IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted

AT MELBOURNE
CIVIL DIVISION
COMMERCIAL - GENERAL DIVISION

Case No. CI-10-01281

PEACHBULK PTY LTD (ACN 102 656 520) Plaintiff
(as Trustee of the CHRIS MOSS STAFF SUPERANNUATION FUND and
as Trustee of the CHRIS MOSS FAMILY TRUST)

v

R T EDGAR PTY LTD (ACN 103 005 965) First Defendant

and

OTHERS (as per the attached Schedule) Defendants

JUDGE:	HIS HONOUR JUDGE GINNANE
WHERE HELD:	Melbourne
DATE OF HEARING:	25-27, 30-31 May, 1-3, 6-9, 20-22 June 2011
DATE OF JUDGMENT:	20 October 2011
CASE MAY BE CITED AS:	Peachbulk Pty Ltd v R T Edgar Pty Ltd & Ors
MEDIUM NEUTRAL CITATION:	[2011] VCC 1370

(first revision 21 October 2011)

REASONS FOR JUDGMENT

Catchwords: Misleading and deceptive conduct – sale of property – purchase of property after auction – agent's statements about offers received – whether misleading or deceptive – whether tort of deceit – whether purchaser relied on statements – damages – mitigation of damages – vendors' liability for agent's conduct – vicarious liability of administrator – right of indemnity of vendors against agents: *Trade Practices Act* 1974, ss.52, 75B, 82; *Fair Trading Act* 1999, s.9, *Guardianship and Administration Act* 1986, s.58B

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr P Bick QC with Mr B Gibson	Norton Gledhill
For the Second and Sixth Defendants	Mr B Quinn	Lander & Rogers
For the Third, Fourth and Fifth Defendants	Mr A Rodbard-Bean with Mr J Armstrong	Septimus Jones & Lee

SCHEDULE OF PARTIES

PEACHBULK PTY LTD (ACN 102 656 520) (as Trustee of the CHRIS MOSS STAFF SUPERANNUATION FUND and as Trustee of the CHRIS MOSS FAMILY TRUST)	Plaintiff
v	
R T EDGAR PTY LTD (ACN 103 005 965)	First Defendant
and	
GREGORY HERMAN-MOORE	Second Defendant
and	
MICHAEL ABAY	Third Defendant
and	
KENDRA MICHELLE ABAY	Fourth Defendant
and	
JANE KIMBERLEY FLEETWOOD	Fifth Defendant
and	
R T EDGAR (TOORAK) PTY LTD (ACN 007 431 101)	Sixth Defendant

HIS HONOUR:

1 This case concerns the sale of a property in Toorak. The purchasers sue the selling agents and the vendors, claiming that they were misled and deceived into bidding $2.7 million by a representation that a person identified as “Tom” had made a bid of $2.6 million, when in fact that was not the case.

2 The purchaser was the trustee of the superannuation funds of a plastic surgeon who practised in a building next door. The agent was the twin brother of one of the vendors.

3 The doctor’s case was that he wished to buy the property to give privacy to his plastic surgery patients, including those he said were “celebrities”. The doctor and his wife developed an elaborate strategy to purchase the property. The property was passed in at $2.1 million and negotiations commenced. A bid was made on behalf of the doctor at $2.4 million and then bids made on the separate apartments. The agent said that he had already received an offer of $2.6 million, on his version, from a man driving a silver Mercedes. The doctor offered $2.7 million, which was accepted.

4 By chance the doctor’s wife saw the underbidder, who was a man named “Tom”, driving past the property in a silver Mercedes a short time after the contracts had been signed. She flagged him down. He told her that he had not offered $2.7 million but $2.1 million. The doctor considers that he was duped and claims the difference between the true value of the property and the $2.7 million.

5 The agents and vendors deny any misleading or deceptive conduct or misrepresentations.

Summary of Findings and Conclusions

6 Peachbulk Pty Ltd (Peachbulk) has established its claim against the agent, R T Edgar (Toorak) Pty Ltd, and its director Mr Gregory Herman-Moore (Mr

Herman) in misleading and deceptive conduct and deceit.

7 Estate agents, in selling properties, may not engage in misleading, deceptive or fraudulent conduct. This law has general application to all commercial activity, including estate agents' actions in selling residential property.[1]

8 The law does not cease to apply because, as was the case in this proceeding, the purchasers themselves engage in conduct to attempt to disguise their interest in the property.

9 The vendors, other than Ms Jane Kimberley Fleetwood, the fifth defendant, are liable for the damages for deceit awarded against their real estate agent, R T Edgar Toorak Pty Ltd (R T Edgar Toorak), and Mr Herman.

10 The proceeding against Ms K Fleetwood is dismissed.

11 Peachbulk paid a total of $2.7 million for the property. Peachbulk claims damages. It is entitled to damages calculated by the difference between that price and real, true or fair price of the property on auction day. The real, true or fair value of the property was $2.5 million.

12 Peachbulk is entitled to a judgment in damages against the defendants, the agents and the vendors, other than Ms Fleetwood, in the sum of $200,000.

13 The vendors, against whom judgment is given, are entitled to an order for contribution and indemnity from the agents in that sum of $200,000.

14 This judgment is divided under the following headings:

(a) Summary of causes of action: paragraphs 15-34;

(b) The Vendors and the Purchasers: paragraphs 35-64;

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[1] See also in the case of estate agents Regulations 11 and 13 of the *Estate Agents (Professional Conduct) Regulations* 2008. Regulation 11 states:

"*An estate agent must at all times act fairly and honestly and to the best of the agent's knowledge and ability in the performance of the agent's functions as an estate agent*."

(c) Mr Kartel: paragraphs 65-66;

(d) The Purchasers' Auction strategy: paragraphs 67-72;

(e) The Auction and the aftermath: paragraphs 73-202;

(f) Remaining events on 27 February 2010 and thereafter: paragraphs 203-210;

(g) The Offer to Rescind: paragraphs 211-220;

(h) Mr Sutherland's Valuation evidence: paragraph 221;

(i) Did Mr Herman make the representations pleaded? - paragraphs 222-251;

(j) Were Mr Herman's statements misleading or deceptive? - paragraphs 252-258;

(k) Were the representations made in trade or commerce? - paragraphs 259-261;

(l) Was R T Edgar Toorak liable for Mr Herman's conduct? - paragraphs 262-265;

(m) The vendors' liability for Mr Herman's conduct: paragraphs 266-275;

(n) Accessorial liability of the vendors: paragraphs 276-285;

(o) Deceit: paragraphs 286-293;

(p) The vendors' liability for Mr Herman's representations: paragraphs 294-308;

(q) Reliance: paragraphs 309-329;

(r) Contributory negligence and apportionment of liability: paragraphs 330-335;

(s) Damages: paragraphs 336-362;

(t) Mitigation of damages: paragraphs 363 -387;

(u) The vendors' entitlement to an indemnity from the agents: paragraphs 388-395;

(v) The vendors' claims for a proportionate liability order against the agents: paragraphs 396-399.

Summary of Causes of Action

15 Peachbulk, in its capacity as trustee of the Chris Moss Staff Superannuation Fund, purchased 502A Toorak Road for the sum of $1,080,000, being 40 per cent of $2,700,000. Dr Chris Moss, who was the second plaintiff, as agent for Peachbulk in its capacity as trustee of the Chris Moss Family Trust, purchased 502B Toorak Road for $1,620,000, being 60 per cent of $2,700,000. Peachbulk became purchaser of both properties.

16 Ms Andrea John, who is married to Dr Moss, is also a director of Peachbulk. I will refer to them collectively as the "Mosses".

17 Peachbulk's claims against the second and sixth defendants, Mr Herman and R T Edgar Toorak, are for misleading and deceptive conduct and for deceit. Mr Herman works for and is a director of R T Edgar Toorak. I will on occasion refer to both R T Edgar Toorak and Mr Herman as the "agents".

18 The proceeding against the first defendant was discontinued.

19 Peachbulk claims damages.

20 The vendors, the third, fourth and fifth defendants are sued as being jointly and severally liable for the actions of their agents, R T Edgar Toorak. While the proceeding was commenced on 25 March 2010, the vendors were not joined as defendants until 14 October 2010.

21 The third defendant ultimately defended the proceeding by his litigation guardian, Ms Michaela Abay.

22 Peachbulk's and Dr Moss' case as pleaded was that during the course of the negotiations, for the sale of 502 Toorak Road, R T Edgar Toorak, by its employee, Mr Herman, represented for itself and for Mr Michael Abay, Ms Kendra Abay and Ms Kimberley Fleetwood, who are the third, fourth and fifth defendants, to Dr Moss and through him to Peachbulk, that the underbidder at the auction, being a man named "Tom", following the auction had made an offer to purchase the property for $2.6 million.

23 The particulars of that representation were that Mr Herman told Dr Moss in a conversation at 12.30 pm on auction day, that "Tom" was wearing a pink shirt, that he was driving a silver Mercedes, that he could not remember his name, but that he had it at the office, that "Tom" was serious, had been through the property many times and that Mr Herman thought he was a property developer. Mr Herman told Dr Moss that he had received the offer from "Tom" after the auction by a telephone call received on his mobile telephone. He stated that if Dr Moss did not buy the property, "Tom" would. Dr Moss asked Mr Herman to give his absolute word as a reputable agent of R T Edgar Toorak that he had received the offer of $2.6 million from "Tom". Mr Herman said that he did. Dr Moss repeatedly told Mr Herman that any decision to make an offer above $2.6 million was conditional upon the fact that he had received a genuine bid from "Tom" as the underbidder and on Mr Herman's guarantee as a reputable agent of R T Edgar Toorak that he had to beat the offer of $2.6 million from the property developer in order to purchase the property. Mr Herman responded that he was comfortable with that. Dr Moss stated that if it were not true that "Tom" had made an offer of $2.6 million he would be taking action. Mr Herman replied that Dr Moss could trust him because it was true. Dr Moss asked Mr Herman to provide "Tom's" full name and details of his offer in writing. Mr Herman said that he would do so the

following Monday in a typed letter. Dr Moss began to write a term to that effect on the contract. Mr Herman stopped him and said that he could not add anything to the contract, because the lawyers would get upset.

24 Five of the witnesses in the trial, who attended the auction, drove silver Mercedes.[2] Because of the reference to silver Mercedes in the agents' representation, this fact had considerably greater significance in the trial than of merely displaying the buying patterns of particular consumers.

25 The plaintiff's case was that Mr Herman made statements to Dr Moss and Ms John that were false, and were of a kind that were also misleading and deceptive or likely to mislead or deceive them into believing that the defendants had received an offer of $2.6 million from Mr Tom Kartel, who was held out to be a property developer, and that if the plaintiffs were to prevent a property development of the subject properties, it had to better that offer. The plaintiffs pleaded that the representation was false and untrue in that the underbidder named "Tom", who was Mr Tom Kartel, had offered only $2.1 million and there was no genuine offer by "Tom" to purchase the properties for $2.6 million. R T Edgar Toorak was liable and Mr Herman was personally liable or liable as an accessory.

26 The case for deceit was that the representations made by Mr Herman were made fraudulently, in that R T Edgar Toorak knew the representation to be false, or alternatively, did not have a genuine or honestly held belief in the truth of the representations at the time it was made. Mr Herman made the statements with the intent to induce the plaintiffs to act upon them by offering a higher amount than $2.6 million for the properties and to enter into the contracts of sale.

27 Peachbulk was induced to act upon the statements, and did so and has thereby suffered loss and damage.

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[2] Mr Kartel, Mr Fleetwood, Mr A'Beckett, Mr Carbonaro and Mr Herman.

28 The agents and the vendors were said to be liable for the misleading or deceptive conduct in contravention of the *Trade Practices Act* 1974 and the *Fair Trading Act* 1999 and to have accessorial liability for those breaches.

29 The agents denied that Mr Herman had engaged in any misleading or deceptive conduct. He made the statements about "Tom" to placate Ms John, who had behaved in aggressive and inappropriate manner. That representation had not induced the Mosses to offer $2.7 million to purchase the property as they wanted it desperately.

30 The agents described the plaintiff's case as an instance of buyers' remorse. The purchasers had possessed unrealistic expectations of the price at which they would be able to purchase the property. The vendors only offered to rescind the contracts because of vendors' remorse, being their regret, and in particular, the regret of Mr Michael Abay snr, that they had sold the property.

31 An important part of the agents' case was reliance on statements made by Mr Stuart Fleetwood, the husband of Ms K Fleetwood, that he would buy the property for $ 2.6 million. This was argued to be the offer that Mr Herman mentioned to Dr Moss.

32 The agents also relied on contributory negligence of the purchasers.

33 The vendors contended they had no knowledge of, involvement in, or liability for Mr Herman's conduct. They were under no pressure to sell and would not have sold the property for less than $2.7 million. They seek contribution and indemnity from the agents.

34 All the defendants disputed the plaintiff's methodology of calculating damages and contended that by failing to rescind the contracts or to accept the vendors' offer to tear them up, Peachbulk had failed to mitigate its loss.

The Vendors

35 The property consisted of two dwellings that I shall refer to as apartments 502A and 502B, Toorak Road, Toorak. 502A was the upstairs apartment and was owned by Mr Michael Abay snr, the third defendant; 502B was the downstairs apartment and was owned by Ms Kendra Abay, the fourth defendant, who was married to Mr Michael Abay jnr, the son of Mr Michael Abay snr, the third defendant.

36 Ms Kendra Abay purchased both apartments in August 2003. She sold 502A to her father-in-law, Mr M Abay snr, but the transfer to him was not registered until after the auction in 2010. He did wish the transfer to be registered, but it did not occur because of concern about the need to pay stamp duty and Ms Abay's view that the property was more valuable if treated as apartments owned by one person.

37 Mr M Abay snr and his wife lived in 502A Toorak Road. Mrs Abay died in July 2008 and shortly thereafter, Mr M Abay snr had a serious fall and entered an aged care residential facility. He wished to return to live in his apartment; however it was uncertain whether that would be possible.

38 In January 2009, Ms K Fleetwood, the fifth defendant, who was the daughter of Mr M Abay jnr, was appointed administrator of her grandfather's estate pursuant to an order of the Victorian Civil and Administrative Tribunal under the *Guardianship and Administration Act* 1986. She let her grandfather's apartment in June 2009.

39 In about June 2008, Ms K Abay informed Mr M Abay jnr that their marriage was over. Discussions then occurred as to what should happen to the property.

40 Dr Moss gave evidence that some time before the auction, he had a conversation with Mr M Abay jnr, who informed him that he and his wife had separated, that the property was to be sold and asked him if he was interested

41 In November 2008, Mr M Abay jnr was arrested on criminal charges and in August 2009, sentenced to a term of imprisonment.

42 After a number of family discussions held in late 2009, it was decided to sell the property as a whole. Ms K Abay assumed the carriage of the sale.

43 Ms Abay made enquiries of two local estate agents. They advised her that the likely sale price of the two apartments was in the vicinity of $2.5 to $3 million. Ms Abay also took into account her knowledge of comparable sales in the area. She had been told by developer friends that the likely selling range of the two apartments was about $3 million based on developers constructing six units on the site.

44 The plaintiff pleaded that the vendors were under financial pressure to sell for various reasons, but I am not satisfied that those allegations have been established. They were not really pursued in final submissions.

45 Ms Abay dealt with her twin brother, Mr Gregory Herman-Moore, the second defendant. I refer to him as Mr Herman in these reasons for judgment because he was so described in most of the evidence. Mr Herman has thirty years' experience as a real estate agent. He is a director of R T Edgar (Toorak) Pty Ltd, the sixth defendant. On occasion Mr Herman had provided financial assistance to his sister, Ms Abay. Ms Fleetwood was Mr Herman's step-niece by marriage.

46 Mr Herman agreed to act for a low commission of 0.55 per cent plus advertising costs of $15,000. R T Edgar Toorak was retained by an Exclusive Auction Authority dated 20 January 2010 and signed by Ms Abay and Ms Fleetwood. The Exclusive Auction Authority stated an estimate of selling price

under s.47A of the *Estate Agents Act* 1980 of between $2 million and $2.2 million.

47 Mr Herman gave evidence that there was a lack of sales data for comparable properties in the Toorak area and it was difficult to estimate the sales price.

48 The property was marketed for four weeks. It was advertised in *The Age* newspaper and on Internet real estate sites of R T Edgar Toorak, domain.com.au and realestate.com.au. It was also advertised in the *Melbourne Weekly Magazine*. The advertisement stated that the property would "suit development of 6 luxury apartments STCA". It was advertised at $2 million plus in the newspaper and appeared in the $1.5 million and $2 million section on the websites. Each week there was a Wednesday and Saturday 'open for inspection'. Mr Herman told potential purchasers at open for inspections that the vendors were asking for "in excess of $2 million".

49 At one of the open for inspections, Mr Tom Kartel made an offer of $1.8 million. Mr Herman said that he did not take the offer seriously because Mr Kartel made it without asking to see any contracts or the terms of the lease of 502A Toorak Road. Mr Kartel subsequently made an offer by telephone to Mr Herman of $2 million, but that was also rejected.

50 Mr J Breeze was a friend of Dr Moss and Ms John. He is an experienced management consultant. In January 2010, Dr Moss asked him if he could register interest in the property. Mr Breeze attended one open for inspection. Mr Herman told him that the sale price was about $2 million. He asked Mr Herman for copies of the contracts and section 32 statements, thereby indicating to Mr Herman that he was a potential purchaser.

51 Dr Moss and Ms John attended an open for inspection and discussed with Mr Herman an agreement concerning the fence between their property and that at 502 that he had reached with Mr M Abay jnr and the possibility of a provision concerning that agreement being included in the contracts. Mr

Herman asked him if he had any interest in purchasing the property, but he said that he did not.

52 Mr Herman gave evidence that he did not learn of the reserve price until after the property was passed in.

53 Despite the fact that the Particulars of the vendors' Defence state that they had discussed the reserve prior to the auction, Ms Abay and Ms Fleetwood denied that that occurred.

The Purchaser

54 Peachbulk is the trustee of two superannuation trusts associated with Dr Chris Moss and his wife, Ms Andrea John, who has worked as an accountant, a television journalist and in an advertising agency.

55 They were friends with Mr J Fox, who was a principal of R T Edgar Toorak, and had dealt with that firm previously.

56 Dr Moss is a plastic and reconstructive surgeon who conducted his practice at 504 Toorak Road, which was next door to the auction property.

57 Ms John conducted a skin care centre at 506 Toorak Road. Dr Moss was the medical director of that centre.

58 Dr Moss' patients included a number, whom he described as "celebrities", who had a concern about maintaining privacy in their attendance at his practice. Often the treatment they received required them to leave without dressings to help the healing of the effects of the surgery. On occasions, elaborate steps were taken to maintain the privacy of the patients when they arrived at and left the practice.

59 Dr Moss and Ms John gave evidence that they were concerned that a property developer might buy the property and develop it in a manner that would increase the overlooking of their property thereby affecting the patients'

60 Dr Moss and Ms John arranged for two people to assist in purchasing the property, so that their interest would be disguised. They were Mr J Breeze, who is mentioned above. Secondly, Mr C Carbonaro, who was Dr Moss' stepfather. He was retired and had been a successful business executive and had considerable experience in buying and selling property.

61 Mr Breeze and Mr Carbonaro did not know each other well.

62 Dr Moss considered that the reserve price would be in the order of $2 million because of the advertised price.

63 Mr A Rohan of Charter Keck Cramer, valuers, gave Dr Moss a "quick opinion" valuation of the property of $2.6 to $2.7 million on a bad day, which meant an auction where property developers made bids, and $2.1 to $2.2 million on a good day, when no property developer made a bid.

64 It is unclear how the Mosses thought that they could determine whether a bidder was a property developer. They appear to have assumed that the amount of the bid would disclose the intended use of the property by the person on whose behalf the bid was made.

Mr Kartel

65 Mr Tom Kartel was also interested in purchasing the property. He intended to use the property as his family home. He had been living across the road and had searched the property on the internet, noting that it was listed in the $1.75 million to $2 million bracket. He inspected the property and asked Mr Herman what price was expected. Mr Herman told him that the price expected was above $2 million.

66 As previously stated, Mr Kartel made bids for the property. Mr Herman did not

consider that Mr Kartel was a serious purchaser, as he had not sought copies of the contract documents.

The Purchasers' Auction Strategy

67 The Mosses engaged a buyers' advocate to assist them develop a strategy.

68 During the week of the auction, Dr Moss met with Mr Carbonaro and asked him to only bid for the upstairs apartment, because that was the preferable apartment to purchase to achieve the objective of stopping a property developer.

69 The day before the auction, Dr Moss and Ms John sent emails to Mr Breeze and Mr Carbonaro. In an email to Mr Breeze, Ms John stated that she would love to get the property for $2.3 million, but that her husband had said to go as high as $2.75 million, although she "couldn't imagine a property developer going that high".[3]

70 In another email on auction eve, Dr Moss and Ms John sent elaborate bidding instructions to Mr Breeze and to Mr Carbonaro.[4] The details ultimately are not determinative of this case. They were based on alternative scenarios, being the sale of the two apartments, together or separately. The email stated:

> "As you know the Abay property was written up in the Melbourne Weekly yesterday and valued at $2,000,000!!! The valuation we received was a range of 2,500,000 to 2,700,000. Based on the valuation we are prepared to bid up to a total of 2,750,000 for the both lots."[5]

71 It is an irony of this case that the purchasers of the property went to elaborate lengths to mislead the vendors and the agents as to their interest in the property. They also failed to disclose the fact that they recorded a number of important conversations that they relied on at trial. However, under the law applicable to the issues in this case, it is the conduct of the vendors and their

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3 Court Book page 355

4 Court Book page 360 and page 362. The plaintiffs said that there was a typographical error in the maximum price specified for 502A as a single apartment. Dr Moss said that it should have specified $1.3 million rather than $1.55 million.

5 Court Book page 362

agents that calls for consideration.

72 The agents argued that the Mosses always intended to use the property in connection with their practice. In May 2010, Dr Moss applied for a planning permit to use 502B as a single medical centre to be operated in conjunction with the existing medical centre at 504 Toorak Road. Dr Moss had been interested in purchasing nearby property for use as an apartment by his patients if they wished to stay for a couple of weeks while receiving treatment.

The Auction

73 Peachbulk presented evidence concerning the events of the auction day, in part relying on what was recorded on an iPhone, including photographs, video footage, sound recordings, text messages and a chronology of the numerous mobile telephone calls passing between members of Peachbulk's camp. In addition, Peachbulk sought to combine sound recordings on the iPhone with CCTV footage taken outside 504 Toorak Road. A chronology was produced purporting to give, in some instances, an almost minute by minute account of what occurred. There was an objection to the completeness of the chronology and additional chronologies provided. While I am prepared to have regard to the chronologies, save in respect of the conversations involving Mr Kartel, which are set out below, and a few other times indicated in them, I have not made much use of them. I have not assumed that they accurately described every event recorded in them.

74 The auction commenced at 11.00 am on 27 February 2010 outside the property. About 30 people attended. The auctioneer was Mr J Fox, on behalf of R T Edgar Toorak. Mr Herman accompanied Mr Fox and kept a note of the bids.

75 Dr Moss and Ms John attended the auction. They spoke briefly with a neighbour, who stated that he did not want a property developer purchasing the property, which was a view that Dr Moss also expressed. Dr Moss spoke

with Mr Fox before the auction commenced. Mr Fox asked him if he was interested in the property and he replied "not really that much", that they did not want a property developer, but he did not think that it was going to be a good site for a property developer. According to Dr Moss, Mr Fox replied "Well, we've got two property developers interested right now".[6]

76 Ms John noticed Mr Stuart Fleetwood in the crowd. Mr Fleetwood is married to Ms K Fleetwood. He also attended the auction, driving a silver Mercedes. Ms John remembered him from university days and had seen him outside the property previously. She thought that he must be a member of the vendors' family.

77 Mr Herman spoke to people in attendance before the auction commenced. When he spoke to Ms John she mentioned Mr Fleetwood. She asked how Mr Herman knew him and he said that Mr Fleetwood was his nephew. Ms John remarked to her husband "that ruins Stuart as a dummy bidder". [7]

78 Mr Breeze and Mr Carbonaro attended the auction. Mr Breeze was accompanied by a friend, Mr Malatesta. Mr Breeze drove to the auction in a silver Mercedes.

79 Mr Kartel attended the auction accompanied by a friend, Mr R Boscolo, who is a domestic builder. Mr Kartel was wearing a pink shirt. He drove to the auction in a silver Mercedes convertible.

80 The vendors and family members and friends stayed inside the downstairs apartment in a back room.

81 Mr Fox announced that the property was to be offered as a whole and if not sold, the two properties would be offered separately.

82 Mr Kartel made the opening bid of $1.8 million, but Mr Fox would not accept it.

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6 T 176

7 T 548

Mr Breeze made a bid of $1.95 million. A vendor bid of $2 million followed. Mr Breeze then offered $2.02 million. The bidding continued, with bids made by Mr Breeze and by Mr Kartel increasing in amounts of $10,000, until Mr Breeze offered $2.06 million. Mr Kartel then offered $2.1 million. Mr Kartel questioned, or heckled, Mr Fox, stating that the property was not worth that amount. Mr Breeze bid $2.11 million. There were no further bids. In accordance with the auction conditions, the properties were passed in to Mr Breeze. Mr Kartel was the underbidder.

83 Mr Fox announced that the property would be passed in, that negotiations would commence, that if it was not sold as a whole then the two properties would be offered separately and that those interested in purchasing should stay around.

84 Mr Herman's evidence was that he did not know or notice that Mr Kartel was bidding, or because he was colour blind, that Mr Kartel wore a pink shirt or what sort of car he drove. The Mosses had noticed Mr Kartel and thought he might be a property developer. Ms John took a photograph of him standing in the auction crowd.

Post-Auction Discussions with Mr Breeze

85 Discussions then occurred inside the property between Mr Breeze and Mr Fox and Mr Herman. They told Mr Breeze that the vendors' reserve was $2.6 million. He offered $2.2 million. He showed them one of the advertisements of the property and pointed to the sale price. His offer was not accepted. Mr Breeze asked how much it would take to purchase the property and Mr Fox said $2.5 million.[8] Mr Breeze offered $2.35 million, but that was rejected. Mr Fox told him that the underbidder was still hanging around, that the guy next door, pointing in the direction of Dr Moss' practice, was interested, as was the neighbour to the rear. Mr Fox said that the reserve was $2.6 million, but that

8 T 735

Mr Breeze could buy the property for $2.5 million, or suggested that he make such an offer.

86 Mr Breeze spoke by telephone with Dr Moss and Ms John, and they considered that at $2.3 million there was no further competition from property developers to contend with.

87 In a further telephone conversation with Mr Breeze, Dr Moss authorised a final offer of $2.4 million. Mr Breeze made this offer and it was rejected on the basis that the reserve was $2.6 million.

88 Mr Breeze and Mr Fox then left the property at about the same time. As he left, Mr Breeze said to Mr Fox that he would buy the apartments separately for less than he had bid, to which Mr Fox replied "no you won't".[9]

89 Dr Moss, who was standing in the crowd, saw Mr Fox make a sign to Mr Kartel, apparently in response to a question from him. Dr Moss considered that the sign meant that they were "almost there". [10]

Conversation with Mr Kartel

90 At 11.32 am, about five to ten minutes after the property was passed in and while negotiations with Mr Breeze were occurring, Mr Herman went outside the property to gain intelligence as to who else was still there. He spoke to Mr Kartel, who had been waiting next to his silver Mercedes.

91 Mr Kartel asked whether the property was sold and Mr Herman replied "no". Mr Herman asked him if he was still interested in the property and he indicated that he was, and that he was willing to pay more than "what they're paying".[11] Mr Herman told him not to go anywhere, to wait and that he would be back. Mr Herman went back inside apartment 502B.

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9 T 1153
10 T 181
11 T 907

92 According to Mr Herman, when the negotiations with Mr Breeze reached $2.35 million, he went outside again and spoke to Mr Kartel and asked for his best offer. Mr Kartel said "$2.2 million", which in his evidence he said was the top price he would have paid on that day. Mr Herman told him that he already had an offer for $2.35 million, to which Mr Kartel replied: "Give it to them", and left.[12] Mr Herman returned inside.

Mr Stuart Fleetwood's Offer

93 While negotiations were continuing with Mr Breeze, Mr Stuart Fleetwood entered 502B Toorak Road with a friend, Mr S A'Beckett, who worked in town planning aspects of property development. Mr Fleetwood and Mr A'Beckett joined the vendors and family and friends in the kitchen. Present were his wife, Ms K Fleetwood, Ms K Abay, Mr M Abay snr and two of his friends, Mr V Hargitay and his brother, Mr S Hargitay, who were able to speak to him in Hungarian.

94 Dr Moss was in contact with Mr Breeze by text messages and telephone calls. At 11.26 am, he texted Mr Breeze that two men had entered the apartments, who had not bid and who were relatives of the agent – this presumably was a reference to Mr S Fleetwood and Mr A'Beckett. He also stated that the under bidder had left. At 11.27 am, Dr Moss telephoned Mr Breeze and told him not to bid against Mr Fleetwood.[13]

95 Mr Fleetwood had previously expressed the opinion at family meetings that apartment 502B should not be sold. When he walked into the apartment he considered that, based on the bids and the low turnout, that the auction had failed.

96 Mr Herman and Mr Fox entered the kitchen and Mr Herman said that he did not think he would be able to get Mr Breeze to pay $2.6 million, that he might

12 T 908
13 T 179

97 Mr Fleetwood intervened and said that under no circumstances should the properties be sold that day, that the auction had not attracted the interest that they had anticipated and that there had been very little bidding at the auction. The properties should be not sold for less than $2.6 million. He turned to Mr J Fox and said: “We should not sell these properties for less than $2.6. I’ll buy this property for $2.6 million”.[14] Mr Fleetwood then spoke to Ms Abay and Ms Fleetwood and earnestly said that they should not sell the property for less than $2.6 million, that the properties had good options going forward and that there was no pressure for them to sell at anything less than $2.6 million.[15] Mr A’Beckett nodded agreement.

98 Mr Fleetwood said that he did not make an offer and that when he said, “I’ll buy it for $2.6 million” he had in mind buying out Ms Abay’s interest as a proportionate part of that sum. He did not turn his mind to the fact that he would be purchasing both upstairs and downstairs.[16] The comment was in the nature of reinforcing his view that it should not be sold for less than $2.6 million. It was not Mr Fleetwood’s intention to buy the property for $2.6 million.

99 Mr A’Beckett’s evidence was that Mr Fleetwood said to Mr Fox that: “We’re not prepared to give the property away. That’s far too cheap and that he would pay $2.6 million for it.”[17] He told Mr Fleetwood that with some time and good planning they could successfully redevelop the property.

100 Ms Fleetwood gave evidence that her husband said: “Do not sell it for 2.5. Do

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14 T 1267
15 T 1268
16 T 1292 and 1289
17 T 1544

not sell it for less than 2.6. If it sells for $2.6 I will buy it for $2.6."[18] He also stated that he would buy Ms Kendra Abay out for $2.6 million. Ms Fleetwood stated that the reference in Ms Abay's email after the auction day to Mr Herman that Mr Fleetwood would buy the property for $2.6 million and develop it, meant that he would have bought Ms Abay's share out based on a price of $2.6 million and possibly develop the property down the track. That email stated:

> "A few minutes later after this reserve had been stated to the top bidder, my son-in-law, Stuart Fleetwood, walked in and was not happy and said the reserve was too low and that he would buy it for $2.6 million and develop it."[19]

101 Ms K Abay gave evidence that Mr Fleetwood did make an offer but it was not to purchase the property at $2.6 million, but to buy her share in the property. He said that price was ridiculously cheap. She understood that if the property did not sell for more than $2.6 million on that day that he would buy her share of the property.[20] Ms Abay told Mr Fleetwood that she would be happy for him to buy her share out.[21]

102 Mr Herman's evidence was that Mr Fleetwood said: "I think the reserve is too low or that 2.6 million is too cheap,[22] if they don't buy it at 2.6 million, I will."[23] Mr Herman asked him: "Stuart, is that an offer?" and then Mr Fleetwood said: "Yes".[24] Mr Herman stated: "Stuart, I can't treat with you now, the top bidder still hasn't refused to pay the $2.6 and under the auction rules I can't accept an offer until he refuses to pay the $2.6".[25]

103 Mr Herman stated that he regarded Mr Fleetwood's statement as an offer to purchase. He said that the offer was expressed twice.[26]

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18 T 1340
19 Court Book page 574
20 T 1509
21 T 1269
22 T 1136
23 T 1024
24 T 1024
25 T 1024
26 T 1171

104 Mr Fleetwood told Mr Herman that he and Ms Abay had discussed the property and that she was okay with it not being sold.[27] Mr Fox was also present. Mr Fleetwood gave evidence that he told Mr Herman, "Kendra and I have discussed the property, that we're okay, that I think Kendra is okay with it not being sold".

105 Ms Abay then said to Mr Herman, "Its okay, Stuart will buy my share out".[28]

106 Mr Fleetwood was cross-examined about his financial capacity to purchase both apartments. The evidence suggested that he did have that capacity, but nothing turns on that point because his offer was to purchase only apartment 502B.

107 Mr Herman stated that "given the ownership situation, it was up to each individual girl how they treated with their own units"[29]. This was his explanation for not pursuing Mr Fleetwood for a further offer before the property was sold to the Mosses.

108 Mr Fleetwood and Mr A'Beckett left the property at about midday.

109 Ms Fleetwood and Ms Abay told Mr Herman that the property would not be sold for less than $2.6 million. Mr Herman and Mr Fox then left the room and Mr Fox left the property.

110 Mr Herman returned to the kitchen and said that the highest bidder had not raised his bid and had left. He said that there were no other bidders left. In response to a question from Ms Abay, he said that he had not seen Dr Moss.

111 Mr Breeze left the property at 12.02 pm.

112 Dr Moss gave evidence that he first learned of the offer by Mr Fleetwood in the pleadings from R T Edgar Toorak. He said that he would not have bid

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27 T 1270
28 T 1270, T 1291
29 T 1141, T 1659

against Mr Fleetwood, as he did not regard him to be a person that would have been sincerely interested in the property. He was not a property developer and, as a member of the family, already had had an opportunity to purchase the property.

113 Mr Fleetwood's offer was first referred to in the agents' Defence of 3 May 2010. On 25 March 2011, the vendors' solicitors wrote to the plaintiffs' solicitors denying that Mr Herman had received an offer to purchase the property for $2.6 million from Mr Fleetwood.[30]

114 Dr Moss and Ms John returned to 504 Toorak Road at 11.40 am.

Negotiations with Mr Carbonaro

115 Mr Carbonaro initially remained outside the property, but at 11.41 am went to 504 Toorak Road and received instructions from Dr Moss and Ms John. He returned to 502 Toorak Road and told Mr Herman that he was interested in purchasing apartment 502A. He asked how much the vendors wanted for it. Mr Herman sought instructions and told Mr Carbonaro that they wanted $1.25 million for the upstairs apartment and $1.55 million for the downstairs apartment.

116 Mr Carbonaro initially made an offer of $1.1 million and then a series of further offers until he reached $1.2 million. After obtaining instructions, Mr Herman rejected each of the offers. After the offer of $1.2 million was rejected, Mr Carbonaro started to leave the property. However, he then made an offer of $1.25 million. Mr Herman sought instructions and returned, stating: "Congratulations, you've bought a property".[31]

117 Ms Fleetwood rang her husband soon after and told him that she had sold apartment 502A for $1.25 million. Mr Fleetwood opposed this and was annoyed.

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30 Supplementary Court Book page 351

31 T 1147

118 Mr Carbonaro waited with Mr Herman outside the front door of apartment 502B, expecting Dr Moss to arrive to deal with the contract.

119 Mr Carbonaro rang and spoke to Dr Moss and, on his instructions, then asked Mr Herman how much they wanted for apartment 502B. Dr Moss heard this conversation as he remained on his telephone while Mr Carbonaro spoke with Mr Herman. Mr Herman sought instructions from Ms Abay, who, with Ms Fleetwood, calculated a price of $1.55 million, based on the price of $1.25 million for apartment 502A. When Mr Herman told Mr Carbonaro this price he asked him whether the vendors would accept $1.35 million to $1.4 million. Mr Herman informed him, perhaps after obtaining instructions, that they would not and that the price was $1.55 million.

120 It was unclear why Dr Moss needed to purchase both properties to defeat a property developer. However, his pre-auction strategy emails reflected an ambivalence about the matter. Dr Moss gave evidence that he wanted to understand the price in light of what he considered had been a high price required to purchase apartment 502A.

121 Because of these conversations, Mr Herman and the vendors knew that Mr Carbonaro had offered to, or agreed to buy apartment 502A for $1.25 million, and appeared to be prepared to buy apartment 502B for $1.4 million, giving a total of $2.65 million.

122 Dr Moss and Ms John discussed the purchase of apartment 502A for $1.25 million. They decided not to proceed with it.

123 One of the themes of the agents' approach to the case was that, by the bids of Mr Breeze and Mr Carbonaro, and then the subsequent bids of Dr Moss, the purchasers had been bidding against themselves. There is some truth in that assessment. The approach of the purchasers did inflate the price the vendors expected them to pay. However, on the approach I have taken to the key issues in the case, this aspect of it does not prove to be critical.

Dr Moss Arrives

124 At 12.20 pm, Dr Moss returned to the property and with Mr Carbonaro, engaged in discussions with Mr Herman. This was the first time Mr Herman knew that Mr Carbonaro was acting on behalf of the Mosses.

125 Dr Moss evidence was as follows. He stated that he was only interested in purchasing the whole property.[32] He requested Mr Herman to ask the vendors their price for both apartments. Mr Herman's evidence was that Dr Moss immediately made an offer of $2.6 million,[33] but I do not accept that account. I do not consider, as the agent contended, that it follows from the text of the conversation involving the Mosses, Mr Kartel and Mr Herman recorded on Ms Johns' iPhone and set out below.

126 Mr Herman regarded Dr Moss or Mr Carbonaro as having put aside or withdrawn the offer for apartment 502A.

127 Mr Herman returned and told him that the price was $2.8 million. Dr Moss said that that price was ridiculous and that he was not going to pay it. He said that R T Edgar Toorak had been quoting the property at $2 million and that as they were now asking for $2.8 million, this was underquoting, that it should be very careful about doing that and that he was thinking of taking issue with it. Mr Herman replied that the vendors had set that price, that "these things happen routinely over minutes" and that he did not have a case, i.e., of taking action over underquoting.[34]

128 Dr Moss said that Mr Herman was part of the vendors' family and he would have known the price they wanted. Mr Herman denied that he had, and said that it was the first time that he had known that $2.8 million was the reserve price.

129 Dr Moss did not accept Mr Herman's statement and said that he was not

32 T 190,1027
33 T 1027-8
34 T 192

happy paying $2.8 million and if that was the price, he was ending negotiations and thinking of taking action in respect of the underquoting.

130 Dr Moss' account of what happened next was as follows. Mr Herman replied: "Well, I've just received an offer of $2.6 million so why would I ask for any less?" Dr Moss asked: "When did you get this offer"? Mr Herman stated: "I got this offer after the auction." Dr Moss said: "When after you were meant to be dealing in exclusive negotiations with the highest bidder?" to which Mr Herman replied: "No, it was after that guy left". Mr Herman stated that he obtained the offer by phone and that the offer was on his phone. Dr Moss asked: "Who's this mystery person that suddenly offered $2.6 million?" Mr Herman stated: "I've had two offers actually"[35].

131 Dr Moss stated that he was quite incredulous at these statements and said, "OK, I'll offer you $2.6". Mr Herman stated that he already "got that". Dr Moss asked: "Who are the people who did these offers?" Mr Herman said: "Well, I've had one offer from the guy we've been talking to". Dr Moss asked: "You mean the highest bidder?" Mr Herman replied: "Yes". This would have been a reference to Mr Breeze. Dr Moss asked: "Who's the other offer from?" Mr Herman stated: "The other offer was from the guy in the silver Mercedes". Dr Moss asked: "What guy?" and Mr Herman stated: "The guy in the silver Mercedes who was the underbidder from the auction". [36]

132 The agents relied on Dr Moss' comments during the street conversations with Mr Herman after the contracts had been signed, in which he said:

> "I deny that! I said to you, I said to you, I will offer you 2.6 million dollars and you said 'No, why would I do that? I've already got 2 other offers at 2.6 million dollars."[37]

133 I do not consider that that passage increases the strength of either version of the timing of Dr Moss' offer of $2.6 million.

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35 T 193

36 T 193, T 1029, T 1173 and T 1175

37 Court Book page 880

134 Dr Moss or Mr Carbonaro asked: "You mean the Lebanese looking guy?" and Mr Herman stated: "Well, he's the dark guy but I'm not sure if he's Lebanese". Dr Moss then asked: "What about the other offer", to which Mr Herman replied: "The other offer was for $2.4 million."[38]

135 Dr Moss stated: "Well, if that other guy was so serious, how come he stopped bidding at $2.1 million?" Mr Carbonaro asked a similar question. Mr Herman said that he was very serious, he had been there throughout the whole process, at almost every open for inspection. He then said that he thought that he was a property developer. Dr Moss asked what the name of the person who had offered $2.6 million was. Mr Herman said his name was "Tom" and when asked: "Tom who?" said that he did not have his name, but it was written down back at the office.[39]

136 Dr Moss asked: "Well, why does he suddenly jump up to $2.6 million?" and Mr Herman stated that "he wants to develop it".[40] Dr Moss asked him how he knew that and he stated: "Well, this guy is very keen. I've been dealing with him for some time now. In fact, I think he'll buy it". Dr Moss asked him if he could call "this Lebanese property developer on the phone" so that he could talk to him and hear that he offered this money. Mr Herman stated that he could not do that.[41] Dr Moss accepted that.

Mr Herman Takes the $2.6 Million Offer to the Vendors

137 Dr Moss' evidence was that he asked Mr Herman to find out "your absolute best price for the property".[42] Mr Herman said he would take Dr Moss' offer to the vendor. He said that he had to explain to them that the one person had been making the bids for the two apartments. He did this.

138 Mr Herman's evidence was that the vendors stated: "Why would we take $2.6

38 T 193
39 T 194
40 T 194
41 T 194
42 T 195

million" when they had offered $2.65 million, being the total of $1.25 and $1.4 million. Their reserve was $2.8 million, being a combination of $1.25 million for apartment 502A and $1.55 million for apartment 502B.

139 Mr Herman returned and told them the offer was rejected and the reserve was $2.8 million and said words to the effect of "You've already offered $2.65 million, $1.25 million for upstairs and $1.4 million for downstairs".

140 Mr Carbonaro confirmed critical elements of Dr Moss' account of his negotiations with Mr Herman. He said that when Dr Moss arrived at the property that he was interested in all the property, that he asked the price, that Mr Herman said $2.8 million, that Dr Moss mentioned underquoting, that Dr Moss threatened to leave, that Mr Herman mentioned offers of $2.6 million, that Mr Herman mentioned that the developer's name was "Tom" and that Dr Moss asked for confirmation of that name. He recalled that Dr Moss said that based on what Mr Herman told him, namely that he had received an offer of $2.6 million from a developer named "Tom", he would make an offer of $2.7 million.[43] He said that he asked if the silver Mercedes was the car parked across the road and Mr Herman answered "yes".[44]

141 There were differences between Mr Carbonaro's and Dr Moss' accounts in matters such as whether they first spoke privately before speaking to Mr Herman. Mr Carbonaro did not recall discussions about offering $2.6 million and he differed as to who asked some of the questions. It is clear however that Dr Moss did make that offer that he did as the further evidence referred to in the next section of the judgment makes clear. I accept his evidence as to the point in the first conversation at which it was made.

142 Mr Herman's account differed. He did recall Dr Moss making the offer of $2.6 million. As previously stated, Mr Herman said that Dr Moss made the offer of $2.6 million at the commencement of the discussion. He then told Dr Moss

43 T 806-807, T 841, T 843, T 848
44 T 1163

that he had already received an offer of $2.6 million, but he would go and have a chat to the vendors.[45] He then told Dr Moss that the reserve was $2.8 million.

143 Mr Herman agreed with some of Dr Moss' evidence. He recalled Dr Moss speaking of under quoting and of considering making a complaint. He agreed that Dr Moss had asked for a guarantee about the offer of $2.6 million. He denied stating that the bid had come from an under bidder or that he was a developer. Mr Herman's account was that in response to Dr Moss' questioning, "Who made the offer?" he replied: "The guy in the silver Mercedes".[46] Dr Moss asked: "You promise me you've had an offer of $2.6 million?" and he replied: "Chris, I promise". He was referring to Stuart Fleetwood.[47]

144 Mr Herman's evidence was that Dr Moss asked him if the other person was a property developer and that he said that he did not know.[48] He said that he only mentioned the name "Tom" in front of Ms John, which was later in the afternoon.[49]

Dr Moss Presses Mr Herman for a Guarantee about the Other Bid

145 Dr Moss said that he was going to ask Mr Herman a question, which he wanted him to answer very carefully because he was basing what he did on that answer. Mr Herman stated, "OK". Dr Moss then asked: "do you give me your guarantee as a reputable agent of R T Edgar that you received a $2.6 million bid from this guy who is the under bidder". Mr Herman said that he did. Dr Moss asked him if was absolutely sure about the details, because he was basing what he did on that and, if it was not true he would be taking action

45 T 1157-T 1158
46 T 1029, T 1165
47 T 1097, T 1204
48 T 1073
49 T 1162

and Mr Herman said that it was true.[50]

146 Dr Moss said: "OK, based on the fact that I have to beat a $2.6 million offer from this Lebanese property developer, I'll offer you $2.7 million", but added: "But I'll only offer you that money on the condition that you give me verification of that offer in writing". Mr Herman said: "That's all right".

147 Mr Herman agreed with much of this evidence about the request for guarantees.

148 At about this time, Ms John rang Dr Moss because she wanted to know what was happening about the $1.25 million offer for 502A. Dr Moss told her: "Look, they've had an offer for $2.6 million and they want $2.8 million. I'll talk to you later". Ms John soon called back and Dr Moss told her what Mr Herman had said about the offers that he had received. [51]

Dr Moss Threatens to Leave

149 Dr Moss went to his car and obtained the clauses that he wanted to be included in the contracts. He called Ms John and told her of the other offer and that he had had to offer $2.7 million. She expressed surprise that the price had gone from $2.4 million to $2.7 million so quickly and Dr Moss reiterated that the bidder was keen, drove a silver Mercedes and that they had no choice because he was a property developer. Dr Moss again rang Ms John and, amongst other things, stated: "We don't have any choice because he said he thinks he's a property developer, and that he said he wants to develop it". Ms John told him that she could not understand how the price had reached that level. He told her that Mr Herman had given his guarantee and that he was going to give them a letter on the Monday.[52]

150 Ms John rang Dr Moss again and said that she was not happy, was

50 T 195
51 T 195
52 T 196-T 197

concerned about this offer out of the blue and wanted him to leave and that they could talk about it later.

151 Dr Moss returned to apartment 502B while Mr Herman was still getting instructions on the $2.7 million offer and called out quite loudly to Mr Carbonaro, “Let’s go Charles”. Ms K Abay then walked down the corridor and Dr Moss told her, “You can tell Greg to call me” and that “Andrea is not happy at that”. Dr Moss came back and said that he had spoken to his wife and she was not happy and they were about to go, at which point Mr Herman called them back in.[53]

152 Mr Herman had been speaking to the vendors for ten to fifteen minutes. He returned and told Dr Moss: “Congratulations, you have bought a property.”[54]

153 Dr Moss expressed Ms John’s misgivings with the offer and said that he could not understand how Mr Herman had suddenly got this offer. Mr Herman said: “Don’t worry. It’s fine Chris. I did. Don’t worry about it, it’ll all be fine”. Dr Moss said that his wife wanted him to leave and that “she needs to come over here and hear all of this for herself”. Mr Herman said: “Don’t worry”.[55]

154 Dr Moss gave evidence that he decided to sit and talk to Mr Herman a bit longer, particularly about the special conditions that he wanted inserted in the contracts.

155 Mr Herman recognised the contract special conditions that Dr Moss produced. They had been previously provided to him by Mr Breeze and he realised that Mr Breeze was connected to the Mosses.

156 Mr Herman then commenced completing the contracts of sale and sat down with Dr Moss and Mr Carbonaro at the dining room table in apartment 502B. They discussed a confidentiality agreement.

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53 T 198, T 845
54 T 198, T 1179
55 T 198

157 Mr Carbonaro left the property at 1.08 pm.

158 Dr Moss rang Ms John and told her "they've accepted the offer. You need to come over now". She stated, "Don't sign anything until I get there".[56]

Ms John Arrives

159 At about 1.10 pm, while the contracts were being finalised, Ms John arrived at the property.

160 Mr Herman's evidence was that when Ms John arrived she screamed at her husband: "You stupid fucking plastic surgeon, you should have stuck to my plan."[57] He said that she was screaming, swearing and stomping around the living room.[58]

161 Ms John denied that she had spoken in that manner, or was critical of her husband.[59] According to Mr Herman, Dr Moss told his wife that he had to offer $2.7 million because Mr Herman had told him that someone else was prepared to buy it for $2.6 million.

162 Mr Herman's evidence was that while he was seated at the table preparing the paperwork, Ms John approached him, stood over him and demanded loudly and aggressively that he tell her who made the offer of $2.6 million. He felt intimidated. He said the "guy in the silver Mercedes". She called him a "fucking liar".[60]

163 Ms John's account was that in response to her question: "Who's this guy that's offered 2.6?" Mr Herman answered "the underbidder". In response to a question "Was he the Lebanese looking guy in the silver Mercedes?" he said "Yes". He also answered "yes" to the question: "Was he a property developer?" He said that his name was "Tom", but that he did not have his

56 T 559
57 T 1032
58 T 1033
59 T 630
60 T 1034

surname.[61]

164 According to Dr Moss, Ms John asked Mr Herman how the price had increased from $2.1 million to $2.7 million in ten minutes. She pressed for details of the offer. Mr Herman said of the offeror that he "was the guy in the silver Mercedes", "the underbiddder", his name was "Tom", that he was the "Lebanese looking guy" and "was a property developer".[62]

165 Mr Herman gave evidence that Ms John asked him many times what the bidder's name was. She placed him under considerable pressure. He said that he was reluctant to give the bidder's name, because of privacy considerations. Mr Herman gave evidence that he eventually plucked the name "Tom" at random, because Ms John was screaming. He could have selected "Dick" or "Harry". He said that he was driving a silver Mercedes, because that was a common car in Toorak. Dr Moss asked him in quiet terms "placate … [his] wife" while gesturing with his hands to that effect. Mr Herman wanted to help Dr Moss placate his wife, but he did not want to reveal the identity of the competing offeror, Mr Fleetwood.[63] She then called him a liar.

166 The suggestion that Dr Moss had quietly requested Mr Herman to placate his wife was not put to Dr Moss in cross-examination.

167 Mr Herman agreed that he wanted to calm everything down so the sale could go ahead.[64]

168 Mr Herman said that Ms John swore at him on a number of occasions, including when he told her that he did not know "Tom's" last name.[65]

169 Mr Herman's evidence was that at some point Ms John asked him if the

61 T 559
62 T 200
63 T 1035
64 T 1182
65 T 1033-T 1034

bidder was a property developer. Mr Herman said, "I'm not sure".[66]

170 Mr Herman told Ms John that he received the offer by telephone after the auction. She demanded to see the telephone and he refused. She said that she thought he was a liar.[67]

171 Ms John's evidence was that she asked to see Mr Herman's telephone to check that he had received an offer from "Tom". Mr Herman refused. Ms John's evidence was that she then called Mr Herman "a fucking liar"[68] and that he said "How dare you. I don't have to listen to this. My family can hear this."[69]

172 Dr Moss gave evidence that Mr Herman said to Ms John that "if you don't want to buy it I'll sell it to Tom."[70] She said "well Tom is a pretty strange name for a Lebanese property developer", to which Mr Herman said "I don't know if he's Lebanese – I didn't say he was Lebanese".[71]

173 Mr Herman at one point said "If you don't want to buy it don't, but I don't have to put up with this".[72] Ms John said to Dr Moss: "Let's go".[73]

174 Ms John showed Mr Herman a photograph of Mr Kartel on her telephone and said: "Is this Tom in the pink shirt"? Mr Herman said, on his evidence to placate her, either "Yes, it could be" or "Yes"[74]. She asked him, "Is this his car"? and again he said, "Yes" or "It could be". [75]

175 Mr Herman said that he was colour blind and did not recognise pink.

176 Ms John asked Mr Herman for "Tom's" surname and mobile telephone

66 T 1185, T 1035-6
67 T 201
68 T 560
69 T 560
70 T 560
71 T 202, T 560
72 T 1196
73 T 560
74 T 1036 and T 1186
75 T 1036

number. He said he had those details in his office and agreed to provide them. Ms John then said:

> "You had better be telling me the truth, Greg, because it's going to take me 25 seconds to find this guy."[76]

177 Mr Herman replied:

> "I'm not lying."

178 At 1.25 pm, after discussion about Mr Breeze's role at the auction and whether he had left a contact number, Ms John telephoned him and spoke to him for about five minutes. He told her that Mr Herman had his telephone number and that he had not ended negotiations. He was able to hear part of her conversation with Mr Herman. He heard her explanation of what had happened. He confirmed that Ms John used the term "property developer" on a number of occasions, but could not recall if Mr Herman had used that term,[77] or the words "underbidder" or "Tom". He gave evidence as follows:

> "Actually before Andrea started asking for this guy Tom's surname, she said to him - had said to Greg, 'So this guy Tom, this guy is a property developer. He's offered 2.6 million and you're telling me he's the same guy that's on my phone, in this photo on my phone' And I heard Greg say yes to that."[78]

179 Ms John concluded her conversation with Mr Breeze and stated: "Okay then, we don't have any choice, we'll go ahead."[79]

180 By making the call, Ms John disclosed Mr Breeze's association with them.

181 Dr Moss tried to calm things down and reminded his wife that they had been given a guarantee, but she said: "They're just thinking you're another stupid plastic surgeon, Chris. Let me do the negotiating"[80] and "You should have stuck to my plan".[81]

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76 T 204, T1190
77 T 781, T 784
78 T 746, T 561-4
79 T 564
80 T 204, T 561-3
81 T 1190

182 Towards the end of the conversation, Dr Moss again raised the question of assurances about the existence of the other offeror. Mr Herman said that he would write a letter by the following Monday about who had made the offer, confirming that it was genuinely made. Ms John said she wanted the information on R T Edgar Toorak's letterhead and Mr Herman said it would be provided on Monday.

183 Dr Moss attempted to write the special conditions that "You've had an offer from the guy in the silver Mercedes" in the contracts, but Mr Herman stopped him, stating "Don't do that. The lawyers won't like it", that "We can't alter contracts".[82]

184 Dr Moss said to Mr Herman: "Greg, do you give me your absolute word that you received an offer of $2.6 million?" Mr Herman said that he did. Dr Moss said to his wife:

> "Andrea, he's given us his word. You can't ask any more than that from a person, and he's going to give us a letter and it's fine." [83]

185 Ms John said "Okay". She asked where she signed the contracts and Dr Moss told her that he was to sign, and she left the property at 1.36 pm. Dr Moss signed and exchanged the contracts. Dr Moss went into the kitchen to speak briefly to the vendors to seek confidentiality surrounding the sale, and left at about 1.53 pm.

Ms John Meets Mr Kartel

186 The outcome of the auction may well have ended there had not events intervened.

187 Just before 2.00 pm, Mr Kartel, accompanied by Mr Boscolo, was driving in his silver Mercedes in Toorak Road near the property, to see if it had been sold.

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82 T 1037 and T 206 – see Court Book Volume 2, page 499

83 T 206

188 Ms John was also driving in Toorak Road and saw Mr Kartel. She flagged his silver Mercedes down and knocked on the window. She asked him if he was the person who was going to purchase the property. She told him that she had purchased it for $2.7 million. She asked him how much his final offer was and he told her that it was $2.2 million. She stated that: "We've been told that you're a Greek developer and you offered the property of $2.6 million". Mr Kartel denied that that was the case.[84]

189 Ms John accompanied Mr Kartel and Mr Boscolo back to 502 Toorak Road, where they met Dr Moss, whom Ms John had phoned. She then recorded on her iPhone a further conversation with Mr Kartel, Mr Boscolo and Dr Moss. There was also visual footage taken from a closed-circuit television monitor. In this conversation, Mr Kartel denied that he had offered $2.6 million and said that he had bid for the property to purchase it as a family home.

190 Mr Herman came out of the property at 2.04 pm to put the sold sticker on the agent's board.

191 The subsequent conversation was recorded without Mr Kartel or Mr Herman's knowledge on the Mosses' iPhone and was later transcribed. It occupies a number of pages. I will set out the parts that appear relevant.

192 Ms John opened the conversation by stating: "He didn't call you to offer 2.6. He did not call you to pay 2.6."[85]

193 Mr Herman said to Mr Kartel: "Didn't you say that you would 'pay anything more than they did'."[86] Mr Kartel denied this and said that he had told Mr Herman that his best offer was "probably looking at $2.2", and when told of the offer of $2.35 million, had said "give it to them".

194 The transcript included the following:

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84 T 903
85 Court Book page 864
86 Court Book page 864

"CJM (**Dr Moss**):

Whereas you said he'd offered $2.6 and I bought that from you on the grounds that they'd offered $2.6?---

Tom (**Mr Kartel**):

No, I didn't.

GH (**Mr Herman**):

I hadn't told you that then.

CJM: You told me they'd offered $2.6. You said you had two offers at $2.6, one from the guy before and one from this guy with the pink shirt. And then you changed it and you said that it was just one, and it was Tom?---

GH: Right.

CJM: … and Tom had been through the place heaps …?---

Tom: Once.

CJM: … and Tom says he's only been through the place once.

GH: OK.

CM: So there's a lot of inaccuracies here. So, Greg, my recommendation is …

ALJ (**Ms John**):

My recommendation is call the *Herald Sun*.

CJM: He reckons, he reckons, he reckons we've paid $400,000 dollars too much so you have to do some really fast thinking.

ALJ: We've got to figure this one out, because I know it's your sister and you're trying to help her out here.

CJM: 'Cos as far as I'm concerned, and I want to say this, and I want to say this in front of everybody – I am not happy.

[Tom laughs]

Inaudible words

GH: Let me solve, I'll sol …

CJM: No, no, no.

ALJ: It's 2.4 or none."[87]

195 There was a dispute about the words highlighted and whether they indicated

[87] Court Book page 865

that Mr Herman had sought an opportunity to explain things, by saying "let me say".

196 At 2.07 pm, Mr Herman returned inside the property and a further conversation occurred outside between the Mosses and Mr Kartel.

197 At 2.20 pm, Ms John phoned Mr Fox and left a message stating:

> "Pls Ph Andrea Moss Urgent … Unless you want to be on the front page of *Herald Sun* tomorrow (Sun)."[88]

198 Considerable conversation followed between the Mosses and Mr Kartel.

199 The Mosses commenced to knock on the door, ring the door bell and telephoned to get Mr Herman to return outside.

200 At 2.27 pm, Mr Herman came out of apartment 502B and a further recorded conversation occurred. Again, I will set out the relevant parts of it.

201 Dr Moss asked Mr Herman if he was going to honour the contract, to which Mr Herman replied "yes". On two occasions Mr Herman was interrupted while stating "let me tell you …" Mr Herman stated "It was your stupidity" and that Dr Moss had offered $2.65 million. Dr Moss denied that suggestion and Mr Herman stated "No, you didn't but your friend did". The following was said:

> "CJM: That's irrelevant.
>
> ALJ: Who, who Justin? …Justin walked away at 2.35.
>
> GH: The guy … The dark guy who was here …
>
> ALJ: He didn't offer 2.6.
>
> CJM: Bullshit.
>
> ALJ: He was not qualified to do that. He was hired to buy one apartment, not the lot.
>
> GH: No he offered … Let me have the opportunity to explain … OK?
>
> CJM: Greg, I'm not happy, all right. Tear the contract up. Tear 'em up.
>
> ALJ: We're cancelling the f…..g cheques.

88 Court Book page 550

CJM: Cancel the whole thing. We'll talk in court.

ALJ: We'll let the lawyers 'deal with it'.

GH: Please listen for one second …."[89]

202 Dr Moss said that after the recording stopped he had a final exchange with Mr Herman in which he said that this sort of thing gives real estate agents a bad reputation. Mr Herman said that he was an idiot, to which Dr Moss replied that he was an idiot for trusting him.[90]

Remaining Events on and after 27 February 2010

203 At 2.47 pm, Dr Moss telephoned Mr Fox and left a message complaining about the auction process. He left subsequent messages. Ms John did also. At about 6.35 pm, Ms John received a voicemail message from Mr Herman, expressing an apology, but that appears to have been a message intended for another person, with whom he had been unable to keep an appointment. Mr Herman did leave a message for Dr Moss but it is not clear what the effect of that message was.

204 At about 4.30 pm, Dr Moss and Ms John spoke with Mr Fox on the telephone. Dr Moss voiced his complaint about the conduct of the sale, stating that Mr Herman had given them a fake offer and they had purchased the property at an inflated price. Mr Fox stated something like:

> "If you had just come and talked to me Chris personally, we're friends. If you had just come and talked to me personally you could have got it for $2.5 million."[91]

205 Dr Moss stated that that was not possible. He explained that Mr Rohan, who had provided him with a valuation of the property, had informed him that Mr Fox had told him that Dr Moss was the main interested party, even though he had not directly expressed interest. Mr Fox replied that he had been at every open for inspection. He told Mr Fox that he wanted him to tear up the

89 Court Book pages 880-881
90 T 224
91 T 221, T 415

contracts. Mr Fox said that that could not be done. Dr Moss said either the contracts would have to be torn up or the price adjusted. Mr Fox said that he was not prepared to do any of those things and the best he could do was to try and on sell the properties for them. Dr Moss said that was not acceptable and that he was not happy with what Mr Herman had done. Mr Fox said that he was very comfortable with everything that Mr Herman had done, and said:

> "Well, as a matter of fact, you've outsmarted yourself by half and you've been too clever in spades and now you've paid too much for the property and now you're angry. Everybody wants to argue about the price. You know people need to just pay the money and get over it."

Dr Moss replied:

> "Jeremy, that's not what happened here. This is a lie and, you know, we wouldn't have paid that amount of money if you hadn't told that lie."[92]

Mr Fox ended the phone call.

206 Dr Moss received a message to call Mr Herman. He did not on legal advice.

207 On Monday, 1 March 2010, he spoke with Mr W Anderson of R T Edgar Toorak, whom he had known for a long time and said "Greg has told us a lie and on the grounds of that we've purchased the property and we're very unhappy."[93] Mr Anderson said that he would look into the matter and he would get back to him to see whether they could try and sort it out.

208 Mr Anderson called Dr Moss back about a week later and proposed a meeting to renegotiate contracts. Dr Moss would only agree to that if Mr Herman admitted he had told a lie. He said that in answer to his question had he admitted the lie. Mr Anderson said "yes". The evidence did not identify what the lie was. Dr Moss told Mr Anderson that there was no use meeting "unless we're talking about changing the contract price to no more than $2.5 million". He asked Mr Anderson if that was a possibility, but Mr Anderson said "no", but then said "everything is on the table. That's a possibility. I'll get back to

92 T 223
93 T 239

you."[94] Apparently a without prejudice meeting was held.[95]

209 Ms John gave evidence that on the Monday she spoke to Mr Fox and said that they were not going to tear up the contract and that Mr Herman had lied to them. On the same day, Ms John instructed the bank to place the deposit cheques on hold.

210 Mr Fox was not called to give evidence. Peachbulk submitted that I should conclude that his evidence would not have assisted the defendants on the issues of how he and Mr Herman regarded Mr Fleetwood's offer and whether it was in the terms of the emails that Ms Abay and Ms Fleetwood sent him and on the issue of whether there was a reserve price before the auction. Mr Anderson was not called as a witness. A similar submission was put in respect of his potential evidence about whether Mr Herman had admitted a lie and if so what it was. In the end I have reached a conclusion in the case without having to place any weight on these submissions.

The Offer to Rescind

211 On the Sunday, Mr Herman told Ms Fleetwood and Ms Abay that the purchasers wished to get out of the contracts for the sale of the property because they were unhappy with the price that they had paid. The vendors were agreeable, particularly Mr M Abay snr, who was sad over selling his apartment. Ms Fleetwood considered that a higher price could have been obtained. They agreed to split the advertising costs.

212 On the Monday, at Mr Herman's request, Ms Abay and Ms Fleetwood sent him emails, stating:

> "You have my authority on the sale of 502a Toorak Road, Toorak to tear up the contracts and return the deposit to the purchaser.
>
> The purchaser is to sign a letter releasing the vendors and vendor's agents from any further obligations or proceedings or liability under the

94 T 241
95 *supra*

contract and this email is to remain confidential."[96]

213 Mr Fox sent an email to Ms John, stating:

> "Further to our numerous telephone conversations on Saturday requesting to withdraw [from] the contract and my subsequent conversation with the vendors, they have sent an email this morning confirming that if you wish to withdraw from the contract on both properties you may do so (see attached). We will return the cheque and they will rescind the contracts on the above mentioned properties forthwith. The vendors do not want any animosity with the next door neighbours or to be drawn into any threatened and misconceived legal battle. We are sorry you feel aggrieved although we do not agree with your position the vendors have agreed with your request."[97]

214 Ms John emailed in reply:

> "This is not satisfactory."[98]

215 Mr Fox emailed in reply:

> "I cannot understand why this is not satisfactory. You have got everything you wanted."[99]

216 On the Tuesday, Dr Moss' solicitors wrote to Mr Herman requesting confirmation in writing of the bid for $2.6 million and the surname of the bidder "Tom" that had been promised by Mr Herman.

217 At Mr Herman's request, Ms Abay, on 3 March 2010, sent him an email setting out her account of events on auction day. Of particular relevance is the following passage:

> "When the property, 502A and B Toorak Road, was passed in to the top bidder, my step daughter, Kimberley Fleetwood, and myself advised the agent, Greg Herman, that the reserve was 2.6 million dollars.
>
> A few minutes later, after this reserve had been stated to be the top bidder, my son-in-law, Stuart Fleetwood, walked in and was not happy and said the reserve was too low, and that he would buy it back for 2.6 million and develop it. To which the agent, Greg Herman, said we couldn't go back on the auction rules, which was to give the top bidder the right of first refusal at the reserve price."[100]

218 On 29 March 2010, Ms K Fleetwood sent an identical email to Mr Herman.

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96 Court Book page 563
97 Supplementary Court Book page 272
98 Supplementary Court Book page 273
99 *supra*
100 Court Book page 574

219 On 13 March 2010, Mr Herman, as a director R T Edgar (Toorak), wrote to Clarke Toop & Taylor, the Mosses' lawyers, withdrawing the offer to rescind. The letter also stated:

> "I write this as a point of clarity as on Saturday, 27th February your clients requested to be released from the contract. This request was agreed to by the vendors and then not agreed to by Mrs Moss."[101]

220 Settlement of the sale of the properties occurred on 27 April 2010.

Mr Sutherland's Valuation Evidence

221 The plaintiff called Mr Geoffrey Sutherland to give a valuation of the market value of the property on 27 February 2010. He was a witness of vast experience, having first qualified as a Member of the Australian Institute of Valuers in 1958. He became a Licensed Estate Agent in 1960 and has conducted hundreds of auctions. His valuation was that as at 27 February 2010, the current market value of 502A Toorak Road was $1,075,000 and of 502B Toorak Road $1,150,000, both exclusive of GST, and the combined value was $2,225,000. Mr Sutherland did not agree that the fact that Dr Moss had purchased the property for $2.7 million meant that that was its true value as at 27 February 2010. He emphasised that one sale at an auction, particularly to someone anxious to purchase the property, did not demonstrate its true value.

Did Mr Herman Make the Representations Pleaded?

222 The plaintiff's pleading of the representations runs together two conversations. The first was between Dr Moss, Mr Carbonaro and Mr Herman, which preceded the making of the offer of $2.7 million. The second was between Dr Moss, Ms John and Mr Herman which preceded the signing of the contracts. A number of the particulars allege that Mr Herman made certain statements to Dr Moss, when they were made principally to Ms John in reply to her questions. Dr Moss was present when these statements were made. There

101 Court Book page 579

is no reason why the things said by Mr Herman to Ms John, when Dr Moss was also party to the conversations, should not be treated as also having been said to Dr Moss.

223 It is common ground that Mr Herman described the person making the offer as a man driving a silver Mercedes. Mr Herman accepted in evidence that Dr Moss had only made a bid of $2.7 million after he told him that he had received a bid of $2.6 million from “a guy in a silver Mercedes”.

224 The parties made elaborate submissions about the credibility of many of the witnesses. I have based many of my findings on evidence which is supported, at least in general terms, by more than one witness. I have also taken into account surrounding circumstances and the conduct of the parties, when they throw light on the reliability of evidence, as is the case with the Fleetwood offer.

225 The agents’ counsel submitted that Dr Moss and Ms John’s evidence, when it conflicted with Mr Herman’s, should be treated with suspicion and disbelieved as a “collaborative concoction”. This submission was undermined by the later submission that the inconsistencies in their evidence made it unreliable. I accept that Dr Moss and Ms John, and perhaps other witnesses, have discussed the events of the auction day perhaps many times. It would be surprising if married couples, members of families and friends did not. But that does not establish any concoction of evidence. Reference was also made to the many phone calls Ms John made to various persons who were involved in the events of the auction. I do not accept that that throws doubt on her evidence. It rather reflects the fact, readily apparent from other evidence in this case, that a number of witnesses could not go for more than a few minutes without using mobile and iPhones to “communicate” with someone else.

226 I have taken into account the defendants’ submissions about the way that

particularly Ms John gave evidence. It was argued that she had been suspicious. Her evidence and conduct on the auction day was said to be appropriately unfavourably contrasted with the calm and measured evidence and conduct of Mr Herman. I consider that these differences more reflected the temperament of the witnesses rather than being a factor determinative of whether their evidence was reliable.

227 I have considered the submissions about the inconsistencies in various accounts of evidence. I do not consider that the inconsistencies affect any matter of substance.

228 I do not accept the agents' submission that on the important issue of the terms of the representations, that Peachbulk's witnesses showed any frailty or imprecision of memory.

229 I do not accept much of Mr Herman's evidence on the matters critical to this proceeding for the following reasons. First, for the reasons that I give below, I do not accept his evidence about his reliance on the Fleetwood offer. Secondly, I do not accept his evidence that he did not know that Mr Kartel was bidding at the auction. Thirdly, I take into account his admissions that he told a number of lies on the auction day. These included the particulars he gave the Mosses of the other offeror, and his statements when Ms John showed him the photographs on her iPhone. Fourthly was his failure to tell the vendors that the Mosses were accusing him of making false statements.

230 I am satisfied that Peachbulk has proved that Mr Herman, on 27 February 2010, before Dr Moss signed the contracts of sale, stated that the under bidder at the auction, a man named "Tom", following the auction, had made an offer on his telephone to purchase the properties for $2,600,000. This finding is supported by the evidence of Dr Moss and Mr Carbonaro.

231 I find that Mr Herman mentioned the man named "Tom" in the conversation with Dr Moss and Mr Carbonaro and in the second conversation following the

interrogation by Ms John. I find that Mr Herman told him all of these matters, before he offered $2.7 million. I find that Mr Herman repeated them to Ms John before Dr Moss signed the contracts.

232 So far as the particulars of the representations are concerned, the evidence that I have set out establishes that Mr Herman made a number of the representations on which Peachbulk relies. I accept the following parts of Dr Moss and Mr Carbonaro's evidence about the statements that Mr Herman made during the first conversation. That Mr Herman had received a bid of $2.6 million after the auction by telephone from the underbidder, who had been present at the auction. That the underbidder's name was "Tom", that he was driving a silver Mercedes, and that Mr Herman could not remember his last name, but had it in his office. That the underbidder was serious and had been through the property many times, that he gave his absolute word that the offer had been received. That the underbidder was a property developer.

233 I accept Dr Moss' evidence that in the first conversation Mr Herman said that the other bidder was serious and had been through the property many times and that he had received the offer on his telephone after the auction. I also accept that he said that if Dr Moss did not buy the property, "Tom" would buy it.

234 The agents placed considerable reliance on Mr Herman's statement to the Mosses and Mr Kartel in the first street conversation that "I hadn't told you that then" as supporting Mr Herman's evidence that Dr Moss offered $2.6 million before he was told of any other offer.

235 I do not accept Mr Herman's evidence on that point and the fact that he asserted that account in the first street conversation does not alter my view. In any event, the more important question is what Dr Moss was told before he offered $2.7 million.

236 I find that in the second conversation Mr Herman repeated that he had

237 I do not accept that Mr Herman's use of Mr Kartel's first name, "Tom", was a coincidence. He denied that he recognised Mr Kartel in the auction crowd. I do not accept that evidence. He had met Mr Kartel at an open for inspection, where he had made a substantial bid. He later made a bid on the telephone. Mr Kartel had drawn attention to himself by questioning, or heckling Mr Fox during the auction. After the auction, Mr Herman went and spoke to Mr Kartel who was standing next to his silver Mercedes. Mr Herman must have known that Mr Kartel was the underbidder. To suggest, as he did, that he did not even know during the auction that Mr Kartel was bidding or that he was the under bidder, is entirely implausible.

238 Mr Herman's credibility on this issue is critical because the Mosses' understanding was that the other bidder being referred to was Mr Tom Kartel. The fact that Mr Herman denies that he even knew that this other "Tom" was at the auction throws considerable doubt on his account of events.

239 I do not accept Mr Herman's evidence that he made the representation on a whim and thought of it then and there whilst at the dining room table with Dr Moss and Ms John.[102] I do not accept his evidence that he mentioned the name "Tom" merely to do Dr Moss a favour by placating Ms John. It was equally in Mr Herman's interests to placate Ms John to make sure that she did not cause the sale to go off.

240 A number of Mr Herman's statements were false, even accepting that he regarded Mr Fleetwood as having have made a bid of $2.6 million for the whole property. Mr Fleetwood was not the underbidder, he was not a property

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102 T 1055

developer, his name was not “Tom”, he was not wearing a pink shirt and Mr Herman knew his name.

241 Mr Herman’s account of the representations was premised on the central point that the offer to which he was referring had come from Mr S Fleetwood. The evidence does not support a conclusion that Mr Herman could have treated what Mr Fleetwood said as an offer to purchase the whole property for $2.6 million. Most of the other witnesses did not so regard it. I find that Mr Fleetwood did not make such an offer.

242 Mr Herman’s explanation that he wished to preserve Mr Fleetwood’s privacy is not a credible explanation for his behaviour as he could have explained that he had received another offer, without adding the matters which formed part of the representations.

243 I find that Mr Herman decided to create the impression that another bidder at auction had offered $2.6 million and was keen to buy and develop the property. He may have started out relying on Mr Fleetwood’s offer, but by the time the second conversation was completed he had created a misleading and deceptive picture of the other bidder.

244 I find that Mr Herman did not believe that Mr Fleetwood had made the $2.6 million offer, which was the subject of his representations.

245 Mr Herman had ample opportunity to state his case that he had received the Stuart Fleetwood offer, if that was what he based his statement on, but he never did so. It was significant that Mr Herman, at no relevant point, informed Dr Moss or Ms John that the offer in fact came from someone other than the underbidder. They made it very plain to him, not least in the conversations in the street after the auction, that they believed that he had told them that Tom Kartel was the source of the offer. All that Mr Herman needed to say was: “You have misunderstood – there was another offer”. He never said that or anything like it.

246 I am prepared to accept that the heated language that Ms John used to Mr Herman in the second conversation before the contracts were signed and in the later conversations, may have restricted the ability of even a very experienced real estate agent to respond in the manner he might otherwise have. But he had ample opportunity to do so later that day, the following day or the following week, even if necessary by a text message. Dr Moss and Ms John were accusing him of conduct that was unprofessional practices. If he had really believed that Mr Fleetwood had made an offer, and he had relied on that offer as the basis of his statements to the Mosses, I do not accept that he would not at some point, either later on the Saturday, 27 February or very soon thereafter, have told them that they had misunderstood things and that there had been another offer.

247 There is a further point. If Mr Herman had really believed that Mr Fleetwood was an offeror for the property, it is improbable that he would not have contacted Mr Fleetwood to see if he wished to better Dr Moss' offer of $2.7 million. Mr Fleetwood had left the property and Mr Herman did not attempt to contact him further. That suggests that he did not regard Mr Fleetwood's statement as an offer.

248 The only conclusion is that when Mr Herman made the representations he was not relying on the Fleetwood offer and not relying on any other offer.

249 This an appropriate point to mention the submission that in reality Mr Herman, both in the second conversation at the property and in the conversations in the street, was acting to placate Ms John and was unable to get a word when faced with her aggressive language. This evidence was not put to Dr Moss in cross-examination. The submissions of the agents' counsel were highly critical of the manner in which the Mosses, particularly Ms John, had behaved towards and spoken to Mr Herman. I will simply say that, even allowing for the fact that Ms John considered that she had been the victim of underhanded conduct, the language she used in addressing Mr Herman did her no credit.

250 However, I do not accept that Ms John's behaviour prevented Mr Herman from responding to her allegations.

251 I also do not accept that Mr Herman was a mere conduit of the terms of Mr Fleetwood's supposed offer, or that it did not contain statements of fact. The evidence does not support those submissions.

Were Mr Herman's Statements Misleading or Deceptive?

252 To determine whether conduct, in this case oral representations, was misleading or deceptive requires consideration of the ordinary meaning of the words used.

253 Conduct is misleading or deceptive if it induces or is capable of inducing error.[103] Whether it has that character is a question of fact. Because the relevant conduct was directed at individuals, the Court undertakes an analysis of the relevant conduct in relation to the plaintiffs alone, bearing in mind what matters of fact each knew about the other as a result of their dealings and the conversations between them, or which each is taken to have known: see *Butcher v Lachlan Elder Realty Pty Ltd*.[104]

254 Peachbulk argued that the representations were false, in that Mr Herman had not received an offer of $2.6 million from the underbidder, who was a property developer, who wanted to develop the property and who had been through it many times.

255 The agents conceded that Mr Herman's statement that an offer of $2.6 million had been made by a person called "Tom" in a silver Mercedes was false, in that no offer in that sum had been made by anyone called "Tom". However, they submitted that in essence, Mr Herman had received what he considered to be an offer of $2.6 million from Mr Fleetwood and that in order to purchase the property, Dr Moss would need to offer in excess of that sum.

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103 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198

104 (2004) 218 CLR 592 at page 604 [37] per Gleeson CJ, Hayne and Heydon JJ

256 The agents submitted that it was irrelevant whether Mr Fleetwood's statement was an offer because, objectively, it sounded like an offer and Mr Herman took it as an offer.

257 The result of my consideration of the Fleetwood offer in the previous section of this judgment is that I do not consider that it was an offer. Secondly, I do not consider that Mr Herman was relying on it when he made the representations.

258 As a consequence, each of the representations that Peachbulk has pleaded and that I have found in paragraphs 230 to 237, that Mr Herman made, was misleading and deceptive, or likely to mislead or deceive.

Were the Representations made in Trade and Commerce?

259 According to current authority, a decision by a vendor to sell their home is not conduct in trade or commerce and therefore does not attract the operation of s.52 of the *Trade Practices Act* or s.9 of the *Fair Trading Act*. In *O'Brien v Smolonogov*,[105] the Full Court of the Federal Court, dealing with the sale of land by individuals, stated:

> "The conduct complained of was not something done by the [vendor] in the course of carrying on a business and it lacked trading or commercial character as a transaction."[106]

260 Although Peachbulk ultimately put this proposition in issue, I will apply the principle stated in *O'Brien v Smolonogov*. Therefore the vendors, who are individuals, are not liable for breaches of s 52 or s 9 of the respective statutes.

261 However representations by real estate agents about the sale of property are conduct in trade or commerce.[107]

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105 (1983) 53 ALR 107

106 (*supra*) at page 114

107 *Butcher v Lachlan Elder Realty Pty Ltd* (*supra*) at page 602 [31] and *Australian Competition & Consumer Commission v Gary Peer & Assocs Pty Ltd* (2005) 142 FCR 506

Was R T Edgar Toorak liable for Mr Herman's Conduct?

262 Peachbulk argued that R T Edgar Toorak, as principal or employer, was jointly and severally liable, or vicariously liable, with its agent or employee, Mr Herman, for any tortuous act or omission committed by the agent or employee, while acting within the scope of his or her actual or ostensible authority.[108] Mr Herman was a director of R T Edgar Toorak.

263 I accept that submission.

264 In addition, R T Edgar Toorak is liable under s.84(4) of the *Trade Practices Act* for Mr Herman's misleading and deceptive conduct.

265 Peachbulk also pleaded that Mr Herman had accessorial liability for R T Edgar Toorak's breaches of the Acts. However, this was not really pressed in final submissions and reliance was placed on his primary liability.

The Vendors' Liability for Mr Herman's Conduct

266 Peachbulk also contended that a principal, in this case the vendors, would ordinarily be liable for the breaches by its agents of the *Trade Practices Act* and *Fair Trading Act.*

267 The fact that the vendors were not engaged in trade and commerce issue is an answer to claims against them as principals.

268 In addition, the vendors were not corporations and are therefore not liable under s.52 of the *Trade Practices Act*.

269 A vendor of property is not considered to have engaged in trade or commerce in selling their home by reason of the operation of s.84(4) of the *Trade Practices Act* because that provision does not impute the business of the agent to the principal: see *Argy v Blunts & Lane Cove Real Estate Pty Ltd*.[109]

270 Section 144(4) of the *Fair Trading Act* does not extend to deeming the

108 *Briess v Woolley* [1954] AC 333 at 348

109 (1990) 26 FCR 112 at 130

conduct of an agent to be the conduct of the principal. Therefore there is no vicarious liability created by that statute of the vendors for the actions of the agent.

271 Peachbulk relied on the decision in *Aliotta v Broadmeadows Bus Service Pty Ltd*[110] and *Havyn Pty Ltd v Webster*.[111] In *Aliotta*, which was a case alleging contravention of s.52 of the *Trade Practices Act,* the Court concluded that as between the vendor and an intending purchaser, the vendor's agent has authority on ordinary principles of agency to bind the vendor by any representation made as to the nature or quality of the property, even if it is false, unless some limitation on the agent's authority was known to the intending purchaser. In *Havyn*, the point does not appear to have received much consideration – the vendor was sued because of an agent's brochure.

272 However in this case, the fact that the vendors were not acting in trade or commerce means that, even if the decision in *Aliotta* were applied, it would not render the vendors liable.

273 In respect of the vendors' possible liability under the *Fair Trading Act*, which applies to persons and not just corporations, they submitted that it must be established separately against each of them that they had the relevant knowledge required to render their conduct a contravention of s.9. They submitted that the acts of an agent are insufficient to found liability of the principal under the *Fair Trading Act* without the direct involvement of the principal in the act which constitutes the contravention. They relied on *Houghton v Arms*[112] and *Astvilla Pty Ltd v Director of Consumer Affairs.*[113] For relevant purposes, those decisions decide, that to be liable as a principal for misleading and deceptive conduct, a person must have engaged in conduct themselves.

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110 (1988) ATPR 40-873
111 [2005] NSWCA 182
112 (2006) 225 CLR 553
113 [2006] VSC 289

274 The vendors submitted that they had not themselves engaged in misleading or deceptive conduct. I accept that submission, but will postpone detailed consideration of it until I deal with the vendors' accessorial liability.

275 Ms K Fleetwood argued that insofar as she was sued individually under s.9 of the *Fair Trading Act*, any statements made by her were not made in a business context, but in the context of selling her grandfather's residence as administrator. I will deal with her position when dealing with the vendors' vicarious liability for the agents' deceit.

Accessorial Liability of the Vendors

276 Peachbulk pleaded but has not established a case that the vendors were liable as accessories for R T Edgar Toorak's breaches of the *Trade Practices Act* and *Fair Trading Act*. Accessorial liability is possible under s.75B and s.158 (4). The required evidence of involvement and knowledge identified in *Yorke v Lucas*[114] has not been established.

277 The vendors submitted that there was no evidence that they knew that a false representation had been made. Their position had to be considered individually.

278 In *Australian Competition and Consumer Commission v IMB Group Pty Ltd*,[115] the Full Court of the Federal Court stated:

> "However, absent a finding of wilful blindness, it is necessary to establish actual knowledge on the part of the person to whom it is sought to sheet home accessorial liability in respect of a contravention of PtV."[116]

279 The vendors submitted that the evidence did not establish that they:

(a) knew that Mr Herman intended to make the representation;

(b) knew that the representation was made;

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114 (1985) 158 CLR 661
115 [2003] FCAFC 17
116 at [135]

(c) knew that the representation was false;

(d) did not disclose Dr Moss and Ms John's complaints.

280 They submitted that Mr Herman did not disclose to them that he had made the representations, nor Dr Moss and Ms John's complaints that they were false. Rather, Mr Herman tried to cover up his conduct and, in doing so, misled them. Mr Herman told them that the unhappiness of the purchasers and their desire to tear up the contracts arose from their conclusion that they had paid too much for the property, a case of buyers' remorse, perhaps because they had bid against themselves. They did not know of the allegations against Mr Herman until they were joined to the proceeding, some months after it was commenced, on 14 October 2010.

281 They submitted that there was no evidence that Mr M Abay snr had knowledge of the making of the representation or of any act by him which could be construed as his involvement in the making of it. He was not in a condition to give evidence.

282 I accept Ms K Fleetwood's evidence that she did not know that Mr Herman had made the representations to Dr Moss and Ms John. Her evidence was that when she heard a loud commotion coming from the front of 502B Toorak Road, Mr Herman came back to the kitchen and said:

> "It's the plastic surgeon's wife and she's going nuts at her husband. They have been bidding against each other and they're not happy. They think they've, you know, I don't know."[117]

283 Ms K Abay gave evidence that Mr Herman did not tell her that Dr Moss and Ms John had complained about her conduct. Peachbulk made submissions attacking the credibility of Ms Abay's evidence, but there was nothing of substance to contradict it. I accept her evidence on this issue.

284 There were a few items of potentially relevant evidence in which Ms Abay was

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117 T 1348

involved and which were relied on by Peachbulk. She was present for a short time in the living room before the contracts were signed and she telephoned Mr Herman after the auction. She had a brief discussion with Dr Moss at the rear of the property after the auction. She did agree to rescind the contract.

285 None of these matters proved the knowledge required to make Ms Abay liable as an accessory.

Deceit

286 Peachbulk's claim in deceit alleges that the representations that were pleaded were made fraudulently, in that Mr Herman knew them to be false, or alternatively, did not have a genuine or honestly held belief in their truth at the time they were made. To succeed in an action in deceit the plaintiff must establish that:

(a) the defendant stated a matter of fact which is untrue;

(b) the defendant knew the matter of fact to be untrue or was reckless as to its truth or falsity;

(c) the defendant made the statement with the intent to induce the plaintiff to act upon it;

(d) the plaintiff was induced to act upon it;

(e) the plaintiff has suffered loss and damage

287 The plaintiff has established each of these matters in respect of the representations that I have found proved in paragraphs 230 to 237: see *Breeze v Woolly*.[118]

288 Peachbulk argued that Mr Herman knew that it was false or reckless to make the statements about the offeror and had failed to withdraw or modify them

118 *supra*

when given the opportunity. He had actively concealed the true identity of the offeror.

289 The agents submitted that the evidence did not support a finding that Mr Herman knew that Mr Fleetwood had not made an offer of $2.6 million or was reckless as to whether that was the case. They pointed to the heavy onus of establishing the tort of deceit and contended that making a false statement through want of care or a false statement honestly believed on insufficient grounds was not fraud.

290 The argument in respect of deceit covered much the same ground as applied to the consideration of the misleading and deceptive conduct claims. The agents conceded that Mr Herman's statement that an offer of $2.6 million had been made by a person called "Tom" in a silver Mercedes was false, in that no offer in that sum had been made by anyone called "Tom". However, an offer of $2.6 million had been made by Mr Fleetwood and he did drive a silver Mercedes. They stated that what was true was that Mr Herman had received what he considered to be an offer of $2.6 million and that in order to purchase the property, Dr Moss would need to offer in excess of that sum. The natural and ordinary meaning of Mr Fleetwood's words conveyed that he would purchase the property for $2.6 million. Mr Herman had an honest belief that there was an offer of $2.6 million from Mr Fleetwood, that his statement that the offer could not be conveyed confirms this. No one corrected his belief and there was nothing else that Mr Herman ought reasonably to have done to ascertain the truth of the matter.

291 Because of the findings I made in considering the misleading and deceptive conduct claims, I also consider that Peachbulk has established that Mr Herman has established a case of deceit based on the false representations that I have set out in paragraphs 230 to 237. I find that Mr Herman knew that these representations that he made to Dr Moss and Ms John about the offeror were false or that he was reckless as to whether they were true. I do not

accept that he was basing his comments on the statements of Mr Fleetwood. He intended that the Mosses would act on his representations, and they did.

292 I have taken into account that the allegations of deceit are serious in nature, involving proof of fraudulent misrepresentations. However, I consider that there is clear and cogent proof of the fact that Mr Herman knew the representations to be false and was reckless as to whether they were true: see *Briginshaw v Briginshaw*[119] and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*.[120]

293 R T Edgar Toorak is again liable for Mr Herman's conduct.

Vendors' Liability for Mr Herman's Representations

294 So far as the vendors' liability for the agents' deceit is concerned, they accept that Mr Abay and Ms Abay are liable as principals, but argue that Ms Fleetwood was not a principal.

295 The vendors rely on their Notice of Contribution and Indemnity, which is dealt with below.

296 Principals are liable for the fraud of their agents while acting within the scope of their actual or ostensible authority.[121]

297 The vendors argued that Ms Fleetwood was not a principal since she was acting as administrator and therefore was not vicariously liable for the actions of the agents.

298 I was not referred to authority on this issue.

299 Ms Fleetwood was acting as administrator of her grandfather's affairs. Her grandfather, Mr Michael Abay snr, is also sued as a defendant. She signed

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119 (1938) 60 CLR 336

120 (1992) 67 ALJR 170 at 170-171

121 See *Briess v Woolley* (*supra*) at 348 and *Colonial Mutual Life Assurance Society Ltd v Producers & Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41

the contract of sale of his apartment as "Administrator of the estate of Michael Abay pursuant to an order of the Victorian Civil and Administrative Tribunal dated 15/1/09". That order gave her all of the powers and duties conferred by *PART 5*, Divisions 3 and 3A of the *Guardianship and Administration Act* 1986. Section 58B states, in relevant parts:

> "(1) Subject to and in accordance with this Act and the administration order appointing an administrator in each case-
>
> (a) the administrator has the general care and management of the estate of the represented person; and
>
> …
>
> (c) the administrator in the name and on behalf of the represented person may generally do all acts and exercise all powers with respect to the estate as effectually and in the same manner as the represented person could have done if the represented person were not under a legal disability.
>
> (2) Without limiting subsection (1), an administrator may in the name and on behalf of a represented person –
>
> …
>
> (g) sell, exchange, partition or convert into money any property."

300 While Ms Fleetwood signed the contracts as administrator in the name of Mr Abay snr, she did not specify that role when she signed the agent's authority. But it was clear that she was so acting.

301 In February 2011, a litigation guardian, Ms Michaela Abay, was appointed to act for Mr Abay snr in the proceeding.

302 Peachbulk has succeeded against Mr Michael Abay snr and Ms K Abay on the basis of their vicarious liability for the agents' actions.

303 No party submitted that the effect of the administration order was that Mr Abay snr could not be sued personally in the proceeding.

304 Ms Fleetwood was not sued in her capacity as administrator representing Mr Abay senior. Rather, he was sued separately.

305 I do not consider that Ms Fleetwood, as Mr Abay's administrator, is vicariously liable as well.

306 The scheme of the *Guardianship and Administration Act* appears to be that the administrator can exercise powers in effect as the person in respect of whose estate the guardianship order has been made.[122] When the administrator enters into a contract, she is doing so as the person for whose estate she is administrator. She is not a principal in her own right appointing another agent, but acting as the person whose estate she administers.

307 The complication is that Ms Fleetwood did not purport to act as administrator when she signed the agent's authority. But she must be taken to have done so because that was the only authority she had to bind her grandfather. I do not consider that as administrator she has separate liability additional to her grandfathers'.

308 The proceeding against Ms K Fleetwood is dismissed.

Reliance - Did Peachbulk Suffer Loss and Damage by the Agents' Misleading and Deceptive Conduct and Deceit?

309 To recover damages for misleading and deceptive conduct in breach of the *Trade Practices Act* the plaintiff must establish that it has suffered loss and damage "by" that conduct: s.82. The *Fair Trading Act* requires proof that the plaintiff has suffered loss, injury or damage "because" of a contravention of a provision of the *Act*: s 159.

310 In *Wardley Australia Ltd v State of Western Australia*, Mason CJ said of s.82:

> "… In this situation, s82(1) should be understood as taking up the common law practical or commonsense concept of causation recently discussed by this Court in *March v Stramare (E and M H) Pty Ltd*, except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act. Had Parliament intended to say something else, it would have been natural and easy to have said so."[123]

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122 Cf the consideration of the Queensland Act in *Bergmann v DAW* [2010] QCA 143

123 (1992) 175 CLR 514 at 525

311 In misleading conduct cases, the offending conduct need not be the only cause of the plaintiff's loss or damage; it is sufficient if it plays a part in that loss or damage, even if only a minor part. In *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*,[124] Gaudron, Gummow and Hayne JJ. stated:

> "In light of these considerations, it is hardly surprising that it is now well established that the question presented by s82 of the Act is not what was the (sole) cause of the loss or damage which has allegedly been sustained. It is enough to demonstrate that contravention of a relevant provision of the Act was *a* cause of the loss or damage sustained."[125]

312 Similarly in deceit, the relevant conduct constituting the tort does not have to be the sole cause of the loss or damage, it is sufficient that the plaintiff claiming loss and damage entered into the contract in reliance on it.[126]

313 Peachbulk submitted that but for the representations, it would not have agreed to pay $2.7 million and would only have agreed to purchase the property for $2.4 million. The maximum that Dr Moss was prepared to pay was $2.75 million, plus perhaps one extra bid, if he saw a competitive auction emerge, where there were a lot of people bidding, including a particularly aggressive, determined, property developer. He could have perhaps, in those circumstances, gone to $2.8 million but that would have been his absolute limit. However, if he had known there was no property developer interested, the maximum he would have gone to would have been $2.4 million, including a premium.[127]

314 Dr Moss explained his bidding on the auction day as follows. The property was passed in at $2.1 million and in negotiations after the auction for the benefit of getting an agreement on the day, he was prepared to pay a premium, and offer $2.4 million, but that was their highest offer.[128] Dr Moss stated in cross-examination that his offer of $2.7 million was $600,000 above

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124 (2002) 210 CLR 109
125 (*supra*) at page128
126 *Holmes v Jones* (1907) 4 CLR 1692 at 1706
127 T 247-248
128 T 249

the passed in price, which was an enormous amount of money.[129] His offer of $2.7 million was made solely on the word of Mr Herman. However, at the price of $2.4 million, there was still the underbid of Mr Kartel, who was looking very interested.[130] Dr Moss disputed that he had offered $2.65 million, being $1.25 million for apartment 502A and $1.4 million for apartment 502B. He stated that he had not offered $2.65 million until he had received the representation concerning the offer of $2.6 million from "Tom", who was a property developer. However, Dr Moss accepted that purchasing apartment 502A would have been adequate security against a property developer but not total security.[131]

315 Dr Moss explained the increase in offer from $2.6 million to $2.7 million as the application of the philosophy that the best way to get an agreement is to go right halfway rather than going incrementally up.[132]

316 The agents submitted that Peachbulk had not established reliance. Peachbulk's purchase of the property for $2.7 million would have occurred regardless of the representations about "Tom" and was attributable to causes which negatived the effect of those representations. The Mosses had gone into the market to buy the property, having planned the purchase for over a year with military precision and developed an elaborate strategy. They wished to purchase it for the future development of Dr Moss' practice. They had a substantial budget and purchased within the budget. The agents pointed to the fact that the Mosses moved from a $2.6 million offer to $2.7 million without an intermediate incremental movement. This showed a desperation to purchase, and was not evidence of reliance.

317 To purchase the property the Mosses had:

- relied on their friend, Mr Breeze, to act on their behalf before the auction

129 T 401
130 T 446
131 T 436
132 T 433

and at the auction;

- used a second person, Mr Carbonaro, to assist in bidding and negotiating on auction day;
- engaged a buyer's advocate to discuss purchasing strategy;
- monitored real estate research sites to ascertain when the property was on the market;
- obtained a valuation, albeit an informal one, from Mr Rohan;
- developed a bidding strategy that at least $2.75 million might be spent;
- discussed the potential purchase with their accountant and made the necessary arrangements for acquiring the property by the superannuation funds;
- expended substantial time, and presumably money, on having solicitors prepare special conditions for insertion into the contracts of sale.

318 Dr Moss had offered $2.7 million for the property before any of the representations concerning "Tom" were made. The Mosses hoped to purchase the property at an unrealistic price.

319 The vendors argued that they would not have accepted an offer of $2.4 million. They expected a sale price for both apartments in the range of $2.8 to $3 million. This was reflected in opinions from real estate agents, as well as in Ms K Abay's own assessment, in family discussions and also in the offers accepted and rejected at the auction.

320 Ms K Abay said that when Mr Herman asked her whether $2.5 million would "do it", she and Ms K Fleetwood thought about it and Ms Fleetwood spoke to her grandfather.[133] They did not accept $2.6 million because they had been

133 T 1456

offered $2.65 million five minutes before. She gave evidence that the property was never for sale at $2.4 million and that it was just not worth selling it for that; it was much better to keep it. She described such a price as "just ridiculous".[134] She stated that her expectation was a minimum of $2.8 million. They had told Mr Herman and Mr Fox that the reserve was $2.6 million.[135] She stated that this was a rock bottom figure, the absolute minimum.[136]

321 Ms Abay stated that she was aware that the property was being advertised on the website at between $1.5 to $2 million but considered that Mr Herman was doing that to attract people who would buy the properties individually.[137]

322 She denied that she and Ms K Fleetwood had agreed on a reserve price of $2.6 million prior to the auction as her solicitor's letter had suggested.[138]

Conclusion on Reliance

323 Peachbulk has established that the representations I have found proved were a cause of its decision to purchase the property. It is probable that without those representations, Dr Moss would not have offered $2.7 million.

324 I accept Dr Moss and Ms John's evidence that they would not have paid $2.7 million without Mr Herman's representations.

325 There is ample evidence to support that oral evidence in the guarantees and assurances that Dr Moss and Ms John sought prior to the signing of the contracts. They evidence the significance that Dr Moss and Ms John placed on the existence of the offer from "Tom". They could hardly have made clearer the importance they attached to it. This is demonstrated by the repetition of Dr Moss' request to Mr Herman, as a reputable R T Edgar Toorak agent, for a guarantee. He insisted on obtaining a statement in writing on R T

134 T 1474
135 T 1477
136 T 1479
137 T 1501
138 T 1503

Edgar Toorak's letterhead and attempted to write the assurance onto the contract.

326 While it is true that the Mosses had a desire to acquire the property, the fact is that on the auction day, they relied on the representations of Mr Herman. It is very clear that those representations were a significant cause of their decision to purchase the properties through Peachbulk.

327 Even if the offer of $2.7 million was made before any representation about "Tom", it was made before the contracts were signed and the evidence strongly supports the conclusion that the contracts may not have been signed without it.

328 The evidence does not establish that the Mosses would have paid $2.7 million regardless of the representations. Rather, it suggests that they required repeated assurances about the offer from "Tom" before Dr Moss offered $2.7 million or signed the contracts.

329 It is clear that, but for Mr Herman's representations, Dr Moss would not have offered $2.7 million and signed the contracts.

Contributory Negligence and Apportionment of Liability

330 The agents relied on the defence of contributory negligence, which was that Peachbulk failed to execute the contract for the purchase of apartment 502A for $1.25 million, which purchase would have secured the property from property developers without necessitating the payment of $2.7 million to achieve that objective.

331 Negligence on the part of the victim of a contravention of s.52 of the *Trade Practices Act* or s.9 of the *Fair Trading Act* is not a defence to an action for damages under those statutes unless the conduct of the victim was such as to destroy the causal connection between contravention and loss and damage:

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332 The defence of contributory negligence and the allocation of proportionate liability are not available under the *Trade Practices Act* if Mr Herman were found to have intentionally or fraudulently caused the plaintiff's loss or damage: see s.82(1B)(c)(i) and (ii) and see *Wrongs Act* 1958, s.24 AF and s.24 AM.

333 The agents submitted that there had been no plausible explanation as to why the Mosses failed to purchase apartment 502A. The damages must therefore be reduced under s.82(1B). In addition, under s.87CD(3)(a), in apportioning responsibility between defendants in the proceeding, the court was required to exclude the proportion of the damage or loss in relation to which the plaintiff was contributorily negligent under any law.

334 I do not accept that there has been any contributory negligence or a failure to take reasonable care by the plaintiffs. Peachbulk made a business decision to purchase both apartments based on Mr Herman's representations and no duty of care to minimise their expenditure existed.

335 In addition, because of the findings that I have made about Mr Herman's representations in respect of both the statutory claims and the action in deceit, I find that Mr Herman's conduct did intentionally cause Peachbulk's loss or damage. Within the terms of s.82 (1B)(c)(ii) of the *Trade Practices Act* and s.24AM of the *Wrongs Act*, this is a finding of fraud and takes the agents' claims outside that regime. Therefore any contributory negligence defence cannot be relied on and no allocation of proportionate liability is available.

Damages

336 Peachbulk claimed damages of $475,000, being the difference between the price of $2.7 million and the sum of $2,225,000, being Mr Sutherland's value

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139 (2001) 206 CLR 459

of the property. This was the amount of damages applying the principle that the defendants were liable for all losses directly caused by entering into the transaction induced by their deceit or misrepresentation.

337 Peachbulk contended that it would only have paid $2.75 million for the property in a competitive market with a developer bidding. Dr Moss and Ms John were only prepared to pay more than $2.4 million if there was competition from a property developer.

338 The agents argued that Peachbulk had not brought a "no transaction" case but rather a "different transaction" case in which it was alleged that absent the representations, it would have purchased the property for $2.4 million. However, I consider that the width of the pleading, see paragraph 18 and 19 of the Second Further Amended Statement of Claim, as well as the application of the principles of damages discussed below, enables Peachbulk to argue what might be described as a "no transaction" case.

339 The agents argued that this case was not like one involving the purchase of shares, or any other asset that would have been purchased in any event. Dr Moss was prepared to pay up to $2.75 million, but the vendors would not have been prepared to sell for $2.6 million. Reference was made to the decision in *Smith New Court Securities Ltd v Citibank NA*,[140] but the circumstances identified in that case as making it appropriate to depart from the compensatory principle, namely the continued diminution in value of shares after their purchase, do not exist in the present case**.**

340 Under s.82(1) of the *Trade Practices Act*, the usual measure of damages is the difference between the real value of the property at the time of purchase and what the plaintiff paid for it: see *Argy v Blunts & Lane Cove Real Estate Pty Ltd*[141] and *Marks v GIO Australia Holdings Ltd*.[142] However, s.82

140 [1997] AC 254 – the approach adopted by that decision was accepted in *Henville v Walker* (2001) 206 CLR 459 as a possible approach to the award of damages in an action in deceit.

141 (*supra*) at 143

142 (1998) 196 CLR 494 at 512

broadens the scope of recovery and is not to be kept within bounds created by comparisons with the common law.[143]

341 In deceit, the measure of damages is usually described as the difference between the real value of the property at the time of the purchase and the price the plaintiff paid for it.[144]

342 In *Potts v Miller,* Dixon J stated that in action for deceit, the proper measure of damages is the expenditure incurred by the plaintiff less any corresponding advantage in money or money's worth obtained, being the actual, real or fair value of the property.[145]

343 Peachbulk submitted that there was no way to tell with any degree of certainty what it might have paid for the properties or what the vendors might have accepted in a competitive market, absent the misrepresentation, as the opportunity to determine the fair or market price was lost by reason of Mr Herman's misrepresentations.

344 The agents submitted that Peachbulk, in its action in deceit, was *prima facie* entitled to recover the difference between the value of the property as represented and the real value at the time the property was purchased: see *HWT Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*.[146] This was the compensatory principle.

345 The agents submitted that the objective of the assessment of damages was to put the plaintiff, so far as possible, in the position it would have been in if he had not acted on the fraudulent inducement. The question was what would the plaintiff have done if not for the fraud.

346 They also argued that Peachbulk needed to bring into account the indirect benefits that it had received from purchasing the property and provided details

143 *HTW Valuers (Central Qld) Pty Ltd v Astonland* (2004) 217 CLR 640 at [62]
144 *Gould v Vaggelas* (1985) 157 CLR 215
145 (1940) 64 CLR 282 at 297-299
146 (*supra*) at [35] and [39]

of what they were.[147] These included that it had benefits as a residential real estate investment and the benefit of not having to fight a property development.

347 The agents submitted that the *Potts v Miller* approach had no application because it could not be concluded that the property would have been purchased in any event. *Potts v Miller* required an assessment of the real value of the property when purchased, not Mr Sutherland's current market value. The real value was the value that the Mosses, in the absence of the representations, would most likely have paid and which would have been accepted and accepted by the vendors.

348 The agents accepted that for this case, the same principles of damages were applicable to damages under the statutory claims as to the claim in deceit. The plaintiff would generally be entitled to recover the difference between the value of the property as represented and the value at the time the property was bought. However that position was not inflexible: the real value of the property had to be ascertained and the Court had to have regard to fact rather than conjecture. The agents submitted that a relevant enquiry was what the plaintiff would have done if not for the fraud. Where the property would have been purchased in any event, but on less advantageous terms, the plaintiff receives the difference between the price paid and the price that would have been paid had the deceit not occurred. If the plaintiff would not have offered $2.6 or $2.7 million without the representation, the counter factual was that the plaintiff would not have been able to purchase the property. There was no evidence that addressed this counter factual.

349 The evidence demonstrated that Dr Moss was prepared to pay a purchase price of up to at least $2.75 million to secure the property. He had agreed to pay $1.25 million for apartment 502A and $1.4 million for apartment 502B.

147 They relied on *Smith New Court Securities Ltd v Citibank NA* (*supra*) and *Flemington Properties Pty Ltd v Raine & Horne Commercial Pty Ltd* [1997] FCA 788 and on appeal [1998] FCA 592

When he arrived at the property and joined Mr Carbonaro, he agreed to pay $2.6 million for both apartments.

Conclusion on Damages

350 In *Potts v Miller*, Dixon J stated that:

> "The measure of damages in an action of deceit consists in the loss or expenditure incurred by the plaintiff in consequence of the inducement upon which he relied diminished by any corresponding advantage in money or money's worth obtained by it on the other side."[148]

351 In *Toteff v Antona*s, Dixon J stated:

> "In an action of deceit 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 fraudulent misrepresentations made by the defendant. When what he has been induced to do is to make a purchase from the defendant and part with his money to him in payment of the price, then, if the transaction stands and is not disaffirmed or rescinded, what is recoverable is 'the difference between the real value of the property, and the sum which the plaintiff was induced to give for it'." [149]
>
> (authorities omitted).

352 In *Gould v Vaggelas,* Gibbs CJ stated:

> "It is well established that in an action of deceit where the plaintiff has been induced by the fraudulent misrepresentation of the defendant to enter into a contract of purchase, the measure of damages usually applicable is the difference between the real value of the property at the time of purchase and what the plaintiff paid for it: *Holmes v Jones; Potts v Miller; Toteff v Antonas; Foster v Public Trustee; Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* … .
>
> The usual rule is, however, only a special application of the general principle that 'in an action of deceit 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 fraudulent misrepresentation made by the defendant': *Toteff v Antonas*. In other words, the general principle is that the plaintiff is to be put, so far as possible, in the position he would have been in if he had not acted on the fraudulent misrepresentation … ."[150]

353 As the High Court stated in *HWT Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*,[151] this last stated principle is flexible – the fundamental rule is that the

148 (1940) 64 CLR at 297
149 (1952) 87 CLR 647at 650
150 (1985) 157 CLR 215 at 220
151 (*supra*) at 667

plaintiff is to be compensated for its loss and the real value rule will be applied where it produces a fair result.[152] Regard can be had to facts, if revealed by events after the transaction occurred, rather than to conjecture, assumption or guess. The amount to be taken into account is the real value of what has been acquired, which is not necessarily the market value. The High Court listed a number of formulations of "real value". These included: "the true value", and "what would have been a fair price to be paid … in the circumstances … at the time of purchase".[153]

354 The same principles apply as a guide to damages under the *Trade Practices Act* and the *Fair Trading Act*. *HTW Valuers* was a case in contract, tort and under s.52 of the *Trade Practices Act*.

355 I do not accept that the fact that the vendors would not have sold the property for less than $2.7 million means that the Court cannot determine what the real, true or fair value of the property is. However, I do accept that the market value is not necessarily the determinant of that value.

356 The application of these principles requires the identification of the real, true or fair value of the property on 27 February 2010.

357 There is no precise science in determining the real, true or fair value of the property on the auction day. Mr Sutherland's market valuation of $2.25 million is to be given due weight, but is not conclusive. I take into account the bid of $2.4 million made by Mr Breeze before the representations were made and the subsequent bids or discussions about the two apartments by Mr Carbonaro. There is also the reserve fixed by the vendors of $2.6 million.

358 Ms K Abay gave evidence of how she had reached a view of the value of the property, including obtaining the views of two real estate agents who provided a range of $2.5 to $3 million.

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152 (2004) 217 CLR at 667 [63]

153 (*supra*) at 657 [36]

359 Dr Moss gave evidence that Mr M Abay jnr offered the property for sale at $2.5 million some time before the auction. Ms K Abay disputed that this statement would have been made but Mr Abay jnr was not called as a witness.

360 There was then the opinion of Mr Rohan that suggested that the property was in the range of $2.1 to $2.7 million depending on who was interested in it.

361 I place little weight on Mr Herman's estimate in his Auction Authority of $2 million to $2.2 million. That has not been borne out by events. Indeed when Mr Kartel offered $2 million before the auction, Mr Herman dismissed it peremptorily.

362 Taking a broad view of the evidence, I consider that the real, true or fair value of the property on auction day was $2.5 million.

Mitigation of Damages

363 The defendants argued that Peachbulk failed to mitigate its loss. The defendants bore the onus of proving that allegation.

364 They argued that Peachbulk asked for, and was given, the opportunity to rescind the contracts of sale and be repaid the deposits, but did not take that opportunity, when it was offered. The vendors also argued that Peachbulk failed to mitigate its loss by not exercising its common law rights to rescind the contracts.

365 Equally, the defendants argued that in respect of its claim under the *Trade Practices Act*, Peachbulk could not recover damages for losses that it could have avoided by taking reasonable steps.[154] The agents submitted that an unreasonable decision to affirm of contract may amount to a failure to mitigate.[155] They submitted that Peachbulk's failure to rescind was

154 See *Finucane v New South Wales Egg Corporation* (1988) 80 ALR 486 at 519

155 see *TN Lucas Pty Ltd v Centrepoint Freeholds Pty Ltd* (1984) 52 ALR 467; on appeal (1985) 60 ALR 187

unreasonable. Had it rescinded, it would have suffered no loss. After rescinding the contract, the Mosses could have retained another agent and attempted to negotiate a new arrangement to purchase the property. Dr Moss had chosen to reveal that he was interested in purchasing the property by bidding at the auction and negotiating afterwards. There was nothing unreasonable in the vendors having to compete with other purchasers in the marketplace if the contract was rescinded and the property again offered for sale.

366 Alternatively, Peachbulk could have fallen back on its agreement, reached through Mr Carbonaro, to buy apartment 502A for $1.25 million. The Mosses were motivated by a desire to teach Mr Herman a lesson. Only when giving evidence did the Mosses explain why they did not take the opportunity to rescind the contract by tearing it up.

367 The vendors' case was that they agreed to tear up the contract because they did not need to sell the property.

368 Peachbulk submitted that affirmation of the contract did not disentitle it to damages. If a vendor makes an actionable fraudulent misrepresentation inducing a purchase, then the purchaser has a right to either elect to rescind the contract or affirm it and sue for damages for deceit: see *S Gormley & Co Pty Ltd v Cubit*.[156]

369 Peachbulk relied on the English Court of Appeal decision in *Strutt v Whitnell*,[157] which dealt with an offer after settlement as establishing that a plaintiff could not be forced by an offer to repurchase by the defendant to choose between remedies by either having to accept the defendant's offer or else forfeit the claim to damages. This was because, if rather than offering to re-purchase the property, the tortfeasor simply offered to pay the full amount

156 [1964-5] NSWR 557 at 560-561

157 [1975] 1 WLR 870 at 873. This decision was criticised in the Court of Appeal decision *The Solholt* [1983] 1 Lloyd's Rep 605; see also *Payvu Ltd v Saunders* [1919] 2 KB 581

of damages in cash, but the plaintiff refused and sued, the plaintiff would still be awarded damages but suffer in respect of costs.

370 Peachbulk submitted that the duty to mitigate relates to unreasonable acts after the affirmation of the contract not to the affirmation itself. It would preclude recovery of aggravated damages or further consequential losses incurred beyond the normal measure of damages as a result of the plaintiff acting unreasonably. In the recent English Court of Appeal decision of *Copley v Lawn*,[158] Longmore LJ, delivering a judgment agreed in by the other members of the Court, stated:

> "In principle, it cannot be correct that a claimant who rejects a defendant's reasonable offer is entitled to nothing. The claimant has still suffered a loss. If a defendant makes an open monetary offer of a sum of money to which the claimant is entitled and it is rejected, the usual result is that the claimant will still make recovery but will not recover the costs of the proceedings. It should not make any difference if the defendant's offer is not monetary but is an offer in kind or an offer to perform a service which will enable the claimant to perform a service which will enable the claimant to avoid his loss."

371 Further, Peachbulk argued that the vendors would have been in the same position whether or not it affirmed the contract. If it had rescinded, the vendors would have had a property worth $2.225 million. As it had elected to affirm the contract and sue for damages, the vendors were in the same position with a property for which Peachbulk had agreed to pay $2.7 million less damages of $475,000 – the same end result of $2.225 million.

372 Alternatively, Peachbulk submitted that if it was under an obligation to act reasonably to avoid damages, its decision not to accept the offer to tear up the contracts was not unreasonable. Rescinding the contract would have thrown them into the unknown and loss of control to prevent a property developer purchasing the property. They would also have given away the opportunity of purchasing the property at a fair market price.[159]

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158 [2010] 1 All ER (Comm) 890 at 899

159 T 227

373 The essence of this argument was contained in Ms John's statement in evidence that: "You can't put the toothpaste back into the tube."[160] By this she meant that they had "lost our opportunity to purchase the property at fair market value".[161]

374 In addition, they had serious concerns about how Mr Herman had behaved. The offer of rescission included a denial from Mr Fox of wrongdoing by R T Edgar Toorak and a condition that prevented them from taking any disciplinary action against Mr Herman for his conduct.

Conclusion on Mitigation

375 The starting point in determining this issue is that one of the rights of a party who has purchased a property because of a fraudulent misrepresentation is once it learns of the misrepresentation to affirm the contract and sue for damages: see *Alati v Kruger*.[162] Such a decision cannot itself be a failure to mitigate damages.

376 An election to affirm a contract which has been induced by misleading conduct does not disentitle an applicant from relief.[163]

377 The next step is to determine whether that position is altered once the wrongdoer offers, or in this case obtains, instructions from his principal, to offer to call off the purchase and rescind the contract.

378 The key point in this case on the mitigation issue is that the plaintiffs wanted to purchase the property. Save for a period on the Saturday afternoon until the Monday morning, they continued in that wish and eventually completed the sale.

379 What they now say is that they decided to keep the property, but they seek

160 T 662
161 T 663
162 (1955) 94 CLR 216 at 222
163 See generally *Tiplady v Gold Coast Carlton Pty Ltd* (1984) 54 ALR 337, 374-375 and on appeal (1984) 8 FCR 438

the remedy of damages, because they paid more than the real, true or fair value of the property because of the fraudulent, misleading or deceptive conduct of the agents.

380 There is no reason in principle why they cannot adopt that course.

381 It is of significance that the purchase induced by the representations was a property that the Mosses wanted to purchase and want to retain and that no further losses occurred after the purchase of the property. There was a once and for all loss incurred in purchasing the property for a price greater than its real, true or fair value.

382 Such a situation is to be contrasted with one where a person buys a business because of fraudulent representations about the takings and continues to operate it incurring losses and rejects reasonable offers to sell it. In such a situation there may have been an unreasonable refusal to mitigate loss. In addition, the chain of causation between the fraudulent representation and subsequent loss has been broken. In the language of s.82 of the *Trade Practices Act*, the loss or damage caused by the continued operation of the business is no longer by the contravention of s.52: see *Brothers v Park*[164] and *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 2).*[165]

383 On occasion questions argued as mitigation issues are more appropriately considered as reliance or causation issues.

384 The English case law also supports that conclusion. I have set out the relevant passages from *Strutt v Whitnall* and *Copley v Lawn*. There is also the Court of Appeal decision in *Uzinterimpex JSC v Standard Bank PLC,* in respect of a claim for conversion of goods in which Lord Justice Moore-Bick, with whom the other members of the Court agreed, stated:[166]

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164 [2004] NSWCA 241 at [50]-[51]; see also *Warwick Entertainment Centre Pty Ltd v Alpine Holdings Pty Ltd* [2005] WASCA 174 at [66]

165 (1989) 89 ALR 539

166 [2008] EWCA Civ 819

> "For the same reason I would accept Mr. Gruder's submission that a person whose property has been stolen is not bound *in the exercise of his duty to mitigate* to accept an offer from the thief to pay him the value of the property, since such an offer does not mitigate the loss; it merely involves an acknowledgment of the thief's liability and an offer to pay damages accordingly. Even in a case where the claimant seeks an order for delivery up of the property, it does no more than offer an alternative remedy of the same monetary value. The claimant is not bound to choose between these two remedies because to do so would not reduce his loss, though as Cairns L.J. pointed out, he might well incur liability for the costs of any proceedings if the outcome was not more advantageous than that which he had been offered. However, considerations of that kind do not arise in this case and in my view little assistance can be derived from *Strutt v Whitnell*. [167]

385 It was argued that by demanding on the Saturday afternoon that the contracts be torn up, that Dr Moss and Ms John had elected to rescind the contract and lost the right to damages.[168] However, there was no unequivocal assertion of a right to rescind to satisfy the principles discussed in *Sargent v ASL Developments Ltd*.[169] Rather, a request or demand to tear up the contracts was made, but rejected by R T Edgar Toorak. On the Monday, R T Edgar Toorak made an offer of rescission which was not unfettered and the Mosses rejected it.

386 The defendants have not established that Peachbulk was under an obligation to accept the offer to tear up the contract. Peachbulk was entitled to pursue its action in damages.

387 Alternatively, if the defendants' offer to tear up the contract is relevant to the question of mitigation of damages, then it has not been established that Peachbulk acted unreasonably in refusing to accept it. It was an offer subject to conditions which sought to remove Peachbulk's right to take disciplinary action against Mr Herman. Acceptance of it would also have meant that Peachbulk was placed in a disadvantaged position in attempting to acquire the property in the future at a fair price. It would also have required them to give up the opportunity to obtain damages, legal costs and the right to make a

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167 (*supra*) at [61]
168 T 1672
169 (1974) 131 CLR 634

complaint.

The Vendors' Entitlement to an Indemnity from the Agents

388 The vendors' Notice for Contribution and Indemnity against the agents was amended on 20 June 2011.

389 This relief was sought under the *Wrongs Act* 1958: see ss.23B and 24. The vendors claimed an entitlement to contribution from the agents in respect of any sum which the plaintiff may recover against them. They also claimed an entitlement to indemnity from the agents in respect of the legal costs they have incurred in defending the claims made against them by Peachbulk.

390 The vendors pleaded that if there is a finding for it which bound them as principal of Mr Herman, then they relied upon their Notice for Contribution and Indemnity to seek a full indemnity from R T Edgar and Mr Herman. They accepted that they, apart from Ms Fleetwood, would be liable for the fraud of their agent. They submitted that on the facts it was just and equitable that the vendors receive an absolute indemnity.

391 The Notice pleaded the agency agreement and alleged that the agents owed a duty of care to the vendors. In summary, this comprised a duty to act with the skill, care and attention of a reasonably competent real estate agent, to act honestly, in good faith and with fidelity with the vendors and all prospective purchasers of the property and not to act so as to expose the vendors to economic loss and damage. The vendors alleged that the agents had breached the agency agreement and duty of care by engaging in conduct pleaded by the plaintiffs.

392 The agents' Amended Defence to the vendors' Notice for Contribution and Indemnity admitted the term of the Agency Agreement and duty of care to act with all the skill, care and attention of a reasonably competent real estate agent in performing its obligations under the Agency Agreement. However,

the agents denied that they had breached the term or the duty of care.

393 There were limited submissions disputing that, if the vendors were held liable on the basis of Mr Herman's representations, they were entitled to full contribution for the amount that they were ordered to pay.

394 It follows from the conclusions I have reached and findings that I have made that the agents breached their agency agreement with the vendors and both of them breached their duty of care in the manner alleged. The vendors had no involvement in the agents' conduct that has given rise to Peachbulk's right to damages. Accordingly, the vendors, Mr Abay snr and Ms K Abay, are entitled to an order of contribution and indemnity from the agents in respect of the judgment against them.

395 I will hear the vendors in respect of their second claim for an order that the agents pay their costs.

The Vendors' Claims for a Proportionate Liability Order Against the Agents

396 The vendors claimed that R T Edgar and Mr Herman were concurrent wrongdoers within the meaning of s.87CB(3) of the *Australian Competition and Consumer Act* 2010 *(*the *Trade Practices Act* 1974*)* and s.24AH of the *Wrongs Act* 1958 in relation to the claims by Peachbulk against the vendors. They claimed that if the vendors were liable to Peachbulk, that liability was limited to an amount reflecting that proportion of the loss or claim that the Court considers just having regard to R T Edgar Toorak and Mr Herman's responsibility and the vendors' responsibility for the loss and damage suffered. They submitted that the appropriate apportionment to them whose "contribution to the ultimate loss is insignificant in [the] case" was 0 per cent.[170]

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[170] Citing *Tarik Solak v Bank of Western Australia Ltd* [2009] VSC 82; however an appeal from that judgment was allowed: see *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd* [2010] VSCA 355; and see also *St George Bank Limited v Quinerts Pty Ltd* [2009] VSCA 245

397 I have found that the vendors were not liable for the statutory claims under the *Trade Practices Act* and *Fair Trading Act.*

398 The vendors did not claim apportionment in respect of the claim in deceit, accepting that such a claim was not apportionable:[171] see *Wrongs Act*, s.24AF (1)(b).

399 No order for apportionment can therefore be made.

Conclusion

400 I will make orders in accordance with these reasons to the following effect:

(a) Judgment for the plaintiff against the second, third, fourth and sixth defendants in the sum of $200,000.

(b) The proceeding against the fifth defendant is dismissed.

(c) The third and fourth defendants are entitled to an order for contribution and indemnity, in respect of the judgment against them, from the second and sixth defendants. I will hear the parties about the form of that order.

401 I will hear the parties about any other orders and costs.

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171 T 1620