FEDERAL COURT OF AUSTRALIA

APD Technology Pty Ltd v Maximo Developments Pty Ltd [2021] FCA 678

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| File number: | NSD 2003 of 2018 |
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| Judge: | **STEWART J** |
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| Date of judgment: | 25 June 2021 |
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| Catchwords: | **CONTRACTS** – real estate agent’s contract – where effective agency commission on the sale of real property was 50% of the sale price – where vendor seeks to recover the whole of the commission less an amount said to be reflective of a fair and reasonable commission – whether alleged misrepresentations by the agent as to substantial part of the commission being paid back to the buyer were made – whether the agent breached its fiduciary duty to the vendor as its agent in proposing such a commission clause – whether subsequent email communication varied or waived reliance on the terms of the agency agreement – whether estoppel defence established**CONTRACTS** – tort – solicitor’s duty to client under retainer and at general law – whether the fourth respondent as the vendor’s solicitor breached his duty to the vendor by allowing a special condition with regard to payment to the agent to form part of the sale contract – where solicitor was retained after the commission clause had already been agreed to – whether solicitor breached duty to vendor by failing to advise that commission clause was of no force or effect because it was induced by misrepresentations or unconscionable conduct – whether solicitor was aware of such conduct – whether the solicitor breached his duty to the vendor by paying the commission to the agent from his trust account **INSURANCE** – liability insurance – cover clause – where indemnity against “civil legal liability for any claim for compensation” – whether the first to third respondents are entitled to be indemnified for defence costs by their insurer – whether vendor’s claims against the agent are for compensation or restitution – whether indemnity excluded by operation of the exclusion for dishonesty  |
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| Legislation: | *Consumer and Competition Act 2010* (Cth) Sch 2 (Australian Consumer Law) ss 18, 21, 236*Corporations Act 2001* (Cth) ss 601AG, 601ED |
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| Cases cited: | *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* [2016] HCA 49; 261 CLR 203*Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963; 160 FCR 35*Barnes v Addy* (1874) LR 9 Ch App 244*CGU Insurance Ltd v Porthouse* [2008] HCA 30; 235 CLR 103*Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390*Hall Brothers Steamship Co Ltd v Young* [1939] 1 KB 748*Harle v Legal Practitioners Liability Committee* [2003] VSCA 133; 13 ANZ Ins Cas 51-605*Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; 156 CLR 41*John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19; 241 CLR 1*Kantfield Pty Ltd v Lockwood* [2003] VSC 420*Kyriackou v ACE Insurance Ltd* [2013] VSCA 150*McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; 203 CLR 579*McCarthy v St Paul International Insurance Co Ltd* [2007] FCAFC 28; 157 FCR 402*Smart v AAI Ltd* [2015] NSWSC 392*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165  |
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| Date of hearing: | 1-4 June, 24 July 2020 |
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| Registry: | New South Wales |
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| Division | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area:  | Commercial Contracts, Banking, Finance and Insurance |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 200 |
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ORDERS

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|  | NSD 2003 of 2018 |
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| BETWEEN: | APD TECHNOLOGY PTY LTD (ACN 100 568 232)Applicant |
| AND: | MAXIMO DEVELOPMENTS PTY LTD ACN 102 362 907 T/AS CENTURY 21 CENTRAL GC (ABN 18 655 110 086)First RespondentSASAN RAHMANISecond RespondentRITA RAHMANI (and another named in the Schedule)Third Respondent |
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| AND BETWEEN: | MAXIMO DEVELOPMENTS PTY LTD ACN 102 362 907 T/AS CENTURY 21 CENTRAL GC (ABN 18 655 110 086) (and others named in the Schedule)First Cross-Claimant |
| AND: | HAMILTON UNDERWRITING LTD FOR AND ON BEHALF OF SYNDICATE 3334Cross-Respondent |

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| JUDGE: | STEWART J |
| DATE OF ORDER: | 25 June 2021 |

THE COURT ORDERS THAT:

1. The proceeding against the first, second and third respondents be dismissed.

2. The proceeding against the fourth respondent be dismissed.

3. Within 14 days of these orders:

(a) The parties to the principal proceeding bring in agreed or competing orders with respect to the costs of the proceeding, and in the event of competing orders then the parties file written submissions of no more than three pages in support of the costs orders that they seek.

(b) The parties to the cross-claim bring in agreed or competing orders with respect to the disposition of the cross-claim and costs, and in the event of competing orders then the parties file written submissions of no more than three pages in support of the orders that they seek on the cross-claim.

4. Within 28 days of these orders, the parties:

(a) File any submissions (of no more than three pages) in response to any of the submissions filed under order 3.

(b) Indicate by way of email to the Associate of Stewart J whether they wish the remaining issues to be determined after a further short oral hearing or whether they are content for the issues to be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

STEWART J:

## Introduction

1 In 2017, the applicant, **APD** Technology Pty Ltd, sold a 7,000 m² vacant block of land at Varsity Lakes, Queensland, to **Bondbao** Pty Ltd for a purchase price of $24 million plus GST. The seller’s agent for the sale was the first respondent, **Maximo** Developments Pty Ltd. The agency commission that was paid was $12 million plus GST of which $5 million plus GST was paid by Maximo to another agent, Mint Property, that introduced Bondao on the basis that it was a “conjunction agent”.

2 On any view, agency commission of 50% on the sale of real property is extraordinary, and all the more so where the purchase price is so high. It is that extraordinary circumstance which is at the heart of this case.

3 APD alleges that it agreed to the 50% commission arrangement on the basis of false representations made by Maximo that all of the commission except for 2% plus GST, which would be paid to Maximo and a “conjunction agent” as their agents’ commission, would be paid back to Bondbao, and that the purchase price was artificially inflated above the actual value of the property as a means of the Chinese interests behind Bondbao transferring money into Australia, presumably as a ruse to circumvent Chinese exchange controls. Maximo denies that it made those representations. It says that APD only wanted $12 million for the property and said that it was agreed that any amount over that that could be achieved by Maximo was for it to keep and to share with any other intervening agents as necessary, but that APD had no interest in such arrangements and did not want to know about them.

4 APD puts its claim against Maximo for repayment of the whole of the commission paid to it less $528,000, being 2.2% of the sale price which is said to be reflective of a fair and reasonable commission, on the following bases:

(1) the alleged representations made by Maximo were misleading or deceptive contrary to s 18 of the Australian Consumer Law (**ACL**);

(2) by requesting and procuring APD to enter into an agency agreement with it on the basis of the representations, Maximo engaged in conduct that was unconscionable contrary to s 21 of the ACL; and

(3) by requesting and procuring APD to enter into an agency agreement with it, in rendering the invoice for commission of $12 million plus GST and in receiving payment of the invoice, Maximo acted in breach of its fiduciary duty to APD as the latter’s agent.

5 APD’s manager, and the principal person who acted on its behalf in the events that are relevant, is Mr Ngat Doan. It is to Mr Doan that it is said that the representations on which APD relies were made. The director of APD is Mr Doan’s wife, Mrs Nhan Hong Doan. The Doans are based in Sydney.

6 Maximo trades as Century 21 Central GC as a real estate agent registered in Queensland. It operates on the Gold Coast. The principal person involved in the events that are relevant to this case on behalf of Maximo is Mr Sasan Rahmani. Mr Rahmani is the second respondent. APD claims that Mr Rahmani made the representations on which it relies to Mr Doan. Mr Rahmani’s wife, Mrs Rita Rahmani, who is also a director of Maximo, is the third respondent. The Rahmanis are based on the Gold Coast.

7 APD puts its case against Mr and Mrs Rahmani on the bases that they:

(1) engaged, in trade or commerce, in the same conduct that is alleged against Maximo as giving rise to contraventions of ss 18 and 21 of the ACL; and

(2) were knowingly concerned in Maximo’s breach of its fiduciary duty.

8 APD asserts an alternative case against Maximo in the event that its principal causes of action fail, namely that Maximo pay to it the sum of $1,293,160, being the difference between the commission actually paid ($12 million plus GST) and the commission expressly agreed in the agency contract between APD and Maximo, namely 2.2% of $12,245,000 plus 99% of the difference between the contract price and $12,245,000.

9 The fourth respondent is Mr Dominic Arcuri, a solicitor from the Gold Coast. He was appointed by Mr Doan on behalf of APD to act on the latter’s behalf in relation to the sale of the property.

10 APD puts its case against Mr Arcuri on the basis that pursuant to his retainer or under the general law he owed APD a duty to exercise all due care, skill, diligence and attention to provide all such advice to APD in relation to the sale as was appropriate to safeguard its interests and to ensure that the sale contract did not impose any obligation on APD as vendor to which it was not otherwise subject.

11 APD says that Mr Arcuri breached his duty to it by:

(1) causing a special condition (**special condition 13**) to be included in the sale contract with Bondbao in consequence of which APD ostensibly incurred a liability to pay to Maximo GST of $1,190,684, to which it was not otherwise subject, in addition to the commission of $11,906,840 purportedly payable under the agency contract;

(2) failing to advise APD that its agreement to pay Maximo and effective commission of 50% was of no force or effect in light of Maximo acting in contravention of ss 18 and 21 of the ACL and in breach of its fiduciary duty to APD as alleged against Maximo;

(3) paying from his trust account out of the sale proceeds Maximo’s invoice for commission of $12 million plus GST; and

(4) being knowingly concerned in Maximo’s breach of its fiduciary duty to APD.

12 The cross-respondent is **Hamilton** Underwriting Ltd for and on behalf of Lloyd’s Syndicate 3334. The cross-claimants are Maximo and the Rahmanis (**the Maximo parties**). They sue for an indemnity on an insurance policy in the event that any one or more of them is liable to APD. Hamilton has denied indemnity on the basis that any liability that the Maximo parties have to APD will be either on the basis of restitution or dishonesty which, it says, are not covered or are excluded under the relevant policy terms.

13 Mr Chiang Sheng Hsiung (referred to in the proceeding as Johnson) and Mrs Jane Lee Hsiung (referred to in the proceeding as Jennifer) were joint-venture partners, as trustees for a family trust, with APD in the Lake Street property referred to below (at [22]). They therefore had an interest in any payment realised on the sale of the property. Their joint-venture interest was 5%.

## The issues

14 The parties identified that the following issues call for determination in respect of the claims by APD against the Maximo parties and Mr Arcuri:

(1) Question 1: Did a conversation to the effect recounted by Mr Doan take place on 1 or 2 November 2016?

(2) Question 2: If the answer is to question 1 is “yes”, was Maximo engaged, in trade or commerce, in conduct that was misleading or deceptive contrary to s 18 of the ACL by reason of the statements made by Mr Rahmani in that conversation?

(3) Question 3: If the answer to question 2 is “yes”, did APD enter into the 5 November 2016 agency contract in reliance upon Maximo’s misleading or deceptive conduct?

(4) Question 4: If the answer to question 3 is “yes”, did APD suffer loss or damage because of Maximo’s misleading or deceptive conduct and, if so, in what sum?

(5) Question 5: If the answer to question 3 is “yes”, were Mr and Mrs Rahmani or was either of them involved in Maximo’s contravention of s 18 of the ACL?

(6) Question 6: Did Maximo, by procuring APD to enter into the November agency contract, engage, in trade or commerce, in connection with the supply of services to APD in conduct that was unconscionable contrary to s 21 of the ACL?

(7) Question 7: If the answer to question 6 is “yes”, did APD suffer loss or damage because of Maximo’s conduct and, if so, in what sum?

(8) Question 8: If the answer to question 6 is “yes”, were Mr and Mrs Rahmani or was either of them involved in Maximo’s contravention of s 21 of the ACL?

(9) Question 9: Was Maximo, as the agent of APD for the purpose of procuring a sale of the property after 21 July 2015, under a fiduciary duty throughout its dealings with APD in relation to that sale, to act in good faith and in APD’s interests, preferring those interests over its own interests?

(10) Question 10: If the answer to question 9 is “yes”, did Maximo act in breach of its fiduciary duty to APD by requesting APD to enter into the November agency contract?

(11) Question 11: If the answer to question 9 is “yes”, did Maximo also act in breach of its fiduciary duty by rendering the invoice for $13,200,000 to APD on 30 June 2017 and by obtaining payment of that invoice?

(12) Question 12: If the answer to each of questions 9, 10 and 11 is “yes”, did APD suffer loss and damage in consequence of Maximo’s breach of fiduciary duty and, if so, in what sum?

(13) Question 13: If the answer to questions 9, 10, 11 and 12 is yes, were Mr and Mrs Rahmani knowingly concerned in Maximo’s breach of fiduciary duty contrary to the second limb of the rule in *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252 and, as such, liable to pay equitable damages in the sum stated in answer to question 12?

(14) Question 14: Did the email exchange between Mr Rahmani and Mr Doan on
1 February 2017 effect a variation of the November agency contract so as to entitle Maximo to claim a commission of $12 million plus GST upon the sale of the property to Bondbao?

(15) Question 15: If the answer to question 14 is “no”, did the invoice for $13,200,000 rendered by Maximo to APD on 29 June 2017 exceed the commission payable according to the term of the November agency contract concerning the payment of commission by $1,293,160?

(16) Question 16: Was it a term of APD’s retainer of Mr Arcuri to act as its solicitor in relation to the sale of the property that he would provide all such advice to APD in relation to that sale as was appropriate to safeguard its interests and to ensure that the sale contract did not impose any obligation upon it as vendor to which it was not otherwise subject or, alternatively, was Mr Arcuri subject to a duty, under the general law, to act in that manner?

(17) Question 17: Was Mr Arcuri bound by his retainer to provide advice to APD on the enforceability of the November agency contract and did he fail to provide any such advice?

(18) Question 18: By permitting the contract for the sale of the property to contain special condition 13, did Mr Arcuri act in breach of the term of his retainer to ensure that that contract did not impose an obligation upon APD as vendor to which it was not otherwise subject?

(19) Question 19: Did APD suffer loss or damage in consequence of Mr Arcuri’s breach of his retainer by failing to provide advice on the enforceability of the November agency contract and/or by permitting the contract for sale to include special condition 13 and, if so, in what sum?

(20) Question 20: If the answer to questions 9 and 11 is “yes”, was Mr Arcuri knowingly concerned in Maximo’s breach of its fiduciary duty contrary to the second limb of the rule in *Barnes v Addy* and, as such, liable to pay equitable damages in the sum stated in answer to question 12?

(21) Question 21: By paying $13,200,000 to Maximo out of his trust account on 29 June 2017, did Mr Arcuri act in breach of the trust referred to in paragraph 32 of the third amended statement of claim?

15 In addition, issues arise in the cross-claim by the Maximo parties against Hamilton. Those issues are identified at [168] below.

## The witnesses

16 The witnesses in the case were Mr Doan, Mr Rahmani and Mr Arcuri. Each gave evidence in chief by way of affidavit and was cross-examined. I had the benefit of seeing the witnesses under cross-examination and making notes of my observations.

17 Mr Doan was generally an unimpressive witness. I gained the clear impression that he gave answers to questions which he assessed would most likely assist his case. He was at times evasive. In general terms, I am hesitant to accept Mr Doan’s version of contested events save to the extent that they are corroborated by contemporaneous documents, other witnesses or the probabilities.

18 Mr Rahmani was a more impressive witness. He generally gave straightforward answers although, as will be seen, his credit is open to some question. I consequently approach his evidence with appropriate caution.

19 Mr Arcuri was an impressive witness. He was careful to give accurate answers, most of which he tied back to his contemporaneous file notes of events. He explained that he would normally make some handwritten notes of meetings and phone calls and then he would prepare file notes by way of dictation after each meeting or phone call. His file notes were not challenged as being inaccurate. I accept them as reliable evidence of what was generally discussed in the meetings and phone calls to which they relate and of the significant things that were said in those meetings and phone calls.

20 APD also read the affidavit of Mr Anthony William Hope, an independent and qualified licensed real estate agent in Queensland. Mr Hope was not required for cross-examination. He expressed the unchallenged opinion that a fair and reasonable commission fee in a competitive market situation for the sale of a $24 million property in Queensland would range between 1% to 1.5% of the contracted final sale price.

## The principal events

21 In this section I set out the principal events that are either not materially in dispute, or if they are in dispute I take the facts from the documents referred to which I find to be reliable contemporaneous evidence of the facts so found.

22 In 2009, APD purchased a vacant parcel of land at 14 Lake Street, Varsity Lakes on the Gold Coast for $2,310,000 including GST. Mr Doan had the intention of developing the property by constructing a substantial building containing apartments, restaurants, shops and commercial premises. APD entered into joint venture arrangements with regard to the purchase and possible development of the property, including with Mr and Mrs Hsiung.

23 In July 2010, APD obtained an initial development consent permitting the construction of 121 apartments in the proposed building. In October 2014, APD obtained an amended approval, increasing the number of permitted apartments to 203.

24 Mr Doan testified that he was unable to obtain the requisite construction funding, explaining that the project became too big for APD, so he resolved that he had no alternative but to sell the property.

25 Mr Doan and Mr Rahmani had had a close personal and commercial relationship for nearly 30 years. They had on many occasions entered into real estate agency contracts on behalf of corporations that they represented, with Mr Rahmani marketing for sale and selling properties on behalf of Mr Doan.

26 On 21 July 2015, Mr Doan had APD enter into the first of several agency contracts, known as a Form 6, with Mr Rahmani’s company, Maximo. The latter was appointed as APD’s exclusive agent for a period of two months to sell the Lake Street property. The agreed list price was $15 million. The commission, inclusive of GST, was recorded as 2.75% up to and including a purchase price of $15 million, and that for any price above $15 million the commission would be 2.75% of $15 million plus 88% of the difference between the contract price and $15 million. The contract recorded, as an example, that if the contract price is $16 million, the commission would be $1,292,500 including GST. On that example, the effective commission would be 8.1%. No sale eventuated.

27 It is to be noted that at about this time Mr Doan and Mr Rahmani concluded Form 6 agency agreements between their respective companies for the sale of other properties with commission structured in much the same way. In that sense, this commission structure was not unusual for them.

28 On 7 December 2015, APD signed a second Form 6 with Maximo in respect of the property. Although it was not signed by Maximo, Mr Rahmani accepts that the parties treated the contract as being effective between them. It was an open listing without specifying the end date. The list price for the property was recorded as $13.1 million plus GST. The commission, inclusive of GST, was recorded as 2.2% up to and including a purchase price of $13.1 million, and for any price above $13.1 million the commission was 2.2% of $13.1 million plus 99% of the difference between the contract price and $13.1 million. The contract recorded as an example that if the contract price was $15 million, the commission would be $2,169,200 including GST. On that example, the effective commission would be 14.5%. Again, no sale eventuated.

29 On 4 May 2016, APD entered into a deed by which APD granted a call option to Headway Group Pty Ltd entitling the latter to purchase the property for $9 million. Headway subsequently allowed that option to lapse, so no sale eventuated.

30 In August 2016, Mr Doan was in communication with Mr Frank Raunik of an architectural firm, Raunik, about a possible new development application to increase the density of any development on the site including by the construction of two towers. Mr Rahmani says that this came about because it was anticipated that the local council was going to amend the relevant regulations to allow a greater density or a greater height.

31 On 30 September 2016, APD appointed Herron Todd White, a property valuation group, to prepare an independent evaluation of the Lake Street property. Mr Rahmani says that he was aware of this appointment.

32 On 12 October 2016, Mr Rahmani sent to Mr Doan by email yet another Form 6 in respect of the property. Neither APD nor Maximo appear to have signed the contract, although Mr Rahmani accepts that the parties treated it as effective between them. It was an exclusive agency appointment without a specified end date. The parties checked as chosen an option that at the end of the exclusive agency, the appointment would continue as an open listing. The list price for the property was recorded as $16.5 million. The commission, inclusive of GST, was recorded as 2.2% up to a purchase price of $16.5 million, and for any price above $16.5 million the commission was 2.2% of $16.5 million plus 99% of the difference between the contract price and $16.5 million. The contract recorded as an example that if the contract price was $18 million, the commission would be $1,848,000 including GST. On that example, the effective commission would be 10.3%. Once again, no sale eventuated.

33 On 18 October 2016, Herron Todd White provided a market valuation of the property which included taking into account that the approved development proposal in October 2014 would not lapse until July 2020. The market value “as is” was given as $4,750,000 excluding GST. Mr Rahmani says that he was not aware of this valuation.

34 On 27 October 2016, Raunik produced some concept drawings showing two residential towers and one student accommodation tower, combined with commercial and recreation spaces, for the property and sent these to Mr Doan. Mr Rahmani said that the concept drawings were prepared for a revised development application to the local council which, if approved, would significantly increase the number of apartments from what had previously been approved and which would have the effect of increasing the value of the property.

35 Thereafter, or in any event at about this time, there was a conversation, or conversations, between Mr Doan and Mr Rahmani, which is at the centre of the dispute. I will return to those events.

36 On 5 November 2016, APD and Maximo concluded another Form 6 for the sale of the property (the **5 November 2016 Form 6**). The contract was signed by Mr Doan for APD and by Mr Rahmani for Maximo. The list price was recorded as $12 million. It was an exclusive agency appointment commencing on 2 November 2016. The commission clause was in the following terms:

The client and the agent agree that the commission including GST payable for the service to be performed by the agent is:

UP TO A PURCHASE PRICE OF $12,245,000 THE COMMISSION IS 2.2% OF THE CONTRACT PRICE INCLUDING GST. ANY AMOUNT ABOVE $12,245,000, THE COMMISSION IS 2.2% OF $12,245,000 PLUS 99% OF THE DIFFERENCE BETWEEN THE CONTRACT PRICE AND $12,245,000. (EXAMPLE: IF THE CONTRACT PRICE IS $15M, THE COMMISSION IS $2,996,840 INCLUDING GST).

37 On the example given of a contract price of $15 million, the effective commission would be 20%.

38 In the period November 2016 to January 2017 there were further discussions between Mr Doan and Mr Rahmani about the sale of the property. The terms of the discussions are in dispute. I will return to them to the extent necessary.

39 A file note of Mr Arcuri records that before 1 February 2017, he had various telephone calls with Mr Doan in which he was advised of a $24 million contract that Mr Rahmani was working on, and that he had various discussions with Mr Rahmani. The file note then records a conference between Mr Arcuri and Mr Rahmani on 1 February 2017 in which details of the contract of sale for the property were discussed and advice was given by Mr Arcuri with regard to the contract being a commercial contract “making it plus GST”.

40 In the early morning on 1 February 2017, Mr Rahmani sent to Mr Tony Yan representing Mint Property a “**Conjunction Confirmation** by Fax or Email”. It recorded that it confirmed that Mint Property had introduced Bondbao as buyer for the property and that as the listing agent Maximo agreed to pay Mint Property a commission of $5 million plus GST based on a contract price of $24 million. It was dated 1 February 2017, but was not signed.

41 In the afternoon on 1 February 2017, Mr Rahmani sent an email to Mr Doan which he copied to Mr Arcuri. The email read, in part:

I confirm that I met with Mick Arcuri this morning to finalise the conditions for the Contract on 14 Lake Street, Varsity Lakes. These are now being prepared. …

On the matter of our commission, please note that the Contract price is going to be $24,000,000. On settlement day APD Technology P/L will receive $10,800,000. Century 21 [i.e., Maximo] will issue an invoice to APD Technology Pty. Ltd. for and [sic] amount of $12,000,000 plus $1,200,000 GST total of $13,200,000. This will bring a net return to APD of $12,000,000 (10.8M plus $1.2M GST). Please confirm by return email that this is correct. Many thanks.

42 Shortly thereafter, Mr Doan replied by email saying, “All agreed, OK”.

43 That exchange of emails on 1 February 2017 to which Mr Doan, Mr Rahmani and Mr Arcuri were parties is significant in what follows. It is to be observed at this stage that Mr Rahmani’s email for the first time confirmed that the purchase price would be $24 million. Also, the commission calculation with which Mr Doan agreed in the email exchange was not in accordance with the commission clause in the 5 November 2016 Form 6. The calculation was more favourable to Maximo than a calculation in accordance with the commission clause would have been.

44 A file note of Mr Arcuri for 2 February 2017 records that he met with Mr Doan in which the terms of the contract for sale were discussed, and in particular the GST position and what would be most favourable to APD. The file note records that Mr Doan “suggested that [the buyer] might wish to get more money out of China by making it a plus GST.” The file note then records the following:

Discussed with Ngat his receipt of $12 million net. He says that he believes that some monies are being paid back by Sasan (significant amounts) with Sasan receiving approximately $600,000.00 commission. He says that with the new town plan the property will stake [should be “stack”] up however he only wants to receive $12 million so he can put that money into the Brisbane project. I suggested to him that if the project stacked up at $24 million then he was doing himself a considerable disservice selling at $12 million. He confirmed that he only wanted to receive $12 million from this and he didn’t care as to the background arrangements through Sasan’s commissions.

45 On 3 February 2017, Mr Arcuri sent to Mr Doan his firm’s costs agreement, being the terms of his retainer, and disclosure notice in respect of the sale by APD to Bondbao. The scope of the work was described as “advice and conveyancing in respect of the sale and all matters associated therewith.”

46 On 7 February 2017, Mr Yan returned the Conjunction Confirmation document by email to Mr Rahmani, having signed it on behalf of Mint Property. Mr Rahmani then signed it on behalf of Maximo and returned the fully executed document to Mr Yan by email the same day.

47 On 8 February 2017, on Mr Doan’s request Mr Rahmani agreed to pay Mr Arcuri’s legal fees on the sale.

48 On 14 February 2017, APD and Bondbao executed a heads of agreement in respect of the sale of the property. The heads of agreement provided for a period of due diligence and recorded the purchase price as $24 million inclusive of GST.

49 A file note of Mr Arcuri dated 29 March 2017 records some details of a telephone conversation between him and Mr Doan on that day. The last point recorded is: “I again said I do not understand his rationale re 12M when property is worth $20M.”

50 On 31 March 2017, there was an exchange of emails between Bondbao’s solicitors and Mr Arcuri in which some of the wording of the contract for sale was discussed. In particular, Mr Arcuri stated that his client “would like to reinsert the attached special conditions 1, 2 and 3 attached to our original draft contract”. The first of those special conditions became special condition 13 in the contract as signed.

51 There is a dispute between Mr Doan and Mr Arcuri with regard to whether special condition 13 was included on Mr Doan’s instructions. I will return to that dispute. It will be recalled that the inclusion of special condition 13 is the foundation of one of the claims against Mr Arcuri.

52 By written contract dated 31 March 2017, APD agreed to sell the property to Bondbao for $24 million inclusive of GST. The seller’s agent was recorded as being Maximo. The sale contract included special condition 13. Its terms are quoted at [156] below in the context of dealing with the claim against Mr Arcuri in relation to that clause.

53 On 12 May 2017, Mr Arcuri had a conference with Mr Doan and Mr Rahmani with regard to the sale. Mr Arcuri’s file note records the following:

[Mr Doan] then advised me that to avoid any uncertainty, APD is to receive from settlement $10.8 Million and will get a Tax Invoice from Sasan Rahmani for $1.2 GST which will give APD a net of $12 million

The rest is to be claimed by Sasan as commission and Sasan will be responsible for payment of commission to 2 Chinese Agents.

Ngat was happy with the deal as he said he only paid $2.5 million

I suggested to them that this is a matter that the ATO may look at given the huge commission payments – they say that it is a legitimate transaction.

54 It is recorded in a file note of Mr Arcuri that he and Mr Doan met on 1 June 2017 and discussed the sale of the Lake Street property. It is recorded that Mr Doan said that as he understood matters, $11.5 million was to be paid back to the Chinese agent who was going to distribute that money between the solicitor, the agent and the various other people including Maximo. Mr Doan believed that Mr Rahmani would obtain a commission cheque of 1% from the Chinese agent. He said that he had been very good to Mr Rahmani and he repeated that all he wanted out of this deal was a net $12 million.

55 On 1 June 2017, Mr Arcuri sent a letter to APD referring to settlement of the sale contract which was expected on 29 June 2017 and dealing with matters connected with that. In particular, he said in the letter that he had received a tax invoice for the commission from Maximo, which he enclosed with the letter. The invoice was for commission of $12 million plus GST, i.e., $13.2 million. That was in accordance with the email exchange on 1 February 2017 and therefore not in accordance with the commission clause.

56 Mr Arcuri then further advised as follows in the letter:

As the Commission is significant we advise that this matter is one that will definitely be reviewed by the Australian Tax Office and accordingly, you should ensure that all records and dealings in relation to this matter are retained by you to respond to any Australian Tax Office enquiries in the future.

57 On 29 June 2017, the sale contract settled.

58 By letter dated 3 July 2017, Mr Arcuri enclosed the settlement statement and explained to Mr Doan that a total of $13.2 million was paid to Maximo “in accordance with your authority” being $12 million plus GST. Attached was Maximo’s invoice to that effect. Mr Arcuri also noted that the sum of $2,400,009.40 was added to the sale price for payment of the GST on the supply and that APD had provided a tax invoice to the buyer to that effect.

59 The result is that despite the contract for sale recording that the price was $24 million inclusive of GST, the price actually paid was $24 million plus GST (plus $9.40 which can be left out of account for present purposes).

60 On 4 July 2017, Maximo paid to Mint Property $5.5 million including GST in payment of Mint’s invoice for its commission.

61 Maximo paid part of the proceeds that it received into accounts nominated by Mr Doan in repayment of an independent prior debt as between Mr Rahmani and Mr Doan. The total paid was $652,116 being the principal debt plus interest.

62 By letter of demand dated 12 September 2017, Mr and Ms Hsiung’s solicitors alleged that APD had acted in breach of several provisions of the joint venture deed between APD and Mr and Ms Hsiung as trustees for a family trust by making representations that the sale price of the property had been $12 million. The demand was for APD to pay Mr and Ms Hsiung $614,994 (being 5% of the sale price of $24 million less the amount already paid based on a sale price of $12 million) plus an amount equal to 5% of the forfeited option fee paid by the previous prospective purchaser in May 2016 and a full accounting of the proceeds of the sale in 2017 and all prior attempted sales of the property.

63 Mr Arcuri responded on behalf of APD and the Doans by letter dated 15 September 2017 saying that the price that was received by APD was only $12 million. The details of the response are dealt with further below (at [67]).

64 On 13 November 2017, new solicitors for Mr and Ms Hsiung wrote a further letter of demand. Mr Arcuri replied the same day, reiterating that APD had only received $12 million and citing “confidentiality issues” as the reason why APD was not able to convey the gross selling price. The letter denied allegations of fraud and stated that APD had notified the Australian Taxation Office of the transaction.

65 The claim made by Mr and Ms Hsiung could not be resolved. In late December 2017, they instituted a proceeding in the Supreme Court of New South Wales against APD, Mr Doan and Mrs Doan to recover the amount by which they had allegedly been underpaid. The proceeding ultimately settled.

## Mr Doan’s versions of the pre-contractual representations

66 The conversation, or conversations, between Mr Doan and Mr Rahmani in the lead up to the conclusion of the 5 November 2016 Form 6 are at the heart of the case. There a number of different versions of the conversations at different times. It is necessary to examine each in order to weigh up and decide whether Mr Doan’s pleaded version is established.

67 The first version of the relevant events given by Mr Doan is in the letter from his solicitors, at that time Acuri Lawyers, to solicitors acting for Mr and Ms Hsiung dated 15 September 2017. At the request of APD’s senior counsel, Mr Arcuri confirmed that that version was written on and reflected Mr Doan’s instructions. It gave the following account:

(1) The price for the land that APD was to receive was always $12 million.

(2) The real estate agents’ commission may seem “uncommercial” and/or unusual, however there were a number of Chinese “agents” involved who also received commission.

(3) The buyer, Bondbao, had difficulties getting funds out of China that precipitated the convoluted agency agreement in regard to the commission but unfortunately APD and the Doans did not receive the specific details in that regard.

68 The second occasion on which Mr Doan gave an account of the material events was in a signed statement on 16 January 2018. The statement is in a typed form with manuscript changes. The original form was prepared by Mr Arcuri following a conference with Mr Doan the previous day. It was then emailed to him by Mr Acuri for his “perusal” and there was a follow-up conference on 16 January 2018 between Mr Arcuri and Mr Doan for the purpose of finalising the statement.

69 Although there are manuscript amendments to the statement, Mr Arcuri explained that those were done not on the basis that what was typed was inaccurate, but rather that what was sought to be prepared was how Mr Doan’s case would be put in the proceeding by the Hsiungs. In any event, Mr Doan was quite adamant that he signed the statement without manuscript amendments. On that basis, I accept that the typed statement reflects what he told Mr Arcuri.

70 Insofar as the critical events are concerned, the typed version of the statement has the following account:

(1) Mr Doan believed that $12 million was a very good price for the land which he told Mr Rahmani he would require for any sale.

(2) Mr Rahmani mentioned that he had a buyer but the sale price would need to be $24 million. Mr Doan advised Mr Rahmani that he had no objection to the proposal proceeding as long as APD received $12 million net.

(3) Mr Doan believed that the buying entity was a Chinese company and there was some manoeuvring on the part of that company which may have been required to get monies out of China, but he did not ask any specific questions and was not interested in anything other than obtaining a good price for the land.

(4) Mr Doan was informed by Mr Rahmani that a significant part of the $12 million commission paid to Maximo was returned to a Chinese agent who may have had affiliations with the buying entity, but Mr Doan was nevertheless more than happy to obtain the $12 million and did not take any enquiries further.

71 The third account is given by Mr Doan in an affidavit that he deposed to, dated 1 May 2018, in the Supreme Court proceeding brought by the Hsiungs against APD out of the events in this case. The complaint that they made against Mr Doan was that he had accounted to them for their interest in the Lake Street property on the basis of a sale price of $12 million whereas they later learned that the sale contract reflected a price of $24 million and they were not satisfied with Mr Doan’s explanations.

72 In the affidavit, Mr Doan stated that on or about November 2016 there was a conversation between him and Mr Rahmani where words to this effect were used:

Mr Rahmani: I have a Chinese investor who may be interested in purchasing the Land. The sale will be a conjunctional sale with a Chinese real estate agent. How much do you want to sell for?

Mr Doan: I want $12 million for the Land.

73 Mr Doan stated in his affidavit that later on he spoke again with Mr Rahmani where words to this effect were used:

Mr Rahmani: I have a buyer for the Land at $12 million. But the conjuncting agent wants you to increase the price so he can get his commission. How much do you want to increase the price by?

Mr Doan: I want $12 million for the Land. I am happy to pay you $300,000 commission for the sale if I get $12 million. If you and the conjuncting agent get anything above $12 million, I do not want to know about it. That can be your commission.

74 Mr Doan also stated in his affidavit that before the heads of agreement was signed there was a conversation between him and Mr Rahmani where they used words to this effect:

Mr Doan: Sasan, why is the purchase price $24 million? I only wanted $12 million for the land.

Mr Rahmani: Don’t worry, you will get your $12 million. The rest is commission for Century 21 GC and the conjuncting agent.

75 The fourth occasion on which Mr Doan’s version of the conversation is recorded is in a letter of demand from his solicitors in the present case, RBHM Commercial Lawyers, to Mr Rahmani on 6 September 2018. The letter stated that there were a number of meetings between Mr Doan and Mr Rahmani during the period between August 2016 and 3 November 2016 during the course of at least one of which there was a conversation to the following effect:

Mr Rahmani: You failed to sell your property for $9 million, I can sell it for $12 million.

Mr Doan: Great, do it.

Mr Rahmani: I have another agent involved.

Mr Doan: I do not give a damn about other agents.

Mr Rahmani: I can get $12 million and you pay me $300,000 commission. I have another agent. I do not have the buyer. Any dollars more than $12 million is their commission.

76 The fifth of Mr Doan’s accounts of the critical conversation is in the original statement of claim in this proceeding which was filed on 23 October 2018. It alleged that in early November 2016, prior to concluding the 5 November 2016 Form 6, Mr Rahmani, on behalf of Maximo, orally represented to APD that Maximo knew of a party who was prepared to pay $12 million for the property. The particulars given of that representation was that it was made in a conversation between Mr Doan and Mr Rahmani on 1 or 2 November 2016, during which words to the following effect were said:

Mr Rahmani: I have a buyer for the land at $12 million. But the conjuncting agent wants you to increase the price so he can get his commission. How much do you want to increase the price by?

Mr Doan: I want $12 million for the land. I am happy to pay you $300,000 commission for the sale if I get $12 million. If you and the conjuncting agent get anything above $12 million, I do not want to know about it. That can be your commission.

77 The above versions of the conversation, or conversations, are very similar. A difference, that does not appear to be material, is that in some versions Mr Rahmani said that he had a buyer for the land at $12 million, whereas in another he said that he could sell the land for $12 million without saying that he already had a buyer. Also, the first two accounts referred to the Chinese buyer having difficulties getting money out of China, and hence the “convoluted” agency arrangements or the “manoeuvring”, but none of the accounts said that the purchase price would be artificially inflated in order to pay money back to the buyer.

78 Of critical significance is that in several of the versions including the statement of claim it is said that if Maximo and the conjunction agent get anything above $12 million, Mr Doan did not want to know about it and that could be their commission. Also, Mr Rahmani said that the commission on a sale price above $12 million would go to Maximo and the other agents and not that any of it would go back to the buyer. As will be seen, both those statements are incompatible with the case that was ultimately run by APD.

79 Mr Doan’s evidence in chief in the case was given by way of affidavit. His first, and principal, affidavit is dated 8 May 2019, which is also the day on which it was filed. It stated that on 1 or 2 November 2016, Mr Doan had a conversation with Mr Rahmani in words to the following effect:

Mr Rahmani: I have a buyer for the land at $12 million. But there is a conjunction agent who is introducing the Chinese buyer. They are happy to pay $12 million for the land but the contract price will be much higher, maybe as much as $20 million. Century 21 [i.e., Maximo] and the conjunction agent will only be getting a commission of 2.2% the rest will be going back to the buyer.

Mr Doan: I want $12 million for the land. I am happy to pay $300,000 commission for the sale if I get $12 million. If you and the conjunction agent get anything above $12 million, I do not want to know about it. But I do want to know: is it legal or not?

Mr Rahmani: I have checked with my lawyer. He has told me that in Queensland, unlimited commissions are now lawful.

80 The significant difference between that version and the previous versions is that in this one, for the first time, Mr Doan said that he had been told by Mr Rahmani that Maximo and the conjunction agent would only be getting a commission of 2.2% on the purchase price and that the rest would be going back to the buyer.

81 APD’s pleaded case was brought into line with the conversation stated in Mr Doan’s affidavit by its second amended statement of claim, which was filed on 22 May 2019. By the amendment, the previously pleaded representations and conversation were deleted. It is now pleaded (noting that these amendments were incorporated into the third amended statement of claim) that prior to concluding the 5 November 2016 Form 6, Mr Rahmani on behalf of Maximo orally represented the following to APD:

(1) Maximo knew of a prospective purchaser who was prepared to pay $12 million for the property;

(2) the prospective purchaser had been introduced to Maximo by a conjunction agent;

(3) the prospective purchaser was a corporation controlled by residents of China, who wished to transfer funds from that country to Australia;

(4) Maximo and the conjunction agent would together charge a commission of 2% (plus GST) on the ultimate sale price of the property;

(5) that in order to facilitate the prospective purchaser’s desire to transfer funds into Australia, the purchase price payable by it for the property would be notionally increased very substantially, perhaps to $20 million or even more;

(6) that the notional increase in the purchase price would, in any event, be refunded to the purchaser; and

(7) that in order to enable the arrangement so outlined to be carried into effect the commission payable to the first respondent under the agency contract would be expressed as was subsequently recorded in the 5 November 2016 Form 6.

82 Those representations are pleaded to have arisen from a conversation between Mr Doan and Mr Rahmani in early November 2016 as set out in Mr Doan’s affidavit of 8 May 2019.

83 Mr Doan filed and served an affidavit of evidence in reply in the proceeding. It is dated 18 October 2019. In it he said that in the relevant conversation he said the following:

I get $12 million + GST for the land. As to the balance you divide commission at 2.2% between yourself and the conjuncting agent and the rest goes back to the buyer. I don’t want to know about it. It’s up to you.

84 That version has Mr Doan saying what will happen with the money, rather than it being a representation by Mr Rahmani.

85 The materially different versions of the critical conversation given by Mr Doan make it difficult to accept the version that he ultimately relied on. Nevertheless, before undertaking the exercise of assessing his evidence it is convenient to consider Mr Rahmani’s version of the pre-contractual representations.

## Mr Rahmani’s version of the pre-contractual representations

86 In his evidence in chief, which was given by way of affidavit, Mr Rahmani said that prior to signing the 5 November 2016 Form 6, he and Mr Doan had discussed the fact that he had found a potential buyer for the property through a conjunction agent, Mint Property. He said that he had told Mr Doan during September and October 2016 that he was working with Mr Tony Yan from Mint Property.

87 Mr Rahmani said that he said to Mr Doan words to the following effect: “Ngat, as you know, I have been talking to Tony Yan and he says he has a client looking for development site. I sent him the info on your land.” He said that Mr Doan’s response was to encourage him to try to sell the land and to tell him that Mr Doan’s minimum price was $12 million.

88 Mr Rahmani said that he communicated to Mr Doan on many occasions that the Lake Street property would sell for more than $12 million given the recent changes in development conditions over the property. He said that on each occasion Mr Doan said words to the following effect: “I want $12 million for the land. If you and the conjuncting agent get anything above $12 million, the rest is yours. I am happy for you guys.”

89 Mr Rahmani said that he said to Mr Doan words to the following effect: “That’s fine Ngat, I will try my best. I am not sure what price Tony will come up with but it will be a lot more than $12 million.” On another occasion he told Mr Doan, “Ngat, things are progressing okay with Tony and the final contract price will be somewhere over $17 million or $18 million, could be even $20 million, are you okay with this?” Mr Rahmani said that Mr Doan responded, “Sasan, I understand very well how the Chinese operate and I have no problem with it. I am happy for you guys.”

90 Mr Rahmani said that those conversations happened on several occasions either in person or on the phone in the period before 1 February 2017 when he first became aware that the contract price was going to be $24 million.

91 Mr Rahmani said that at no point between 1 February 2017, when he brought the offer to Mr Doan/APD, and 31 March 2017, when the sale contract was signed, did Mr Doan or APD or APD’s solicitors raise either the purchase price or the commission structure with him. It was not until he received a letter of demand from APD’s solicitors on 6 September 2018, some 14 months after settlement, that Mr Rahmani became aware that APD was disputing the amount of commission paid.

92 Mr Rahmani denied making any statements to Mr Doan about the purchase price being inflated as a means for a Chinese buyer to bring money into Australia and/or the purchase price being substantially refunded to the purchaser.

93 In relation to Mr Doan’s dispute with the Hsiungs, Mr Rahmani said that on 14 September 2017, some two and a half months after settlement, Mr Doan approached him requesting that they execute another Form 6 agreement (the **backdated Form 6**) and backdate it as evidence of the commission paid for use in the Supreme Court proceeding. Mr Rahmani signed the backdated Form 6 for Maximo.

94 Mr Rahmani said that the backdated Form 6 was, for the most part, identical to the 5 November 2016 Former 6, except that Mr Doan asked for the wording in the commission clause to read “up to a purchase price of $12,000,000, the commission is $300,000 plus GST. Any amount above $12,000,000 is the commission of Century 21 Central GC and its conjuncting agents.” It was dated 3 November 2016.

95 Mr Rahmani said that on 22 March 2018, Mr Doan asked him to provide a new invoice on a Century 21 letterhead stating that the sale price was $12 million and the commission was $300,000 plus GST, which he did. The invoice was also to assist Mr Doan’s defence to the Hsiungs’ claim.

96 After receiving the letter of demand on 6 September 2018, Mr Rahmani received the following text dated 8 September 2018 from Mr Doan (quoted with typographical errors):

The form 6 I signed with you is exactly a form 6 , we signed after, only different is 300k, actually it is better for you, I talk to you on Sunday when I arrive Sydney. Johnson disputes about 12 mils dollar commission of C21 n your associates agents, actually it is not legal n common practice of agent, to me I do not care but now Jihnson bring it up n make very big noise…

… You have big commissions I do not care, but I can not paid 5% for what C21 n Mint agents received, I paid already for my portion.

97 The defence to the third amended statement of claim similarly denies all allegations that Mr Rahmani made representations about the purchase price being inflated as a means for a Chinese buyer to bring money into Australia and/or the purchase price being substantially refunded to the purchaser.

## Mr Arcuri’s evidence relevant to the representations

98 It will be recalled that on 2 February 2017, Mr Arcuri had a conference with Mr Doan. Mr Arcuri’s file note records that Mr Doan told him that Mr Doan believed “that some monies are being paid back by Sasan (significant amounts) with Sasan receiving approximately $600,000 commission.” It was put to Mr Arcuri in cross-examination that in fact Mr Doan had said to Mr Arcuri words to the following effect, “Sasan told me many times that Century 21 and the conjunction agent’s commission is 2.2% of the sale price and that a big proportion of this commission is going back to the buyer.” Mr Arcuri denied that he was told that and said that he was not told the source of Mr Doan’s belief that money was to be paid back to the purchaser. He also denied having been told that Maximo and the conjunction agents were only a mechanism in the middle earning 2.2% on the sale.

99 Mr Arcuri’s evidence in cross-examination was that it was his understanding throughout that a lot of the money was to be paid back to the purchaser via the Chinese agents, but not that Mr Rahmani was the source of his understanding, whether directly from Mr Rahmani or as reported by Mr Doan.

100 To the suggestion that the commission arrangement between Mr Doan and Mr Rahmani was exceptional and unusual and that it begs an immediate inquiry as to why a vendor would conceivably commit themselves to a sale on those terms, Mr Arcuri said that he had been dealing with Mr Doan and Mr Rahmani for many, many years, and that such a structure was part of the way that they did business. So, in the context of their dealings he did not find it unusual. Mr Arcuri said that he did not expect that there would have been some side agreement between the two companies qualifying the terms of the commission.

101 Mr Arcuri said that he viewed Mr Doan as one of the smartest and most cunning business people he had ever met in his professional career of some 40 years. He said that it was absolutely in character for Mr Doan to agree the kind of commission structure which would have his company paying 50% of the sale price of a property that sold for more than $20 million in commission.

## Why Mr Doan’s version must be rejected

102 There are a number of reasons why the evidence of Mr Doan that Mr Rahmani told him, prior to the 5 November 2016 Form 6 being executed, that most of the sale price was to be paid back to the buyer and that he relied on that cannot be accepted as proved. Indeed, for the reasons that follow, I reject Mr Doan’s version on this point.

103 First, there are Mr Doan’s different versions of the material conversations. The first five versions given by Mr Doan do not mention Mr Rahmani having said that most of the commission was to be paid back to the buyer, or that the price was artificially inflated for that purpose. Moreover, as observed above (at [78]), the original version of the statement of claim and several of the earlier versions given by Mr Doan alleged that Mr Doan did not want to know about what Maximo and the conjunction agent achieved above $12 million and that that could be their commission. That asserted position is incompatible with the case ultimately sought to be run which was not only that Mr Rahmani told Mr Doan that the buyer would be paid most of any amount of the purchase price greater than $12 million, but that Mr Doan relied on that.

104 The most pertinent conflict between the different versions is between the version given on oath by Mr Doan in his affidavit in the Supreme Court proceeding and his affidavit in this proceeding. In the Supreme Court, Mr Doan said that Mr Rahmani had said, “Don’t worry, you will get your $12 million. The rest is commission for Century 21 GC [i.e., Maximo] and the conjuncting agent.” In this Court, Mr Doan reported the relevant conversation in exactly the same way save that he said that Mr Rahmani had said, “Don’t worry, you will get your $12 million. Most of the second $12 million will go back to the buyer. The buyer is using this transaction to transfer funds from overseas to Australia. Century 21 GC and the conjuncting agent will only be getting 2.2% of the total sale price of $24 million.” Those two versions are irreconcilable yet they were both given on oath by Mr Doan.

105 Moreover, Mr Doan gave evidence in re-examination in this Court that before he swore the Supreme Court affidavit he went through it and that he was happy with its contents.

106 There is a further consideration. In his Supreme Court affidavit Mr Doan gave evidence that he informed his wife that “Sasan told me that the purchase price for the Land was $12 million and that the rest was commission for Century 21 and the conjuncting agent.” In this Court Mr Doan said that he was truthful to his wife and that he told her the whole story. Mrs Doan also swore an affidavit in the Supreme Court proceeding. In it she said that Mr Doan had told her that there was an offer from a Chinese buyer for the land for $12 million and “that if Sasan and the Chinese real estate agent sold the Land for more than $12 million, then the amount above $12 million was their commission.” Also, at the time of signing the heads of agreement which reflected the purchase price of $24 million, Mrs Doan said that Mr Doan told her that APD would only be getting $12 million and that “the rest of the purchase price was commission for Sasan and the Chinese real estate agent.”

107 Not only are those versions incompatible with the version that APD sues on, but Mrs Doan is the director of APD and she did not give evidence. I infer that that is because her evidence would not have assisted APD’s case. Indeed, if she gave evidence in this Court that was consistent with what she told the Supreme Court, then APD’s case would fail.

108 Secondly, APD’s argument which on the face of it is the most powerful argument in support of its position, namely that no reasonable seller of real property would conceivably agree to pay half the sale price of $24 million for a property as commission unless they had been told that that was in fact an artificially inflated purchase price to achieve some other purpose, such as to assist the purchaser in circumventing foreign exchange controls, cannot be accepted. That is because Mr Doan had concluded essentially the same commission structure with Mr Rahmani on numerous previous occasions where there was no suggestion of an artificially inflated purchase price or some ulterior purpose. Moreover, Mr Arcuri, who had represented Mr Doan over a long period of time on many transactions, was not at all surprised by the arrangement and regarded it to be just the sort of thing that Mr Doan and Mr Rahmani would agree to; it was “absolutely in character” for Mr Doan and “the sort of stuff he would do”. That was notwithstanding that he regarded Mr Doan to be one of the smartest and most cunning business people he had ever dealt with.

109 Thirdly, it is quite conceivable that, independently of Mr Rahmani having told him anything to that effect, Mr Doan thought and understood that a substantial part of the purchase price would be paid back to the buyer and that the purchase price of $24 million was inflated for that purpose. That is particularly so because he did not believe that the property was worth more than $12 million, which would have caused him to wonder why a sale price of $24 million was being proposed.

110 That Mr Doan in fact thought that most of the price above $12 million was to be paid back to the buyer is borne out by what he told Mr Arcuri on several occasions and what Mr Arcuri recorded in his file notes. But Mr Doan never told Mr Arcuri that Mr Rahmani had told him that that is what the arrangement was. Moreover, Mr Doan invariably said that he was not interested in the arrangement. He cannot in those circumstances be heard to complain that the arrangement did not turn out to be what he thought it was.

111 Fourthly, Mr Doan was not an honest witness. Indeed, at the heart of his case is his knowing participation in a dishonest scheme. That is that he says that the contract for sale at a price of $24 million, that APD concluded through his agency, falsely reflected the purchase price which was in truth only $12 million plus approximately $300,000 in commission. On his own version, the purchase price was falsely reflected at almost double the true price as a sham to achieve an ulterior purpose being the circumvention of Chinese foreign exchange controls. On his version, he was a knowing participant in that sham. That reflects a propensity to dishonesty which might equally infect Mr Doan’s approach to the present case by falsely claiming to his advantage that he was told certain things by Mr Rahmani.

112 Also, Mr Doan gave an untruthful account of how the backdated Form 6 came to be prepared. It will be recalled that Mr Rahmani said that Mr Doan asked him to sign a new backdated Form 6 to assist Mr Doan in his dispute with the Hsiungs. In his affidavit evidence, Mr Doan said that after completion of the sale contract, APD’s accountant had said that he should go back to Mr Rahmani and ask for another Form 6 for Mr Doan’s wife to sign because she was the director of APD, not Mr Doan who had signed the 5 November 2016 Form 6. Mr Doan maintained that version under cross-examination.

113 However, in his affidavit in the Supreme Court proceeding Mr Doan presented the backdated Form 6 as being the applicable Form 6 in respect of the sale of the property and that it was signed on 3 November 2016. That evidence was false because in fact it had been signed many months later and the applicable Form 6 was the one signed on 5 November 2016.

114 Also, Mr Doan’s explanation for the need for the re-signed Form 6 makes no sense. That is because if indeed it was necessary for the director of APD to sign the Form 6, Mrs Doan could simply have signed the 5 November 2016 Form 6 thereby ratifying Mr Doan’s signature of it. Any accountant would have known that. There was no need to go through the rigmarole that Mr Doan embarked on to get another Form 6 signed, and he failed to call his accountant to support his account notwithstanding that the matter was put sharply in issue.

115 There is also the fact that the two documents were not identical save for the signatures – the backdated document had a different commission structure which was the structure that suited Mr Doan to defend the case brought by the Hsiungs. Mr Doan knew that the commission structure in the documents was different as recorded by him in a text message to Mr Rahmani (quoted at [96] above).

116 In the circumstances, it is completely implausible that Mr Doan’s version of how the backdated Form 6 came to be prepared is true, whereas Mr Rahmani’s version is entirely plausible and is consistent with what the documents reflect. It follows that Mr Doan was knowingly dishonest in his affidavit in the Supreme Court proceeding and in his affidavit and oral evidence in the present proceeding, and that he was prepared to manufacture a document in order to advance his interests. That casts a significant shadow over his evidence of what Mr Rahmani is alleged to have said to him with regard to part of the purchase price being paid back to the buyer.

117 The text message referred to also acknowledged that Mr Rahmani had received “big commissions” and that Mr Doan “did not care”. That demonstrates that Mr Doan knew that Maximo’s commission was unusually big which shows that his subsequent version that he thought that Maximo would only get the usual 2.2% (or $300,000, Mr Doan having been inconsistent in this respect) is false.

118 If that was not enough, there are other reasons to have substantial doubt with regard to Mr Doan’s credibility. In the original statement of claim, which Mr Doan said in evidence was prepared on his truthful and accurate instructions, the backdated Form 6 was pleaded as having been concluded on 3 November 2016, and it was then pleaded that the 5 November 2016 Form 6 was executed on that date at the request of Mr Rahmani. That version of the pleadings, which was plainly false, survived through to the amended statement of claim and was only ultimately removed in the further amended statement of claim.

119 Finally, there is nothing in the evidence of Mr Rahmani or Mr Arcuri, despite extensive cross-examination, that supports Mr Doan’s version that he was told by Mr Rahmani that most of the purchase price above $12 million would be paid back to the buyer.

120 Mr Rahmani’s version of the events leading up to the conclusion of the 5 November 2016 Form 6 is the same as Mr Doan’s version to the Supreme Court. I accept that version as established.

121 That said, Mr Rahmani’s credit is not left unscathed. On his own version he was prepared to sign the backdated Form 6 and to then supply a false invoice to assist Mr Doan in a dishonest scheme in defence to the Hsiungs’ claims. All that can be said for Mr Rahmani in that regard is that the scheme was not for his benefit and, unlike Mr Doan, he was upfront and candid about it in his evidence. As indicated, it nevertheless calls for a cautious approach to his evidence.

## Question 1: did the conversation occur as alleged by APD?

122 In those circumstances, the answer to the first question in the case, namely did a conversation to the effect recounted by Mr Doan take place on 1 or 2 November 2016, is “no”.

## Questions 2 to 5: the consequences of Maximo’s conduct and the s 18 case

123 Given the answer to question 1, questions 2 to 5 fall away. Maximo accepts that if the answer to question 1 was “yes”, then it did breach the statutory prohibition against misleading and deceptive conduct in s 18 of the ACL.

124 Further, even if Mr Rahmani had made the representations as alleged by Mr Doan, I would not have found that Mr Doan relied on them in entering into the 5 November 2016 Form 6. That is because he consistently said, including on his own version and repeated many times in cross-examination, that he had no interest in knowing what the arrangements were with respect to any amount over and above $12 million, that he did not want to know and that he was quite happy to receive $12 million. On that basis it is simply not established that in truth he was keenly interested in knowing what was to become of any sum over and above $12 million and that if it was not going to be paid as he understood then he would not have concluded the agency contract, or at least not on the same terms.

## Questions 6 to 8: APD’s unconscionability case under s 21 of the ACL

125 The s 21 unconscionability case is pleaded in paragraph 17 of the third amended statement of claim. It relies on the conduct of the Maximo parties pleaded in paragraphs 9 and 14. The first of those pleads the representations dealt with and rejected under question 1. The second pleads that none of the Maximo parties at any time prior to the making of the agency contract, informed APD that the representations pleaded in paragraph 9 were untrue.

126 Thus, the unconscionability case rests entirely on the disputed representations which are dealt with and rejected in answer to question 1. It follows that the unconscionability case must fail and questions 6 to 8 fall away.

## Questions 9 to 13: APD’s fiduciary duty case against Maximo

127 APD pleads that by virtue of the execution of the agency contract, Maximo was constituted the agent of APD for the purpose of procuring a sale of the property and as such assumed a fiduciary duty throughout dealings with APD to act in good faith and in its interests, at all times preferring APD’s interests over its own interests.

128 It then pleads that a fair and reasonable commission payable to an agent effecting a sale of the property for $24 million is not more than $528,000, being 2.2% of the sale price inclusive of GST, and that by reason of those facts, by its conduct in requesting and procuring APD to enter into the agency contract, in rendering the invoice for its commission of $12 million plus GST and in receiving payment of that invoice, Maximo acted in breach of its fiduciary duty to APD. It is also pleaded that Mr and Mrs Rahmani were knowingly concerned in Maximo’s breach of its fiduciary duty to APD.

129 In *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; 156 CLR 41, Mason J (at 97) explained that where a contractual and fiduciary relationship coexists between the same parties, it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction. That passage was adopted in *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19; 241 CLR 1 at [91]. See also *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* [2016] HCA 49; 261 CLR 203 at [78].

130 Therefore, even accepting that there was a fiduciary relationship between APD and Maximo such that Maximo owed fiduciary duties to APD, those duties were subject to the terms of any agreement between the parties. Critically in this case, the parties agreed a particular commission structure in their 5 November 2016 Form 6. That was very similar to previous structures adopted by them. In the absence of the misleading and deceptive conduct that APD alleges against Maximo, and the fact that Mr Doan repeatedly told Mr Rahmani that he had no interest in what happened to any amount over and above $12 million for APD and that it could be the agents’ commission, there is no breach of any duty by Maximo to APD in signing a commission structure in that form with APD.

131 Moreover, the email exchange between the parties on 1 February 2017 in which Mr Rahmani informed Mr Doan that the contract price was going to be $24 million and that Maximo intended to invoice APD for $12 million plus $1.2 million plus GST and asked Mr Doan to confirm, and Mr Doan confirmed with “All agreed, OK”, discharged any duty that Maximo owed APD. That is because Mr Rahmani played open cards with Mr Doan, and Mr Doan agreed. The parties were free to agree what they chose to agree, and in the absence of some other unconscionable conduct, there is no breach of duty. On the facts as I have found them, Mr Rahmani had Mr Doan’s fully informed consent to charge the commission that he charged which is a complete answer to the breach of fiduciary duty claim. See *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390 at 393; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963; 160 FCR 35 at [293]-[296].

132 The position is confirmed by the fact that Mr Doan expressly authorised Mr Arcuri to pay to Maximo the sum of $12 million plus GST as commission on the sale, even after Mr Arcuri had on several occasions pointed out to Mr Doan that he was doing himself and APD a disservice by paying so much commission on the sale. See [53] above.

133 APD’s fiduciary duty case against the Maximo parties therefore fails.

## Questions 14 and 15: whether the emails on 1 February 2017 varied the agency agreement

134 The essential issue here is that the commission clause in the 5 November 2016 Form 6 specified that “the commission including GST payable” was 2.2% of $12,245,000 plus 99% of the difference between the contract price and $12,245,000, whereas the commission actually paid was $13,200,000, being $1,293,160 more than what the commission clause on a price of $24 million including GST provided.

135 Maximo does not plead that the exchange of emails between Mr Rahmani and Mr Doan on 1 February 2017 varied the 5 November 2016 Form 6 agreement. Rather, Maximo pleads that APD waived and abandoned its rights to rely upon the commission payable under the 5 November 2016 Form 6 by the exchange of emails and by never thereafter querying the commission or claiming that Maximo had been overpaid commission until the third amended statement of claim.

136 Maximo pleads in the alternative that APD is estopped by its representation in Mr Doan’s email of 1 February 2017 from asserting any right that the commission is payable other than in accordance with that email. Maximo pleads that it relied on the representation in Mr Doan’s email by agreeing a 60/40 split of the total commission payable on the sale between it and Mint Property, respectively, and on that basis then agreed to pay Mint Property $5.2 million, being 40% of $12 million plus GST.

137 The email exchange on 1 February 2017 is unequivocal. It admits of no confusion. Moreover, Mr Doan did not say that he was confused or mistaken. He did not agree to that commission in the email exchange or to subsequent payment in accordance with its terms under any mistake or misapprehension. In the circumstances, APD waived any reliance on holding Maximo to the terms of the commission clause in the 5 November 2016 Form 6.

138 Insofar as the estoppel defence is concerned, Mr Rahmani’s evidence was that in about October 2016 he had a discussion with Mr Yan of Mint Property about selling the Lake Street property. Mr Yan had a potential purchaser for the property and he and Mr Rahmani agreed to work together on the sale and to split any commission 60/40 in Maximo’s favour.

139 On 1 February 2017, Mr Yan called Mr Rahmani and said, for the first time, that the purchaser was prepared to pay $24 million. On the basis of their agreement with regard to splitting commission, Mint Property’s share of a total commission of $12 million plus GST would then be $4.8 million plus GST. Mr Yan asked, and Mr Rahmani agreed, to round that up so that Mint Property’s share of commission would be $5 million plus GST, i.e., $5.5 million. It was on that basis that Mr Rahmani completed, but did not sign, the Conjunction Confirmation document and sent it to Mr Yan reflecting a commission payable by Maximo to Mint Property of $5 million plus GST.

140 Mr Rahmani’s evidence was that if Mr Doan had not agreed to the commission payable as set out in the 1 February 2017 email, he would immediately have withdrawn the Conjunction Confirmation document that he had sent to Mr Yan earlier that day, and he would have prepared a different document calculating a lower commission payable with reference to the 60/40 agreement, and that he would have paid Mint Property in accordance with that lower commission.

141 In cross-examination by APD’s senior counsel, Mr Rahmani’s attention was drawn to his affidavit evidence where he had said that at any time between 1 February 2017 when the commission was agreed and 31 March 2017 when the contract for sale was signed, he would have been prepared to renegotiate the proposed commission with APD if Mr Doan had asked him to. He was asked whether he adhered to that evidence, to which he said “yes”. He then agreed that if Mr Doan had expressed some displeasure about the proposed commission arrangement at any time in that period he would have been prepared to renegotiate the commission between APD and Maximo and he would have been at liberty to renegotiate how much of that commission would have to be paid to Mint Property.

142 It is submitted on behalf of APD that no reliance on the representation by Mr Doan in the email exchange of 1 February 2017 to the detriment of Maximo was established because prior to that exchange, Mr Rahmani had agreed with Mr Yan that Maximo would pay Mint Property commission of $5 million plus GST. That was at a time prior to Mr Rahmani knowing that the commission agreement between APD and Maximo was anything other than what was set out in the 5 November 2016 Form 6. Therefore, so it is submitted, Mr Rahmani could not have relied on the representation of Mr Doan and it is not to the point that the Conjunction Confirmation document was not in fact executed until 7 February 2017.

143 In my assessment that submission overlooks that the agreement in the Conjunction Confirmation document which followed the discussion between Mr Rahmani and Mr Yan recounted above is premised on the total commission payable on the sale being $12 million plus GST. It is not apparent from the evidence why at that stage, which is to say prior to the email exchange between Mr Rahmani and Mr Doan later that day, the expectation was that that would be the commission, but it does not particularly matter. The point is that that was Mr Rahmani’s expectation, and that expectation was then confirmed, unequivocally, in the email exchange. I accept that had Mr Doan not confirmed that the commission payable would be $12 million plus GST, but had rather held Mr Rahmani to the commission structure in the 5 November 2016 Form 6 agreement, or agreed a different commission structure, then Mr Rahmani would have renegotiated the terms of the Conjunction Confirmation with Mr Yan so as to reflect their earlier 60/40 split agreement. Since he had not signed the Conjunction Confirmation document on behalf of Maximo, it was open to him to do that.

144 It does not particularly matter that Mr Rahmani was prepared to renegotiate the commission structure with Mr Doan. That much is implied by Mr Rahmani’s email on 1 February 2017 seeking Mr Doan’s confirmation of a commission structure different to what they had agreed in the 5 November 2016 Form 6. The material point is that Mr Rahmani and Mr Yan had a 60/40 agreement which formed the basis of what they then agreed in the Conjunction Confirmation document, based on commission being paid by APD as confirmed on 1 February 2017. Mr Rahmani relied on that to the detriment of Maximo in fixing the deal with Mr Yan which might otherwise have been different. Maximo’s estoppel defence is therefore established.

145 There is something else to be said about this part of APD’s claim. It is that APD has calculated the amount payable with reference to a sale price of $24 million, but in fact the amount that was paid was $24 million plus an additional $2,400,009.40 being GST plus another small amount (see [58]-[59] above). The additional amount should also be taken into account in the event that this claim was otherwise successful.

146 In the circumstances, APD’s claim for repayment of commission overpaid as a consequence of the 1 February 2017 exchange of emails fails on grounds of both waiver and estoppel.

## Questions 16 and 17: did Mr Arcuri breach his duty to APD?

147 APD pleads this aspect of the case against Mr Arcuri on the following bases.

148 APD alleges that on or about 5 November 2016, APD retained Mr Arcuri to act as its solicitor for fee or reward in providing and performing all professional services necessary to have a sale of the property proceed to completion. In his defence, Mr Arcuri says that he was retained to act for APD as vendor in relation to the sale of the property in or about February 2017, the retainer did not extend to providing advice to APD in relation to the appointment of Maximo as real estate agent for the sale of the property, and the retainer was entered into after APD had executed the 5 November 2016 Form 6 with Maximo.

149 APD alleges that it was a term of Mr Arcuri’s retainer that he would “exercise all due care, skill, diligence and attention to provide all such advice to [APD] in relation to the sale as was appropriate to safeguard its interests and to ensure that the sale contract did not impose any obligation on [APD] as vendor to which it was not otherwise subject.” To this, Mr Arcuri admits that it was an implied term of the retainer, and independently, that he owed APD a duty of care to exercise reasonable care, skill and diligence “in all matters within the scope of [his] retainer.”

150 APD alleges that when Mr Arcuri accepted the retainer he became aware of the terms of the 5 November 2016 Form 6, and in particular the commission clause, and that shortly after APD executed the 5 November 2016 Form 6 and numerous subsequent occasions, APD (by Mr Doan) informed Mr Arcuri of the commission clause and “requested his advice on the legality of that term.” To this, Mr Arcuri alleges that he had no knowledge of the 5 November 2016 Form 6 during the period of his retainer and that at no time did Mr Doan advise him about the 5 November 2016 Form 6 or request advice from him in relation to it.

151 APD alleges that in breach of the retainer, Mr Arcuri failed and neglected to advise APD that the commission clause was of no force or effect in light of the facts stated in paragraphs 17 and 18 of the third amended statement of claim, i.e., the allegations that the Maximo parties had engaged in unconscionable conduct contrary to s 21 of the ACL. Mr Arcuri denies the underlying conduct by the Maximo parties, or that he had been asked to advise in relation to the commission clause, and alleges that he had in any event raised concerns with regard to the commission clause with Mr Doan on many occasions.

152 In view of my conclusions with regard to the conduct alleged against the Maximo parties, this claim against Mr Arcuri must fail. Simply put, since the commission clause did not suffer from the defect alleged by APD, Mr Arcuri could not have been obliged to advise APD that it did suffer from that effect.

153 In any event, it is clear that Mr Arcuri was only retained by APD on or about 1 February 2017, some four months after the commission clause had been agreed to. Mr Arcuri did, however, know of Mr Doan’s agreement to the commission as set out in the email exchange of 1 February 2017, and he on several occasions raised with Mr Doan his view that Mr Doan was selling himself short by agreeing to pay Maximo such a substantial commission. In terms that were entirely plausible to Mr Arcuri given his long relationship with Mr Doan and his knowledge of the way in which he was inclined to operate, Mr Doan explained to Mr Arcuri why he was happy with that arrangement. At no point did Mr Arcuri know that Mr Doan’s version was that Mr Rahmani had told him that a substantial part of the commission would be paid back to the buyer. Nor did Mr Arcuri know that if that representation had been made it was untrue.

154 In the circumstances, this claim by APD against Mr Arcuri must fail.

## Question 18: special condition 13

155 In this part of the claim, APD alleges that in breach of his retainer Mr Arcuri caused special condition 13 to be included in the sale contract with Bondbao “in consequence of which [APD] ostensibly incurred a liability to pay to [Maximo] GST of $1,190,684 to which it was not otherwise subject, in addition to the commission of $11,906,840 purportedly payable under the [5 November 2016 Form 6].” Mr Arcuri pleads in his defence that special condition 13 was not drafted by him and he did not cause it to be included in the sale contract. He pleads that APD was at all times aware that GST was payable on any agreed commission and that it entered into the sale contract with full knowledge that GST was payable on the agreed commission.

156 Special condition 13 was in the following terms:

On the completion of this Contract, the Seller agrees to pay the Seller’s agent (and authorises the Buyer to pay the Seller’s agent from the deposit or if insufficient deposit is paid, from the purchase price) the agent’s commission calculated as agreed between Seller and Agent together with any amount of Goods and Services Tax which is to be remitted by the Seller’s agent in respect of the commission.

157 That clause of the contract between the vendor and the purchaser, to which the agent was not a party, did not alter the position as between the vendor and the agent with regard to the amount of, or calculation of, commission. Indeed, the clause recognises that what is payable is “the agent’s commission calculated as agreed between Seller and Agent”. The apparent purpose of the clause was to “secure” the commission, by providing that it would be payable from the deposit and, if necessary, also the balance of the purchase price. Thus, the obligation which it imposed on APD was one of timing and manner of payment, not of amount of payment.

158 In the circumstances, the underlying premise of this claim fails – the inclusion of special condition 13 did not prejudice APD by causing it to have a greater liability for commission to Maximo than it otherwise had.

159 It is also submitted on behalf of APD that special condition 13 “seemingly worked to bring about a result directly opposite to that which Mr Doan expected to occur, in line with the representations made to him by Mr Rahmani on 1 or 2 November 2016, namely that, on or immediately following the completion of the sale contract, the bulk of the purchase price in excess of $12 million would be refunded to the purchaser by Maximo.”

160 That submission is incorrect. On his version, Mr Doan’s expectation was that the full commission amount would be paid to Maximo which would then pay some of it to a conjunction agent or agents, retain some of it, and pay the bulk back to the buyer, or the interests behind the buyer. Special condition 13 had no impact on that arrangement because it envisaged that the commission would be paid to Maximo. Once that occurred, it had nothing further to say about what happened to what had been paid.

161 This claim against Mr Arcuri must therefore also fail.

## Question 19: APD’s loss as a consequence of Mr Arcuri’s breaches of his retainer

162 Since the claims against Mr Arcuri must fail, the question of APD’s loss as a consequence of Mr Arcuri’s alleged breaches of his retainer does not arise.

## Question 20: was Mr Arcuri knowingly concerned in Maximo’s breach of fiduciary duty?

163 Since Maximo did not breach any fiduciary duty to APD, Mr Arcuri could not have been knowingly concerned in that breach so this claim must fail.

## Question 21: Mr Arcuri’s payment of $13.2 million to Maximo

164 This claim against Mr Arcuri relates to the claim in questions 14 and 15 because it is, in essence, that APD was not indebted to Maximo in the sum of $13.2 million because its true indebtedness was to be calculated with reference to the commission clause in the 5 November 2016 Form 6 and not with reference to the email exchange of 1 February 2017.

165 To succeed in this claim APD would have to establish that it had given a copy of the 5 November 2016 Form 6 to Mr Arcuri and that, notwithstanding that, Mr Arcuri was not justified in paying out Maximo in accordance with the 1 February 2017 emails, subsequent confirmation and Maximo’s invoice that he sent to APD on 1 June 2017 and in respect of which he received no countervailing instruction from Mr Doan.

166 There is nothing to support Mr Doan’s claim that he gave Mr Arcuri a copy of the 5 November 2016 Form 6 prior to settlement. Mr Arcuri denies that claim. I accept that denial and I reject Mr Doan’s claim to the contrary. Mr Arcuri was entirely justified in relying on the email exchange of 1 February 2017, Mr Doan’s explanations to Mr Arcuri from time to time that Maximo would be paid commission of $12 million plus GST, and on Mr Doan’s silence in the face of Mr Arcuri’s letter of 1 June 2017 which enclosed Maximo’s commission invoice, implied that commission would be paid in accordance with that invoice and invited any queries. This claim therefore fails.

## The cross-claim

167 Since I have decided that the claims against the Maximo parties must fail, no question of indemnity in respect of any amounts that they must pay APD under the insurance policy with Hamilton arises. However, the policy also provides for defence costs with the result that the dispute about whether the policy responds to APD’s claims must still be decided because the Maximo parties want their costs of defending APD’s claims indemnified by Hamilton. Also, against the event that I am wrong in my conclusion that the Maximo parties are not liable to APD, it is necessary to decide the cross-claim.

168 There are essentially two issues to be decided on the cross-claim:

(1) First, is the claim by APD against the insureds (i.e., Maximo and the Rahmanis as directors of Maximo) covered by the insuring clause of the policy with Hamilton?

(2) Secondly, is indemnity in any event excluded by operation of the exclusion for dishonesty?

169 It is common ground that the Maximo parties bear the onus in respect of the first issue and Hamilton bears the onus in respect of the second issue.

170 There is no issue between the parties that the claim against the Maximo parties was made during the period of the cover or that the Maximo parties are all insureds under the policy.

### The policy

171 The policy is styled as a real estate agents and property managers professional indemnity policy. Maximo was the named insured and the policy extended to directors of the insured. The Rahmanis, as directors of Maximo, were consequently also insureds under the policy. The insured’s professional business was stated to include estate agents and property managers.

172 Relevant terms of the policy include the following:

DEFINITIONS AND INTERPRETATIONS

…

**Circumstance**

Any **Circumstance** of which the **Insured** first becomes aware during the **Policy Period** which may or is likely to give rise to a claim against them and is subject to the indemnity provided under this **Policy**.

**Defence Costs**

All costs and expenses incurred with the prior written consent of the **Insurer** in the investigation, defence or negotiation of the settlement of any claim or **Circumstance**.

…

POLICY COVER

The **Insurer** will indemnify the **Insured** in respect of:-

1. **Civil Liability**

The **Insurer** agrees to indemnify the **Insured** against civil legal liability for any claim for compensation first made against the **Insured** during the **Policy Period** and which is notified to the **Insurer** during the **Policy Period** arising from breach of professional duty on the part of the **Insured** incurred in the conduct of the **Insured’s Professional Business**.

2. **Trade Practices and Related Legislation**

The **Insurer** agrees to indemnify the **Insured** against civil legal liability for any claim for compensation made against the **Insured** under the terms of the Competition and Consumer Act 2010 (Cth), the Fair Trading Act 1987 (NSW), the Fair Trading Act 1985 (Victoria) or similar legislation enacted by other States or Territories of the Commonwealth of Australia.

…

4. **Defence Costs**

 The Insurer agrees to indemnify the Insured in respect of Defence Costs in relation to claims made that are covered by the Policy.

…

EXCLUSIONS

This **Policy** shall not indemnify the **Insured** in respect of any claim, loss, liability or expense arising directly or indirectly out of:-

…

9. Dishonesty

 the dishonesty of the **Insured** or **Employee**.

(Emphasis in original.)

173 There is no disagreement with regard to the principles to be applied to the task of interpreting an insurance policy. The ordinary rules of interpretation for commercial contracts apply. The policy should therefore be given a businesslike interpretation which requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure: *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; 203 CLR 579 at [22]; *CGU Insurance Ltd v Porthouse* [2008] HCA 30; 235 CLR 103 at [43].

174 Further, the meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction. See *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 at [40].

### Issue 1: does the insuring clause cover the claims?

175 It will be observed that both paragraphs 1 and 2 of the insuring clause provide for indemnity “against civil legal liability for any claim for compensation”. In respect of paragraph 1, it is such liability “arising from breach of professional duty”, and in respect of paragraph 2 it is such liability “under the terms of” the specified legislation. The point being that in both cases it is civil liability for “compensation” that is indemnified. The defence costs cover in paragraph 4 is limited in the same way since it is limited to being in respect of claims “that are covered by the Policy”. Thus the defence cover responds to the defence of claims which if proved would give rise to a civil liability for compensation covered by one or other of the paragraphs of the insuring clause.

176 Hamilton’s submission is that the true nature of APD’s claim is that it is not a claim for compensation but rather that it is a claim for restitution of money had and received. Hamilton submits that APD seeks the Court’s aid to achieve an accounting for an unconscientiously gained benefit, not a claim for compensation, and it is no loss to be deprived of an unwarranted benefit or to be ordered to disgorge ill-gotten gains.

177 The Maximo parties submit, in contrast, that there is no claim against them for “equitable account or debt” or in restitution. They submit that the claims made by APD are for damages based upon a breach of the prohibitions in ss 18 and 21 of the ACL and a breach of fiduciary duty. They also point to the fact that Maximo paid-on part of the commission it received to Mint Property with the result that the claim against it cannot be characterised as a claim for an “unwarranted benefit” which the Maximo parties should “be ordered to disgorge”.

178 In the alternative, the Maximo parties submit that even if the claim is in truth a claim in restitution, the claim is in any event covered. They submit that such a claim is a claim for compensation.

179 The Maximo parties also submit that APD’s separate claim dealt with as questions 14 and 15 above, i.e., the claim that commission should have been payable under the commission clause in the 5 November 2016 Form 6 and not in accordance with the 1 February 2017 emails, is a claim covered by the insuring clause.

180 I accept, as submitted by Hamilton, that the insurer is not bound by the way in which APD has chosen to formulate its claim; the Court must ascertain the true nature of the claim in order to determine whether the Maximo parties’ claim for indemnity in respect of that claim is within the insuring clause: *West Wake Price & Co v Ching* [1957] 1 WLR 45 at 53; ***McCarthy v St Paul*** *International Insurance Co Ltd* [2007] FCAFC 28; 157 FCR 402 at [75] per Allsop J, Kiefel and Stone JJ agreeing.

181 The leading Australian authority on the question of the reach of a liability policy insuring clause which is limited to liability for “civil compensation or civil damages” is ***Kyriackou*** *v ACE Insurance Ltd* [2013] VSCA 150 . The reasons of the Court are those of Harper JA with whom Tate JA and Kyrou AJA agreed. The insurer agreed to indemnify the insured against “Loss arising from any Claim in respect of civil liability for breach of a duty owed in a professional capacity” where “Loss” was defined as amounts payable “as civil compensation or civil damages”: at [2] and [4].

182 The underlying claim in respect of which indemnity was claimed was for defence costs in respect of a proceeding brought by the Australian Securities and Investments Commission (ASIC) against the insured. ASIC had sought a declaration that the insured, and others, had engaged in conduct in contravention of s 601ED of the ***Corporations Act*** *2001* (Cth) by operating a managed investment scheme which required registration but was not registered. ASIC had also sought relief restraining the insured from further operating or promoting the scheme in question, and that the scheme be wound up. Ultimately ASIC’s proceeding was discontinued and no order for costs was made, but the insured was left significantly out-of-pocket in respect of his own legal costs for which he sought indemnity under his professional indemnity policy. See *Kyriackou* at [9] and [17]. The question was thus whether ASIC’s claim against the insured was a claim for civil compensation or civil damages for breach of a duty owed in a professional capacity within the meaning of the insuring clause.

183 With reference to *Kantfield Pty Ltd v Lockwood* [2003] VSC 420 at [12], it was held in *Kyriackou* (at [51]) that a claim for civil damages or civil compensation does not include a claim in debt, and on the basis of that reasoning such a claim does not encompass a claim for restitution or for a civil penalty; still less does it include a claim for a declaration and an injunction. It was therefore concluded that ASIC’s claim against the insured was not such a claim and was not covered.

184 However, the Court in *Kyriackou* also considered whether a claim by an aggrieved person with respect to the managed investment scheme would be a claim covered by the policy. That was because ASIC could conceivably have amended its relief and sought the payment of damages to the investors: at [37]. With reference to *Hall Brothers Steamship Co Ltd v Young* [1939] 1 KB 748 at 756, it was held (at [52]) that a claim for damages requires a breach of a duty or obligation and would therefore exclude claims for restitution or debt. It was reasoned that any claims by investors in the managed scheme would likely be for the return of borrowed funds, or to enforce contractual rights “– in other words, for restitution of money had and received, or for a debt due or payable under contract – neither of which would constitute payment of compensation or damages.” It is particularly on that reasoning that Hamilton relies in the present case.

185 In ***Smart v AAI*** *Ltd* [2015] NSWSC 392, another case dealing with a similar issue, the insured was referred to as Q1. It was a finance broker. The claimants against Q1 had transferred sums of money to it on the basis that the funds would be used to make loans to clients of Q1 who would then repay the loans to the claimants (at [2]-[3], [7]). The claimants were not repaid anything, the funds having been misappropriated by Q1’s general manager (at [4]). Since there had been no intention on the part of the general manager to lend the funds to clients and no clients, Q1 was liable to the claimants for damages for breach of contract (at [7]). Q1 had been wound up and deregistered, so the claimants brought claims against Q1’s insurer under s 601AG of the Corporations Act (at [5]-[6]). One of the issues in the case was whether Q1’s liability to the claimants was covered by the policy of insurance.

186 The policy was styled as a professional indemnity insurance policy for the mortgage and finance industry (at [167]). The insurer indemnified Q1 “against civil liability for compensation” in respect of any claim made during the period of insurance where claim meant “any demand by a third party upon the Insured for compensation” (at [168]-[169]). One of the insurer’s contentions was that the claimants had not established a “civil liability for compensation” within the meaning of the insuring clause (at [174]). The insurer contended that the claims against Q1 were in truth claims in debt for monies had and received, not for compensation (at [176]).

187 Beech-Jones J distinguished between characterising the liability and the claims that were made, recognising, with reference to *McCarthy v St Paul* at [76], that at an early stage of any complaint a claim may be inarticulately expressed as a general assertion but over time it may be sophisticatedly and precisely drafted (at [177]-[178]). Thus, the critical question is to characterise the nature of the liability which is determined by reference to the facts that give rise to the liability rather than the form of liability (at [179]). In that case it was the nature of the liability that had been established, whereas in the present case I have found that there is no liability which makes the exercise more difficult; it is necessary to characterise the nature of the liability that might have been established had the facts asserted as underpinning the claims been found proved.

188 Beech-Jones J held that the liability in that case arose from a breach of a duty or an obligation, namely the obligation to use the funds to effect the lending transaction. On that basis his Honour was satisfied that the claimants had established “a liability for compensation” within the meaning of the insuring clause (at [179]).

189 APD asserts three principal claims (summarised in [4] and [7] above) and an alternative claim (summarised in [8] above) against the Maximo parties. The first three claims are for breaches of ss 18 and 21 of the ACL and for breach of fiduciary duty. The “loss and damage” that APD claims to have suffered as a consequence of each of those breaches is pleaded (in [41] of the third amended statement of claim) to be $12,672,000, “being the difference between the amount paid by [Mr Arcuri] out of his trust account to [Maximo], being $13,200,000 and the amount fairly and reasonably payable to [Maximo], namely $528,000.” The ACL claims are “actions for damages” within the contemplation of s 236 of the ACL and the breach of fiduciary duty claim is also a claim for damages calculated in the same way.

190 None of those claims is for a debt or for restitution or for performance of a contract. Each claim asserts a civil legal liability of the Maximo parties for compensation arising from a breach of duty, being either a breach of a statutory duty as expressed in ss 18 and 21 of the ACL or a breach of fiduciary duty. As in *Smart v AAI* where what was claimed was damages arising from the payment of funds to Q1 which were not repaid, the liability that would have arisen had the facts underlying the claims asserted against the Maximo parties been proved would not have been a liability in debt for monies had and received. On that basis, the liability that the Maximo parties would have if those claims were established would on the face of it be a liability covered by the insuring clause.

191 Hamilton’s argument to the contrary is summarised in its submission that the true nature of the claim is exposed by the consideration that if the Court were to find that the Maximo parties must account to APD for their “unauthorised benefit”, then “this will be because it would be against conscience to allow them to retain it” and “it would be wholly against conscience that, in those circumstances, the insurer should finance a resolution of this tawdry dispute.” Hamilton thus presses, in effect, for the wording of “civil legal liability for any claim for compensation” to be construed to exclude any claim in respect of liability for unconscionable conduct or to repay some “ill-gotten” gain.

192 That reasoning has some force but what is missing from the analysis is recognition that if the claims in this case were established then the policy would not indemnify the Maximo parties because indemnity would be excluded by the dishonesty exclusion. That would be true of a significant proportion of unconscionability claims, particularly considering that “dishonesty” in this context “embraces deliberate conduct which is considered to be dishonest by the standard of ordinary decent people, or, put another way, the ordinary standards of reasonable and honest people”: *Harle v Legal Practitioners Liability Committee* [2003] VSCA 133; 13 ANZ Ins Cas 51-605 at [28].

193 There is therefore no reason to read down the plain meaning of the operative words in the insuring clause, namely indemnity “against civil legal liability for any claim for compensation”, to exclude claims such as those asserted against the Maximo parties because the insureds would otherwise be able to benefit from their own unconscionable conduct and enjoy a windfall at the expense of the insurer. A reasonable businesslike construction of the insuring clause does not require that limitation. That is particularly so having regard to the cover in paragraph 2 of the insuring clause being civil liability for compensation under the terms of the *Consumer and Competition Act 2010* (Cth). Although there are many potential bases to liability for compensation under that Act, quintessential amongst them are ss 18 and 21 of the ACL. There is no good reason why the parties should be thought to have intended to exclude such liability from cover.

194 In my view, the three principal claims against the Maximo parties are claims covered by the insuring clause.

195 The alternative claim for repayment of the amount overpaid on account of payment of commission not having been done in accordance with the commission clause in the 5 November 2016 Form 6 is a claim in debt and would not be covered by the insuring clause. However, given that the other claims are covered that does not matter.

### Issue 2: does the dishonesty exclusion apply?

196 In view of my conclusion that Mr Rahmani was not dishonest in his dealings with Mr Doan in relation to the sale of the Lake Street property, the dishonesty exclusion does not apply. I understand Hamilton to accept as much.

### Disposition

197 For those reasons, Hamilton is liable to indemnify the Maximo parties under the defence costs cover in the policy.

198 As I have not heard from the parties to the cross-claim on what form of relief would be most appropriate in the circumstances, I will give them the opportunity to bring in agreed or competing orders to give effect to these reasons.

## Conclusion

199 As the parties have not had the opportunity to make submissions on costs, I will not make any orders on costs and I will provide for the parties to either agree or make submissions on costs.

200 Insofar as the matter as a whole is concerned, there should be orders as follows:

(1) The proceeding against the first, second and third respondents be dismissed.

(2) The proceeding against the fourth respondent be dismissed.

(3) Within 14 days of these orders:

(a) The parties to the principal proceeding bring in agreed or competing orders with respect to the costs of the proceeding, and in the event that it is the latter then the parties file written submissions of no more than three pages in support of the costs orders that they seek.

(b) The parties to the cross-claim bring in agreed or competing orders with respect to the disposition of the cross-claim and costs, and in the event that there are competing orders then the parties file written submissions of no more than three pages in support of the orders that they seek on the cross-claim.

(4) Within 28 days of these orders, the parties:

(a) File any submissions (of no more than three pages) in response to any of the submissions filed under order 3.

(b) Indicate by way of email to the Associate of Stewart J whether they wish the remaining issues to be determined after a further short oral hearing or whether they are content for the issues to be determined on the papers.

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| I certify that the preceding two hundred (200) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart. |

Associate:

Dated: 25 June 2021

SCHEDULE OF PARTIES

|  |  |
| --- | --- |
|  | NSD 2003 of 2018 |
| Respondents |  |
| Fourth Respondent: | DOMINIC ANTHONY ARCURI |
| Cross-Claimants |  |
| Second Cross-Claimant: | SASAN RAHMANI |
| Third Cross-Claimant: | RITA RAHMANI |