FEDERAL COURT OF AUSTRALIA

Consolo Ltd v Bennett [2012] FCAFC 120

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| Citation: | | Consolo Ltd v Bennett [2012] FCAFC 120 |
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| Appeal from: | | Bennett v Elysium Noosa Pty Ltd (in liq) [2012] FCA 211 |
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| Parties: | | **CONSOLO LTD (ACN 000 022 266) and CONSOLO PROPERTY PTY LTD (ACN 093 500 059) v LUKE ANTHONY BENNETT**  **and**  **PEARSON PROPERTY GROUP (NOOSA) PTY LIMITED (ACN 112 246 612) and PEARSON PROPERTY GROUP PTY LTD (ACN 076 423 268) v LUKE ANTHONY BENNETT** |
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| File numbers: | | QUD 199 of 2012 |
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| Judges: | |  |
|  | |  |
| Date of judgment: | | 31 August 2012 |
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| Catchwords: | | **TRADE AND COMMERCE** – s 84(2) *Trade Practices Act 1974* (Cth) – misrepresentations by sales agents – sale of lot in Community Title Scheme – whether misconduct engaged in on behalf of body corporate – whether misconduct engaged in at the direction of or with consent or agreement of director, employee or agent of body corporate acting within actual or apparent authority – responsibility of one joint venturer for conduct of other joint venturer – separate entity doctrine  **TRADE AND COMMERCE** – s 52 *Trade Practices Act 1974* (Cth) – pre-contract representations – sale of lot in Community Title Scheme – common facility to be provided as part of Scheme – misleading or deceptive representations made – conduct likely to mislead or deceive  **TRADE AND COMMERCE** –s 53A(1)(b) *Trade Practices Act 1974* (Cth) – false or misleading representations in connexion with the sale of an interest in land –– sale of lot in Community Title Scheme – false or misleading representations in connexion with facilities associated the land – common property  **TRADE AND COMMERCE** – s 51A *Trade Practices Act 1974* (Cth) – misleading representations as to future matters – sale of lot in Community Title Scheme – facilities to be provided as part of Scheme – whether reasonable grounds for making representations – operation of deeming provision in s 51A(2) – whether misleading under s 51A(1)  **TRADE AND COMMERCE** – whether pre-contractual misconduct caused loss suffered on completion of contract  **TRADE AND COMMERCE** – s 82(1) *Trade Practices Act 1974* (Cth) – damages – quantum – loss claimed in respect of inducement to enter contract – sale of lot in Community Title Scheme – loss assessed at date of acquisition |
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| Legislation: | | *Body Corporate and Community Management Act 1997* (Qld) ss 10, 24(2), 223, 224  *Trade Practices Act 1974* (Cth) ss 51A, 52, 53A(1)(b), 53A(3)(c), 84(2) |
|  | |  |
| Cases cited: | | *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2004) 141 FCR 183 cited  *Ackers v Austcorp International Ltd* [2009] FCA 432 discussed  *Balmedie Pty Ltd and Anor v Russo and Ors* (unreported, Ryan, Whitlam and Goldberg JJ, 19 August 1998) discussed  *Bennett v Elysium Noosa Pty Ltd (in liq)* [2012] FCA 211 related  *Bill Acceptance Corp Ltd v GWA Ltd* (1983) 50 ALR 242 approved  *Bonett v The Barron & Dowling Property Group Pty Ltd* (2006) 67 NSWLR 475 discussed  *British Thomson-Houston Co Ltd v Sterling Accessories Ltd* [1924] 2 Ch 33 cited  *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 followed  *R v Maxwell* (1998) 217 ALR 452 cited  *Salomon v A Salomon & Company Ltd* [1897] AC 22 cited  *Taylor v Crossman (No 2)* (2012) 199 FCR 363 followed  *The Queen v Toohey; ex parte Attorney-General (NT)* (1980) 145 CLR 374 cited  *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 76 FLR 455 cited  *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27 cited |
|  |  | |
| Date of hearing: | 7 August 2012 | |
|  |  | |
| Place: |  | |
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| Division: |  | |
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| Category: | Catchwords | |
|  |  | |
| Number of paragraphs: | 93 | |
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| **In QUD198/2012:** |  | |
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| Counsel for the First and Second Appellants: | Mr DA Savage SC with Ms MJ Luchich | |
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| Solicitor for the First and Second Appellants: | Gadens Lawyers | |
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| Counsel for the Respondent: | Mr R Douglas SC with Mr R Butler | |
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| Solicitor for the Respondent | Griffiths Parry Lawyers | |
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| **In QUD199/2012:** |  | |
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| Solicitor for the First and Second Appellants: | Mr T McBride of Russells | |
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| Counsel for the Respondent: | Mr R Douglas SC with Mr R Butler | |
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| Solicitor for the Respondent | Griffiths Parry Lawyers | |
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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 198 of 2012 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | CONSOLO LTD (ACN 000 022 266)  First Appellant  CONSOLO PROPERTY PTY LTD (ACN 093 500 059)  Second Appellant |
| AND: | LUKE ANTHONY BENNETT  Respondent |

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| JUDGES: | KEANE CJ, MCKERRACHER & KATZMANN JJ |
| DATE OF ORDER: | 31 august 2012 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. the appeal be allowed and the judgment against the first and second appellants be set aside; and
2. the respondent pay the first and second appellants’ costs to be taxed if not earlier agreed.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 199 of 2012 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | PEARSON PROPERTY GROUP (NOOSA) PTY LIMITED (ACN 112 256 612)  First Appellant  PEARSON PROPERTY GROUP PTY LIMITED (ACN 076 423 268)  Second Appellant |
| AND: | LUKE ANTHONY BENNETT  Respondent |

|  |  |
| --- | --- |
| JUDGES: |  |
| DATE OF ORDER: | 31 august 2012 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. the appeal be dismissed; and
2. the first and second appellants pay the respondent’s costs to be taxed if not earlier agreed.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| DISTRICT REGISTRY |  |
|  | qud 199 of 2012 |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | CONSOLO LTD (ACN 000 022 266)  First Appellant  CONSOLO PROPERTY PTY LTD (ACN 093 500 059)  Second Appellant |
| AND: | LUKE ANTHONY BENNETT  Respondent |

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| BETWEEN: | PEARSON PROPERTY GROUP (noosa) PTY LIMITED (ACN 112 256 612)  First Appellant  PEARSON PROPERTY GROUP PTY LIMITED (ACN 076 423 268)  Second Appellant |
| AND: | LUKE ANTHONY BENNETT  Respondent |

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| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

# THE COURT

# INTRODUCTION

1. Dr Bennett, the respondent to these appeals, was the applicant in the proceedings below in which he claimed damages for misleading and deceptive conduct in contravention of Pt V of the *Trade Practices Act 1974* (Cth) (the TPA). Dr Bennett alleged that the appellants, through their agents, misled him in various ways whereby he was induced to purchase Lot 181 in the Elysium Noosa Development (the Development).
2. The Development is a residential community title development located near Noosa on the Sunshine Coast of Queensland. It is now more formally described as the Elysium Noosa Community Title Scheme (the Scheme) which is governed by the *Body Corporate and Community Management Act 1997* (Qld) (the BCCM Act). The Scheme was established on 25 February 2008. Elysium Noosa Pty Ltd (Elysium) was the owner of the land on which the Development took place.
3. The Development was undertaken as an unincorporated joint venture between NR Nominees Pty Ltd (NR Nominees) and Pearson Property Group (Noosa) Pty Ltd (PPG Noosa) on land of which Elysium was the registered proprietor. Consolo Pty Ltd (Consolo) owned all of the shareholding in Consolo Property Pty Ltd (Consolo Property) and in NR Nominees which, in turn, owned all of the shareholding in Elysium. Pearson Property Group Ltd (PPG) held all of the shareholding in PPG Noosa. Where appropriate, we will refer to Consolo Property and Consolo as “the Consolo appellants” and to PPG and PPG Noosa as “the Pearson appellants”.
4. Dr Bennett’s case was quite complex in terms of the misconduct alleged and the number of parties alleged to be legally responsible for the loss suffered by him as a result of that misconduct.
5. The primary judge rejected much of what was urged on Dr Bennett’s behalf, but his Honour accepted that Dr Bennett had been induced to agree to purchase Lot 181 by some representations made to him by Nick and Julianne Burke, employees of the marketing consultant engaged by Elysium to sell lots in the Development. The primary judge held that s 84(2)(b) of the TPA operated to deem each of the appellants to have made the representations made by the Burkes. His Honour held that these representations were made without reasonable grounds for making them and were, in consequence, misleading.
6. The primary judge assessed Dr Bennett’s damages at $500,000, that amount being the difference between the price paid by him on settlement of the contract and the true value of Lot 181 at that date.
7. The appellants do not challenge his Honour’s findings as to the representations which were made to Dr Bennett by the Burkes.
8. In this Court, both appellants argue that the primary judge erred in holding that:

(a) there were not reasonable grounds for making the representation that the community centre would be constructed contemporaneously with the completion of Lot 181;

(b) any loss at all was suffered by Dr Bennett by reason of his entry into the contract to purchase Lot 181;

(c) the quantum of loss suffered by Dr Bennett was $500,000.

1. In addition, the Consolo appellants argue that the primary judge erred in holding that they were deemed by s 84(2)(b) of the TPA to have engaged in the making of the representations made by the Burkes. The Pearson appellants do not raise this ground of appeal.
2. We propose now to summarise the findings of the primary judge which are not challenged on the appeals. We will then set out the contractual and statutory framework within which the issues arise before turning to address the issues raised by the appellants in this Court.

# FACTS NOT IN ISSUE ON THE APPEALS

1. Because of the way the case was presented to the primary judge by the parties, his Honour was obliged to give lengthy reasons in which small amounts of wheat were required to be separated from a vast quantity of chaff. Because of the careful, fair and conscientious manner in which his Honour carried out this difficult task, and because of the limited nature of the challenges to his Honour’s conclusions, it is possible to state the uncontroversial facts relatively briefly.
2. Mr Clive Austin and Mr Michael Austin were directors of each of the Consolo appellants and other Consolo subsidiaries, including NR Nominees. On 6 July 2004, the Consolo Board made a decision to purchase the land necessary for the Development. The joint venture between NR Nominees and PPG (Noosa) to pursue the Development began in August 2004, although a formal agreement was not executed until 15 August 2006.
3. Under the terms of the joint venture agreement, Mr Michael Dowling was employed by Consolo Property as joint project manager of the Development with Mr David Pearson of PPG.
4. Mr Dowling prepared the master program for the design and construction of Stage 1 of the Development using an estate master software program together with a feasibility study. His role in the joint project management was to secure financing for the project, attend to the preparation of feasibility studies and otherwise provide accounting and administrative support. Mr Dowling left PPG in May 2006 at which time he was replaced by Ms Victoria Tompson and Mr Sean McKeown.
5. Mr Pearson’s role in the joint project management was the promotion, advertising and marketing of the project.
6. The overall management of the Development was under the control of an operating committee chaired by Mr Michael Austin. There was also a site committee which was responsible for providing monthly reports on building progress and expenditure to BOS International (Australia) Ltd (BOS), the main financiers for the Development.
7. In December 2004, Elysium entered into a marketing consultancy services agreement with PRD Consulting Services Pty Ltd (PRD) and a separate project marketing agreement with PRD Realty Pty Ltd. Mr Pearson negotiated both of these agreements and Mr Michael Austin signed them as a director of Elysium. PRD employed Nick and Julieanne Burke who worked as sales agents in the on-site sales office at the Development from January 2005 until May 2006.
8. During this time, the individuals involved in various roles with the appellants had different levels of involvement with the Burkes. Neither Mr Clive Austin nor Ms Tompson of the Consolo respondents had any involvement with the Burkes. Mr Michael Austin met with the Burkes on site on one or two occasions, but did not actually give them any instructions in relation to the marketing of the Development. Mr Dowling had slightly more frequent contact with the Burkes. Mr Pearson had a closer relationship with the Burkes by reason of his responsibility for the promotion, advertising and marketing of the Development.
9. Dr Bennett first became aware of the Development from articles in the local media in January 2005. At this time, he visited the site and spoke to the Burkes at the on-site sales office. He informed the Burkes that he wished to gain a better understanding of the Development and he asked them to explain it to him. The Burkes gave him promotional and marketing material: Reasons [24]-[26]. The Burkes also explained various features of the Development including the Community centre which the Burkes described as the “focal point for the lifestyle activities within the estate”. Dr Bennett visited the site on two further occasions. The Burkes made further statements on these occasions as set out at Reasons [36].
10. As to the representations made by the Burkes to Dr Bennett, it is sufficient to note that the primary judge found that in early 2005 the Burkes represented to Dr Bennett that the Development would include a multi-function community centre, comprising multiple facilities, the construction of which would be completed at about the same time as the completion of Stage 1 of the Development including Lot 181.
11. In February 2005, Dr Bennett signed a contract for the purchase of Lot 181, comprising a house and land package, in the Scheme. He received a draft copy of the sale and purchase contract on or before 14 February 2005. The contract was dated 7 March 2005. The respondent completed his purchase of Lot 181 on 11 March 2008 paying over the sum of $2.1 million in return for title of the Lot.
12. While there was a dispute about the precise timing in which finance for the Development was arranged, financing for the Development was finalised in late 2005. A facility of $96 million was arranged with BOS, together with a facility from a mezzanine financier for the sum of $39.5 million.
13. It was a pre-condition of the BOS facility that 30 lots had to be pre-sold by 31 December 2005. The existence of this pre-sales condition was reflected in a provision of the draft contract for the purchase of Lot 181 which enabled Elysium to terminate the contract of sale to Dr Bennett. The appellants duly met that condition and the finance for Stage 1 of the Development was drawn down progressively from early in 2006. Construction was undertaken throughout 2006 and 2007.
14. The original timetable for construction of the Development contemplated completion of Lot 181 in March 2007. There were delays, as a result of which Lot 181 was not finished ready for settlement of Dr Bennett’s contract until about February or March 2008.
15. The community centre had not been built at the date of settlement. Indeed, no contract for its construction had even been awarded at that date.
16. Relations between the joint venturers began to break down in about April 2007. The joint venture was formally terminated in August/September 2007. On 23 September 2009, receivers and managers were appointed to Elysium, and it was subsequently ordered to be wound up.

# CONTRACTUAL TERMS

1. The contract of sale for Lot 181 contained the following relevant terms:

**3.1 Development approvals**

The Seller may terminate this Contract by giving written notice to the Buyer if, by 31 December 2005:

(a) a development permit from the Noosa Shire Council authorising construction of the Scheme Improvements, on terms satisfactory to the Seller, has not taken effect; or

(b) the Seller is not able to obtain any other approval necessary for the reconfiguration of the Land, construction on the Land or the Lot, or sale or use of the Land on terms satisfactory to the Seller; or

(c) the Seller, decides, in its absolute discretion, not to proceed with construction of the Development.

…

**4.3 Changes to the Scheme**

Subject to the BCCM Act (which gives Buyers the right to cancel contracts if they are materially prejudiced by some changes to the Scheme), the Seller may:

(a) change the name of the Scheme and the Development;

…

(f) alter the size, location or permitted use of any lot in the Scheme (other than the Lot). However[,] minor the variations may be to the configuration and size of the Lot;

(g) alter the Common Property or any facilities or rights in relation to their use;

…

**4.6 Changes to the Dwelling**

The Seller may:

(a) make changes to any part of the Dwelling as directed by the local authority or as reasonably required to comply with proper and usual building practices; and

(b) make changes to the Dwelling Plans and Specifications, including substituting any items (including Chattels) with items of a similar quality (as decided by the Seller acting reasonably).

**7.6 Buyer must complete**

The Buyer must not object, delay settlement, make any claim or withhold any part of the Purchase Price because of:

…

(b) non completion of any facilities to be constructed on the Scheme Land …

1. Under the BCCM Act, the community title scheme is to take effect at the time when the first community management statement for the scheme is recorded: s 24(2). Thereafter, the lots in the scheme become scheme land. Under s 10 of the BCCM Act, the scheme land includes common property in the scheme.

# STATUTORY PROVISIONS

1. Section 52 of the TPA relevantly provided:

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

…

1. Section  53A(1)(b) of the TPA relevantly provided:

(1) A corporation shall not, in trade or commerce, in connexion with the sale or grant, or the possible sale or grant, of an interest in land or in connexion with the promotion by any means of the sale or grant of an interest in land:

(a) …

(b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land; …

1. Section 53A(3)(c) of the TPA was in the following terms:

In this section, *interest*, in relation to land, means:

…

(c) a right, power or privilege over, or in connexion with, the land.

(Emphasis in original.)

1. Section 51A of the TPA was relevantly as follows:

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

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

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

1. Section 84(2) of the TPA relevantly provided:

Any conduct engaged in on behalf of a body corporate:

(a) by a director, servant or agent of the body corporate within the scope of the person’s actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

1. We turn now to address the issues raised on appeal. We propose to address each issue raised by the appellants in turn, noting first the primary judge’s reasons for his conclusions, and then the appellants’ arguments on the issue before considering the merit of those arguments.

# REASONABLE GROUNDS FOR THE REPRESENTATION

## Primary judge’s reasons

1. The primary judge found that, as at the time at which the Burkes made the representation, the community centre was a project for which there was no development approval, no contract or associated construction program, no reliable costings and no genuine commitment by the joint venture partners. Accordingly, the Burkes and others deemed to have made the representation to Dr Bennett did not have reasonable grounds to represent to Dr Bennett that the community centre would be constructed contemporaneously with the completion of Lot 181.
2. In considering whether the representation made by the Burkes was misleading or deceptive or likely to mislead or deceive in the terms of s 52 of the TPA, or was false or misleading in the terms of s 53A(1), the primary judge proceeded on the sound footing that the mere fact that a representation has not come to pass does not necessarily make that representation misleading: see *Bill Acceptance Co Ltd v GWA Ltd* (1983) 50 ALR 242 at 250 per Lockhart J.
3. Dr Bennett relied on s 51A(2) of the TPA, contending that the appellants had failed to discharge their onus of proving on the balance of probabilities that there were reasonable grounds for the representation made by the Burkes. The appellants adduced extensive evidence with a view to showing that there were reasonable grounds to make the representation made by the Burkes. The primary judge considered that the deeming provision in s 51A had been displaced, and went on to assess whether there were reasonable grounds for making the representation to which we have referred.
4. His Honour referred to some documented aspects of the history of the Development, and noted that, although the community centre building had been included in a feasibility study for the Development, this was based on costs estimates prepared by Napier & Blakeney that proved to be quite unreliable and which, in turn, were based upon preliminary drawings prepared by Cox Raynor Architects that were not produced in evidence. Napier & Blakeney had prepared costs estimates on the assumption that the Development would be constructed within a particular timeframe. As early 2005, however, that assumption was not based on a construction program for the Development because none existed.
5. The primary judge went on to express his view that he discerned, from the evidence of witnesses called for the appellants, an absence of any genuine commitment to the community centre on the part of the appellants. In this regard, his Honour said at Reasons [155]:

Apart from these particular aspects of the construction of the Community Centre building, it is instructive to consider the more general attitude of these various witnesses (above) towards it. Their evidence conveyed to me the clear impression that the Community Centre building was something to which they did not give any real importance or priority, nor devote any significant attention, or resources. In short, I do not consider that they had a genuine commitment to provide the Community Centre building as a part of Stage 1 of the development …

## The appellants’ argument

1. The appellants’ first submission is that the primary judge’s findings should be treated with reserve given the delay in delivering the judgment. The trial proceeded for five days in April 2011 and continued for a further three days in June 2011. Judgment was delivered on 9 March 2012.
2. The appellants refer to a decision of the New South Wales Court of Appeal, *R v Maxwell* (1998) 217 ALR 452 where Spigelman CJ and Sperling and Hidden JJ said at 463 that a delay in the order of 10 months was “such as to require a more comprehensive statement of the evidence than would normally be required, in order to manifest, for the parties and the public, that the delay ha[d] not affected the decision”.
3. Next, the appellants contend that the primary judge failed to address the following circumstances:
4. the community centre had been designed by reputable architects and costed by reputable quantity surveyors;
5. a development approval had been obtained;
6. finance for the construction was approved by a reputable financier soon after the contract was made;
7. the proposed development had been assessed as profitable by Consolo Property and its officers who were experienced property developers and who had documented that feasibility; and
8. when there was subsequently some challenge as to whether the community centre was within the development approval, within a short period of time the development approval was amended to include a facility that had all or most of the represented features.
9. The appellants submit that these documented facts had a greater claim on the attention of the primary judge than aspects of the oral evidence of the appellants’ witnesses referred to by his Honour. The circumstances disclosed that significant time, resources and attention were dedicated by the appellants to the construction of the community centre.

## Consideration

1. It must be said immediately that it is wrong to suggest that the primary judge based his resolution of this issue on impressions of the appellants’ witnesses or that his findings may have been affected by the lapse of time between the giving of their evidence and the delivery of judgment. This suggestion was advanced only in the appellants’ written submissions; it was not developed in oral argument by the appellants’ Counsel. That is hardly surprising. It is readily apparent from his Honour’s reasons that his primary focus was upon the documentary record which, as his Honour held, did not reveal a reasonable basis for representing to potential purchasers that the construction of the community centre would be completed at or about the time that Dr Bennett would be obliged to complete his purchase of Lot 181.
2. As to the appellants’ second contention, it is sufficient to say that the absence of any contract for the construction of the community centre, either at the time of the representation to Dr Bennett, or at any time thereafter, is eloquent of the want of reasonable grounds for making the representation which was made to Dr Bennett.
3. It is entirely beside the point for the appellants to emphasise that they had good reason to believe that the Development would proceed and that the completion of the community centre would occur. The issue is not whether there were reasonable grounds for general confidence in the viability of the Development. The issue is whether there were reasonable grounds for representing to potential purchasers in early 2005 that the community centre would be completed at or about the time that the purchaser would be obliged to complete the purchase of his or her lot. The matters referred to by the appellants and summarised at [42] above do not include a firm construction timetable. The absence of a contract and associated construction timetable, or even a firm timetable for construction, meant that there were not reasonable grounds for making such a representation at that time for the construction of the community centre which might have justified making these representations to purchasers.
4. Accordingly, we would reject the appellants’ arguments on this issue.

# CAUSATION OF LOSS

## Primary judge’s reasons

1. Dr Bennett argued at trial that had it not been for the Burkes’ pre-contractual representation, he would not have entered into the contract. He also advanced an alternative claim that, but for further contraventions of the TPA which occurred prior to completion, he would not have completed the purchase.
2. Dr Bennett alleged that this “pre-completion” misconduct induced him to pay over the purchase price in return for the transfer of a lot. Dr Bennett alleged that he could not have been obliged to complete the contract because of a breach of warranty in s 223(3) of the BCCM Act, which purportedly gave rise to a right to terminate before completion under s 224 notwithstanding cl 7.6(b) of the contract. The breach of warranty allegedly occurred because, in the terms of s 223(3) of the BCCM Act, there were “circumstances … in relation to the affairs of the body corporate likely to materially prejudice” Dr Bennett, viz that the community centre had not been constructed as part of the common property of the Scheme.
3. The primary judge rejected the pre-completion aspect of Dr Bennett’s case including the contention that Dr Bennett was entitled to terminate the contract under the BCCM Act. On appeal no attempt has been made on Dr Bennett’s behalf to resurrect these aspects of his case. On the other hand, the appellants seized upon this convoluted part of Dr Bennett’s case to argue that he was, as he alleged, entitled to terminate the contract, and that he chose not to do so for his own reasons which had nothing to do with any inducement for which the appellants were responsible but which included his reliance upon a valuation of Lot 181 at $2.9 million (the Propell valuation).
4. On this basis, so it is said, the primary judge should not have been found that the loss Dr Bennett suffered on completing the contract was caused by the conduct which induced him to make the contract in the first place.
5. The primary judge summarised the evidence at Reasons [241]-[246]:

241 Dr Bennett said in his affidavit that: “If a different, lesser picture had been painted to me and what the development entailed for me as a buyer with lesser lot or community facilities, provided by the time I settled on $2.1 million purchase [sic], I would not have entered the contract”. The respondents did not challenge this aspect of Dr Bennett’s evidence. Instead, as their submissions show, their challenge was essentially directed to the period leading up to the completion of Dr Bennett’s purchase in March 2008. In the absence of any challenge to Dr Bennett’s evidence on this aspect, I accept his evidence and find that he acted on the Burkes’ pre-contract representations, specifically those about the Community Centre … to enter into the contract to purchase Lot 181.

242 Based on this finding and applying the authorities referred to above, once Dr Bennett entered into the contract to purchase Lot 181 and that contract was not terminated under cl 3.1 (which it was not), that meant that once he received a notice to settle – under the contract, 14 days notice could be given upon the establishment of the Scheme or on the completion of the dwelling, whichever was the later – he was obligated to pay the sum of $2.1 million in accordance with the terms of the contract. Assuming, therefore, that he suffered loss as a consequence, there was a relevant connection between his reliance on the Burkes’ representations about the Community Centre and that loss.

243 There are two other aspects of this issue I need to address. First, I have … rejected the submissions of Mr Douglas that Dr Bennett could rely upon the provisions of the BCCM Act to avoid the obligation to settle his purchase of Lot 181 (see at [232]–[237] above). It follows from this conclusion that I consider Dr Bennett was obligated to settle his purchase and pay the sum of $2.1 million in accordance with the terms of the contract for Lot 181, whether or not the common property for the Elysium Noosa Community Title Scheme included the Community Centre and its related facilities at completion, as represented by the Burkes. However, even if I am incorrect in this conclusion and Dr Bennett could have relied upon the provisions of the BCCM Act to avoid his obligation to settle the purchase of Lot 181, I do not consider that his decision to proceed with the settlement constituted an abnormal event such that, as a matter of common sense, it broke the chain of causation: see the principles and supporting authorities set out at [240] above.

244 Secondly, I reject the respondents’ submissions that Dr Bennett did not rely upon the Burkes’ representations, but instead completed his purchase of Lot 181 knowing that the Community Centre had not been constructed and relying on the Propell valuation putting the market value of the property at $2.9 million. The complete answer to these submissions is (as above) that once Dr Bennett signed the contract for Lot 181, the dice[sic]was cast and, provided the contract remained on foot, he was obligated to settle his purchase in accordance with the terms of that contract. Indeed, Dr Bennett correctly made this very point when the same proposition was put to him by Mr Savage in cross-examination (which evidence I accept) as follows:

Well, can I suggest to you that that simply wasn’t so, and can I suggest to you that when you saw the valuation at 2.9 million, you completed because you thought that you had made a profit - a handsome profit on your investment, and you wanted to keep that rather than to let it go by cancelling the contract?---No, that’s an inaccurate statement. I completed because I felt obliged to by the contract that I had signed. I was, especially by the day of settlement, quite dissatisfied with the way things were going, and as I have said to you, I was hopeful that we may be able to make the best of a bad situation and get to a point where the value evidenced in this valuation may be salvageable at some point in the medium - or the near to medium term, I suppose.

245 In any event, even if the Propell valuation was relied upon, in part, by Dr Bennett and he was somehow able to avoid his obligation to settle his purchase of Lot 181, for the reasons given above, I do not consider that either of these events effected a break in the chain of causation between the Burkes’ representations and his alleged loss.

246 For these reasons, I consider that the representations the Burkes made to Dr Bennett, which caused him to enter into the contract for Lot 181 and in turn eventually obligated him to settle that contract, notwithstanding the failure to provide the Community Centre and related facilities in accordance with those representations, was a cause of his alleged loss.

## The appellants’ argument

1. The appellants contend that Dr Bennett’s case at trial was that he had an entitlement to rescind the contract by virtue of the BCCM Act, but nonetheless proceeded to completion. The appellants contend that the primary judge erred in concluding that the pre-contractual misconduct found by the primary judge caused the loss suffered by Dr Bennett.

## Consideration

1. Any semblance of strength in the appellants’ argument derives only from the overly elaborate way in which Dr Bennett’s case was pleaded and presented. The appellants’ argument on this issue founders on the primary judge’s finding of fact to the effect that Dr Bennett did not regard himself as at liberty to walk away from his contract. That finding was based on Dr Bennett’s evidence. Dr Bennett’s evidence was that he thought that he was obliged to complete. The appellants advanced no basis on which it might be said that his Honour erred in accepting Dr Bennett’s evidence.
2. It is well-established that it is sufficient for the purposes of the TPA that the contravening cause be merely *a* cause of the loss: see *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 (*HTW Valuers*) at [33] and *Taylor v Crossman (No 2)* (2012) 199 FCR 363 at [64]-[65].
3. In the light of the primary judge’s findings of fact, based as they were on his Honour’s acceptance of Dr Bennett’s evidence, his Honour was entitled to conclude that the loss suffered on completion of the contract was caused by the misconduct which induced the making of the contract.
4. Accordingly, we would reject the appellants’ argument on this issue.

# QUANTUM OF DAMAGES

## The Reasons of the primary judge

1. The primary judge adopted the value of $1.6 million as the true value of Lot 181 as at settlement on 8 March 2008 and the value to be deducted from the purchase price of $2.1 million. Accordingly, his Honour assessed the respondent’s loss on the acquisition of Lot 181.

## The appellants’ argument

1. The appellants submit that the primary judge erred in taking $1.6 million – the value of Lot 181 as at 8 March 2008 – to be the value of the land.
2. It would seem that the appellants take issue with $1.6 million as the value of the land on the basis that it contradicts the High Court’s explanation of the test in *HTW Valuers* where it said at [36] that the “test depends not on the difference between price and ‘market value’ but price and ‘intrinsic’ value … or ‘actual value’”. As $1.6 million was the market value, not the “intrinsic” value, of the land (neither party having adduced evidence of the intrinsic value of the land) the appellants submit that the primary judge could not properly assess the quantum of Dr Bennett’s loss.

## Consideration

1. The appellants’ submission seems to be quite inconsistent with what Counsel for the appellants said in their submissions to the primary judge. There it was submitted that, since the contract in question is a deferred completion contract, it was appropriate for the primary judge to use the market value at settlement. The market value at settlement was, it was common ground, $1.6 million.
2. The conclusion of the primary judge reflects the application of orthodox principle. In *Bonett v The Barron & Dowling Property Group Pty Ltd* (2006) 67 NSWLR 475, it was said at [142]:

The contract for the purchase of the Property had a deferred or delayed settlement date. In such circumstances it is permissible to assess the loss at the date of the settlement: *Saunders v Edwards* [1987] 1 WLR 1116 at 1124 (per Kerr LJ) and at 1130 (per Nicholls LJ); [1987] 2 All ER 651 at 657–658 (per Kerr LJ) and at 662 (per Nicholls LJ). n[sic] any event, I am of the view that the appropriate time at which to assess loss in the circumstances of this case is at the date of settlement. The price paid was $11 million and the value at settlement was $10.9 million. Applying the “guide” provided by the so-called usual rule in *Potts v Miller* and in the absence of evidence from the plaintiff of the maximum amount below $11 million he would have paid for the Property, I am satisfied that the appropriate measure of the plaintiff 's loss or damage is $100,000.

1. The principal difficulty in considering the argument advanced by the appellants under this heading is the difficulty of understanding just what that argument is. There is no dispute as to the value of Lot 181 at the date of completion. The proper approach to the assessment of damages in a case such as this is well settled. And there can be no doubt that no injustice was occasioned to the appellants by the conclusion reached by the primary judge.
2. As to the last point, the Consolo appellants in their written submissions to the primary judge concluded their argument on the issue of assessment of damages in the following terms:

In the event that [Dr Bennett] is found to have suffered any loss by reason of the alleged conduct, the extent of that loss is $500,000.

1. The primary judge’s conclusion accorded with that submission; it was also correct. Accordingly, the appellants’ argument on this ground should be rejected.

# SECTION 84 OF THE TPA

## The Reasons of the primary judge

1. Some appreciation of the problem with which the primary judge was obliged to grapple in relation to this issue may be gleaned from para 4C of Dr Bennett’s Fourth Amended Statement of Claim, being the statement of claim on which he proceeded to trial. This paragraph was in the following terms:

In respect of the Development:

(a) The Development land was acquired in 2004;

(b) Following acquisition there was promulgated the following measures with a view to marketing the Development lots to the public:

(i) A design for the Development both as to individual lots and common facilities;

(ii) A development theme;

(iii) Engagement of public relations and marketing consultants;

(iv) A system of press releases to media publications;

(v) The drafting of documents for posting in a site office, together with brochures and individual lot plans to be furnished to prospective Development lot purchasers;

(va) The construction of a Development model which was placed in the site office;

(vi) The refurbishment of a site office on the Development land;

(vii) The appointment of on site sales consultants to deal with members of the public interested in considering purchase of any lot;

(viii) The tutoring of site office sales consultants as to information pertaining to the Development for imparting to prospective purchasers;

(xi) Construction;

(c) The last mentioned onsite sales consultants were Nick and Julieanne;

(d) The Development was undertaken ~~in partnership or in joint venture,~~

by:

(i) ~~Consolo and PPG~~;

~~(ii) Further~~ one or alternatively, some or all ~~combination~~ of Consolo, Consolo Property, NRN, Evenland, Elysium, PPG and PPG Noosa;

~~(“the joint venturers”)~~;

(dd) The Development was undertaken in the course of the business, affairs or activities of each of the Respondents:

(e) Further ~~Under the joint venture~~:

(i) Each of Consolo and PPG were the ultimate beneficiaries of the expected profits of the development;

(ia) The said subsidiaries of each of Consolo and PPG acted as their agents in respect of the measures pleaded above in (b) of this paragraph;

(ii) Directors and employees of each of the subsidiaries~~joint venturers~~[sic] engaged in the promulgation and pursuit of the measures pleaded above in (b) of this paragraph, directly and indirectly by giving instructions to the others ~~Respondents~~ and otherwise permitting such measures to be pursued;

(f) By reason of the ~~above~~ matters pleaded above in this statement of claim, any representation made or conduct engaged in, whether in documents drafted for Development marketing furnished, or orally by Nick and Julieanne as sales agents in representations to prospective purchasers of lots, in the Development:

(i) was engaged in the course of the business, affairs or activities of each of the Respondents, or alternatively one or more of them; ~~constituted conduct of the joint venturers, or alternatively~~

(ii) thereby was conduct engaged in ~~on their behalf, or on behalf of other of the Respondents acting~~ or on behalf of each of the Respondents, or alternatively one or some of them ~~the joint venturers~~, within the meaning of s 84(2) of the TPA.

1. The primary judge noted that this pleading did not identify into which of the descriptors in sub-para (a) or (b) of s 84(2) the Burkes were said to fall. Since it did not appear to be in dispute that the Burkes were not, at any relevant time, directors, employees or agents of any of Dr Bennett’s within the terms of sub-para (a), the primary judge assumed that sub-para (b) applied. The pleading did not allege that a named and identified director, employee or agent of one or more of the appellants gave instructions to the Burkes. In light of these deficiencies, the primary judge proceeded to make a series of assumptions. As appears from this Honour’s Reasons [189], his Honour said relevantly:

Nonetheless the reference to “otherwise permitting such measures to be pursued” in para 4C(e)(ii) could conceivably extend to include the Burkes because two of the measures identified in para 4C(b) are: “The appointment of on site sales consultants to deal with members of the public interested in considering purchase of any lot” (sub-para (vii)); and “The tutoring of site office sales consultants as to information pertaining to the Development for imparting to prospective purchasers” (sub-para (viii)). I will therefore assume that Dr Bennett is relying upon s 84(2)(b) of the TPA to allege that certain unnamed directors, employees or agents of the respondents “directly and indirectly gave instructions to” the Burkes and otherwise permitted them to act as sales consultants in relation to the development. Since the only persons who could realistically be among these unnamed directors etc are the Austins, Mr Dowling and Mr Pearson, I will assume it is one of them that gave the instructions to the Burkes. I am fortified in this approach by the fact that the respondents appear to have proceeded on the same assumptions in their affidavit material and in their closing submissions…

1. His Honour made a comprehensive survey of the evidence of the involvement of the appellants and their officers in the Development and the submissions made on behalf of Dr Bennett. The passage from his Honour’s reasons is lengthy, but should be set out in full. His Honour said at [193]-[199]:

193 In relation to the Consolo [appellants], Mr Douglas submitted that Consolo Property was a subsidiary of Consolo charged with operating its property division. He submitted that the Consolo Board made decisions on matters of investment and policy in relation to the development and very few, if any, separate Board meetings were held for Consolo Property. Instead, he submitted, the Consolo Property Board meetings were conducted as a part of the Consolo Board meetings and were minuted as such by Consolo. As a part of this approach, the activities of Consolo Property were reported as a part of Consolo’s annual reports. Mr Douglas highlighted the following parts of those annual reports relating to the period in question in these proceedings:

Mr Clive Austin and Mr Michael Austin, as Directors of Consolo (2005 Report):

During the year we shifted our residential focus to Queensland, increased focus on industrial property and achieved [successes] with our major offshore investment … we have secured two major residential sub-division opportunities on Queensland’s Sunshine Coast. Elysium, at Noosa, is the last major residential precinct to be developed within the Noosa Heads postcode. It involves the development of a luxury estate with resort style amenities and caters for the premium market with house prices ranging upwards from $1.5m. The estate will be progressively developed over a three year period … Both projects are being undertaken in joint venture with Brisbane-based Pearson Property Group. Looking at Consolo Property in its entirety, the property team headed by Richard Luscombe and Michael Dowling – together with our extended family of joint venture partners, architects, project managers and advisors – have worked extremely hard this year to put in place the platform and future pipeline of activities to ensure a prosperous and sustainable level of return on funds invested.

Mr Clive Austin, as Executive Chairman, and Mr Michael Austin, as managing director of Consolo (2006 Report):

… the largest single initiative upon which the company has embarked … Property division … New Joint General Managers Sean McKeown and Tory Tompson are managing projects [they are replacing Mr Richard Luscombe in that role].

Our luxury residential development, Elysium Noosa …

We also intend to start looking at designs for future stages of Elysium.

Mr Clive Austin and Mr Michael Austin as directors of Consolo (2007 Report):

[Consolo has taken steps] … to focus on our two major property developments: Elysium, at Noosa, and Dicky Beach near Brisbane.

… Property development is a core business for Consolo.

… The Elysium project at Noosa, which is the Company’s largest single project, progressed during the year with a number of notable milestones.

… The remaining 29 sold houses are scheduled to be completed by the end of the first quarter of 2008, as are all the community facilities … In consultation with our joint venture partner it was decided during the year to broaden the potential market for the Elysium product …

194 Mr Douglas pointed to the following events which were, he submitted, of significance to the Consolo respondents’ role in the development:

1. That the minutes of the Consolo Board of 6 July 2004 recorded the decision to acquire the property for the Elysium Noosa development;

2. That Mr Michael Austin, as a director of Elysium Noosa Pty Ltd, signed the agreement to engage PRD as the marketing consultant for the development;

3. That Mr Michael Austin, as a director of Elysium Noosa Pty Ltd, signed Dr Bennett’s contract for the purchase of Lot 181.

195 In relation to the Pearson respondents, Mr Douglas submitted that their reliance on the joint venture agreement to distance themselves from their involvement in the development should be rejected because the evidence showed that the joint venture Operating Committee did not commence to operate until May 2006. He submitted that Mr Pearson and his companies were responsible for the marketing of the development and he was directly involved in the preparation of brochures and newspaper articles promoting the development.

**Factual background as to how the development was carried out**

196 To put these submissions in some context, and to properly consider this issue, it is necessary to set out some further factual background about the development and how, and by whom, it was carried out. In doing so, I will endeavour to avoid repeating too much of the background material that is already set out at [123]-[129] above.

197 As noted a number of times elsewhere in these reasons, the Burkes were employed by PRD. They worked as sales agents in the site office at the Elysium Noosa development from January 2005 until about May 2006. During that period, the main people involved with the development for the respondents – the Austins, Mr Dowling and Mr Pearson – had varying levels and kinds of involvement with them. Mr Clive Austin does not appear to have any significant involvement with the Burkes, nor does Ms Tompson, who did not arrive on the scene until after they had left. However, Mr Michael Austin said in his evidence that he had met the Burkes on site on one or two occasions, but he said he did not give them any instructions or any tutoring in relation to the marketing of the development, or in relation to what they should tell prospective purchasers of properties in the development. Mr Dowling’s evidence about the Burkes was to similar effect, although he appears to have had more frequent contact with them. He said in his evidence that he met them shortly after the marketing for the development commenced, he had discussed the project with them and they had asked him questions about it. For his part, it is clear on the evidence, that Mr Pearson knew the Burkes reasonably well and he appears to have had a much closer involvement with them than either Mr Michael Austin, or Mr Dowling. He said in his evidence that, to prepare the Burkes to sell the Elysium Noosa development to potential purchasers, he was involved with others in training sessions to ensure that they could answer all questions that may arise.

198 These varying levels and kinds of involvement with the Burkes is consistent with the differing kinds of involvement the Consolo respondents and the Pearson respondents had in the development. On the Consolo side of the joint project management, Consolo Property and Mr Dowling were responsible for arranging the finance for the project and for providing administrative support. On the Pearson side, Mr Pearson was responsible for the marketing, promotion and advertising of the development. However, Mr Pearson said in his evidence that he consulted regularly with Mr Dowling and, after his departure, with Ms Tompson about marketing matters. Mr Pearson said he was also responsible for the media releases that were issued in relation to the development and he employed the services of other specialist marketing companies such as Pulse Media and Black Ink.

199 The media releases that were issued by Mr Pearson in January 2005 resulted in a number of articles being published in the local media. They included the following:

Noosa News, *Noosa*Property section for 28 January 2005

**Prestige land development opens doors**

…

ELYSIUM Noosa opened its sales office on 27 hectares of former horse grazing land, once owned by the Hoffman family, adjacent Noosa Springs and Lake Weyba on Friday.

Developers David Pearson, of Pearson Property Group, and Michael Dowling, of Consolo Property, engaged 12 top Australian architects to each design three to four homes, which will be sold as part of a house and land package for between $1.25 and $2.5 million.

…

Stage one, comprising 41 individually designed and landscaped homes are selling off the plan now.

Mr Dowling said civil engineering works were due for completion in October and all homes were expected to be erected within 18 months.

When the five-stage, $400 million development is completed, it will hold 189 separate dwellings set over 27.5 hectares with 35% of land set aside as parkland.

The central facilities at Elysium (Greek for abode of the blessed) include swimming pool, tennis courts, health spa and parks linked by walkways and bike paths.

Architects include Gabriel Poole, Bark Design, Cox Raynor, Bligh Voller Nield.

This article included a photograph apparently taken at the Elysium Noosa site office under which appears the caption “EXCITING OUTLOOK: David Pearson, left, of PPG, and Michael Dowling of Consolo with Elysium Noosa on-site sales representatives Nick and Julianne Burke”. (Emphasis in original)

1. The primary judge said at Reasons [206]-[207]:

In *Ackers v Austcorp International Ltd* [2009] FCA 432 (“*Ackers*”) (a case relied upon by Mr Douglas), Rares J dealt with a factual situation that is somewhat similar to the present case. In that case, Austcorp was engaged in the business of a property developer. In its 1999 Annual Report, Austcorp identified the particular development concerned in that case as a joint venture project with Great Pacific that was being developed on prime central coast waterfront land (see at [217]). While his Honour’s conclusions are specifically directed to the facts of that case, he proceeded to hold that the particular development was part of the ordinary business, affairs and activities of Austcorp and representations made by “officers, subsidiaries, PRD and Mr Walker” was conduct engaged in on behalf of Austcorp (see at [217]).

…

Among other things, they show that the level of involvement of the actor concerned may not be significant, provided it comprises “some” involvement. In context, I consider this means some real or genuine involvement. They also show that the actor’s subjective intention is one criterion for assessing whether he or she is acting on behalf of the company concerned. Alternatively, they show that an objective assessment of the actor’s conduct may lead to the conclusion that he or she was acting on behalf of that company. Finally, they show that the assessment as to whether the actor was acting on behalf of a company is ultimately dictated by the circumstances of each particular case. Thus it may conceivably involve a combination of the subjective and objective assessments (above) in a particular case.

1. The primary judge went on to consider whether the Burkes’ conduct was engaged in at the behest of, that is, “at the direction or with the consent or agreement (whether express or implied) of”, the appellants. His Honour considered that the phrase “whether express or implied” applied to each operative word in that phrase, namely, “direction”, “consent” and “agreement”. His Honour also considered that the word direction, on its ordinary meaning, should be taken to mean “authoritative guidance, instruction … of keeping in right order; management, administration”. Accordingly, his Honour considered the relevant question to be whether Mr Michael Austin, Mr Dowling or Mr Pearson gave any authoritative guidance to the Burkes.
2. The primary judge concluded that Mr Pearson gave authoritative guidance and instruction to the Burkes of a kind that falls squarely within the ordinary meaning of the word “direction”. Mr Pearson required the Burkes to learn “every element of the Elysium project” in his capacity as the manager of public relations and marketing for the whole of the Development. Mr Pearson swore in his affidavit that he was “involved, together with others of the marketing team … in ‘Q and A’ sessions with [the Burkes] to ensure that they could answer all questions that [could] arise” in the selling the lots in the Development. As Mr Pearson was, at this time, concurrently acting in his capacity as director of both PPG Noosa and PPG, the primary judge concluded that the Burkes were acting at the behest of the two Pearson appellants within the terms of s 84(2)(b).
3. The primary judge went on to conclude that Mr Pearson was acting as the agent of all the corporate entities involved in the joint venture when he gave his directions to the Burkes. Those corporate entities involved included Elysium, NR Nominees and Consolo Property which were involved directly, and Consolo which was involved indirectly. His Honour concluded at Reasons [219]-[222]:

219 For these reasons, I consider the Elysium Noosa development was a central and main part of the business, affairs, and activities of each of the companies involved in the Elysium Noosa joint venture. On Consolo’s side, that included Consolo itself (as the main financial investor), Consolo Property (as the joint project manager), NR Nominees (as one of the joint venture partners) and Elysium Noosa Pty Ltd (as, among many other things, the owner of the land). On the Pearson side, that included both PPG (as an investor and the other joint project manager) and PPG Noosa (as the other joint venture partner).

220 Turning then to the Burkes. The marketing and selling of the lots in the Elysium Noosa development was self-evidently critical to its financial success. While his comments were specifically directed to the settlement of the sales of the lots in early 2008, Mr Michael Austin readily agreed that this was so.

221 So, taking into account the conclusion that the Elysium Noosa development was a central and main part of the business, affairs and activities of all of the respondents and the conclusion that the Burkes were engaged in an activity that was critical to the financial success of that development, I consider, on an objective assessment, it can be fairly said that the Burkes were acting “on behalf of” the respondent companies within the terms of s 84(2) of the TPA when they were engaged in that selling activity.

222 It is immaterial, in my view, whether the Burkes were also employed by PRD and their selling activities were concurrently being carried out on behalf of PRD. It is also immaterial whether anyone at Consolo, or at the Pearson companies, was aware that the Burkes were engaged in the selling activities on their behalf. Instead, what matters is whether the Burkes’ selling activities, when viewed objectively, could be said to be a part of the business, affairs and activities of those companies. I do not consider that this conclusion strains the expression “on behalf of”, or applies too loose a meaning to it. It is consistent, in my view, with casting a wide net and allowing an applicant in the position of Dr Bennett, to sheet home responsibility to each of those companies, on whose behalf the Burkes were carrying out this critical sales activity in the Elysium Noosa development.

## The argument of the Consolo appellants

1. The Consolo appellants submit that it was not the task of the primary judge to attempt to piece together Dr Bennett’s case. The Consolo appellants make the point that Dr Bennett’s pleading failed to name any servant or agent of the Consolo appellants who gave any identified direction to the Burkes, which was within the scope of any authority, actual or apparent, from the Consolo appellants other than Elysium. They also make the point that his Honour’s analysis does not include any findings of fact on these issues. The primary judge made no finding about what direction Mr Pearson gave to the Burkes on behalf of the Consolo appellants. It was not Dr Bennett’s case at trial that Mr Pearson was agent for Consolo; this was not Mr Pearson’s evidence; and it was not suggested to Mr Pearson or to any of the directors of Consolo.
2. The Consolo appellants argue that the Annual Reports referred to by his Honour did not show the Development to be an asset of Consolo in that the reference to the Development in these reports was consistent with the preparation of consolidated accounts for all subsidiaries. The only role undertaken by Consolo was the commitment of equity in respect of the Development to its subsidiary, Elysium; the commitment of funds to a subsidiary does not mean that the holding company was carrying on the marketing of the Development.
3. Senior Counsel for Dr Bennett invited this Court to regard the corporate structure established to acquire, finance, construct, and market the Development as effectively a sham so that the Consolo appellants could be seen to stand revealed as the principals for whom Mr Pearson was the agent instructing the Burkes in relation to sales.

## Consideration

1. As has been seen, Dr Bennett’s pleading did not actually attempt to address the specific requirements of s 84(2)(b). We draw attention to this circumstance, not because the deficiency in the pleading is fatal to Dr Bennett’s case, but because the absence of an articulation of the facts said to deem the Consolo appellants to have engaged in the misconduct engaged in by the Burkes means that it is hardly surprising that the necessary elements of s 84(2)(b) were not met.
2. The issue of present concern is not whether the Burkes engaged in the giving of the misleading assurances on behalf of Elysium, but whether these assurances were given on behalf of either of the Consolo appellants at the direction of or with the consent or agreement of a director, employee or agent of that appellant acting within his actual or apparent authority.
3. The primary judge’s findings do not establish a factual basis for concluding that the representations made by the Burkes were the subject of direction, consent or agreement by any individual who was a director, employee or agent of one of the Consolo appellants, much less one who was “giving a direction, consent or agreement” within the scope of his actual or apparent authority as its director, employee or agent of the appellants. That the primary judge’s findings do not go so far is hardly surprising, given the exiguous evidence adduced on behalf of Dr Bennett on this issue and the want of a pleading sheeting home responsibility for the Burkes’ representation to the Consolo appellants by reference to the requirements of s 84(2)(b) of the TPA. It is not sufficient in this regard to point to the general economic interest of the Consolo appellants in the success of the marketing of the Development.
4. On Dr Bennett’s behalf particular reference was made to a number of authorities in which s 84(2) of the TPA has been discussed. Judicial exegesis of s 84(2) has given it a wide scope. Thus in *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27 at 37, Lockhart J said (with the agreement of Sweeney and Neaves JJ):

The phrase “on behalf of” is not one with a strict legal meaning and is used in a wide range of relationships. The words are not used in any definitive sense capable of general application to all circumstances which may arise and to which the subsection has application. This must depend on the circumstances of the particular case …

1. It may be accepted that the phrase “on behalf of” encompasses a wide range of relationships that are “in some way concerned with the standing of one person as auxiliary to or representative of another person or thing”: see *The Queen v Toohey; ex parte Attorney-General (NT)* (1980) 145 CLR 374 at 386; *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 76 FLR 455, at 474-475 (*Tubemakers*); *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2004) 141 FCR 183 at [101].
2. The wide potential reach of the phrase “on behalf of” to any auxiliary or representative relationship is narrowed by s 84(2)(b) to conduct engaged in by a person other than the body corporate “at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent” of the body corporate and that direction, consent or agreement (whether express or implied) is “within the actual or apparent authority of the director, servant or agent” of the body corporate.
3. It is not difficult to see that these requirements were met so as to deem Elysium to have engaged in the conduct engaged in by the Burkes. Elysium had engaged PRD as its agent to sell lots in the project and the Burkes were, in turn, engaged by PRD. Mr Pearson knew of the Burkes’ role in this regard, and gave them directions in relation to its performance. He was a director of the Pearson appellants. And as has been noted, the Pearson appellants have not sought to challenge the primary judge’s conclusion that s 84(2)(b) was engaged to deem them to have engaged in the conduct engaged in by the Burkes.
4. While it is true to say that s 84(2) is not to be read down, there is no warrant in   
   s 84(2)(b) to disregard the fundamental principle that companies are entities with rights and liabilities separate from their shareholders and holding companies are entities separate from their subsidiaries. Thus for example, it is not correct to say that Consolo “owned” the land on which the Development was to proceed: the land was owned by Elysium. The assets and liabilities of each company within the Consolo group might have been consolidated for the purposes of obtaining a view of the group’s accounts, but the assets and liabilities of each company were not thereby deemed to be the assets and liabilities of the other companies in the group or of the holding company.
5. To say this is not to say that s 84(2)(b) might not operate to sheet home liability to a holding company; it is simply to say that the requirement of a direction by a representative with the actual or apparent authority of a holding company is not satisfied by showing no more than a general economic interest in the success of the subsidiary.
6. Section 84 of the TPA proceeds on the assumption that corporations are entities separate and distinct from their shareholders and directors. It also proceeds on the assumption that business is routinely and legitimately conducted through corporate structures which confer the benefit of limited liability on shareholders. It does not purport to dissolve corporate business structures or to effect a wholesale shift of liability to shareholders. Rather, it operates by assuming the reality and legitimacy of corporate business structures and sheeting home to corporations responsibility for the conduct of those who act on their behalf where it can be shown that the requirements of the section are satisfied. In this regard, the present case may be contrasted with *Tubemakers* (1983) 76 FLR 455 at 477 where Toohey J said:

Tubemakers is responsible for Mr Achterberg’s conduct, only in terms of s 84(2). Achterberg’s actions … were at the direction of Bint or at any rate with his consent. That consent was in my opinion express; if not it was certainly implied. But Achterberg was not the directing mind and will of Tubemakers and … it is not responsible for Achterberg.

1. Thus Tubemakers, the holding company, by its regional manager, Bint, was expressly directing the actions of Achterberg who was the manager of Tubemakers’ subsidiary. In the present case the kind of connection established by these findings was not open on the case pleaded and presented by Dr Bennett. Submissions were put on Dr Bennett’s behalf in this Court to the effect that the corporate structure and joint venture through which the Consolo appellants carried on business can simply be ignored because they were all part of the business of the Development. Those submissions cannot be accepted. If they were accepted they would not engage the operation of s 84(2); rather they would render it otiose.
2. The primary judge drew support at Reasons [206] (cited above) from the decision in *Ackers v Austcorp International Ltd* [2009] FCA 432 (*Ackers*) at [217] where Rares J said:

Austcorp’s business, affairs and activities were centred on property development. Mr Chappell’s managing director’s review in Austcorp’s 1999 annual report identified the resort as a joint venture project with Great Pacific being developed on prime Central Coast waterfront land. He noted (as at 17 September 1999) that 70% of the 145 apartments had been pre-sold. I am satisfied that the course of Austcorp’s ordinary business, affairs and activities in relation to the development and marketing of apartments in the resort involved it in the range of activities in which, its officers, and any subsidiary, PRD and Mr Walker acted in its or his dealings with each applicant. The conduct complained of in making the representations was engaged in on behalf of Austcorp by those, officers, subsidiaries, PRD and Mr Walker. Thus s 84(2) has the consequence that it is deemed to have been engaged in by Austcorp.

1. In *Balmedie Pty Ltd and Anor v Russo and Ors* (unreported, Ryan, Whitlam and Goldberg JJ, 19 August 1998) (*Balmedie*) the Full Court of the Federal Court upheld the view of the primary judge that s 84(2)(b) was not engaged to attribute to one member of a joint venture responsibility for the conduct of another member of the joint venture. The mere existence of the joint venture does not of itself justify the conclusion that one venturer is the agent of the others in relation to the former’s dealings with third parties. The Court said:

The applicants also rely upon s 84(2)(a) of the Trade Practices Act 1974 (Cth) but that reliance is misconceived as that provision is only relevant if it is established that conduct has been engaged in on behalf of a corporation. To say that the primary judge failed to have regard to s 84(2)(a) begs the question in this case where there is no evidence that Equuscorp in entering into the transaction and executing the Facility Agreement and Letter of Credit was acting as agent for any of the claimed joint venturers or was acting otherwise from as a principal in its own right. It is trite law that a company is a separate entity, and distinct legal person, from its shareholders and does not become an agent for its shareholders simply because of the fact that they are shareholders.

1. It would seem that in *Ackers*, Austcorp was regarded as having actually, albeit impliedly, authorised the conduct of those who dealt with the persons who suffered loss. Whether or not *Ackers* is distinguishable on this ground, it would appear that neither Rares J nor the primary judge in this case was directed to *Balmedie*.
2. In the present case, no attempt was made, at trial or on appeal, to suggest that there was a provision in the joint venture agreement that authorised Mr Pearson to act as the agent of the Consolo appellants (as opposed to the joint venture companies) in marketing the Development. Dr Bennett did not point to a term of the joint venture agreement which authorised Mr Pearson to represent the Consolo appellants in dealing with the Burkes or potential purchasers. And there was no suggestion of any holding out by the Consolo appellants of Mr Pearson as their representative to Dr Bennett so as to ground a finding of apparent authority.
3. A commonality of business interests between a holding company and its subsidiary does not, of itself, make the subsidiary, or the subsidiary’s director, the agent of the holding company. It has long been well-recognised that, subject to statutory qualifications, shareholders are not personally responsible for the conduct of a limited liability company: *Salomon v A Salomon & Company Ltd* [1897] AC 22; *British Thomson-Houston Co Ltd v Sterling Accessories Ltd* [1924] 2 Ch 33 at 38.
4. Section 84(2) of the TPA does not dissolve the corporate veil so as to reveal the Consolo appellants as the principals of the Burkes. Nor may this Court accept the argument advanced on behalf of Dr Bennett that the general commonality of business interests on the part of the Consolo appellants and Mr Pearson meant that the corporate structure by which the Development was created and marketed can be set at nought. Accordingly, we would uphold this aspect of the challenge by the Consolo appellants.

# CONCLUSION AND ORDERS

1. We would allow the appeal in part and set aside the judgment against the Consolo appellants. Otherwise the appeal should be dismissed.

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| I certify that the preceding ninety-three (93) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Keane and Justices McKerracher and Katzmann. |

Associate:

Dated: 31 August 2012