMERCE – COMPETITION, FAIR

TRADING AND CONSUMER PROTECTION
 LEGISLATION – CONSUMER PROTECTION –
 MISLEADING OR DECEPTIVE CONDUCT OR FALSE
 REPRESENTATIONS – MISLEADING OR DECEPTIVE
 CONDUCT GENERALLY – MISLEADING OR
 DECEPTIVE: WHAT CONSTITUTES – where defendants
 contracted to purchase apartment off the plan – where
 apartment was located on ninth-storey of a master-planned
 residential development and had views of a lake and to the
 horizon – where the plaintiff seller knew that the buyers were
 seeking privacy and unrestricted views – where seller’s
 employed salesman represented that the apartment would
 have unimpeded views of lake and horizon – where seller had
 policy of not informing sales staff of its development plans –
 where seller, at the time of the representations, had lodged
 application to develop the area in front of the subject
 apartment to eleven storeys – where contract contained
 “entire agreement” clause – whether seller had reasonable
 grounds for making representations about future matters –
 whether seller’s representations as to views and silence as to
 application constituted misleading and deceptive conduct

Trade Practices Act 1974 (Cth), s 51A, s 52, s 87

Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592;
 [2004] HCA 60 cited

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR
 304; [2009] HCA 25 followed

Gould v Vaggelas (1985) 157 CLR 215; [1985] HCA 85 cited

Henville v Walker (2001) 206 CLR 459; [2001] HCA 52 cited

HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd
 (2004) 217 CLR 640; [2004] HCA 54 cited

I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd
 (2002) 210 CLR 109; [2002] HCA 41 cited

Manwelland Pty Ltd v Dames & Moore Pty Ltd (2001) ATPR
 41-845; [2001] QCA 436 cited

Mirvac Queensland Pty Ltd v Tyan Pty Ltd ATF Tavakol
Investment Trust [2010] QSC 333 followed

Pavich v Bobra Nominees Pty Ltd (1988) ATPR (Digest) 46-
 039 cited

Potts v Miller (1940) 64 CLR 282; [1940] HCA 43 cited

Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd
 (2005) 220 ALR 211; [2005] FCAFC 131 cited

QCoal Pty Ltd v Cliffs Australia Coal Pty Ltd [2009] QCA
 358 cited

Smith New Court Securities Ltd v Scrimgeour Vickers (Asset
Management) Ltd [1997] AC 254; [1996] UKHL 3 cited

Street v Luna Park Sydney Pty Ltd (2009) 223 FLR 245;
 [2009] NSWSC 1 cited

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR
 165; [2004] HCA 52 cited

Waltip Pty Ltd v Capalaba Park Shopping Centre Pty Ltd
 (1989) ATPR 40-975 cited
Watson v Foxman (1995) 49 NSWLR 315 followed

COUNSEL: A L Wheatley for the plaintiff
 J W Lee for the defendants

SOLICITORS: Minter Ellison for the plaintiff
 Malcolm Wright for the defendants

- [1] Mr Buskey and Ms Tuominen (“the buyers”) were interested in purchasing an apartment with unrestricted views and the privacy of not having occupants in other high rise apartments looking into theirs. The apartment was to be their permanent residence. They looked at apartments at Main Beach and Broadbeach on the Gold Coast. The one they inspected at Broadbeach was in a property that adjoined an old motel site, and a development on that site might impair their view. As a result, the buyers lost interest in buying that apartment. On inspecting the apartment at Broadbeach they found that it offered only “view corridors” between nearby buildings. It was not what the buyers were looking for.
- [2] In early January 2008, the buyers saw a full page newspaper advertisement in the Gold Coast Bulletin which introduced “the French Quarter at Emerald Lakes”. The advertisement contained a large artistic impression of the French Quarter, which the advertisement described as “the latest addition to the European Village at Emerald Lakes”. The advertisement described it as “a unique residential and retail precinct offering residents something truly special.” The features included:

“Exclusive penthouse apartments with views from Surfers Paradise to Burleigh.”

The artist’s impression depicted a high rise apartment. The buyers were attracted to it. The same day they went to the Sales Centre at Emerald Lakes, where apartments in the French Quarter were being sold “off the plan”.

- [3] They met the developer’s employed sales representative, Mr Guy Joris. Mr Joris gave a presentation about the development. A DVD presentation about Emerald Lakes was on a continuous loop, and there were artists’ impressions of a building in the French Quarter that was being sold “off the plan”. It was called Bella Vue.
- [4] During their discussions with Mr Joris, the buyers explained to him that they had looked at other buildings, and that they wanted “unrestricted views and also [the] privacy of not having buildings looking back in.” They told him of their endeavours to find an apartment meeting these requirements at Main Beach and Broadbeach, and Mr Joris said that it was “a little bit different at Emerald Lakes because it’s a master plan community” and that Nifsan “controlled all the sites in front.” The buyers having raised the question of views, Mr Joris took them from the ground floor sales office in a waterfront building named Porto Bellago to an empty apartment on its fifth floor. The purpose of doing so was to compare the view that was obtained from the fifth floor of Porto Bellago with the view that would be obtained from the eighth floor of Bella Vue. Later I will address in greater detail what was said on that occasion and in their subsequent discussions. However, there

is no dispute that Mr Joris explained to the buyers that the elevation at Bella Vue would be much higher than the fifth level at Porto Bellago.

- [5] The buyers and Mr Joris then returned to the sales office and discussion turned to whether a particular apartment on the top level of Bella Vue, level nine, was available. According to Mr Buskey, Mr Joris said that from level nine “you would definitely look over the top of the town centre” and “[y]ou wouldn’t have any roof views there”. He also mentioned the benefit of having no-one above them and the fact that the penthouse had much higher ceilings. As a result of these discussions, the buyers placed a holding deposit of \$1,000. Contracts were prepared in due course and included special conditions in relation to certain items to be installed in the apartment. The buyers did not seek to insert a special condition in relation to views. Mr Buskey said that he had no reason to do so because he and Ms Tuominen were “clearly told” about the views, that Nifsan “has a long reputation on the Gold Coast” and that he had no reason to think that what he was told about the views was not the case.

- [6] For what was presented in the pleadings as essentially a word-on-word contest between the buyers and Mr Joris, there was a substantial amount of common ground in their evidence as to what was said by Mr Joris about the views that would be enjoyed from the penthouse at Bella Vue. But there remain some residual disputes about precisely what was said. Importantly, Mr Joris acknowledges that he said that the buyers would have a view from the penthouse apartment in the middle of the ninth floor of Bella Vue “looking over the top of all the buildings that were currently there”, including Porto Bellago, and the view “would be looking over the top of all the buildings that were proposed to be built”. Mr Joris said that this statement was based on what he was aware of, and that he was aware of approvals for a proposal to construct buildings beside the lake up to the same height as Porto Bellago, namely five levels. Bella Vue was to be constructed on an elevated site, so that the eighth and ninth floors of Bella Vue would be at a substantially higher level than the fifth floor of the Porto Bellago building and any other buildings that were constructed to the same height. Incidentally, the DVD presentation that was on a continuous loop in the sales office where Mr Joris worked depicted the proposed buildings at the harbour side to be of the same height as Porto Bellago. In the DVD computer-generated “flyover” of Emerald Lakes the proposed buildings were depicted in white, whereas existing buildings had a different colour. Mr Joris agreed that “nowhere along the waterfront in the flyover is there any proposed building at a height higher than Porto Bellago.”

- [7] According to Mr Joris, he was not aware of a substantial and important application that his employer, Nifsan, had made on or about 24 October 2007 to the Gold Coast City Council. That application sought Preliminary Approval Overriding the Planning Scheme for a Material Change of Use. The application was supported by a substantial Planning Assessment Report which relevantly sought approval increasing building heights in the waterfront precinct from five storeys as shown on approved plans to a height of up to 12 storeys. Mr Joris’s evidence, and Nifsan accepts his evidence as correct in this regard, is that Nifsan had a policy not to tell its sales staff of such matters. Still, its Sales Manager knew of this important application, as did its management team.

- [8] Unsurprisingly, not having been told of his employer's plan to build an 11 storey building (referred to as Building B) as part of the Porto Grande waterfront precinct, Mr Joris did not tell the buyers about it.
- [9] The buyers entered into a contract to purchase the relevant lot. They executed the contract on 7 February 2008 and the contract was concluded on or about 12 February 2008. The purchase price under the contract was \$1,595,000. The buyers paid the balance deposit of \$78,750 on 23 February 2008.
- [10] On or about 3 July 2008 they received a Further Statement pursuant to s 214 of the *Body Corporate and Community Management Act* 1997 (Qld) and a covering letter that stated that the effect of certain changes to the building in which their lot was located meant that the building would be "slightly reduced in height". After receiving the letter dated 3 July 2008, the buyers went to see Mr Joris who told them that it was a Council requirement to reduce the height of the building slightly, and he said it would have little or no effect on the buyers because it was only half a metre and they were on the ninth floor.
- [11] In around September 2008 the buyers again went to the sales office. It was one of many visits that they made to Emerald Lakes. They noticed a three dimensional model in the sales office which depicted the harbour precinct, which Nifsan named Porto Grande. A high rise building appeared to be between 10 and 12 storeys high. The model of it had a light blue roof, and the model is depicted in Exhibits 6, 7 and 8. If constructed, the building was likely to interfere with the buyers' views of the lake and beyond. The buyers raised their concerns with Mr Joris, who on this occasion was not his normal composed self. According to Mr Buskey, Mr Joris said:

"[D]on't look at it. I have had people come in here complaining. I have had the architect in and there is something wrong and he is going to have a look at it."

Mr Joris said that he would get back to the buyers, but he did not. They tried to speak to Mr Joris again, but were unable to. Instead, they spoke to another sales person named Corey Gilmore about their concerns. He put up what Mr Buskey described as "a very strong wall" to their questions, and asked the buyers to squat down on their knees to have a look at the model and the view corridors that they would have through the buildings. Ms Tuominen was particularly upset at this suggestion and said words to the effect of "I didn't buy any view corridors". The buyers went away and sought legal advice.

- [12] On 24 February 2009 their then solicitors wrote a letter complaining about Nifsan's misrepresentations. The letter stated that Mr Gilmore had indicated that "he had just become aware of the fact that the height of the building had been increased." It noted that the DVD display at the sales centre still showed the building in question as having the same height as it was when the buyers entered into their contract, being substantially the same height as other buildings on the waterfront. Nifsan's website was said still to show the building in question as having a lower height than shown on the model. The letter referred to further investigations that the buyers had carried out, from which they had become aware of the existence of Nifsan's application of 24 October 2007. It recited the facts in relation to the purchase, the view that had been undertaken from the top floor of Porto Bellago and the alleged representations made by Mr Joris to the effect that they would be looking over the

top of all other buildings proposed to be built and would have uninterrupted views and privacy. The letter noted that all information provided to the buyers, including the DVD and the statements of Mr Joris, reassured them that none of the buildings in the waterfront precinct would be of sufficient height to cause them any concern.

- [13] The letter reiterated that the buyers were not speculators, and had contracted to buy the apartment as their home. They had already paid an additional \$3,300 for alterations they wished to make to their apartment. The letter said that they had been induced to enter into the contract by a misrepresentation, and were entitled to terminate it. Their rights were reserved but their solicitors expressed their preference to proceed with the purchase if they could receive what was represented as being available. The letter inquired whether Nifsan was prepared to undertake the obligation to ensure that no building would be built in the waterfront precinct to a height greater than that represented to the buyers. The letter noted that such an obligation would need to be protected by a registered covenant.

- [14] The buyers' then solicitors received no response to the letter of 24 February 2009. On 6 April 2009 they again wrote to Nifsan and reiterated that the buyers had been induced to enter into the contract by a misrepresentation which entitled them to terminate it. Notice of termination was given. They requested the return of the deposit and indicated that the buyers reserved their rights in relation to loss or damage which they had suffered as a result of the alleged misrepresentation. The deposit was not returned. Nifsan did not accept the buyers' purported termination. The relevant community titles scheme was established on 20 April 2010. Settlement was originally set for 14 May 2010, but was then set for 31 May 2010. By this date Nifsan had received Gold Coast City Council approval of an application that it had lodged on 19 September 2008 to develop the Waterfront Precinct. This development approval included a building, Building B, to be known as the Porto Grande building.

- [15] On 22 June 2010 Nifsan commenced proceedings against the buyers for specific performance. The buyers defended that claim on the grounds that the contract ought to be set aside for the reasons pleaded in their counterclaim. Their counterclaim seeks a declaration pursuant to s 87 of the *Trade Practices Act 1974* (Cth) ("the TPA") that the contract is void, or alternatively an order that it be set aside. Other relief under s 87 is sought, including an order for the return of the deposit and the payment of the cost of the work done to the unit, legal and other costs with respect to the contract and other costs. Because Nifsan's claim for specific performance was defended only on the basis of the buyers' TPA claim, the trial proceeded with the buyers' calling their evidence first.

The issues

- [16] The parties are agreed that the following are the substantial issues:
 1. What was said ("the representation issue")?

 2. Were the things said by Mr Joris, together with Nifsan's silence as to its intention to construct an 11 storey building as Building B in Porto Grande, conduct that was misleading or deceptive, or likely to mislead or deceive the buyers? ("the contravention issue")

3. Did the buyers rely on the conduct? (“the reliance in fact issue”)
4. Has Nifsan established that there was “a break in the chain of causation” between the alleged contravention of s 52 of the *Trade Practices Act 1974* (Cth) and the buyers’ entry into the contract by “intervening events”? (“the causal break issue”)
5. Are the buyers entitled to seek relief pursuant to s 87 of the TPA because they have suffered, or are likely to suffer, loss or damage by conduct that was in contravention of s 52; and, if so, should relief pursuant to s 87 be granted? (“the s 87 issues”)

The representation issue: what was said?

[17] There is a substantial amount of common ground about what was said by Mr Joris to the buyers. Mr Joris acknowledged that:

- he said that the views from an upper storey of Bella Vue would be “over the lake and to the horizon” which he later clarified in his evidence as meaning that he told the buyers that they would have views “of the lake and beyond the lake to the horizon”.
- the attraction of the Emerald Lakes development to the buyers, compared to the restricted views that they had at the apartments they had previously inspected, “was a very broad, open space, with a large lake”.
- another big attraction of Emerald Lakes was that it was a master planned community and, subject to Council approval and the possibility that Nifsan might sell certain precincts, Nifsan would control what was to be erected on the site.
- the buyers had made it plain to him that their priorities included good quality views.
- the purpose of taking the buyers to the fifth floor of Porto Bellago was to show them a completed unit and also to give them an idea of the views they would get.
- he told the buyers that the views that they would get from level eight of Bella Vue would be similar to the view from level five of Porto Bellago, but the views would be from a higher perspective. In other words “that you could see the lake, you could see the horizon, but from a different perspective, from a higher perspective.” It would give a “similar view but from a perspective further back.” Mr Joris thinks that he would have explained to the buyers that they would see from level eight of Bella Vue views similar to those from level five of Porto Bellago.
- he told the buyers there was a proposal for the harbour precinct (as the Porto Grande area was known at the time), and it would incorporate a Ferry Road market-style precinct and apartments.

- in that regard, Mr Joris did not tell the buyers that there was at least a possibility that the building to go on the site of Porto Grande might be higher than Porto Bellago. Mr Joris said that he did not know at the time that there was a risk that that would occur.
- he knew that the buyers were looking for unimpeded views of the lake and the horizon.
- he told them that the units to be constructed on the ninth floor of Bella Vue would extend over the top of the town centre. He told them that the units in the middle of the ninth floor of the Bella Vue building would be looking over the top of all of the buildings that were currently there, including Porto Bellago. He also told them that the views from the units in the middle of the ninth floor of Bella Vue would be looking over the top of all of the buildings that were proposed to be built.

[18] The last statement was based upon matters of which Mr Joris was aware at the time. His evidence was that he had no knowledge that what was going to be built at Porto Grande would be higher than Porto Bellago, or that it could be higher. He was not aware of anything that could impair the buyers' views across the lake to the north of Porto Bellago, and what he knew was that there was approval for a five level building to the north of Porto Bellago.

[19] Mr Buskey's evidence is that he and Ms Tuominen told Mr Joris that they wanted "unrestricted views and also [the] privacy of not having buildings looking back in." Mr Buskey explained that he and Ms Tuominen were taken to the fifth floor of Porto Bellago to show how that elevation compared with the elevation at Bella Vue. What appealed to them was that there was nothing in front of them, that they had a nice wide view, and that Mr Joris said that "when you got up to the eighth floor [at Bella Vue] the view would be so much better." When they returned to the sales office Mr Joris discussed with the buyers whether or not any buildings in the town centre might impede their view from the eighth floor of Bella Vue; he said that they would not, and that the buyers would see over the top of the town centre. At no stage did he suggest that their views to the north would be limited to the Q1 building at Surfers Paradise or limited to Burleigh at the south. Discussion then turned to the penthouse apartment at level nine of Bella Vue and Mr Joris said that they would definitely look over the top of the town centre, that they would not have any roof views, that they would have the benefit of having no-one on top of them and that level nine had much higher ceilings, being the top floor.

[20] Ms Tuominen's evidence was to like effect. Her recollection is that Mr Joris said that their views on the eighth floor of Bella Vue would be higher than the fifth floor of Porto Bellago and said words to the effect that the view would be the same, namely a clear view from north of Southport all the way to Burleigh. He said that they would have privacy as they would be "looking over the town centre". Ms Tuominen recalled a discussion about curtains in this context and that she said that she did not like curtains. In discussing views, including whether the town centre development might impede their view, Mr Joris said that they would be able to see the coastline over the town centre. He did not suggest that views to the north would be limited to the Q1 building at Surfers Paradise and to the south to Burleigh.

- [21] In the course of her cross-examination Ms Tuominen was shown plans depicting Building B at Porto Grande and said “that’s not the building I saw when I bought the unit.” She went on to explain that Porto Bellago was five storeys high and that the “fingers” on the harbourside development were “meant to continue at the same level and this is not the same level.” She explained that this was based on the DVD that was on display in the sales office and which became Exhibit 4. The contents of the DVD are not relied upon as a representation and Ms Tuominen was asked whether she was thinking about the DVD when she said in her evidence that the harbourside development was supposed to be only five storeys. In response she gave evidence that “Mr Joris told us it’s going to continue five floors from Porto Bellago. He never told us it’s going to be six, seven, eleven.... He said it continues from Porto Bellago to the two fingers in [the] same height.” This evidence was not given by Ms Tuominen in her evidence in chief. Under further cross-examination it was put to her that Mr Joris did not say that the harbour would be limited to five storeys. In response, Ms Tuominen said that she remembered these additional words, but conceded that maybe Mr Joris did not use them.
- [22] I have already given an account of subsequent events, including the complaints raised by the buyers when they saw a three dimensional model which depicted Building B at Porto Grande. Their solicitors’ letter of 24 February 2009 gave a brief account of what had been said and done when they first inspected Emerald Lakes with Mr Joris in early January 2008. Their solicitors’ letter says that Mr Joris made representations that they would be looking “over the top of all other buildings proposed to be built and have uninterrupted views and privacy.” It stated that all information provided to them reassured them that none of the buildings in the waterfront precinct would be of sufficient height to cause them any concern. Their initial defence filed 27 July 2010 relevantly alleged that Mr Joris had said to them that if they purchased a unit on the ninth level of the development, that unit “would be looking over the top of all buildings that were proposed to be built and would enjoy uninterrupted views and privacy.” This was not pleaded as a comprehensive statement of what Mr Joris said. The buyers’ amended defence contained greater detail about what was said and the context in which it was said. I do not regard their former solicitor’s letter of 24 February 2009 or their defences as proving that the buyers’ recollection has improved with time, contrary to ordinary experience. Their solicitor’s letter encapsulated the alleged representation, as did their initial defence. Their third amended defence added more detail. It did not purport to quote the precise words used by Mr Joris, and the buyers did not purport to give evidence about the precise words used by him.
- [23] In assessing the evidence of the buyers, I respectfully follow what was said by McLelland CJ in *Eq in Watson v Foxman*:¹

“Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances.”

His Honour continued:²

¹ (1995) 49 NSWLR 315 at 318.

² *Ibid* at 319.

“Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said.”

- [24] I found the buyers to be honest and generally reliable witnesses. Their recollection of detail was generally good. Ms Tuominen’s concession that Mr Joris may not have actually said that the harbour development was going to continue the five storey level from Porto Bellago was an appropriate concession, whilst having a recollection that this is what he said. I conclude that this aspect involves an inference by Ms Tuominen from what Mr Joris said about the buildings proposed for the harbourside and the views that she and Mr Buskey would have over the top of them. If Mr Joris did not say that the buildings proposed for the harbourside would be the same height as Porto Bellago, this is what he understood, and what the advertising material on display in the sales office indicated. If Mr Joris did not say what Ms Tuominen recalled him saying, then this is an inference that she drew from what he said about the heights of levels eight and nine of Bella Vue, compared to the height of the top floor of Porto Bellago and the views that would be obtained from level nine.
- [25] The buyers pleaded that a three dimensional model was on display in the sales room when they visited it on or about 4 January 2008. In fact, there was a large, coloured, illuminated plan of the Emerald Lakes developments on a table which was shown to them. It was not a three dimensional model, and the buyers did not give evidence that the display that they saw was a three dimensional model.
- [26] Mr Joris presented as an honest witness who did his best to recall his dealings and conversations with the buyers, but I find that his recollection of certain matters was not particularly good. For example, he could not recall going to the fifth level of the Porto Bellago building to show the buyers the view. His evidence was often cast in terms of what he would have said, rather than what he recalled saying. For example, he gave evidence that “when I describe views to anybody, including the defendants, I refer to from Q1 across to the south-east.” I find that he did not say such a thing to the buyers. I am satisfied that if he had done so the buyers would have responded and inquired about why their view to the north of Q1 would be limited. No such discussion occurred. Under cross-examination he acknowledged that he did not tell the buyers that they would only see between Q1 and Burleigh.
- [27] Mr Joris’s evidence that he would have referred to the view from Q1 across to the south-east begs a number of questions. The unit, as constructed, presently has uninterrupted views of the coastline well to the north of Q1 and Surfers Paradise, such views including towers at Main Beach and the area around Southport. The views are depicted in photographs that form part of Exhibit 2. Mr Joris gave evidence that sales staff were told by development managers that Q1 was the point “that you need to look at across. You would always see that and to the right.” This begs the question of whether the development managers said anything about the views that could be expected to the north of Q1 and, if so, what part of the proposed development might block it. Mr Joris’s evidence was not very clear on this point. He later said that he was not aware of anything that would stop the buyers from

looking to the north of Q1. When asked what would stop them from looking to the south of Burleigh, he answered that “[t]here was a development called Quay South and next to that was an apartment building called Quay Views and that was proposed to be a five-level building”. How this was expected to stop the buyers from seeing the coastline south of Burleigh was not explained. Overall, I found Mr Joris’s evidence about what might limit views to the view between Q1 to Burleigh in the south-east confusing. I am satisfied that he did not mention any such limitation on views to the buyers, and I am satisfied that if he had done so the buyers would have pursued that topic and sought an explanation as to why their views would be thereby limited. No other evidence was given by Nifsan about any instructions or information given by development managers to sales staff such as Mr Joris in relation to views, whether by reference to Q1 or some other landmark.

- [28] Mr Joris gave evidence that Nifsan had a policy that kept information from its sales staff of decisions that had been made by Nifsan’s management about planning applications, approvals and things of that nature. His evidence is that Nifsan followed that policy. Other evidence indicated that such information was known to the Sales Manager, who at one stage was Mr Joris’s brother. But Mr Joris’s evidence is that his brother did not tell him about such matters, including whether there was a pending application with the Gold Coast City Council that might affect the units that Mr Joris was selling in the development. Mr Joris says that there were occasions outside of work when he would ask his brother what was happening, and try to fish for information but he would not be told. He says that it was Nifsan policy not to tell sales staff until something was “set in stone” by which he meant that the development was approved so that Nifsan could go ahead with the construction at which point the information would be released to sales people and the media. According to Mr Joris’s understanding of the Nifsan policy, at the time that he was talking to the buyers about what was going to happen on the waterfront there may have been an application by Nifsan to the Council awaiting final approval but which had not received “the final stamp of approval” and not been released to the public through the media. In such an event, Mr Joris said that he would not know about it. He and other sales staff would only be told when a media release was pending and they would be told at a sales meeting. The sales staff would be told perhaps a few days before the media release.
- [29] If there was such a policy, then, contrary to Mr Joris’s evidence, it was not strictly observed. The policy did not extend to Nifsan’s plan to have a Ferry Road style market in a lower level of the harbourside precinct. Nifsan admits in its pleadings, and the evidence is, that Mr Joris told the buyers that Nifsan was hoping to get development approval to put in Ferry Road style markets in the harbourside development and that if such approval was granted, then a market place would be designed in a manner similar to the Ferry Road markets.
- [30] In these proceedings the buyers did not seek or resist a finding that the policy described by Mr Joris existed. If such a policy existed, and was observed, it explains why Mr Joris was not aware of Nifsan’s intention to obtain Council approval for, and to construct, an 11 storey building as Building B in Porto Grande. If, instead, there was no such policy, then the buyers’ case is that Mr Joris nevertheless did not tell them of this.
- [31] Nifsan submits that I should accept Mr Joris’s evidence about the existence of the relevant policy. I am prepared to do so in the absence of other evidence from

Nifsan that there was no such policy. However, Mr Joris's evidence was unsatisfactory about the extent to which the policy was observed both in respect of information provided by development managers in relation to views and how, if the policy existed, he came to know of the proposal for a Ferry Road style market.

- [32] The buyers' evidence was not identical, and I would have been concerned if it had been. However, it was generally consistent. The evidence of what was said by Mr Joris was given with sufficient precision to enable me to be reasonably satisfied about the substance of what was said. It is necessary to make findings of fact in respect of matters which Mr Joris could not recall, or in respect of which his recollection differed from that of the buyers. To the extent that the recollections of the buyers conflicted with Mr Joris's evidence I prefer the evidence of the buyers. I found their recollections generally reliable and based upon a genuine recollection of things that were said on matters of great importance to them. By contrast, Mr Joris's recollection on contentious matters was not convincing. It was a reconstruction of what he thought that he said rather than a genuine recollection of what was said.

- [33] Based upon both evidence about which there was no dispute (despite certain matters having been denied in Nifsan's defence) and my preference for the evidence of the buyers over the evidence of Mr Joris where it is in conflict, I make the following findings of fact.

- [34] The buyers made clear to Mr Joris that they were concerned not to purchase an apartment where its privacy and views would be impaired by the height of surrounding buildings. Mr Joris took them to the top floor of the Porto Bellago building where they had unrestricted views of the lake and buildings along the coastal strip. Mr Joris told the buyers that the unit in which they had expressed an interest on the eighth level of Bella Vue would be at a higher level. It would provide similar views of the lake and the coastal strip, but from a higher perspective. He said that they would have views of the lake and to the horizon. The substance and effect of what he said was that any buildings between Bella Vue and the lakeside would not impede their view of the lake and the horizon and, in this regard, they would have the same view as they were experiencing from the top floor of Porto Bellago, namely uninterrupted views of the lake and horizon. Upon returning to the sales office discussion turned to the penthouse apartment on the ninth floor of Bella Vue. The buyers and Mr Joris discussed the views that could be obtained from this unit. Mr Joris said words to the effect that the views from the penthouse in question would be of the lake and to the horizon. He said that the views from that apartment would extend over the top of the town centre, and that the buyers would have a view over the top of all of the buildings that were currently there, including Porto Bellago. He also said that they would have views over the top of all of the buildings that were proposed to be built.

- [35] My findings accord with the statements pleaded in subparagraphs 5(a) to (c) in the third amended defence, and described in that pleading as "the Representation". Nifsan submits that the buyers have not proven their pleaded case, and makes particular reference to the fact that they did not give evidence that Mr Joris used the words "uninterrupted views". However the substance and effect of what Mr Joris said was that the buyers would have uninterrupted views of the lake and the horizon. This is the very matter that they were interested in, as Mr Joris knew. This is why he showed them uninterrupted views of the lake and horizon from Porto

Bellago, and explained that they would have these views, but from a higher perspective. The specific things that he said about the views from the ninth floor of Bella Vue, namely that they would see over the top of the buildings between it and the lake (the town centre and buildings that were proposed to be built), meant that their views of the lake and the horizon would not be interrupted by these buildings.

- [36] For completeness, and to address some other matters that are in issue on the pleading, I should add that there was a passing discussion about the fact that the apartment was so high up and the buyers would have sufficient privacy such that they would not even need to have curtains. This occurred, as Ms Tuominen explained, after Mr Joris had said that they would have a clear view from the north of Southport to Burleigh, and that they would have “full privacy as we are over the town centre building, so nobody can look in.” In that context Ms Tuominen mentioned that she did not like curtains. I should also add, because the transcript is ambiguous on this point, that the negative answer recorded at T 1-76 1 30 was conveyed in the sense that Ms Tuominen had no recollection that Mr Joris said that the views might ever be impacted. As previously noted, Mr Joris told the buyers that Nifsan was hoping to obtain development approval to have Ferry Road style markets in the harbourside precinct. He did not raise with the buyers any other development issues in respect of the development. In particular, he did not refer to other aspects of Nifsan’s application in respect of the harbourside development, save for indicating that views from the penthouse apartment that the buyers were interested in would look over the top of all of the buildings that were proposed to be built.
- [37] My findings on critical aspects of the pleaded representation are based in substantial part upon matters about which there is no contest in the evidence. For example, Mr Joris admits that the views from the penthouse apartment in the middle of the ninth floor would be looking over the top of all of the buildings that were proposed to be built. I find that Mr Joris said words to this effect, supported as it is by Mr Joris’s own evidence. Further, it is improbable that Mr Joris would not tell the buyers what he knew about the height of buildings proposed to be built and their effect on views from the apartment in Bella Vue that the buyers proposed to acquire. Mr Joris apparently did not know of any proposed building that would impair the views that could be obtained from that apartment of the lakes, the surrounding countryside and the horizon. It is likely that he told the buyers what he knew in regard to the proposed building at the harbourside development. He did not raise any issue in relation to the height of the proposed buildings in that area because Nifsan chose not to tell him of its proposal to construct buildings that were substantially higher than the height of Porto Bellago and, in particular, its proposal to construct an 11 storey building as Building B in Porto Grande. It is probable that Mr Joris told the buyers the substance of what he had been told in relation to the harbour precinct, namely that Nifsan had approval to build a five level building to the north of Porto Bellago. If Mr Joris did not state in terms that the proposed building at the harbour precinct was to be the same height at Porto Bellago, then such an inference would be reasonably drawn in the circumstances from what was said by him about views, and from what was presented to the buyers in the audio visual presentation and in the material given to them. Mr Joris acknowledges, and I accept, that he did not tell the buyers that there was a possibility that the building to go on the site of Porto Grande might be higher than Porto Bellago.

- [38] It is not the case that Mr Joris told the buyers nothing about Nifsan's proposals for the harbour precinct. As I have found, he told them about the views that would be obtained from the apartment over the top of the buildings that were proposed to be built. He also told them about the Ferry Road style markets that were proposed.
- [39] Mr Joris did not tell the buyers about Nifsan's intention to construct an 11 storey building as Building B in Porto Grande. In fairness to him, he did not tell the buyers about this because his employer had a policy of not telling its employed sales representatives of such matters. Mr Joris acted on the basis of what he knew, namely that the height of buildings proposed in the harbour precinct/Porto Grande would be in accordance with the existing Council approval which was for a five level building at the same height as Porto Bellago and the rest of the waterfront. His understanding in this regard was consistent with the level of the proposed building depicted in the fly-over DVD display that he saw every day at work, and which the buyers saw when they visited the sales office.
- [40] I conclude that the buyers have proved their case on the representation issue.

The contravention issue

- [41] The buyers pleaded that the Representation was with respect to a future matter, and invoked s 51A of the TPA. Nifsan in reply admitted that if those statements were made, they were with respect to a future matter. The buyers pleaded that Nifsan did not have reasonable grounds for making them, and in response Nifsan pleaded that:

“at the time of the alleged Statements (which are denied) the approval, PN119514/01/DA12, which was granted in 2005, was in effect and it provided for *inter alia* a maximum building height of 5 storeys in Precinct A, which provided a reasonable basis for stating the alleged Statements (which are denied)”.

Nifsan admitted that Mr Joris acted within his authority, actual or ostensible. The statements that were made by Mr Joris were within the scope of his actual or apparent authority as an employed sales representative. Nifsan is deemed, for the purposes of the TPA, to have engaged in that conduct.³

- [42] Section 51A of the TPA relevantly provided:

“**51A.** (1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.

(2) For the purposes of the application of sub-section (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

³ TPA, s 84(2).

(3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.”

- [43] The contravention issue that arises for determination in this context is *not* whether Mr Joris had reasonable grounds to make the statements that he did. The issue is whether *Nifsan* had reasonable grounds for making them at the time they were made.
- [44] By early 2008 when Mr Joris spoke to the buyers, Nifsan had well-developed plans to increase the height of buildings that it proposed to build in the harbour precinct. These included an 11 storey building. Nifsan was concerned that its 2005 approval would not yield it the desired levels of profit, and so by July 2007 it had developed new concepts for the harbour with the intention of obtaining Council approval for them.
- [45] The 2005 approval was in the form of the “Complete Preliminary Approval” dated 10 August 2005. A preliminary approval does not itself permit development, namely actual building work, to occur, but it is an important document. In the case of the 2005 approval, it varied the relevant Local Area Plan, and allowed for a maximum building height of five storeys in the waterfront precinct.
- [46] An Application for Preliminary Approval Overriding the Planning Scheme for a Material Change of Use dated 24 October 2007 was lodged with the Council by Nifsan’s town planning consultant. It was a very substantial application, and it cost Nifsan hundreds of thousands of dollars to prepare. Its lodgement was preceded by discussions between Nifsan’s representatives and officers of the Gold Coast City Council. It sought approval for what was described as the European Village Development Code, and a change to the maximum building heights from five storeys to six to eleven storeys in Precinct A and from three to five storeys to four to twelve storeys in Precincts B and C. The application was proposed to have the effect of overriding parts of the Gold Coast Planning Scheme. In addition to facilitating heights of up to twelve storeys, it also made provision for limited architectural features up to ten metres above the designated maximum building height and for masts, aerial spires etc.
- [47] Mr Grierson, who was the General Manager of Developments for Nifsan from 1 August 2007 to January 2011, gave evidence and identified a visual representation of the Emerald Lakes Porto Grande Concept at February 2010. The image includes an eleven storey building in the harbour precinct, and reflected the company’s intentions with respect to the harbour precinct. Mr Grierson accepted that it had been Nifsan’s intention to produce such a building in February 2008, and that it had been its intention to do so for some time before that. It had been Nifsan’s intention to produce such a building when it lodged the application for preliminary approval in October 2007.
- [48] Nifsan’s application dated 24 October 2007 described the proposed Waterfront Precinct A, and stated:

“In the heart of the Waterfront Precinct lies Plaza Grande, the main communal meeting place with a major public artwork as its centrepiece. Plaza Grande is anchored by a key 11 storey building. The bigger scale of architecture around Plaza Grande and the use of robust materials gives this space a sense of communal pride and a certain civic ‘gravitas’.”

The eleven storey building is also described in documents as Building B. Mr Grierson accepted that it obscured the view from Bella Vue. There is no dispute that the proposed eleven storey building would obscure the buyers’ view of the lake and the horizon.

- [49] Nifsan’s October 2007 application was not some insubstantial document which did not reflect its intentions in early January 2008. It was a substantial document, and in the booming market that prevailed at the time there was, according to Mr Grierson, “a sense of urgency in trying to obtain approval from the GCCC of the European Village Application because the market was in a booming phase.” Whether it would ultimately proceed to construction depended upon later Council approvals, the economy and other factors. However, in January and February 2008 when the buyers dealt with Mr Joris before contracting to purchase the apartment, Nifsan intended to proceed with the plan and construct the proposed buildings to take advantage of market conditions. As a result, there was a real prospect that Nifsan would construct an eleven storey building in the harbour precinct styled Porto Grande. In short, that was its plan.
- [50] In those circumstances, and contrary to paragraph 36(c)(ii) of Nifsan’s amended reply and answer to the third amended defence, the fact that its 2005 approval allowed for a maximum building height of five storeys did not provide a reasonable basis for making the statements that Mr Joris did (and which Nifsan is deemed to have made). I conclude that Nifsan did not have reasonable grounds for making the representations that were made by Mr Joris with respect to future matters. As a result, the representations are taken to be misleading by reason of s 51A of the TPA.
- [51] Nifsan also made submissions about what it described as “the ‘silence’ allegations” by reference to pleaded allegations in the third amended defence that Mr Joris “did not raise with the Defendants any other development issues in respect to the Development”, and that neither Mr Joris nor any representative of Nifsan ever advised the buyers that the October 2007 application had been lodged or informed them of its contents.
- [52] Nifsan’s submissions on silence were made principally on the basis that the positive representations had not been proved and, at best, only the allegation in relation to seeing over the town centre may have been established. However, positive representations about the views have been proven, and it is unnecessary to address Nifsan’s submissions about “mere silence”. The buyers did not contend that a developer has to tell a potential purchaser of all applications that it has made to a Council. Such a general proposition would be unsustainable, and the buyers do not make it.
- [53] In this matter, the buyers do not rely upon mere silence. They rely upon Mr Joris’s statements about future matters, the fact that he did not raise any other development issues and the fact that neither he nor Nifsan advised them that the application of

October 2007 had been lodged or its contents. I have found that Nifsan did not have reasonable grounds to make representations with respect to the future matters stated by Mr Joris. As a result, Nifsan is taken by virtue of s 51A of the TPA to have made representations that were misleading.

- [54] The conclusion that Nifsan engaged in misleading conduct is not negated by the fact that the application was the subject of public notification in accordance with the *Integrated Planning Act*, which required public notification. The buyers did not see any such notices and, incidentally, nor did Mr Joris, who worked at Emerald Lakes and did not pay any attention to any notice that advertised the October 2007 application. He did not read such signs. The consequences of the buyers not ascertaining that the application had been made, or having their solicitor undertake a search for such an application before they contracted to purchase the apartment, will also be considered in the context of the reliance in fact issue and the causal break issue.
- [55] The contract's terms did not disclose matters that contradicted what Mr Joris had said about views from the apartment. Again, relevant clauses of the contract will be considered in relation to reliance and causation issues. In short, cl 3.2(k) which provided that "Subject to the BCCM Act, the Seller may... change the layout of the lots in the Development (or anything to be comprised in the Development)" did not falsify anything said by Mr Joris in relation to Nifsan's proposals in January 2008 and, of course, any such contractual entitlement to change was subject to the *BCCM Act*. Clause 3.6(b) provided that if Nifsan "decides that the Development is not Financially Viable, it may terminate this Contract by giving written notice to the Buyer by 1 October 2008." Again, this clause did not falsify any representations made by Mr Joris about Nifsan's proposals and their impact on the buyers' views. Nor did cl 10.6 (Entire Contract/No Representations), which is a clause which assumes importance in relation to reliance on the representations that were made.
- [56] The question whether conduct is misleading or deceptive or likely to mislead or deceive is logically anterior to the question whether a person has suffered loss and damage thereby. There is a distinction between characterisation of the conduct and determination of the causation of the claimed loss said to result from it.⁴
- [57] The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct.⁵ As French CJ observed in *Campbell v Backoffice Investments Pty Ltd*,⁶ a person accused of engaging in misleading or deceptive conduct may claim that its effects were negated by a contemporaneous disclaimer by that person, or a subsequent disclaimer of reliance by the person allegedly affected by the conduct. The contemporaneous disclaimer by the person engaged in the impugned conduct is likely to go to the characterisation of the conduct. A subsequent declaration of

⁴ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 318, [2009] HCA 25 at [24].

⁵ *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 625, [2004] HCA 60 at [103] per McHugh J, cited with approval in *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 341-342, [2009] HCA 25 at [102] per Gummow, Hayne, Heydon and Kiefel JJ; and see at 319-320, [27] per French CJ.

⁶ (2009) 238 CLR 304 at 320, [2009] HCA 25 at [29].

non-reliance by persons said to have been affected by the conduct is more likely to be relevant to the question of causation. Gummow, Hayne, Heydon and Kiefel JJ added, in relation to an “entire agreement clause” and a provision denying that the purchaser relied on any warranty made by or on behalf of the vendor, that:

“... of itself, neither the inclusion of an entire agreement clause in an agreement nor the inclusion of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent the provision of misleading information before a contract was made constituting a contravention of the prohibition against misleading or deceptive conduct by which loss or damage was sustained. As pointed out earlier, by reference to the reasons of McHugh J in *Butcher*, whether conduct is misleading or deceptive is a question of fact to be decided by reference to all of the relevant circumstances, of which the terms of the contract are but one.”⁷ (footnotes omitted)

Clause 10.6 is a relevant circumstance. However, I accept the buyers’ evidence that they relied on Mr Joris’s statements, and the inclusion of this clause does not lead to a different characterisation of the effect of his statements about future matters, namely that they were misleading.

- [58] Finally, the contractual acknowledgement in clause 19 that Nifsan gave “no warranty” as to the final type, nature and composition of the properties comprised in the Emerald Lakes project (cl 19(a)(iii)) relates to the absence of a contractual warranty, not to the fact that pre-contractual representations were made, their accuracy or whether Nifsan had reasonable grounds for making them.
- [59] Nifsan’s conduct did not cease to be misleading because of the provisions of the contract or because it advertised the application in accordance with the requirements of the *Integrated Planning Act*. Nor did it cease to be misleading because Emerald Lakes was a large, complex development and the decision to proceed with future stages and buildings, such as Building B, was dependent on future matters including the state of the market, financial viability and Council approval of development applications. It was the buyers’ concern that future developments would impair their view of the lake, the surrounding countryside and the horizon that prompted them to ask Mr Joris about these matters and for him to make the representations that he did. Those representations were made in the context of advice from Mr Joris that Nifsan controlled the development. The contractual provisions that I have summarised, and the buyers’ presumed knowledge that future development of Emerald Lakes would be subject to Council approval and market conditions, do not alter the position arrived at by virtue of s 51A, namely that Nifsan engaged in conduct that was misleading.
- [60] That the prospect of Nifsan gaining Council approval of its plans for the development of Porto Grande, and proceeding in accordance with that Council approval, was not remote is evidenced by subsequent events in 2009. Nifsan’s application for development approval was being formulated at the same time that Council officers were assessing its 2007 application, and “well advanced design concepts” of its proposal were submitted to Council to help inform its assessment of the October 2007 application. The Gold Coast City Council formally approved the

⁷ Ibid at 348, [130].

October 2007 application on 3 September 2008. Shortly thereafter Nifsan's town planner, Humphreys Reynolds Perkins prepared a report dated 19 September 2008 which described the approval granted on 3 September 2008 as having established "the primary development controls over the subject site." As noted, a three dimensional model showing the proposed development, including the eleven storey building, Building B, was on display in the sales office in September 2008.

- [61] The lodging of the development application, which sought approval to construct Building B to eleven storeys high, is relied upon by the buyers as evidence that by January 2008 there was a real, as distinct from a remote, possibility that an eleven storey building would be constructed by Nifsan upon the waterfront. Nifsan cites *Street v Luna Park Sydney Pty Ltd*⁸ as authority for the proposition that the granting of development consent, let alone the making of a development application, does not involve any obligation to implement the consent, nor any representation that, if consent is granted, it will be implemented. That proposition is not in contest. Moreover, this is not a case in which claimants rely on representations said to have been made by a party in lodging a development application. The conduct relied upon by the buyers relates to representations made in January 2008 about whether their views would be impaired by buildings that Nifsan proposed to construct. Unknown to Mr Joris, Nifsan proposed at the time to develop a harbourside precinct that would include an eleven storey building that would impair those views. Nifsan's reasons for keeping that information from its employed salespersons (save for its Sales Manager) is not a matter that I am required to address. The effect of Nifsan's policy was that Mr Joris made representations to the buyers based on his knowledge of the existing approval which had maximum building heights of five levels in that precinct. The representations that were made by him were with respect to future matters. Because Nifsan did not have reasonable grounds to make them, they are taken to be misleading. This characterisation of Nifsan's conduct is not negated by the relevant surrounding facts and circumstances.
- [62] I find that Nifsan engaged in conduct that contravened s 52 of the TPA.

The reliance in fact issue

- [63] The buyers plead that in reliance upon Mr Joris's statements, and induced thereby, they entered the contract, paid the initial and balance deposits, and paid Nifsan for ancillary works to the unit. In response, Nifsan pleads a number of matters including that the alleged statements were sales "puff", that the buyers had conducted their own exhaustive research, certain provisions of the contract and the disclosure statement dated 30 January 2008, that Mr Buskey had experience as a property developer and real estate agent, that the buyers were legally represented, that they received the further Disclosure Statement in early July 2008 and that Nifsan had, in accordance with its obligations as to public notification advertised the relevant application on relevant road frontages from 9 January until 25 February 2008 and in the Gold Coast Bulletin on 9 January 2008. These many matters are pleaded in support of the conclusion that if there was the alleged reliance by the buyers (which is denied), then "such reliance was not reasonable".
- [64] The present issue is not the reasonableness of reliance, but whether there was reliance in fact. Unreasonable reliance may be relevant to questions of the causal

⁸ (2009) 223 FLR 245 at 279-80, [2009] NSWSC 1 at [133].

connection between Nifsan's conduct and the loss and damage allegedly suffered or likely to be suffered.

[65] In deciding whether there was reliance in fact, and whether the buyers were in fact misled by Nifsan's conduct, one looks at all of the surrounding circumstances, including the terms of the contract entered into. In its written submissions on reliance, Nifsan does not press some of the matters pleaded in relation to reasonable reliance. For example, it does not seek a finding that the alleged statements were sales "puff" or that the initial or further statements provided under the *Body Corporate and Community Management Act 1997* (Qld) have a bearing on the present issue. The buyers did not see any signs that Nifsan placed to advertise the application and this issue falls away. Nifsan's written submissions focus on:

- (a) certain conditions of the contract and Mr Buskey's knowledge of them;
- (b) the absence of an attempt to insert a special condition about views, whereas the buyers negotiated special conditions about other matters; and
- (c) the fact that they did not request their solicitor to insert a term in relation to views.

[66] There was some delay between the inspection on or about 4 January 2008 and the signing of the contracts. During this time the buyers returned to the sales office a number of times to discuss interiors and changes that they wanted to make to the apartment because it was to be their permanent residence. Initially Nifsan resisted making any such changes, but eventually the parties negotiated certain changes and the costs that would be associated with them. These were incorporated in special conditions in the contract. The special conditions provided for Nifsan to undertake work on the lot in accordance with a quotation, and for the buyers to pay within 14 days of signing the contract the sum of \$3,300. An additional handwritten special condition was inserted by which Nifsan agreed to install dimmer switches in all areas, excluding wet areas.

[67] Ms Tuominen relied on the buyers' then solicitor and her partner, Mr Buskey, in relation to the terms of the contract and did not read it prior to signing it. The buyers were represented by a solicitor at the time they executed the contract.

[68] Mr Buskey was taken in his evidence to cl 3.2(b) of the contract which provides that subject to the BCCM Act, the seller may "make variations to any of the Development, Scheme Buildings [etc]...", but he was not cross-examined about whether he read this clause before signing the contract or what he understood it to mean. Next he was directed to cl 3.6(b) of the contract which provided that if Nifsan decided that the Development was not "Financially Viable", then it might terminate it by giving written notice by 1 October 2008. Next he was taken to cl 3.7(b) by which the buyers acknowledged that the construction of the Emerald Lakes Project would occur "over a considerable period of time" and that they would not object to certain building operations. Save for acknowledging that the contract contained such a clause, Mr Buskey was not asked whether he read it before entering the contract and what, if anything, he understood about its effect. Of greater relevance was Mr Buskey's evidence in relation to cl 10.6. Particular reference was made to cl 10.6(e) which states that the terms of the contract "are the entire agreement between the Buyer and the Seller despite any Representations

before the Buyer signed this Contract”. Mr Buskey read cl 10.6 during his evidence and it is appropriate that I set that clause out in full:

“10.6 Entire Contract/No Representations

The Buyer acknowledges and agrees that:

- (a) no Representations of the Agent or the Seller was [sic] supplied or made to the Buyer with the intention or knowledge that it would be relied upon by the Buyer;
- (b) no Representations have in fact been relied upon by the Buyer unless they are specifically contained in this Contract or the Disclosure Statement;
- (c) before the Buyer entered into this Contract it satisfied itself, from its own independent enquiries, as to the value of the Property being purchased;
- (d) the Buyer has relied upon its own judgment in purchasing the Property on the terms contained in this Contract;
- (e) the terms of this Contract (and the Disclosure Statement) are the entire agreement between the Buyer and the Seller despite any Representations before the Buyer signed this Contract;
- (f) to the extent that there were any Representations before the Buyer signed this contract, the terms of this Contract supersede them;
- (g) without limitation, no Representations have been given that the Property is, or will remain, fit, suitable or adequate for all or any of the purposes the Buyer wishes to use the Property for;
- (h) to the maximum extent permitted by law, all Representations or provisions implied by law, relating to fitness, suitability or adequacy of the Property do not apply to this Contract or the Property.”

After being taken to cl 10.6(e) specifically, Mr Buskey acknowledged, based upon his experience as a real estate agent, that these types of terms are in all off-the-plan contracts. Interestingly, he said that generally similar terms are in off-the-plan contracts, “which is why you rely very heavily on what is told to you by the real estate person.”

[69] Mr Buskey was asked why he did not seek to insert a term in the contract about views, to which he responded: “I had no reason to.” He explained that he had no reason to do so because “we were clearly told”. He referred to Nifsan’s “long reputation on the Gold Coast” and said that he had no reason to believe that someone would “tell me that what they said wasn’t true when they said the height

was going to continue. I had no reason to think that it wasn't the case." He went on to say that he never doubted that he would not get what he thought he was going to get.

- [70] Mr Buskey was also taken to cl 19 of the contract which contained an acknowledgment that the Emerald Lakes Project would occur over a number of years and that the nature and type of property developed and sold may change based on matters such as market demand and economic conditions. Mr Buskey did not acknowledge having read this clause, and when asked whether he read it at the time he answered in the negative, saying that he "just went through and got advice from my lawyer and basically said most of this is fairly standard, which it is in off-the-plan contracts." He denied having read every page of the contract and said that he read "a lot of things that were pertaining to me", and knew that these sorts of clauses are generally standard terms in off-the-plan contracts.
- [71] Nifsan submits that Mr Buskey's failure to attempt to insert a term about the views, while on the other hand having special conditions inserted into the contract in relation to matters as minor as dimmer switches, seems to display "a lack of logical progression" in his reasoning. It submits that, on the one hand, he was concerned about something that was represented to the buyers in respect of which he sought to insert a term to ensure performance, but, on the other hand, he was not concerned about any representations regarding views and did not feel the need to insert a term seeking to protect them. Nifsan submits that it follows that at the time of entering into the contract, any views and privacy were, in fact, not material considerations for the buyers.
- [72] There is no evidence that the buyers told their then solicitor that views were important to them. Incidentally, the evidence was that proper contractual protection of views would have required the negotiation of a light and air easement.
- [73] The question of reliance must have regard to all of the circumstances. These include the personal circumstances and experience of the parties, the clauses of their contract that bear upon the issue of reliance and the circumstances under which the statements in question were made.
- [74] Mr Buskey knew of Nifsan's long-established reputation and knew that Mr Joris had been employed by it for a long time. Mr Joris was known in the industry, and at the time of these events he had worked for Nifsan for approximately 17 years. I am persuaded that Mr Buskey (and Ms Tuominen) accepted what Mr Joris told them about views.
- [75] The clause of the contract that particularly bears upon the issue of reliance is cl 10.6. If Mr Buskey did not read it before signing the contract, then he was aware that, like other off-the-plan contracts, this contract contained such a clause. Relevantly in respect of the "entire agreement" subclause, Mr Buskey's evidence is that the existence of such a clause is why one relies very heavily on what is told to you. Mr Buskey may not have properly appreciated that other parts of cl 10.6 amounted to an acknowledgment that no representations had in fact been relied upon by the buyers. Even if Mr Buskey had an inadequate understanding of cl 10.6 at the time he signed the contract, he knew that clauses of this kind were part of off-the-plan contracts.

- [76] The authorities recognise that reliance is a question of fact and that the existence of an exclusion or qualification clause is relevant to a determination of the question of whether a claimant has established reliance.⁹ The “entire agreement” provision in cl 10.6(e) addresses the terms of the contract, namely whether pre-contractual representations have contractual effect. It does not address the issue of whether they were made or whether, having been made, the buyer relied upon them. Other subclauses of cl 10.6 address this issue and constitute a contractual acknowledgment that no representations of Nifsan’s were made with the intention or knowledge that they would be relied upon by the buyer, and an acknowledgment that no representations had in fact been relied upon by the buyer, unless they were specifically contained in the Contract or the Disclosure Statement. Nifsan does not rely upon cl 10.6 on the basis that it relied upon it and the buyers are estopped or otherwise precluded from asserting the fact of reliance.¹⁰ Instead, Nifsan relies upon cl 10.6 as an acknowledgment of the absence of reliance, being an acknowledgment made by Mr Buskey who was familiar with clauses of this kind. Nifsan’s counsel provided me with a copy of *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*.¹¹ However, I am unsure of the relevance of that authority to the present case. I am not presently concerned with the question of whether the execution of a contract conveys a representation to a reasonable reader of the document that the person who signed it has read or approved its contents, or will take the risk of being bound.¹² The general rule that applied in that case was that a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document. That rule applies where there is no suggested vitiating element and no claim for equitable or statutory relief.¹³ I am concerned with a different question, namely reliance.
- [77] The buyers’ contractual acknowledgment that they did not rely upon the representations is a factor which is taken into account in deciding the factual issue of reliance. As the passage which I have earlier quoted from the joint judgment in *Campbell v Backoffice Investments Pty Ltd* indicates, the inclusion of a provision expressly denying reliance upon pre-contractual representations will not necessarily prevent the provision of misleading information before a contract was made from constituting a contravention of the prohibition against misleading or deceptive conduct by which loss or damage was sustained. All of the circumstances must be taken into account. Those circumstances include:
- (a) Mr Buskey’s professional experience;
 - (b) the trust that he placed in Nifsan’s and Mr Joris’s reputations; and
 - (c) the DVD fly-over which corroborated what Mr Joris had said about proposed buildings on the waterfront.

⁹ *Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd* (2005) 220 ALR 211 at 232, [2005] FCAFC 131 at [102].

¹⁰ cf *Waltrip Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) ATPR 40-975 where it was held that there could not have been any reliance by the appellant upon such a clause because it knew that in fact representations had been made.

¹¹ (2004) 219 CLR 165, [2004] HCA 52.

¹² *Ibid* at 180-181, [45].

¹³ *Ibid* at 185, [57].

I am not persuaded that the contractual acknowledgement in cl 10.6 negates the fact of reliance. It may mean that Mr Buskey was naïve or unduly trusting in relying upon what was said by Mr Joris. He may have taken inadequate steps to protect his and Ms Tuominen's interests in the circumstances. However, I am not persuaded that their failure to seek a special condition in the contract about views means that they did not rely on Mr Joris's statements.

- [78] Views were important to them. They made this clear to Mr Joris and, as a result, Mr Joris made representations to them upon which they in fact relied. The subject matter of views was not an inconsequential matter which, long after the fact, was opportunistically seized upon in an attempt to avoid the contract. It was a matter of great importance to the buyers. Incidentally, it remained so when they sought and obtained the assurances which they did in July 2008 after receipt of the further disclosure statement. The importance of views to them was again exhibited when they saw the 3D model in September 2008 and expressed their displeasure at it showing a development that was contrary to what had been represented to them. That views remained important to them was further evidenced by their preparedness to proceed with the contract if Nifsan was prepared to give them the views that had been represented. These references to events after the contract are included because Nifsan's pleading refers to certain post-contractual matters as being relevant to the issue of reliance. What the parties did and said at the time the contract was made assumes far greater importance. The buyers indicated at that time the importance of views, and Mr Joris understood their importance to the buyers. It was for this reason that he took them to the top level of Porto Bellago and said the things that he did. The buyers trusted him and his employer, and relied upon his statements.

The causal break issue

- [79] Nifsan denied that any loss or damage alleged to have been suffered by the buyers was caused by it and the alleged statements:

“as there was a break in the chain of causation between the alleged Statement [sic] and the Defendants entry into the Contract, by the following intervening events:

- (i) The Disclosure Statement dated 30 January 2008 and acknowledged on 7 February 2008;
- (ii) The terms of the Contract, as pleaded in paragraphs 12(a)(iv)¹⁴ above;
- (iii) The entry into the Contract on or about 12 February 2008;
- (iv) The Defendants were legally represented;
- (v) The Defendants conducting their own ‘exhaustive research’;

¹⁴ There appears to be a typographical error and I apprehend that the relevant subparagraph is 18(a)(iv) rather than 12(a)(iv).

- (vi) The Further Disclosure Statement, as pleaded in paragraph 10 of the Statement of Claim, which advised of a building height reduction.”

These causal break contentions were not developed in Nifsan’s submissions which made the general introductory submission that “the Defendants have not suffered and are not likely to suffer any loss or damage caused *by* the alleged conduct”.¹⁵ I apprehend that the submissions made by Nifsan in relation to reliance are relied upon in support of this contention.

[80] Some of the matters pleaded in respect of the alleged break in the chain of causation can be briefly addressed. Nothing specific was pleaded in relation to the contents of the Disclosure Statement dated 30 January 2008 that bears upon the present issue. The Further Disclosure Statement referred to in subparagraph (vi) above, and pleaded in paragraph 10 of the statement of claim is one that was sent on or about 3 July 2008, which post-dated the contract and could not constitute an intervening event between the alleged statements and the buyers’ entry into the contract. This leaves the terms of the contract, as pleaded in paragraph 18(a)(iv) of the amended reply and answer and the fact that the buyers were legally represented.

[81] The terms of the contract, as pleaded, have been earlier summarised. These are summarised in Nifsan’s pleading as follows:

- “(A) That the Plaintiff could make changes and variations to the Development, Scheme Buildings and the Emerald Lakes Project, clause 3.2;
- (B) That the Defendants acknowledged that all necessary development approvals may not have taken effect, clause 3.6;
- (C) That the Contract was the entire agreement between the Plaintiff and the Defendants and that no representations have been made, relied upon or if representations had been made, these were superseded by the Contract (and/or incorporated into the Contract), clause 10.6;
- (D) That the Emerald Lakes development will occur over a number of years and may change, in terms of the nature and type of properties comprised in the Emerald Lakes Project, clause 19.”

[82] I am not persuaded that these contractual provisions made the buyers’ reliance on representations made to them so unreasonable as to disentitle them to relief pursuant to s 87 of the TPA, or to provide a sufficient basis to conclude that any loss and damage suffered by them, or likely to be suffered by them, was not “by” Nifsan’s contravention.

[83] The causal connection that is encapsulated in the word “by” in s 82(1) and s 87(1) of the TPA is not necessarily negated by a failure to check the accuracy or reasonableness of a representation, or an unreasonable failure to take other steps by

¹⁵ Emphasis in original.

way of self-protection. Gleeson CJ in *Henville v Walker*¹⁶ stated, in the context of s 82(1):

“It will commonly be the case that a person who is induced by a misleading or deceptive representation to undertake a course of action will have acted carelessly, or will have been otherwise at fault, in responding to the inducement. The purpose of the legislation is not restricted to the protection of the careful or the astute. Negligence on the part of the victim of a contravention is not a bar to an action under s 82 unless the conduct of the victim is such as to destroy the causal connection between contravention and loss or damage.”

The issue of causal connection was again considered by the High Court in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*¹⁷ in which the respondent sought to uphold an apportionment of the appellant’s loss by reason of the appellant’s own carelessness in assessing the credit-worthiness of the borrower. Such an apportionment was rejected having regard to the purpose of the statute. It was sufficient that the respondent’s contravention of the Act was a cause of the appellant’s loss. Gaudron, Gummow and Hayne JJ observed that s 87, like s 82, requires the identification of a causal connection between loss or damage and contravention.¹⁸ After discussing the subject of causation, their Honours concluded that it is enough to demonstrate that contravention of a relevant provision of the Act was a cause of the loss or damage sustained. McHugh J cited the earlier authority of *Pavich v Bobra Nominees Pty Ltd*¹⁹ in which French J (as his Honour then was) held that the primacy of the causation principle in s 87 seemed to exclude reliance upon concepts such as mitigation or contributory negligence. McHugh J agreed with French J to the effect that contributory negligence was irrelevant “unless it could be shown that the applicant’s carelessness or disregard for their interest was *the* cause of all or some part of the claimed loss.”²⁰ His Honour also observed that “there may come a point where the applicant’s own conduct was ‘so dominant’ in the causal chain as to constitute a novus actus interveniens.”²¹ There is ample authority in support of the proposition that a plaintiff is not denied a remedy under the TPA merely because he or she has failed to check the accuracy of a representation.²²

- [84] The fact that the Emerald Lakes development was a large development which was expected to occur over a number of years, subject to market conditions, the financial viability of stages of the project and Council approval of proposed constructions did not make it unreasonable for the buyers to rely upon statements by the developer about its proposals. It was the fact that proposed waterside developments might impair the buyers’ view that prompted their inquiries about that very matter. Mr Joris might be expected to know about those proposals or, if he did not, to refer the buyers to someone who did. The buyers trusted him and Nifsan. The buyers’ failure to check on the accuracy or reasonableness of what he told them was not so

¹⁶ (2001) 206 CLR 459 at 468, [2001] HCA 52 at [13].

¹⁷ (2002) 210 CLR 109, [2002] HCA 41.

¹⁸ Ibid at 127, [54].

¹⁹ (1988) ATPR (Digest) 46-039 at 53,124.

²⁰ *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 136, [2002] HCA 41 at [85] (emphasis in original).

²¹ Ibid.

²² *QCoal Pty Ltd v Cliffs Australia Coal Pty Ltd* [2009] QCA 358 at [33] and the authorities cited therein.

unreasonable as to negate the causal connection between what he said and their entry into the contract.

- [85] It was not established conveyancing practice in such a case for a solicitor to obtain a town planning certificate. Such a town planning certificate would have been very expensive, and would have reported upon approvals, rather than pending applications. Expert evidence in these proceedings is that the accepted or standard professional practice applying to a solicitor acting for a potential purchaser of a residential unit “off-the-plan” in the Emerald Lake Development was *not* to obtain, and to recommend not obtaining, a standard town planning certificate or full town planning certificate in respect of the Development prior to the potential purchaser entering into a contract to purchase. The accepted or standard professional practice was to recommend obtaining a standard town planning certificate after construction, but that obtaining a full town planning certificate was not worthwhile.
- [86] A copy of the development applications was obtainable via the Council’s website called “PD online”. This permits a relatively easy search to bring up information on applications that are currently before Council. The search is by reference to land parcels. The buyers might have undertaken such a search, or requested their solicitor to do so. However, the buyers did not do so because, as Mr Buskey explained, they relied upon what they had been told by Nifsan. There is no evidence that, in the circumstances prevailing, their solicitor would have undertaken such a search or recommended to the buyers that such a search be undertaken. The court appointed expert was not asked by the parties to address this issue.
- [87] Nifsan makes the submission that Mr Buskey in particular was well aware of the inherent risks in buying off-the-plan. However, it was to address one such risk that the buyers inquired of Mr Joris about views, and were told, among other things, that the views of the lake and the horizon from the unit that they proposed to purchase on floor nine would not be impaired by existing buildings or by buildings that were to be constructed in the development.
- [88] In circumstances in which Nifsan:
- (a) knew of the important and substantial application that it lodged with Council in September 2007;
 - (b) chose as a matter of policy not to inform Mr Joris of it;
 - (c) was asked by the buyers about views, being a matter which Mr Joris appreciated was important to them;
 - (d) volunteered information about views to the buyers in order to address their concerns, and did so based upon Mr Joris’s knowledge of the maximum permissible building heights allowed by the 2005 approval that was granted to Nifsan; and
 - (e) pleads that such conduct in making statements was reasonable because the 2005 approval provided a reasonable basis for making the statements,

I decline to find that the buyers’ reliance on what Mr Joris said was so unreasonable that there was “a break in the chain of causation” between the alleged statements and

the buyers' entry into the contract. Leaving aside the metaphor of the "chain of causation", which is inapt in a statutory context where loss and damage may be caused by numerous concurrent causes, I find that Nifsan's contravention was a cause of the buyers' entry into the contract. The buyers have established the required causal connection between the contravention of the Act and their entry into the contract.

- [89] I am also satisfied that if the contravention had not occurred, then the buyers would not have entered into the contract. I take account of the nature of evidence given after the event as to what someone would have done had something not been said. However, given the importance which the buyers attached to views, and the trust which they placed in Mr Joris's advice and Nifsan's good repute, I am satisfied that if the buyers had not been told of the matters that Mr Joris told them, they would not have entered into the contract. Nifsan has not submitted that I should reject their evidence on this issue of causation, and I do not do so.

The s 87 issues

- [90] The buyers seek relief pursuant to s 87 of the TPA, including an order that the contract be set aside. The buyers plead that they have suffered loss and damage, being:

- (a) the deposits paid by them totalling \$79,750;
- (b) \$3,000 paid for work to be done to the unit; and
- (c) legal and other costs with respect to the contract.

They further plead that the current market value of the apartment is substantially less than the purchase price of \$1,595,000 and that if they completed settlement of the contract they would suffer loss and damage, being the difference between the purchase price and the current market value. These pleas were apparently made to engage s 87, and the matter was argued on that basis. In August 2010 Nifsan caused a valuation report to be prepared in respect of the apartment, which reported a value of \$1,000,020. The expert evidence of Mr Allsop, a valuer, is that the apartment has a current market value of \$820,000.

- [91] Section 87(1) of the TPA provided:

"Subject to subsection (1AA) but without limiting the generality of section 80, where, in a proceeding instituted under this Part, or for an offence against Part VC, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV, IVA, IVB, V or VC, the Court may, whether or not it grants an injunction under section 80 or makes an order under section 82, 86C or 86D, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the

first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.”

- [92] The s 87 issues in this proceeding are in two parts. The first is whether s 87 is triggered. The second issue is whether the discretion to grant relief under s 87 should be exercised. Nifsan contends that the buyers have not suffered and are not likely to suffer any loss or damage caused by its alleged contravention. It submits that the fall in the market value of the apartment to \$820,000 is the result of the general property market downturn and a significant downturn in the market on the Gold Coast, particularly in relation to multi-unit developments.
- [93] On the first issue, the buyers submit that s 87 applies on one or more of the following bases:
- (a) that they have suffered the loss and damage that they allege;
 - (b) that they will suffer loss and damage if the contract is not set aside;
 - (c) that the value of the apartment is diminished by the risk of a tall building being constructed on the waterfront, and this risk was not factored into the purchase price they agreed to pay.

The third matter was not pleaded.

- [94] In their submissions both parties referred to *Mirvac Queensland Pty Ltd v Tyan Pty Ltd ATF Tavakol Investment Trust*.²³ In that case the defendant failed to prove a contravention of the TPA, which was its sole basis for resisting specific performance and for claiming damages. McMurdo J went on to address other issues, in case they became relevant. The parties in this matter referred particularly to paragraphs [39] and [40]. Nifsan relies upon [39] but not on [40]. The buyers relied particularly on [40]:

“[39] There was also argument as to whether a case for an order relieving the defendant from performance of the contract was warranted, assuming that a contravention of s 52 was proved. Had I found such contravention, it would have been necessary for the defendant to prove that the defendant has suffered, or is likely to suffer, loss or damage by that conduct: s 87(1). The defendant pleaded that it had suffered loss and damage as follows. There was a claim for the interest paid to its bank for the provision of the bank guarantee which constituted the deposit, which was in a total of \$8,100. There was a claim for stamp duty paid on that bank guarantee of \$440 and other fees and charges in relation to the bank guarantee of \$30. There was also a claim for legal fees paid in respect of the contract of \$975. In each case, the incurring of the expense was not disputed. But each of them represents a loss to the defendant by the fact that an outlay has been incurred for a transaction which, if the contract were terminated, would not proceed. I would have been satisfied that each of those sums should have

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been awarded as damages under s 82, if the contract was to be terminated under s 87. But they were not instances of loss or damage which would have warranted an order for termination of the contract because the termination of the contract would not avoid such losses.

[40] Accordingly, Mirvac was right to submit that there was nothing pleaded by the defendant as to actual or potential loss or damage, so as to engage s 87. Nor was there any valuation evidence which established some difference between the current value of the apartment and the agreed price. But Mirvac appeared to accept within its own submissions that the current market value is less than the price. On that basis, I would have been prepared to find that there was a sufficient potential for loss from the alleged misconduct, which would have enlivened the discretion under s 87.” (footnotes omitted)

- [95] I shall first address the question of the loss and damage that is alleged to have been suffered by the contravention, namely the payment of the deposits and the amount of \$3,000 for additional work to be done. I find that the buyers have suffered loss and damage in this regard by the contravention. They were induced to enter the contract and pay these amounts pursuant to it by the contravention. Whether or not an order under s 87 setting aside the contract would be effective to avoid such losses is not, in my view, the issue on the threshold point, although it may be relevant to discretionary issues as to whether it is a sufficient remedial response to the contravention simply to order payment of compensation pursuant to s 87(1), as contemplated by s 87(2)(d). It might be said that an order setting aside the contract would be effective to entitle the buyers to payment of the deposit and the amount paid for improvements to the apartment, but I need not decide that issue.
- [96] In a case in which the buyers entered into the contract by reason of the contravention, and would not have done so had the contravention not occurred, I am satisfied that the sums paid by them constitute loss and damage suffered by the contravention, such as to trigger s 87(1).
- [97] If an order setting aside the contract is not sufficient to entitle the buyers to a return of the deposit and payment of the costs paid pursuant to it, then an order may be made pursuant to s 87(1) for the repayment of those amounts. If “the termination of the contract would not avoid such losses”²⁴ then the losses have still been suffered and the discretion under s 87 has been enlivened.
- [98] As to the second basis for invoking s 87, the observation of McMurdo J in *Mirvac Queensland Pty Ltd v Tyan Pty Ltd ATF Tavakol Investment Trust*²⁵ supports the buyers’ submissions. Here there is evidence of a large difference between the current market value of the apartment and the agreed price. The issue is whether such a matter engages s 87 on the basis that, if the buyers have not already suffered loss and damage by entering into a contract that has this consequence upon settlement, they are likely to suffer loss and damage if required to settle.

²⁴ Ibid at [39].

²⁵ Ibid at [40].

[99] Nifsan's answer to the counterclaim pleads that:

- (a) the value of Lot 3469 as at the date of the contract was \$1,595,000;
- (b) the proper measure of any alleged loss and damage is the difference between the contract price and its value as at the contract date.

As to the first matter, there is no satisfactory evidence that the market value of the lot as at the date of the contract was \$1,595,000.

[100] As to the second matter, this point relates to a different area of discourse, namely the measure of damages in a case in which a contract has settled and a party seeks compensation. What is often described as a *prima facie* measure in that regard, namely the difference between the agreed price and the "real value" at the date of the transaction, is not an inflexible rule of law. The fact that the "rule" is flexible was authoritatively confirmed in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*.²⁶ In *Manwelland Pty Ltd v Dames & Moore Pty Ltd*,²⁷ McPherson JA (with whom Thomas JA and Douglas J agreed) observed that this measure of damages is only one method of arriving at loss. Gibbs CJ in *Gould v Vaggelas*²⁸ described the "usual rule" as only a special application of the general principle that a plaintiff is entitled to recover as damages a sum representing the prejudice or disadvantage he has suffered in consequence of his altering his position under the inducement of the representation. The principle underlying this measure of damages had been earlier stated by Dixon J in *Potts v Miller*.²⁹ *Manwelland* related to the measure of damages for a contravention of the TPA. After reviewing relevant authorities, McPherson JA stated that the plaintiff "is entitled to recover compensation for its loss, which means it is to receive the amount needed to restore it to the position it would have occupied had it not been induced to enter into the transaction, meaning by that the purchase and acquisition of the subject land."³⁰ As Lord Steyn stated in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*,³¹ the fundamental rule is that the plaintiff should be compensated and that the rule that there be an assessment of the value of the asset as at the date of the transaction is "simply a second order rule applicable only where the valuation method is employed."

[101] In a case in which a party completes a contract and sues for compensation, seeking to have its loss measured as at a date after the date of the transaction, difficult issues may arise as to whether a fall in the value of the relevant property is due to factors that are "independent", "extrinsic", "supervening" or "accidental". The quoted words appear in the reasons for judgment of Gibbs CJ in *Gould v Vaggelas*³² and, as McPherson JA observed in *Manwelland*,³³ they are traceable to what was said by Dixon J in *Potts v Miller*.³⁴ They were repeated by the High Court in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*³⁵ in which the Court quoted Dixon J:

²⁶ (2004) 217 CLR 640 at 656-7, [2004] HCA 54 at [35]-[36].

²⁷ (2001) ATPR 41-845 at 43,462, [2001] QCA 436 at [13].

²⁸ (1985) 157 CLR 215 at 220, [1985] HCA 85 per Gibbs CJ.

²⁹ (1940) 64 CLR 282 at 297, [1940] HCA 43 per Dixon J.

³⁰ (2001) ATPR 41-845 at 43,463, [2001] QCA 436 at [17].

³¹ [1997] AC 254 at 284, [1996] UKHL 3 per Lord Steyn.

³² (1985) 157 CLR 215 at 220, [1985] HCA 85 per Gibbs CJ.

³³ (2001) ATPR 41-845 at 43,463, [2001] QCA 436 at [16].

³⁴ (1940) 64 CLR 282 at 298, [1940] HCA 43 per Dixon J.

³⁵ (2004) 217 CLR 640 at 659, [2004] HCA 54 at [40].

“If the cause be ‘independent’, ‘extrinsic’, ‘supervening’ or ‘accidental’, then the additional loss is not the consequence of the inducement.”

Losses that are not the consequence of the inducement are not recoverable.

- [102] I am not presently concerned with the proper measure of the loss that would be suffered by the buyers if they were required to settle. The present issue is whether they will suffer loss or damage if required to settle. Still, an issue of causation is involved since s 87(1) requires a finding that the claimant has suffered, or is likely to suffer, loss or damage *by* conduct in contravention of certain provisions of the Act. I am satisfied of that causal element in this case. The contravening conduct induced entry into a contract that obliges the buyers to pay at settlement an amount substantially more than the property’s present value. If the buyers had not been misled, they would not have entered the contract, would not have suffered loss and damage and would not be exposed upon completion of the contract to the further loss and damage of paying \$1,590,000 (together with interest pursuant to the contract) for an apartment worth \$820,000.
- [103] The fact that a general property market downturn, along with a number of factors, has resulted in the property having a market value of \$820,000 does not negate the proposition that the buyers will suffer a loss if required to complete a contract they were induced to enter as a result of Nifsan’s contravening conduct. This is especially so where the buyers in this case did not affirm the contract, settle and sue for compensation. They purported to terminate the contract on 6 April 2009 after Nifsan did not respond to their complaints, and their offer to settle if Nifsan was prepared to provide to them what was represented. Nifsan insisted that the contract remain on foot, brought its proceeding for specific performance and resisted the buyers’ TPA counterclaim. The fall in the market during this period due to general market conditions is a consequence that the buyers will suffer if required to complete. If required to complete the buyers will suffer loss and damage by being required to pay \$1,595,000, together with interest pursuant to cl 7.4 of the contract at the rate of 12 per cent per annum from the original date of settlement for an apartment with a current market value of \$820,000. Accordingly, I find that they are likely to suffer loss and damage by the contravening conduct. I agree with the approach adopted by McMurdo J in *Mirvac Queensland Pty Ltd v Tyan Pty Ltd ATF Tavakol Investment Trust*,³⁶ namely that such a potential for loss enlivens the discretion under s 87(1).
- [104] I have found that the buyers have suffered loss and damage on the first basis advanced by them. I also find that they have suffered loss and damage, or are likely to suffer loss and damage, on the second basis advanced by them. This makes it unnecessary to address the third basis; however, I will say something about it. The evidence does not justify a finding that the price of \$1,595,000 equated to the market value of the apartment at the date the buyers contracted to purchase it. It provides some evidence in this regard but the apartment’s market value was not the subject of valuation evidence. Mr Allsop addressed in a supplementary report and in his oral evidence the impact of the construction of a building in accordance with a development approval that was obtained on 25 May 2009 which included buildings that would block out a significant proportion of the water view. His oral evidence

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[2010] QSC 333 at [40]

also addressed the diminution in value that would occur if a building that is the subject of a more recent approval was built. As to the former, he thought that the value, as previously assessed by him at \$820,000, would be diminished by three to five per cent, depending on the final building position and the structure of the proposed development. Buildings of a lesser height would result in a diminution in value of only a few per cent.

- [105] The impact of the construction of a building to different heights on the market value of the apartment is one thing. Depending on the height of the building, it may be minor but it would still constitute a diminution in value compared to the value of an apartment whose view was not at risk of being blocked. The relevant issue is not so much the impact of certain proposals or approvals on the market value, coupled with the uncertainty of whether the buyers agreed to pay the market value of the property. The issue is that the buyers were prepared to contract to pay \$1,595,000 in reliance on representations about the view, and would not have done so if Nifsan had not contravened the Act. They would not have purchased the unit at all. Therefore, it is artificial to address what the buyers would have been prepared to pay if they had not been told the things they were told, or were told about Nifsan's application to build an eleven storey apartment building. One cannot say that they would have offered only a few per cent less on the basis that they placed the same value on a view as other consumers. All one can say is that, on the hypothesis that they would still have contracted to purchase, they would not have been prepared to pay \$1,595,000 and would have offered substantially less. They became contractually committed to pay more than the amount that they hypothetically would have agreed to pay if the contravention had not occurred. I find it unnecessary to conclude whether this means that they are likely to suffer loss or damage. I conclude, however, that the risk of a tall building being constructed on the waterfront was not factored into the purchase price they agreed to pay. The third matter was not pleaded in relation to the s 87 issues, and I decline to allow the buyers to rely upon this third aspect of their s 87 submissions.
- [106] I find that s 87 is enlivened on each of the first two bases advanced by the buyers.
- [107] On the issue of discretion, Nifsan repeats its submissions that the drop in the market value of the apartment to its current market value of \$820,000 is the result of a general property market downturn. It also submits that the impact on the market value of the apartment is relatively minor, and relies upon Mr Allsop's evidence in this regard. However, these matters do not persuade me not to exercise the discretion under s 87 to set aside the contract. The consequence of such an order under s 87 is to permit the buyers to avoid purchasing an apartment that they would not have purchased if the representation had not been made. Such an order seems to be an appropriate remedial response in the circumstances. If that response also means that the buyers do not suffer the consequence of a market downturn on the Gold Coast, which has been significant in relation to multi-unit properties, then this is the consequence of orders that seek to restore the buyers to the position that they would have been in had the contravening conduct not occurred. It is not a good reason to decline relief under s 87 or to limit that relief to compensation.
- [108] The buyers have advanced a "no transaction" case. They have established that if the contravention had not occurred, they would not have entered the transaction. Section 87 responds to a case such as this, and I exercise my discretion to avoid the contract. Further orders should be made for the return of the deposit and the

payment of the amount of \$3,000 paid for work to be done to the unit, being an amount which is admitted on the pleadings. The sum of \$3,000 is pleaded, not the contracted amount of \$3,300. I will award interest on \$3,000 at the Practice Direction rate of 10 per cent from 12 February 2008 to today, namely \$1,100. The buyers did not prove that they had incurred legal and other costs with respect to the contract in the pleaded amount of approximately \$5,000. They have not proven the quantum of such legal fees and other costs and I decline to order compensation for those fees and costs pursuant to s 87.

[109] I will hear the parties as to costs. However, the appropriate order would seem to be that costs should follow the event.

Orders

[110] I propose to make the following orders:

1. The plaintiff's claim is dismissed.
2. Judgment for the defendants on their counterclaim.
3. Order pursuant to s 87 of the *Trade Practices Act* 1974 (Cth) that the contract entered into between the plaintiff and the defendants on or about 12 February 2008 to purchase proposed Lot 3469 on SP 211908 in the Parish of Gilston County of Ward be declared void.
4. Order that the initial deposit of \$1,000 and the balance deposit of \$78,750, together with all interest that has accrued thereon, be paid to the defendants.
5. Order that the plaintiff pay to the defendants the amount of \$3,000 together with interest of \$1,100 pursuant to s 47 of the *Supreme Court Act* 1995.