PERPETUAL NOMINEES LTD v McGOLDRICK & ANOR (No 3) - [2017] VSC 78

IN THE SUPREME COURT OF VICTORIA Not Restricted

AT MELBOURNE
COMMERCIAL COURT

S CI 2012 04476

PERPETUAL NOMINEES LIMITED (ACN 000 733 700)	Plaintiff
v	
IAN ANDREW McGOLDRICK	First Defendant
and	
FREDERIQUE SIMONE BENTLEY	Second Defendant
AND BETWEEN	
~~IAN ANDREW MCGOLDRICK~~	~~First Plaintiff by Counterclaim~~
and	
FREDERIQUE SIMONE BENTLEY	Second Plaintiff by Counterclaim
v	
PERPETUAL NOMINEES LIMITED (ACN 000 733 700)	First Defendant by Counterclaim

and

RACSO PTY LTD (ACN 007 107 253) (IN LIQUIDATION)	Third Defendant by Counterclaim

and

SULE ARNAUTOVIC (IN HIS CAPACITY AS LIQUIDATOR OF RACSO PTY LTD (ACN 007 107 253) (IN LIQUIDATION))	Fifth Defendant by Counterclaim

and

GLENN ANTHONY CRISP (IN HIS CAPACITY AS LIQUIDATOR OF RACSO PTY LTD (ACN 007 107 253) (IN LIQUIDATION))	Sixth Defendant by Counterclaim

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JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATES OF HEARING:	30-31 MARCH, 1 APRIL, 4-6 APRIL, 18-19 JULY 2016
DATE OF JUDGMENT:	16 MARCH 2017
CASE MAY BE CITED AS:	PERPETUAL NOMINEES LTD v McGOLDRICK & ANOR (No 3)
MEDIUM NEUTRAL CITATION:	[2017] VSC 78

CORPORATIONS — Defendants guaranteed loan to company of which they are directors — Plaintiff claims amount owed under guarantee — Administrators appointed to company under pt 5.3A *Corporations Act 2001* (Cth) — Company subsequently wound up and administrators appointed as liquidators — Liquidators commence and complete sale of real property owned by company.

NEGLIGENCE —Defendants claim sale of real property at an undervalue and negligence in conduct of the sale — administrator/liquidator owed a duty of care to avoid causing pure economic loss — Duties of administrators/liquidators — Whether duty owed to guarantors of company debt by administrators/liquidators — Salient features discussed — *Mills & Ors v Sheahan* (2007) 99 SASR 357; *Brookfield Multiplex Ltd v Owners-Strata Plan No 61288* (2014) 254 CLR 185 applied — *Marsh v Baxter* **(2015) 49 WAR 1 considered.**

AGENCY — Whether administrators/liquidators agents of the plaintiff creditor — *Medforth v Blake* [2000] Ch 86; *Bank of Western Australia v Abdul* [2012] VSC 222; *State Bank of NSW v Chia* (2000) 50 NSWLR 587 applied — No agency found.

CONSUMER LAW — Whether unconscionable conduct on the part of the Administrators/Liquidators under s 21 of the Australian Consumer Law (' ACL ') — ACL inapplicable as conduct not 'in connexion with' supply of relevant services — no unconscionable conduct either under statutory provisions or under the general law in equity.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff/First Defendant by Counterclaim	Mr B Carew	Gadens Lawyers
For the Defendants and the Second Plaintiff by Counterclaim	Duty Barrister Scheme: Mr R Antill	–

For the Third, Fifth and Sixths Defendants by Counterclaim	Mr M Galvin QC	Colin Biggers & Paisley

HIS HONOUR:

Introduction

1. The Plaintiff, Perpetual Nominees Ltd ('Perpetual'), claims $4,648,363.61 (as at 30 March 2016) pursuant to guarantees of loans advanced to two companies, Racso Pty Ltd ('Racso') (now in liquidation), the Third Defendant by Counterclaim, and Zido Pty Ltd ('Zido'). Perpetual is the custodian for OnePath Funds Management Ltd, a financier and responsible entity for a mortgage pool ('OnePath').

2. The First and Second Defendants and the First and Second Plaintiffs by Counterclaim, Mr Ian McGoldrick ('McGoldrick') and Dr Frederique Bentley ('Bentley') (collectively the 'Defendants'), were from time to time directors of Racso. They were also directors of Zido. Racso and Zido borrowed money from OnePath under various loan agreements (the 'OnePath loan facilities').

3. The Defendants guaranteed the liability of Racso and Zido to OnePath pursuant to written guarantees executed on 5 August 2009 (the 'Guarantees'). In addition to the Guarantees, Racso's debt to OnePath was secured by a second mortgage executed in favour of Perpetual (as custodian) over land owned by Racso at 441 Maroondah Highway, Lilydale ('441 Maroondah Hwy'). This property was also encumbered by a first mortgage in favour of Banksia Mortgages Ltd ('Banksia'), a subsidiary of the Banksia Financial Group, which Racso had given in or around February 2008.

4. An adjoining property at 443 Maroondah Highway, Lilydale ('443 Maroondah Hwy'), was also owned by Racso, and encumbered by a first mortgage executed in favour of Perpetual on or about 28 March 2008 in support of the OnePath loan facilities.

5. On 6 November 2012, the Fifth and Sixth Defendants by Counterclaim, Mr Sule Arnautovic ('Arnautovic') and Mr Glenn Anthony Crisp ('Crisp'), were appointed by Perpetual as joint and several administrators of Racso under the provisions of Part 5.3A of the *Corporations Act 2001* (Cth) (the '*Corporations Act*').

6. At a meeting on 11 February 2013, Racso's creditors resolved to wind up the company and appointed Arnautovic and Crisp as joint and several liquidators of the company (the 'Liquidators').

7. A process for the sale of 441 and 443 Maroondah Hwy (together the 'Maroondah Hwy properties' or the 'Properties') was commenced during the administration and continued after the company went into liquidation.

8. The Liquidators sold the Properties on 20 March 2013 for $3,000,000. Of the net proceeds of sale, $1,780,812.14 was paid to discharge Banksia's mortgage over 441 Maroondah Hwy and the balance of $644,249.70 was paid to Perpetual in reduction of its debt.

9. In its Statement of Claim, Perpetual seeks to recover the balance of its debt from the Defendants under their Guarantees. The Defendants deny liability to Perpetual on the grounds set out in their Third Further Amended Defence and Counterclaim.

10. In essence, the Defendants contend that the Liquidators (both in their capacity as liquidators and formerly as administrators) owed them various duties which effectively bound them to act, in their interests as sureties of Racso's liability to Perpetual, in such a way as to ensure that the Properties were sold for market value. They say that, to the extent that the Liquidators failed to do so and thereby exposed them to liability for any shortfall under their Guarantees, the Liquidators are liable to them for damages.

11. Relevantly, the Counterclaim contains allegations against the Liquidators in respect of the sale of the Maroondah Hwy properties. The substance of, and background to, these claims is that:

(a) the market value of the Properties as at 24 August 2011 was $10,900,000;

(b) Arnautovic and Crisp were appointed as administrators of Racso on 6 November 2012;

(c) the administrators commenced a sale process;

(d) Racso was wound up and the administrators became the Liquidators on 11 February 2013;

(e) on 20 March 2013, the Liquidators entered into a contract for the sale of the Properties for $3,000,000, which was $7,900,000 less than they were worth;

(f) of the net proceeds of sale, the Liquidators allocated $1,780,812.14 to Banksia and $644,249.70 to Perpetual;

(g) the Liquidators, at all times, acted as agent for, alternatively, at the direction of, Perpetual;

(h) the Liquidators were, at all times, aware or ought to have been aware that, as guarantors of Racso's debt to Perpetual, their interests would be sacrificed if the Properties were sold below their market value;

(i) arising from these facts, the Liquidators owed the Defendants duties:

(i) of care;

(ii) to act in good faith;

(iii) to refrain from acting in a manner in which no reasonable administrator or liquidator would act;

(iv) to take all reasonable care to sell the property for not less than market value;

(v) to pay the debts of Racso and adjust the rights of the contributories among themselves;

(j) further arising from these facts, the sale process was flawed; and

(k) by reason of the flaws, the Liquidators breached their duties to the Defendants, as a result of which they suffered loss and damage which entitles them to damages or equitable compensation.

12. The Liquidators deny that they owed the duties alleged and that the sale process was affected by the alleged flaws. If the sale process was flawed, they submit that it has not been shown that it materially affected the price obtained for the properties.

13. The Liquidators contend that the steps taken in connection with the sale of the Properties were pursuant to their best commercial judgment and on the advice of professional real estate agents.

14. As to the position of representation by the Defendants, in management directions held before me prior to the trial, both McGoldrick and Bentley were self-represented. Several applications for an indefinite adjournment were made by McGoldrick on the grounds of his alleged ill health. Through the good offices of the Victorian Bar duty scheme, Mr Richard Antill of counsel stepped forward to represent both defendants. His services have been very valuable and the Court thanks him for his assistance.

Bankruptcy and Abandonment of McGoldrick's Counterclaim

15. The trial of this proceeding took place between 30 March and 6 April 2016, when the evidence was heard, and between 18 and 19 July 2016, when final addresses of the parties, other than McGoldrick, were heard. [1]

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[1] *Perpetual Nominees Ltd v McGoldrick & Anor (No 2)* [2016] VSC 628.

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16. On 30 May 2016, McGoldrick became bankrupt when the Official Receiver accepted a debtor's petition presented by McGoldrick under s 55 of the *Bankruptcy Act 1966* (Cth) (the 'Bankruptcy Act'). The Official Trustee in Bankruptcy was appointed trustee of McGoldrick's bankrupt estate.

17. On 6 July 2016, Mr Daniel Juratowitch (the 'Trustee in Bankruptcy') replaced the Official Trustee in Bankruptcy as trustee of McGoldrick's bankrupt estate. On the same day, the solicitors for the Plaintiff notified the Trustee in Bankruptcy of the present proceeding.

18. On 15 July 2016, the solicitors of the Trustee in Bankruptcy notified the Court that, pursuant to s 60(2) of the Bankruptcy Act, the Trustee in Bankruptcy would elect whether to proceed with or abandon McGoldrick's counterclaim by 3 August 2016. The solicitor of the Trustee in Bankruptcy subsequently notified the Court that it had elected to abandon the counterclaim.

19. Accordingly, as earlier found, [2] in the events that have happened, McGoldrick has no standing personally to continue to prosecute his counterclaim or make any submissions in relation to it. This, finding, however, does not affect Bentley's counterclaim, and her capacity to be heard in relation to it, which is determined below.

[2] Ibid [36] .

The Maroondah Highway Properties

20. Racso acquired 443 Maroondah Hwy in or around February 2000 for a purchase price of about $500,000. The adjoining property at 441 Maroondah Hwy was purchased in or around May 2001 for about $1,087,500. Racso became registered as the proprietor of both properties.

21. The properties comprise four adjoining parcels of land containing a total area of approximately six hectares. The smaller property, 441 Maroondah Hwy, comprises 1.585 hectares and the larger property, 443 Maroondah Hwy, 4.556 hectares. Both properties are irregularly shaped and have frontages onto Maroondah Highway (although that frontage is limited in the case of 443 Maroondah Hwy). At the time of the events the subject of this proceeding both properties were vacant.

22. 441 Maroondah Hwy had the following key zoning and physical characteristics:

(a) Zoning — mixed zoning, primarily 'Business 4', but including residential zones.

(b) Drainage — the site had significant overland flow and included an above ground water course, requiring a drainage strategy to be developed in conjunction with the responsible Council and Melbourne Water.

(c) Heritage House — an uninhabited and dilapidated dwelling, known as the 'Manor House', stood on the southern section of the site. It was subject to a heritage overlay in the Yarra Ranges Shire Planning Scheme and designated as having 'at least regional, and possibly State significance as one of Lilydale's most important historical properties dating from 1887 or earlier'. The house and surrounding vegetation was required to be retained.

(d) Flora — a number of mature trees were located across the site with dense stands of trees present. Significant trees were to be retained impacting the development potential.

(e) Access — only possible from Maroondah Highway. Access to residential development would need to traverse the land in the Business 4 Zone. A public road would need to be added in the Business 4 Zone. Upgrading of the entry from Maroondah Highway was needed and may have required signalisation and/or construction of a slip lane.

(f) Topography — the site featured steep topography, with decline in the eastern direction from the Warburton Trail, a heritage asset which ran along the western boundary of the site. Significant earthworks and retaining/benching was required to establish site levels and undertake creek realignment.

23. 443 Maroondah Hwy had the following key zoning and physical characteristics:

    (a) Zoning — primarily 'Residential 1'.

    (b) A disused quarry was located on the northern section of the site. It contained uncontrolled fill. Expert consultants, Taylors Development Strategists ('Taylors'), in a property investigation report dated March 2013 considered this likely triggered a requirement for site assessment and completion of an Environment Audit at an estimated cost of between $125,000 and $190,000.

    (c) Other features, including vegetation, slope and an open water course, are described the various expert reports which were tendered in evidence.

Appointment of the Administrators

24. On 6 November 2012, Perpetual appointed Arnautovic and Crisp as administrators (the 'Administrators') of Racso pursuant to s 436C of the *Corporations Act* . The Administrators took possession of 443 Maroondah Hwy and began taking steps to market and sell both properties with the consent of Banksia, the first registered mortgagee of 441 Maroondah Hwy. These included:

    (a) seeking sales submissions from three real estate agencies;

    (b) seeking the consent of Banksia to a sale of the properties in one line and initiating communications with McGrathNicol, the receivers and managers appointed to Banksia;

    (c) receiving and considering sales proposals from estate agencies Foxwood, CBRE and Colliers; and

    (d) seeking quotations for a valuation of the Properties from three agents.

25. Sales submissions were sought from the estate agents for 443 Maroondah Hwy alone and for both 441 Maroondah Hwy and 443 Maroondah Hwy together. Ultimately, all agents advised that the Properties ought be sold in 'one line' (i.e. together). Whilst he could not recall it, McGoldrick did not deny having a conversation with a Mr Samarasinghe of the liquidators' office early in the administration in which McGoldrick also stated that the properties would need to be sold in one line.

26. On or about 4 December 2012, the Administrators appointed Foxwood as the agents to sell the Properties.

27. Colliers International ('Colliers') were appointed to value the Properties. Mr Paul Wheate of Colliers provided market valuations of $3,600,000 on an 'as is' basis for 443 Maroondah Hwy and $2,000,000 for 441 Maroondah Hwy on an 'as is' basis.

Appointment of Liquidators

28. On 11 February 2013, a meeting of the creditors of Racso was convened under s 439A *Corporations Act* .

29. The minutes of the meeting of creditors of Racso held on 11 February 2013 record that the chairperson, Crisp, called for nominations for a liquidator. No nominations were received and he announced that he and Arnautovic (his co-administrator) would become the joint liquidators.

30. A special resolution was passed by the creditors to wind up Racso under s 439C(c) of the *Corporations Act* .

The Sales Campaign

31. Marketing of the Maroondah Hwy properties commenced on or about 2 February 2013. This was during the period of the Administration.

32. From 9 February 2013 onward, the Properties were marketed as available for sale in one line or separately. The mode of sale was by way of expression of interest and public tender. The campaign consisted of online advertising, on-site signage, advertisements in the public printed press, namely *The Age* newspaper, an advertisement in the *Australian Financial Review*, and direct marketing.

33. The Administrators initially envisaged a three-month marketing campaign for the Maroondah Hwy properties. However, Foxwood recommended to the Administrators that a four-week marketing campaign with the time for expressions of interest closing in week five would be adequate. Arnautovic accepted this recommendation from Foxwood.

34. The campaign was initially scheduled to end on 28 February 2013. However, it was extended on 9 February 2013 to 7 March 2013 and again extended on 14 February 2013 for a further week. The sales campaign ended on 14 March 2013.

35. Steps taken and developments arising in the course of the campaign were regularly reported to, and discussed with, Mr Gilchrist of Perpetual, which was the first registered mortgagee of 443 Maroondah Hwy. Similarly, the receivers of Banksia, the first registered mortgagee of 441 Maroondah Hwy, were kept informed of developments. Banksia (by its receivers and managers) made a point of reserving its rights throughout the campaign.

The Advertising

36. There were errors in the first advertisement placed in *The Age* newspaper on 2 February 2013. The errors were:

    (a) The spelling of 'Maroondah' was incorrect. The word was missing the 'h' in the heading of the advertisement. Nevertheless, 'Maroondah' was spelled correctly in the advertisement naming 'Maroondah Highway' on the map of the property contained in the advertisement; and

    (b) The advertisement incorrectly stated that the sale of the Maroondah Hwy properties was under instructions from 'receivers and managers' instead of the correct position, being 'voluntary administrators'.

37. The errors in the 2 February 2013 advertisement in *The Age* newspaper were brought to the attention of the Administrators on 7 February 2013 by McGrathNicol, the receivers and managers of Banksia. The advertisement had not been sent to the Administrators prior to its publication. On the same day Arnautovic requested that Foxwood correct the errors. Arnautovic also informed Foxwood that the advertisement should include the words 'offered in one line or separately'.

38. Subsequently, Mr Kalaf, of Foxwood, told Arnautovic that the advertisement had been rectified but that the cut-off date for the placement of the advertisement in *The Age* had been missed. Consequently, the errors in the advertisement were corrected in the publication in *The Age* only on 9 February 2013, when the words 'offered in one line or separately' were also added.

39. The advertisement in *The Age* was republished with the necessary corrections on 16 February 2013. By that stage the Administrators had been appointed as the Liquidators and the wording of the advertisement was changed to include the words 'under instructions from voluntary liquidators' in place of the words 'under instructions from voluntary administrators'.

40. The marketing reports provided to the Liquidators in the first week of the campaign recorded that an advertisement for the Maroondah Hwy properties had been placed on the *realcommercial.com.au* website and people had responded to the online advertisement. E-marketing through Foxwood's and Biggin & Scott's database was also carried out.

41. However, advertising signage exposing the Properties to the Maroondah Highway was not installed at the site of the properties until 22 or 23 February 2013.

42. Advertisements were also placed in the print media.[3]

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[3] The *Australian Financial Review* on 7 February 2013; the *Lilydale Leader* on 4 and 16 February 2013; and *The Age* on 23 February and 6, 9 and 13 March 2013.

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43. Throughout the campaign, Foxwood provided Arnautovic and Crisp with weekly written reports. These reports detailed the level of interest in the properties, identifying interested parties and the advertising medium through which those persons became aware of the properties.

The Information Memorandum

44. An information memorandum for the Properties was prepared but was not completed until 11 February 2013 (the 'Information Memorandum').

45. The Information Memorandum was amended on or about 18 February 2013 to include information regarding planning work undertaken by the firm Taylors and a copy of a planning permit dated 18 December 2000.

46. The amended Information Memorandum was sent out to prospective purchasers in the Biggin & Scott database on 19 February 2013.

The Sales Contracts

47. On 8 February 2013, Mr McCulloch of McGrathNicol requested that two sets of sales contracts should be prepared. One contract would be for the possible sale of the Maroondah Hwy properties in one line and two separate contracts for the separate sale of properties to enable Banksia to consider any offer for 441 Maroondah Hwy independently of the property at 443 Maroondah Hwy.

48. The Administrators instructed Gadens to prepare three draft sales contracts, the first being for both properties in one line, the second for 441 Maroondah Hwy (the Banksia mortgaged property) and the third for 443 Maroondah Hwy (the Perpetual mortgaged property).

The Second Meeting of Creditors and McGoldrick's Concerns

49. On 11 February 2013, a second meeting of creditors was held and it was resolved that Racso be placed in liquidation and that the administrators be appointed as the company's joint and several liquidators.

50. Following this meeting of creditors McGoldrick called the Liquidators' office and voiced concerns that there had not been disclosure of the planning permits and building permits for the commercially zoned area on 441 Maroondah Hwy and that, in his opinion, selling the properties separately rather than in one line would provide a better result. McGoldrick also expressed concern about the advertisement that had been published over the preceding weekend and that the liquidators had rushed the liquidation process. In response to McGoldrick's concerns the liquidators asked for Foxwood's advice on the issues that he had raised.

The Appointment of Biggin & Scott

51. Mr Andrew Egan of Biggin & Scott initially contacted Arnautovic by email on 17 December 2012 and told Arnautovic that he was intimately acquainted with the site as he had conditionally sold the Maroondah Hwy properties in 2008. On 18 December 2012, Arnautovic responded that the Administrators had already engaged Mr Willoughby of Foxwood but that any assistance that Mr Egan could provide in regard to the site would be beneficial. Arnautovic told Mr Egan that he should liaise with Mr Willoughby in this regard.

52. On 12 February 2013, McGoldrick telephoned Mr Willoughby. Following that conversation, Mr Willoughby emailed Arnautovic and told him that he had spoken with Mr Egan and that Mr Egan knew the site well. Mr Willoughby recommended to Arnautovic that the Maroondah Hwy properties should be marketed together through Foxwood and Biggin & Scott as 'joint exclusive' agents with all future marketing material to be co-branded. He also recommended extending the campaign for a further week to 14 March 2013. Arnautovic accepted that advice.

53. On 12 February 2013 Mr Willoughby, Mr Egan and McGoldrick met at Biggin & Scott's offices to discuss the sales campaign.

54. Foxwood and Biggin & Scott commenced their joint marketing of the Maroondah Hwy properties immediately, although a formal written joint-exclusive agency agreement between the Liquidators and Foxwood and Biggin & Scott was not executed until 26 February 2013.

The Taylors Report

55. In October 2011, Racso had entered into a contract to sell 443 Maroondah Hwy to a company, GRD Lilydale Pty Ltd, for $5,750,000. A deposit of $5,000 was paid, but the balance of the purchase price was never paid and the sale did not proceed.

56. On 12 February 2013, McGoldrick emailed Mr Gilchrist and advised that Taylors, a professional firm specialising in urban design, civil engineering, and development strategy, had prepared extensive planning proposals in relation to the Maroondah Hwy properties for GRD Lilydale. This email was forwarded to Mr Willoughby.

57. Subsequently, Mr Kalaf contacted Taylors. Niki Hendriksen of Taylors confirmed that Taylors would be happy to talk to any potential purchasers for the site. Mr Willoughby agreed that having Taylors' involvement was a good idea on a complex site with planning uncertainty.

58. On 13 February 2013, Arnautovic received an email from Foxwood copying the email from Nicki Hendriksen. Taylors' email indicated that they had had considerable involvement with the Maroondah Hwy properties over the years and outlined various reports and assessments that had been prepared previously. Taylors also indicated that the main issues with the properties were:

    (a) Slope;

    (b) The quarry;

    (c) Significant creek/waterway running through the site;

    (d) Interface required along the Warburton trail;

    (e) Heritage house and how it was to be approached;

    (f) A retaining wall;

    (g) Significant trees located on site which needed to be retained; and

    (h) Access into the site.

59. The Liquidators requested Foxwood to include the Taylors' information provided by Ms Hendriksen in the Information Memorandum. Mr Gilchrist also agreed with that course.

60. However, Taylors refused to release the report because they were owed approximately $80,000 by GRD Lilydale. Nevertheless, Taylors agreed to provide a summary report, including a concept plan for the development of the Maroondah Hwy properties, upon payment of a fee of $5,000. Mr Gilchrist and the Liquidators agreed to provide funding from Perpetual to obtain a copy of Taylors' summary report and a concept plan. The report was provided to the Liquidators and Foxwood on 8 March 2013.

61. Mr Sutherland gave evidence that the expenditure of $80,000 would not have been justified, without knowledge of what was contained in the reports, as to whether they would have been detailed enough and whether they were adverse or positive in nature.

62. The Taylors' summary report provided information about the drawbacks in respect of the Maroondah Hwy properties.

63. The expert retained by McGoldrick and Bentley, Mr Bettiol, gave evidence that, in his opinion, disclosure of the report to interested parties would not have necessarily benefitted the ultimate price obtained for the Maroondah Hwy properties because of the uncertainties that remained for interested parties, being the costs of dealing with the drawbacks adverted to in the report.

The Biggin & Scott Recommendations

64. On 13 February 2013, Mr Egan wrote to Ms Laura Kahar of Foxwood and commented that maybe the advertising should be revised as he had observed the advertisement for the Maroondah Hwy properties was not on the internet.

65. On the same day Mr Egan also told Mr Willoughby that he thought that it would be beneficial losing 10 days of the campaign, withdrawing the remaining advertising, and then relaunching the sales campaign with a new closing date. The renewed sales campaign he advised could be accompanied by aerial photography, planning comment and the concept plans from Taylors.

66. He also thought that the further *Australian Financial Review* advertising should be cancelled in favour of further advertising in *The Age* and that the internet should be utilised in addition to each agent's database being used.

67. Mr Willoughby was reluctant to run additional press advertisements and recommended to the Liquidators that the online campaign be extended. Mr Willoughby also recommended that the campaign be extended rather than stopped and restarted.

68. Mr Egan's other suggestions were adopted. An aerial photograph was included in the advertisement in *The Age* on 6 March 2013 and subsequent advertisements.

Involvement of Banksia

69. The Liquidators kept Banksia apprised of the sale process and provided copies of the Colliers valuations and sales submissions provided by CBRE, Colliers and Foxwood.

70. On 14 February 2013, the Administrators advised Banksia that Foxwood had engaged Biggin & Scott as external agents. The following day Banksia reiterated that it reserved its rights with respect to its security and ability to sell the property separately in the event that a favourable offer was received. Banksia also reserved its rights to refuse offers.

71. On 13 March 2013, McGrathNicol, receivers and managers of Banksia, wrote to the Liquidators and again reiterated that no discharge of Banksia's mortgage would be provided unless it was satisfied with the terms of the sales contract, including, but not limited to, the amount to be received by it at settlement.

Conclusion of the Sale

72. By the end of the campaign there were five interested parties and three offers had been presented.

73. Of these offers, two offers were received for the Maroondah Hwy properties 'in one line', namely, an offer from Third Street in the sum of $3,100,000 and an offer from Westrock Pty Ltd in the sum of $3,000,000.

74. The other offer was received from Abraxas Commercial Pty Ltd to purchase 441 Maroondah Hwy for the sum of $1,803,213. No offers were received from Abraxas for the purchase of 443 Maroondah Hwy separately.

75. Further negotiations took place subsequent to 14 March 2013. By 15 March 2013 Abraxas indicated that it was willing to increase its offer on 441 Maroondah Hwy to $2,000,000, so long as it were not 'shopped around'. McGrathNicol urged the Liquidators to accept that offer for 441 Maroondah Hwy.

76. The Liquidators kept pressure on the real estate agents to obtain a sale price of at least $4,000,000for both lots. The Liquidators told Foxwood that they would accept an offer in excess of $4,000,000 for both lots but also indicated they would accept an offer of $2,000,000 for 441 Maroondah Hwy if the $3,000,000 parties did not increase their offers to $4,000,000. The Liquidators expressed a willingness to adjust that position if both Foxwood and Biggin & Scott advised them that if 441 Maroondah Hwy sold for $2,000,000 then they would not get $1,000,000 for 443 Maroondah Hwy.

77. On or about 20 March 2013 the agents set a deadline of close of business 21 March 2013 for parties to submit executed contracts containing final offers.

78. The response in respect of the Maroondah Hwy properties was two offers from Westrock Pty Ltd for both properties, one for $3,000,000 on terms of a 90 day settlement and the other for $3,300,000 with settlement due in March 2014. As to 441 Maroondah Hwy, Abraxas Commercial Pty Ltd offered the sum of $2,000,000. There were no offers on 443 Maroondah Hwy alone, and Foxwood advised that 443 Maroondah Hwy was likely to sell for less than $1,000,000 if sold separately.

79. On 22 March 2013, the Liquidators recommended to Perpetual that it accept the sale of the Maroondah Hwy properties for $3,000,0000 and Perpetual did so. On or about the same day, Westrock Pty Ltd and Racso entered a contract of sale pursuant to which the Maroondah Hwy properties were sold for a total sum of $3,000,000.

80. The sale was completed on or about 2 July 2013, upon which the Liquidators paid the sum of $1,780,812.14 to Banksia in discharge of its debt and the sum of $644,249.70 to Perpetual in reduction of its debt.

Legal Principles – Duty Owed to Guarantors by Administrators and Liquidators

The Defendants' Pleading

81. In paragraph 17z of their Fourth Amended Defence and Counterclaim dated , the Defendants alleged that:

> By reason of their appointment as joint and several administrators and liquidators of Racso, Arnautovic and Crisp owe and at all material times since 6 November 2012 have owed to the Defendants a duty to:
>
> (a) exercise reasonable care and diligence in exercising their powers and duties;

(b) act in good faith in exercising their powers and duties;

(c) refrain from acting in a manner in which no reasonable administrator/liquidator would act;

(d) in exercising a power of sale in respect of the property of Racso, take all reasonable care to sell the property for not less than market value;

(e) pay the debts of Racso and adjust the rights of the contributories among themselves.

Particulars

The duties alleged in subparagraphs (a)–(d) above arise at law and/or in equity.

82. This pleading was the subject of criticism by Judd J when the proceeding was before his Honour on the return of interlocutory applications. [4] Nevertheless, his Honour was of the opinion that in the interests of justice, and by reason of its nature, the matter ought to proceed to trial, with an invitation extended to the Defendants to re-plead their case. [5]

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[4] *Perpetual Nominees Ltd v McGoldrick & Anor* [2014] VSC 152 [25]–[26].
[5] Ibid [42].

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83. Notwithstanding his Honour's critique of this aspect of the Defendants' pleadings, the content of the duty remained neither pleaded nor particularised. It remains unclear whether the Defendants mean to allege a breach of the Administrators'/Liquidators' statutory and general law duties to act with reasonable care and diligence or intend to assert breach of a tortious duty of care.

Second Defendant's Submissions

84. The Second Defendant, through her counsel, advanced the following submissions on the law which was said to be applicable to the duties owed by the Administrators and Liquidators to persons in the position of the Guarantors in this case. In summary, these were:

(a) The inability of a vulnerable person to protect himself from the risk of loss is an important consideration in determining whether a duty of care is owed. [6]

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[6] *Brookfield Multiplex Ltd v Owners-Strata Plan No 61288* (2014) 254 CLR 185, 200–201 [22]–[23] (French CJ), 209 [51] (Hayne and Kiefel JJ), 228–229 [130] (Crennan, Bell and Keane JJ); *Perre & Ors v Apand Pty Ltd* (1999) 198 CLR 180.

(b) Liquidators who sell company property at an undervalue may owe a duty of care to a guarantor or other person liable in respect of the principal debt. [7]

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[7] *Mills & Ors v Sheahan* (2007) 99 SASR 357, 361–363 [9]–[15], 366–370 [21]–[33] (Debelle J); 379–381 [101]–[111], 383 [125] (Sulan J); [128] (Layton J); *Perpetual Nominees Ltd v McGoldrick & Anor* [2014] VSC 152 [27]; see also *Velissaris v Fitzgerald & Anor* [2014] VSCA 139 [29]; cf *Viscariello v Macks* (2014) 103 ACSR 542, 560–565 [85]–[99] (Kourakis CJ).

(c) Receivers/managers owe an equitable duty of good faith to guarantors of the principal debt when they exercise a power of sale, which duty is '... enhanced and strengthened ...' by s 420A of the *Corporations Act*. [8]

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[8] *Florgale Uniforms Pty Ltd (rec & man apptd) (in liq) v Orders* [2004] VSC 65 [336]–[388]; *Ultimate Property Group Pty Ltd v Lord* [2004] NSWSC 114 [94].

(d) Equally, when conducting a mortgagee sale, mortgagees owe a duty to the mortgagor to act 'in good faith and have regard to the interests of the mortgagor' [9] and may be liable in negligence depending upon the circumstances, [10] including to a guarantor. [11]

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[9] *Transfer of Land Act 1958* (Vic) s 77(1).
[10] *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 All ER 633, 643; cf *Ultimate Property Group Pty Ltd v Lord* [2004] VSC 65 [339]–[388]; .
[11] *Jenkins v National Australia Bank* [1999] VSCA 33 [22]; *American Express v Hurley* [1985] 3 All ER 564, 571.

(e) If a mortgagee or a receiver/manager breaches the equitable duty of good faith or s 420A of the *Corporations Act* by selling company property at an undervalue, a guarantor of the principal debt is:

(i) entitled in equity to a credit, in the sum of the undervalue, to be set-off against any liability to the financier. [12]

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[12] *Buckeridge v Mercantile Credits Ltd* [1981] 147 CLR 654, 675; *GE Capital Australia v Davis & Ors* [2002] NSWSC 1146 [83]–[87]

; *Irani v St George Bank Limited (No 2)* [2005] VSC 403 [142] ; *Florgale Uniforms Pty Ltd (rec & man apptd) (in liq) v Orders* [2004] VSC 65 [357]–[388] ; *Ultimate Property Group Pty Ltd v Lord* (2004) 60 NSWLR 646 [73]–[107] ; *National Transport v Smith* [2001] NSWSC 1046.

(ii) entitled to equitable or common law damages against the receiver/manager. [13] For example, in *Investec Bank (Australia) Ltd v Glodale Pty Ltd* ,[14] the failure of the receiver to engage a local real estate agent was found to have been a critical default, which led to the claim for damages against the receiver succeeding.

(f) It was further submitted that there is no reason why the principles developed in relation to the duties of mortgagees or receiver/managers (as above) should not equally apply to administrators or liquidators in favour of guarantors of the company's debts. [15] These duties would be 'entirely compatible' with the statutory duties owed by administrators or liquidators when realising the assets of a company. [16]

(g) Finally, it was submitted that it is a principle of equity that guarantors of the principal debt are generally entitled to have the principal debtor discharge and exonerate the guarantor from liability, to the extent of the value of the securities. [17]

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[13] *Ultimate Property Group Pty Ltd v Lord* (2004) 60 NSWLR 646 [94] ; *GE Capital Australia v Davis & Ors* [2002] NSWSC 1146 [85]–[92] ; *Investec Bank (Australia) Ltd v Glodale Pty Ltd* (2009) 24 VR 617, 639–641 ; *Boz One Pty Ltd v McLellan* [2015] VSCA 68.

[14] (2009) 24 VR 617, 630 [60] .

[15] *Perpetual Nominees Ltd v McGoldrick & Anor* [2014] VSC 152 [39], [41] .

[16] *Mills v Sheahan* (2007) 99 SASR 357, 369–370 [30]–[32], 371 [38] (Debelle J).

[17] *Salcedo & Anor v Mawarie Mining Co Pty Ltd & Ors* (1991) 6 ACSR 197, 202–203 .

Claim for Pure Economic Loss

85. A central question in this proceeding is whether a liquidator also owes a duty of care to third parties in the position of the Defendants. The answer turns on application of the principles which govern claims for pure economic loss.

86. This area of law in Australia is developing, and is not yet constrained by firm principles, but rather is to be determined by judicial evaluation of a variety of factors found to be relevant to the particular case at hand. [18] Accordingly, the existence of a duty of care will not necessarily rest on the same principles in each case.

[18] See *Perre v Apand* (1999) 198 CLR 180, 253 [198], 254 [201] (Gummow J).

87. The concept of proximity was previously used in Australia to 'identify categories of cases in which a duty of care arose under the common law of negligence'. [19] For example, in *Bryan v Maloney* , [20] it was held by the High Court that the builder of a dwelling house owed a duty of care to a subsequent purchaser of the house such that, in the event of a breach of the duty arising from careless construction of the foundations, a claim in negligence could be maintained against the builder by the subsequent owner for economic loss.

[19] *Brookfield Multiplex Ltd v Owners Corporation Stata Plan 61288 and Anor* (2014) 254 CLR 185, 199–200 [21] (French CJ).
[20] (1995) 182 CLR 609 .

88. Proximity no longer governs the issue of duty of care in the law of negligence in Australia, having been laid to rest by the High Court in *Sullivan v Moody* ,[21] where a unanimous five member bench observed that it gave 'little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty of care has been established'.[22] It has ceased to be the formula by which to determine whether a duty of care exists in cases which fall outside established categories of cases.

[21] (2001) 207 CLR 562 .
[22] Ibid 578.

89. It is now necessary to determine whether there is a sufficiently close relationship arising from a range of factors relevant to the particular case, termed 'salient features', such as to give rise to a duty of care which, in the event of breach giving rise to pure economic loss, might establish a cause of action in negligence. [23] Nevertheless, proximity might be relevant as one of the salient features which may assist a court to determine whether a duty of care was owed in the circumstances of the case.[24]

Mills v Sheahan (' *Mills* ')

[23] Usefully summarised in *Caltex Refineries (Queensland) Pty Ltd v Stavar* (2009) 75 NSWLR 649, 675–677 [101]–[105] (Allsop P).

[24] Ibid 676 [103](g).

90. In *Mills* [25] the Full Court of the Supreme Court of South Australia considered an application for leave to appeal from an order striking out the certain parts of the plaintiffs' further amended statement of claim[26] which alleged liability on the part of the defendant for economic loss in tort.

[25] (2007) 99 SASR 357 .

[26] Pursuant to r 46.18 of the *Supreme Court Rules 1987* (SA).

91. The facts giving rise to the application were somewhat complex, but the essence may be reduced as follows. The plaintiffs (appellants) became liable for losses suffered by companies of which the defendant was the liquidator. The plaintiffs' case was that the liquidator sold the assets of the companies, which included land, at significantly less than market value. As a result, under their contractual arrangements, the amount for which the plaintiffs became liable was greater than it would have been if the assets had been sold at what the plaintiffs claimed was the true value. The plaintiffs commenced proceedings against the liquidator in which they claimed that he owed to them a duty in tort to take reasonable care to sell the assets for their true value. It was further alleged that the liquidator breached his duty by realising the assets at a significant undervalue. The liquidator was successful in his application to strike out the statement of claim on the ground that it failed to disclose a reasonable cause of action. [27] The plaintiffs appealed to the Full Court.

[27] *Mills & Ors v Sheahan* (2006) 95 SASR 49.

92. The appeal was allowed. The majority (Sulan and Layton JJ) held that it was at least arguable that a liquidator could owe a duty of care to persons in the position of the plaintiff. Justice Debelle went a step further and held that, as a matter of law, the liquidator of the company *did* owe the plaintiffs a duty of care in respect of any shortfall arising from the sale of the company assets.

93. The reasons of Debelle J characterised the central issue for consideration as: [28]

> ... whether, when exercising the powers to realise the assets of an insolvent company or bankrupt, a liquidator or trustee in bankruptcy owes a duty of care, not only to creditors and shareholders in the case of an insolvent company or creditors and the bankrupt in the case of personal bankruptcy, but also to third persons who are liable to the liquidator or trustee to make up the shortfall. Those persons might be

guarantors or persons who have provided an indemnity ... That question must be determined by reference to the principles by which it is determined whether a duty of care exists for economic loss suffered by a plaintiff.

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[28] *Mills* (2007) 99 SASR 357, 366 [21] .

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94. His Honour proceeded to identify the 'five principles' he considered relevant to answering the question of whether a duty of cares might exist in the context of liability for economic loss in that case, being those identified and applied by McHugh J in *Perre v Apand Pty Ltd* ('*Perre*')[29] and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* ('*Woolcock Street Investments*'), [30] namely: [31]

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[29] (1999) 198 CLR 180 .
[30] (2004) 216 CLR 515 .
[31] *Mills* (2007) 99 SASR 357, 366 [23] . However, his Honour noted that 'reasonable foreseeability of loss' was 'unnecessary to consider' as it had been conceded by the respondent: 366, [24].

(iii) reasonable foreseeability of loss;

(iv) indeterminacy of liability;

(v) knowledge of the risk and its magnitude;

(vi) vulnerability of the plaintiff to the risk; and

(vii) autonomy of the individual.

In the circumstances of the application, Debelle J further considered it appropriate to examine the proximity of the relationship between the plaintiffs and the defendant (to the extent it was relevant)[32] and whether the imposition of a duty of care would be compatible with the defendant's existing duties and commensurate with principles of law, equity or statute.[33]

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[32] Ibid 367–368 [27].
[33] Ibid 369–370 [31]–[33].

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95. In his reasoning, Debelle J analysed each of the other salient features under the following categories: indeterminacy of liability;[34] knowledge of the risk and its magnitude;[35] vulnerability;[36] individual autonomy;[37] proximity[38] and inconsistent duties.[39] His Honour ultimately concluded that the liquidator owed a duty of care to the plaintiffs in law and, on that basis, set aside the strike out order.

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[34] Ibid 368 [29].
[35] Ibid 367 [25].
[36] Ibid 367 [26].
[37] Ibid 368–369 [30].
[38] Ibid 367–368 [27].
[39] Ibid 369–370 [31]–[33].

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96. Justice Sulan (with whom Layton J agreed[40]) identified the key question as:[41]

> ... not whether a duty of care would necessarily be established in the circumstances of the present case. The relevant question is whether it can be said that the plaintiffs' claim discloses no reasonable cause of action such that a duty could be said, with certainty, not to exist.

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[40] Ibid 383 [128].
[41] Ibid 379 [101].

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97. Unlike Debelle J, Sulan J did not find that a duty of care existed, but rather that its existence was at least arguable on the plaintiff's case as pleaded and appropriate for further submission and ventilation at trial. His Honour observed that the duties of a liquidator owed on accepted grounds would not necessarily be irreconcilable with the duty of care pressed by the plaintiffs.[42]

Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 ('Brookfield')

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[42] Ibid 381–382 [112]–[118].

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98. **The** 2014 decision of *Brookfield* remains the most recent High Court authority on the factors which may give rise to a duty to avoid causing another economic loss. [43]

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[43] (2014) 254 CLR 185 .

99. In this case the owners of strata-titled serviced apartments in Chatswood (the 'Owners') brought proceedings against a building company, Brookfield Multiplex Limited (the 'Builder'), contending that it was liable in negligence for breach of a duty 'to take reasonable care to avoid a reasonably foreseeable economic loss to the owners in having to make good the consequences of latent defects caused by the building's defective design and/or construction'. [44] The Owners' argument was previously rejected at first instance [45] but upheld by the New South Wales Court of Appeal. [46]

[44] *Owners Corporation Strata Plan 61288 v Brookfield Multiplex Ltd* [2012] NSWSC 1219 [18] .
[45] *Owners Corporation Strata Plan 61288 v Brookfield Multiplex Ltd* [2012] NSWSC 1219.
[46] *Owners – Strata Plan No 61288 v Brookfield Australian Investments Ltd* (2013) 85 NSWLR 479 .

100. On appeal to the High Court the Builder successfully argued against liability being imposed for pure economic loss. The Court determined that there was no duty of care owed by the Builder to the Owners in respect of pure economic loss flowing from latent defects. In so doing, the High Court confined the operation of the earlier authority of *Bryan v Moloney*. [47]

[47] (1995) 182 CLR 609 .

101. Chief Justice French noted that the High Court in *Sullivan v Moody* had 'eschewed any attempt at formulating a general test for determining the existence or non-existence of a duty of care for the purposes of the law of negligence'. [48] His Honour further observed: [49]

> As the Court said [in *Sullivan v Moody*] different classes of case raise different problems, requiring "a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle".

[48] (2014) 254 CLR 185, 201 [24] .
[49] (2001) 207 CLR 562, 579–580 [50] .

102. As further observed by the Chief Justice, determination of the question as to whether or not a duty of care arises in cases where pure economic loss is claimed, 'requires consideration of the salient features of the relationship' between the plaintiff and defendant parties. [50]

[50] [2014] 254 CLR 185, 203–204 [30].

103. Justice Gageler shortly expressed a rationale for the High Court's decision in *Brookfield* in the following way:[51]

> The continuing authority of *Bryan v Maloney* should be confined to a category of case in which the building is a dwelling house and in which the subsequent owner can be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builder's want of reasonable care. Outside that category of case, it should now be acknowledged that a builder has no duty in tort to exercise reasonable care, in the execution of building work, to avoid a subsequent owner incurring the cost of repairing latent defects in the building. That is because, by virtue of the freedom they have to choose the price and non-price terms on which they are prepared to contract to purchase, there is no reason to consider that subsequent owners cannot ordinarily be expected to be able to protect themselves against incurring economic loss of that nature.

[51] Ibid 245 [185].

104. Further, Crennan, Bell and Keane JJ explained that the:[52]

> ... Court's decision in *Bryan v Moloney* does not sustain a proposition that a builder that breaches his contractual obligations to the first owner of the builder is to be held responsible for the consequences of what is really a bad bargain made by the subsequent purchasers of the building. To impose upon a defendant builder a greater liability for a disappointed purchaser, than to the party for whom the building was made and by whom the defendant was paid for its work would reduce the common law to incoherence.
>
> Moreover, to hold that a subsequent purchaser of a building is vulnerable to the builder so far as the risk of making an unfavourable bargain for its acquisition is concerned, would involve a departure from what was held by this court in *Woolcock Street Investments*.

[52] Ibid 214 [69] (citations omitted).

105. Accordingly, for the purposes of the present case, *Brookfield* confirms the position that in determining the existence of non-existence of a duty of care in the law of negligence where pure economic loss is claimed, a general test is not open to be applied. Rather, the exercise involves a judicial evaluation of the various factors which may be relevant to each particular case to arrive at a principled decision. This approach accords with that adopted by Debelle J in *Mills*.

Marsh v Baxter

106. A claim for economic loss was recently by the Court of Appeal of the Supreme Court of Western Australia in ***Marsh v Baxter***. [53] **The facts of the case gave rise to different judicial evaluations and conclusions as to the existence of a duty of care.**

[53] (2015) 49 WAR 1.

107. In a divided decision, a majority of the Court refused an appeal for a claim in negligence and nuisance for damages arising from the accidental windborne dispersal of genetically modified canola ('GMC') from the Respondent's farm onto the Appellants' neighbouring property. The presence of GMC on the Appellants' farm led to the organic certifier decertifying parts of their property, which prevented them from selling certain of their product at a premium. The Appellants alleged that the way that the Respondent had harvested produce, which involved GMC being swathed, stacked in windrows, and exposed to the elements for 2–3 weeks to enable the canola seeds to dry out, had caused the contamination which resulted in the decertification.

108. Justices of Appeal Newnes and Murphy rejected the Appellants' arguments in their entirety. The President of the Court of Appeal, McLure P, would have allowed the claims in negligence and nuisance. Their Honours reached different conclusions on the Appellants' 'vulnerability', which was adopted as a central salient feature in establishing the existence of a duty of care to avoid causing economic loss.

109. In finding that the Appellants were not 'vulnerable', the majority highlighted the fact that the Appellants could have taken steps to prevent GMC contaminating their farm, such as erecting barriers to prevent genetically modified produce being blown onto their farm.[54] Further, the majority noted that the 'apparent fragility' of the Appellants' contractual arrangements for organic certification was a relevant factor in deciding whether the Appellants could have protected themselves from harm.[55]

[54] Ibid 110–111 [684].
[55] Ibid 111 [685].

110. The dissenting decision of McLure P focused on the risk posed by the Appellants' close geographical proximity to the Respondent's farm and his awareness of the possibility that the Appellants could be decertified if their land was contaminated.[56] The President observed that significant factors leading to the contamination of the Appellants farm were in the 'direct and sole' control of the Respondent.[57] Her Honour concluded that the Appellants were vulnerable in the relevant sense and that a duty of care extended to protect the Appellants against economic loss.

[56] Ibid 56 [345].
[57] Ibid.

The Content of the Duty

111. If a duty of care exists in this case, a concomitant question arises as to its content. In considering the content of any duty which the Liquidators in this case owed to the Defendants as guarantors, it is relevant to consider the context of what other duties a liquidator is bound to observe.

112. A liquidator has a duty to exercise reasonable care and diligence in the discharge of his or her functions. [58] It is a duty owed to the creditors and shareholders of the entity the subject of the winding up. [59]

[58] *Gray v Bridgestone Aust Ltd* (1986) 4 ACLC 330; *Sydlow Pty Ltd v TG Kotselas Pty Ltd* (1996) 65 FCR 234.
[59] *Mills* (2007) 99 SASR 357, 363 [15] (Debelle J).

113. A liquidator is subject to statutory duties of care and skill. Pursuant to s 9 of the *Corporations Act* an 'Officer' of a corporation includes '(f) a liquidator of the corporation'. As such, liquidators are subject to the duties prescribed by s 180 of the *Corporations Act* . Section 180(1) of the *Corporations Act* and its accompanying 'Business judgment rule' in sub-s (2) provide:

> Care and diligence - directors and other officers
>
> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Business judgment rule

(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

(a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

114. In *Gray v Bridgestone Australia Ltd,* Cox J described the standard of care required of a liquidator in the following terms: [60]

> His knowledge and skill must be commensurate with the powers and responsibilities which a liquidator is required to perform. In exercising any judgment or discretion he must act reasonably. What is reasonable will depend upon the circumstances.

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[60] (1986) 10 ACLR 677, 679 .

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115. A similar view was taken by Lindgren J in *Pace v Antlers Pty Ltd (in liq)*, where his Honour said: [61]

> In my view, a liquidator must exhibit care (including diligence) and skill to an extent that is reasonable in all the circumstances. "All the circumstances" will include the facts that a liquidator is a person practising a profession, that a liquidator holds himself or herself out as having special qualifications, training and experience pertinent to the liquidator's role and function, and that a liquidator is paid for liquidation work. "All the circumstances" will also include the fact that some decisions and courses of action which a liquidator is called upon to consider will be of a business or commercial character, as to which competent liquidators acting with due care, but always without the benefit of hindsight, may have differences of opinion.

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[61] (1988) 80 FCR 485, 499 .

116. To like effect is the approach of Plowman J in *Leon v York-o-Matic Ltd*: [62]

> [H]ere, as I have said, there is no question of fraud, and, having considered all the evidence, which is fairly voluminous and lengthy, I am not satisfied that the liquidator here did not exercise his discretion bona fide; nor am I satisfied that he acted in a way in which no reasonable liquidator could have acted. [63]

[62] [1966] 1 WLR 1450.
[63] Applied in *Re Teller Home Furnishers Pty Ltd; Electronic Industries v Horsburgh* [1967] VR 313, 318 (Gowans J).

117. As noted by Debelle J in *Mills*: [64]

> one of the duties of a liquidator is to liquidate the assets of the company being would up so that the proceeds can be applied to discharge the liabilities to creditors, with any surplus being distributed to shareholders.

[64] (2007) 99 SASR 357, 365 [13].

118. The power to sell the property of the corporation is provided by s 477(2)(c) of the *Corporations Act* which empowers a liquidator to 'sell or otherwise dispose of, in any manner, all or any part of the property of the company'. In selling or disposing of company assets, there is no reason in principle why the liquidator should not be subject to the duty of care imposed under s 180 of the *Corporations Act*. [65]

[65] Ibid.

119. Accordingly for present purposes, the content of the duty of care, if it arises, I find to be a duty on the part of the Liquidators to sell or otherwise dispose of, in any manner, all or any part of the property of the company Racso acting in good faith and with due care and skill to an extent that is reasonable in all the circumstances. The 'circumstances' will include the fact that some decisions, such as the selling of the Properties in this case, and marketing of those properties which the

Liquidators were called upon to consider, were of a business or commercial character, and the decisions made in those circumstances must be judged within the range of decisions which were reasonably open to have been made, but without the benefit of hindsight.

Keay's Insolvency

120. The learned authors of the most recent edition of *Keay's Insolvency* make no mention any duty of a liquidator owed to third parties.[66] However, they observe that:[67]

> As with any property, the liquidator must choose the method of sale and price that will give maximum benefit to the creditors. Naturally, the liquidator should seek to obtain as good a price as possible, given the market conditions. Options will include private contract, public auction, tender and clearance or "liquidation" sale. The means of sale is at the liquidator's discretion. The court will only interfere if the liquidator fails to act as a reasonable liquidator would act. ... There is no express equivalent provision for liquidators similar to the duty imposed on receivers exercising the power of sale (s 420A); however, the statutory duty of care imposes a similar requirement to act reasonably – although without the statutory instruction to seek market price under s 420(1)(a).

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[66] Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Lawbook, 9th ed, 2016).

[67] Ibid 517 (citations omitted).

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121. This observation reinforces the content of the duty of care on the part of the Liquidators which I have found.

Whether the Liquidators Owed to the Guarantors a Duty of Care

122. I will consider whether the Liquidators owed a duty of care to the Guarantors under the following categories of salient features: indeterminacy of liability, knowledge of the risk and its magnitude, vulnerability, individual autonomy, proximity and inconsistent duties.

Indeterminacy of Liability

123. A factor which may militate against imposing a duty to take reasonable care to protect another from economic loss is the concern of the law to avoid what Chief Judge Cardozo in *Ultramares Corporation v Touche* called the imposition of liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.[68] Concern about indeterminacy may arise for example when the defendant is not in a position to determine how many claims might be brought against it or what the general nature of the claims might be. [69] In *Perre* , McHugh J explained: [70]

> It is not the size or number of claims that is decisive in determining whether potential liability is so indeterminate that no duty of care is owed. Liability is indeterminate only when it cannot be realistically calculated. If both the likely number of claims and the nature of them can be reasonably calculated, it cannot be said that imposing a duty on the defendant will render that person liable in an indeterminate amount for an indeterminate time to an indeterminate class.

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[68] 174 North Eastern Reporter 441 (1931); 255 NY (2d) 170 (1931) 179.
[69] *Mills* (2007) 99 SASR 357 [29] .
[70] (1999) 198 CLR 180 [106]–[107] .

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124. In the present case there is no basis for a finding of indeterminate liability. The liability is confined to the Guarantor Defendants as the persons liable to indemnify Racso under the terms of their Guarantees. The potential liability is limited to the amount of the shortfall sustained between the outstanding debt payable by Racso and the sum realised on the sale of the Properties.

125. The Liquidators were fully aware of the liability of the Guarantors to meet any such shortfall from their own resources should they be called upon to do so under their Guarantees.

Knowledge of the Risk and its Magnitude

126. In *Woolcock Street Investments* , McHugh J referred to the fact that the case for imposing a duty of care is strengthened if the defendant knew of the risk and its magnitude. [71] In the present case, I am satisfied that the Liquidators knew of the risk and its magnitude. They were aware that the price for which they sold the assets comprised in the Properties directly affected the liability of the Guarantors to make up the shortfall under their Guarantees.

Vulnerability

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[71] (2004) 216 CLR 515, 550 [87] . See also *Mills* 99 SASR 357, 367 [25] .

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127. The vulnerability of the party alleged to have suffered the pure economic loss is an important requirement. [72]

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[72] Justice McHugh described it as a 'critical issue': *Woolcock Street Investments* (2004) 216 CLR 515, 549 [80] .

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128. In this context, relevant vulnerability arises when the party alleged to have suffered the pure economic loss is likely to suffer damage if reasonable care is not taken. It is to be understood as a reference to that party's inability to protect himself or herself from the consequences of the other party's want of reasonable care. [73] The Defendants were vulnerable in this sense, arising from the terms of their Guarantee. This created a liability, the amount of which was directly affected by the amount recovered from the sale of the Properties.

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[73] *Mills* (2007) 99 SASR 357, 367 [26].

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129. The Guarantors found themselves in a position in which they were not able to adequately protect themselves and were left to suffer from the consequences of the sale by the Liquidators of those assets. Their liability to indemnify under their Guarantees was entirely dependent upon what the Liquidators obtained for those assets. They were vulnerable in the sense that they had no ability to ensure that the Liquidators would take care to secure the best price reasonably obtainable in all the circumstances.

Individual Autonomy

130. There is a recognised community standard that, in the pursuit of legitimate personal advantage in a competitive free enterprise economic system, where a personal economic gain may be achieved at another's loss, there is no duty to take reasonable care to avoid causing mere economic loss to another, as distinct from physical injury to another's personal property. [74] In *Woolcock Street Investments* McHugh J said: [75]

> In *Hill v Van Erp*, I pointed out that "Anglo-Australian law has never accepted the proposition that a person owes a duty of care to another person merely because the first person knows that his or her careless act may cause economic loss to the latter person". Speaking generally, a person owes no duty to prevent economic loss to another person even though the first person intends to cause economic loss to that other person. This particular immunity from liability reflects the common law's concern with the autonomy of the individual and its desire to give effect to the choices of the individual by not burdening his or her freedom of action. Thus, as long as a person is legitimately protecting or pursuing his or her commercial interests, the common law does not require that person to be concerned with the effect of his or her conduct on the economic interests of other persons.

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[74] Ibid [30] and the authorities contained therein.
[75] *Woolcock Street Investments* (2004) 216 CLR 515, 548 [78].

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131. The question of individual autonomy is not relevant in this case because, if a duty of care was imposed on the Liquidators, it would not be merely because the Liquidator knows that his or her careless act may cause economic loss to the latter person. It would be because the consideration of individual autonomy has been considered as only one factor in the mix of salient features and when balanced in this way, is not considered to outweigh the other features which give rise to a duty of care.

132. I find that this balancing exercise results in the imposition of a duty of care on the part of the Liquidators in undertaking the sale of the assets comprised in the Properties.

Proximity

133. Considerations of proximity, although no longer providing a test for the imposition of a duty of care in pure economic loss cases, may still provide a degree of guidance in considering whether a duty of care in fact arises. [76]

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[76] *Mills* (2007) 99 SASR 357, 367–368 [27].

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134. The question under this category of proximity is to determine whether there is a sufficiently close relationship to give rise to a duty of care, a breach of which may give rise to recovery of a pure economic loss.

135. The approach of the courts is to consider this element of proximity as a 'global' exercise. By standing back and considering in combination the other salient features which have been identified together with other relevant factors, a determination can be made as to whether or not a sufficiently close relationship was present such as to give rise to a duty of care.

136. As observed by Debelle J in *Mills*,[77] in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* ('*Caltex Oil*'), [78] Stephen J identified what he called 'salient features' which combined to constitute a sufficiently close relationship to give rise to a duty of care owed to Caltex for which it might recover its purely economic loss. Chief among those was the defendant's knowledge that the property in question, being a set of pipelines, was of the kind inherently likely, when damaged, to cause economic loss.

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[77] Ibid.
[78] (1976) 136 CLR 529, 576.

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137. Another salient feature identified in *Caltex Oil* was the defendant's knowledge or means of knowledge of certain charts which led to the obvious inference that the pipeline was used to carry

refined products from its refinery in the plaintiff's terminal.[79] Justice Stephen held that these and other factors clearly demonstrated a sufficiently close relationship to entitle the plaintiff to recover its reasonably foreseeable economic loss.

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[79] Ibid.

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138. In the present case, I find that there was a real relationship of proximity between the Liquidators and the Guarantors by reason that the former knew that the amount recovered from the sale of the assets comprising the Properties would directly affect the amount to which the latter would be exposed to under their Guarantees.

139. To the extent that proximity is relevant, there was a sufficient degree of proximity in the nature of a sufficiently close relationship to establish a duty of care on the part of the Liquidators.

Inconsistent Duties

140. Another relevant factor is whether the imposition of a duty of care would be compatible with other duties which the Liquidators owed. [80] A liquidator, when exercising the power to realise assets, is subject in each case to a duty to creditors and the shareholders to exercise reasonable care and diligence.

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[80] *Mills* (2007) 99 SASR 357, 367 [31]–[33].

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141. So it was in this case. The duty on the part of the Liquidators was to sell or otherwise dispose of the Maroondah Hwy properties acting in good faith and with due care and skill to an extent that was reasonable in all the circumstances. This involved taking reasonable care to secure the best price possible in the commercial context which existed at the time.

142. The duty which the Guarantors seek to enforce is a duty to secure the best price reasonably obtainable in the circumstances for the assets which have been sold. The duties are entirely compatible. There was a coincidence of the interests of the creditors with those of the Guarantors who were liable to indemnify. If the Liquidators discharged that duty, there could be no impairment to the interests of the creditors or the shareholders of Racso.

143. For this reason, the coincidence of duties did not conflict, and do not operate to negate the duty of care.

Conclusion as to Duty of Care

144. Having considered the 'salient features' relevant to this case, I find that the Liquidators owed a duty of care to the Guarantors. The duty was to sell or otherwise dispose of the property of the

company Racso, being the Maroondah Hwy properties, acting in good faith and with due care and skill to an extent that was reasonable in all the circumstances. This involved taking reasonable care to secure the best price possible in the commercial context which existed at the time.

Whether the Liquidators Breached the Duty of Care

145. The sale and marketing of the Properties were not undertaken without imperfections. However, I am also satisfied that the conduct of the Liquidators in realising the Maroondah Hwy properties by sale, was not undertaken without due care and skill to an extent that was reasonable in all the circumstances. Nor were the sales undertaken without good faith or in a manner which was unconscionable. I am further satisfied that the sales secured the best price possible in the commercial context which existed at the time.

146. The selling and marketing of the Properties, which the Liquidators administered, and the decisions which they were called upon to make in these processes, were of a commercial character. They were decisions made in circumstances to be judged within the range of decisions which were reasonably open to have been made, and without the benefit of hindsight. Considered in the light of all of the evidence, I am satisfied that the Liquidators did not breach the duty of care which they owed to the Guarantors.

Adequacy of the Marketing

147. The principal allegations maintained by the Defendants as to the alleged inadequacy of the marketing of the Maroondah Hwy properties are here described and analysed against the evidence. This body of evidence, as I asses it, supports the conclusion that the Liquidators did not breach the duty of care which they owed to the Guarantors.

Marketing Campaign Too Short

148. It was said by the Defendants that the marketing campaign was too short. In that respect the Liquidators received advice that the properties had been put to market by Racso in the period prior to administration and had failed to sell. Arnautovic said in his evidence on this matter:

> The initial intention was to have a three month marketing campaign. However, Foxwood advised us that a three month campaign was unnecessarily long and that they could shorten the time period and run a more intensive advertising campaign. Foxwood advised that this was a more suitable way to market this type of property particularly given that it had previously been on the market and had failed to sell.

Foxwood advised the Liquidators that a period of four to five weeks was sufficient.

149. The expert evidence of Mr Sutherland and Mr Dowling, which I accept, was that the time frame for the marketing campaign, namely from 2 February 2013 to 14 March 2013, was adequate. In this regard, Mr Dowling said in his evidence:

> In the present case, in my opinion, a reasonable period would require the publicity of the intended sale to take place over a time between four weeks and six weeks and to be concentrated within that period by a sufficient frequency and repetition of the sale advertisements.

Foxwood Not a Suitable Agent

150. It is alleged by the Defendants that Foxwood was not a 'suitable' agent.

151. However, Foxwood had a Victorian office and at the time Mr Willoughby of Foxwood was involved in the sale of the large Martha Cove development on the Mornington Peninsula of Victoria.

152. Secondly, Foxwood's authority permitted the firm to engage a co-agent.

153. On 11 February 2013, McGoldrick complained to the Liquidators' office in respect of the appointment of Foxwood.

154. On 13 February 2013, Biggin & Scott were appointed as a co-agent.

155. From then on the properties were marketed by both agencies for a period of one month.

156. In any event, at the time Foxwood was first engaged the firm was not inexperienced in interstate property sales. It had already undertaken a considerable number of sales for large residential estates in Victoria, New South Wales and Queensland, and all on instructions from banks and receivers.

Sales Campaign Not Stopped and Re-launched

157. It is alleged by the Defendants that, against the recommendation of Andrew Egan (of the agent Biggin & Scott) the campaign was not stopped and re-launched.

158. On 13 February 2013, Mr Egan made the suggestion to cease the campaign and re-launch with aerial photography and 'planning comment and concept plans from Taylors'.

159. However, a commercial decision was made to extend the campaign by one week instead. This was made by the Liquidators following a recommendation from both agents by email dated 13 February 2013 that '*we extend it* [the sales campaign] *again for another week (which can only benefit the market) ...*'.

160. Mr Sutherland's expert view was that this was an appropriate step, saying in his evidence: '*This was the appropriate action to allow potential purchasers more time to undertake the necessary due diligence*'.

Failure to Obtain and Provide a Feasibility Report

161. It is alleged by the Defendants that the campaign was flawed by reason of the failure to obtain a 'feasibility report' together with 'proposed plan of subdivision or development plan', engineering costings, and 'other relevant reports such as heritage and environmental'.

162. Taylors was a professional services firm which specialised in urban design, civil engineering, property development strategy and project management.

163. On 13 February 2013, Mr Arnautovic learned that Taylors had previously performed work in relation to the properties for and on behalf of McGoldrick and were in possession of various reports relevant to proposed development of the properties. Taylors advised Mr Arnautovic as to the main negative features of the site.

164. However, Taylors refused to release the information by reason of outstanding fees owed by McGoldrick said to be in the order of $80,000. To overcome the problem Perpetual agreed to pay Taylors the sum of $5,000 for a summary report.

165. On 8 March 2013, the Liquidators received the summary report and a concept plan for a housing yield of 80 residences.

166. It was also the case that on or about 12 February 2013, Mr Willoughby contacted Ms Niki Hendriksen of Taylors who informed him that Taylors would willingly discuss the properties with potential purchasers. This offer was willingly accepted by Mr Willoughby who, in his evidence, recognised that '*having Taylors involvement was a good idea on a complex site with planning uncertainty. I believed it would help us maximise the value*'.

167. It was Mr Sutherland's expert opinion that this was adequate, observing that: '*The liquidators did not obtain a feasibility report for use by prospective purchasers. However, potential purchasers were referred to* [Taylors] *to obtain further information by the Agents (Information Memorandum)'.*

Late Provision of Information Memorandum

168. The evidence discloses that the first draft of an information memorandum relating to the Maroondah Hwy properties had been prepared by 11 February 2013, and, at that time, it was not in a state to be provided to prospective purchasers. By this time there were some seven parties who had requested the information memorandum.

169. The information memorandum was not finalised until 19 February 2013 when it was available for prospective purchasers.

170. An information memorandum was a critical document for this type of property sale.

171. Although the information memorandum was provided later than ideally it should have been, I am not satisfied that its effectiveness was lost.

172. From at least the time on or about 19 February 2013 onward the information memorandum included the following information:

(viii) the fact that Biggin & Scott and Foxwood were the property agents, with contacts for 'more information' provided from Peter Kalaf and Clint Willoughby of Foxwoods and Andrew Egan from Biggin & Scott;

(ix) under the page headed 'Development', the fact that Taylors had done 'considerable work' in respect of a residential development concept plan was disclosed with seven reports and assessments listed, in respect of traffic engineering, flora and fauna, environmental constraints, heritage, geotechnical issues and other matters which had been prepared during what was described as the '*Master-planning phase*';

(x) the fact various sub-consultants had been engaged;

(xi) importantly, this page of the Information Memorandum concluded with: '*For further planning advise please contact: Niki Hendriksen, TAYLORS DEVELOPMENT STRATEGISTS*', with contact details provided;

(xii) in a meeting with Council in September 2012 general support was given for a medium density residential development; and

(xiii) a town planning application could be lodged with Council in 10-12 weeks.

173. The expert opinion of Mr Sutherland was that it was appropriate to market the properties without including all of the information available from Taylors for a number of reasons:

(xiv) the costs of obtaining the information;

(xv) the risks that such information would have been detrimental to the sales; and

(xvi) given the fact that potential purchasers were referred to Taylors to seek further advice in any event.

Failure to Market the Properties Separately

174. The Defendants further complained that the properties were not marketed separately.

175. However, from on or about 9 February 2013 onwards the advertisements for the sales of the properties included this line, 'offered in one line or separately'.

176. The properties co-joined properties and the marketing made it clear that they could be bought in 'one line', that is, together, or separately.

Advertising Deficient

177. The Defendants complained of deficiencies in the advertising, namely:

    (a) Mistakes in the initial advertisement;

    (b) Late provision of an advertising sign; and

    (c) Advertising undertaken only in Victoria.

178. As to the mistakes in the initial advertisement, these were soon corrected. In any event, I do not find that the mistakes, such as they were, had any material effect on the sales campaign.

179. As to the late provision of the advertising sign advertising the Properties to the public using the Maroondah Highway, a sign was erected on 23 February 2013, some three weeks into to sales campaign. However, given the nature of the targeted market, being property developers and investors, this delay was not likely to have materially affected the marketing of the properties.

180. As to the allegation that the properties were only marketed in Victoria, this is incorrect. The properties were listed online as from 18 February 2013 and also advertised in the *Australian Financial Review*. The first advertisement of the sales campaign appeared in the *Saturday Age* on 2 February 2013. The second was published in the *Australian Financial Review* on Thursday, 7 February 2013.

181. The expert opinion of Mr Sutherland is that the advertising was appropriate.

Weekly Reports

182. The Defendants contended that weekly reporting between the co-agents was inadequate, resulting in a lack of co-ordination between Foxwood and Biggin & Scott.

183. However, overall, I am not satisfied that this had a material or detrimental effect on the ultimate sales price achieved.

Delay in Provision of Sales Contracts

184. Contracts were not provided until 4 March 2013. Contracts were exchanged on 22 March 2013.

185. I do not find this time span to have been unreasonable in all the circumstances, and there is no evidence which I accept that this detrimentally affected the sale price.

Acceptance of the Sale Price Offered

186. Ultimately, the price of $3,000,000 was the highest price that was offered for the Maroondah Hwy properties at the completion of the sales campaign.

187. In all the circumstances, I do not accept that the price or the terms on which it was offered by Westrock Pty Ltd was too readily accepted, or that it was unreasonable to conclude the sales on this basis.

188. Although it was a possible commercial course to have commenced a new sales campaign, rather than accept the highest price and the terms offered by 22 March 2013, I do not find it to be an unreasonable course not to have done so. I make this finding in the light of the history of the conclusion of the sale of the properties which has been earlier discussed. I am satisfied that the Liquidators negotiated in good faith with prospective purchasers to secure the sales on the best terms and for the best price which, in their professional judgment, were available at the conclusion of the marketing campaign. In so doing, the Liquidators acted reasonably in all the circumstances.

Expert Evidence as to Marketing Campaign and Valuations Expert Witnesses for the Plaintiff

189. My assessment of the expert witnesses called at trial further supports the conclusion that the Liquidators did not breach the duty of care which they owed to the Guarantors.

Expert Witness for the Plaintiff

Mr Sutherland

190. The Plaintiff, Perpetual, called Mr Paul Geoffrey Sutherland ('Mr Sutherland') as an expert witness on the question of the adequacy of the marketing campaign for the Maroondah Hwy properties.

191. Mr Sutherland did not prepare a valuation.

192. Mr Sutherland summarized his findings in the following way:

1. In my opinion, with reference to the main body of this Statement, on balance I do not consider that the shortcomings with the campaign, the majority of which were rectified during the campaign, resulted in the sale process being considered to be 'not properly conducted'.

2. The timeframe of the marketing campaign was considered adequate, being from 2 February 2013 to 14 March 2013.

3. The advertisements and Information Memorandum stated the properties were zoned 'Residential 1' and 'Business 4' and it is noted that approximately 25% of the site area of 441 Maroondah Highway was zoned 'Business 4' and approximately 75% was zoned 'Residential 1.

4. The marketing included national exposure via an advertisement in the Australian Financial Review and listing on property websites.

5. Initially only Foxwood was appointed, an agent without a strong presence in Victoria. However, this was rectified with the appointment of Biggin & Scott to act in conjunction.

6. Biggin & Scott and Foxwood recommend extending the marketing campaign after the meeting on 12 February 2013.

7. The liquidators did not obtain a feasibility report for use by prospective purchasers. However, potential purchasers were referred to [Taylors] to obtain further information by the Agents (Information Memorandum).

8. The properties were marketed allowing a purchaser to purchase either or both properties.

9. The marketing campaign did indicate that there was 'Business 4' zoned land and 'Residential 1' zoned land.

193. As to the failure to obtain copies of reports prepared by Taylors, Mr Sutherland opined:

- The suggested cost of $80,000 to obtain copies of the Taylors Reports was significant, particularly without knowledge of the contents of the reports and as to whether they were adequate in scope and positive or negative.

- I note in the Report from Taylors headed Property Investigation Report, 441-443 Maroondah Highway, Lilydale, dated March 2013 under the heading Planning Considerations, sub heading Contamination indicates the following "the most recent assessment of the site has been undertaken by Tonkin & Taylor. This Report notes that although the site could be generally considered to have a low potential for contamination, the presence of the quarry is likely to trigger the requirement for a Site Assessment as a minimum and most likely the completion of an Environmental Audit. A magnitude of costs for these additional investigations required is estimated to be in the order $125,000 to $190,000".

- I do not consider it appropriate for a Vendor to commission Environmental Reports at the above cost without knowing the likely outcome and as to whether the Reports may be adverse or positive in respect to the overall site. There would have also been a significant delay, as the preparation of such Reports generally takes an extended period.

- Thus, I consider the course of action referring people to Taylors without obtaining these further Reports to be reasonable.

- They did market the properties separately and did offer the opportunity to purchase one or both properties.

194. Mr Sutherland concluded that, in his opinion:

- with reference to the main body of the statement on balance, he does not consider that the shortcomings with the campaign, the majority of which were rectified, resulted in the sale process being considered to be 'not properly conducted'.

- The aspect that is impossible to quantify is the effect, if any, of not obtaining the relevant reports, would have had upon the marketing campaign and end sale result.

- It may have been the case that:

  o The Reports did not contain enough information to greatly assist with the sale process as further extensive investigations were required;

  o The findings of the Reports were positive and would have enhanced the sale price; or

  o The Reports were negative and would have depressed the sale price.

- As the Reports are unavailable to him, it is therefore impossible to quantify the impact, if any, upon the sale campaign that would have occurred should these Reports have been available.

195. I accept the evidence of Mr Sutherland.

Expert Witnesses for the Liquidators

Mr Dowling

196. The Liquidators called John Kenneth Dowling ('Mr Dowling') as an expert witness on the question of the adequacy of the marketing campaign for the Properties. Mr Dowling also did not prepare a valuation. In summary, Mr Dowling was of the opinion that:

- Your first question, marked (a), asks: "*Are there any features of the Racso Land that would restrict the property's saleability?*" My answer to that question is: Yes, subject to my elaboration upon that answer in the ensuing paragraphs herein.

- Your second question, marked (b), asks: "*Having regard to the selling strategy advised to the Liquidators, in your opinion was that strategy appropriate in order to achieve a fair market price upon sale in a mortgagee-in-possession sale?*" My answer to that question is: Yes, subject to my elaboration upon that answer in the ensuing paragraphs herein.

- Your third question, marked (c), asks: "*Was there any part of that strategy which, to a person who is not a real estate agent, was so manifestly unreasonable that it should have been questioned?*" My answer to that question is: No, subject to my elaboration upon that answer in the ensuing paragraphs herein.

- Your fourth question, marked (d), asks: "*Having regard to the offers that were made, in your opinion was the agents' advice to the Liquidators to accept the amount ultimately accepted, in line with what a competent real estate agent acting reasonably would have advised?*" My answer to that question is: Yes, subject to my elaboration upon that answer in the ensuing paragraphs herein.

197. Mr Dowling supported his conclusions with a detailed analysis, which included the following observations:

> At the relevant date, there were several such negative characteristics. I record that, at the date of my inspection made for the purpose of this advice, those characteristics have been substantially ameliorated.
>
> The negative characteristic to which I refer were the result of a relatively high degree of uncertainty about the likely optimum use of the land, due largely to its physical condition. The physical uncertainties and associated legal uncertainties related to: (a) the dilapidated condition of the dwelling house existing on Property A [the 441 Maroondah Hwy property]; (b) the practical effect of any statutory heritage provisions applicable to that dwelling; (c) the lack of adequate maintenance of Property A leading to the poor condition (including structural defects) of the dwelling and of its surrounding grounds; (d) the physical status of the former quarry on Property B [443 Maroondah Highway property] and the character of the material that had been used to fill it; (e) the extent of the former quarry on Property B in regard to its dimensions and depth, including a lack of information about the likely extent of remediation necessary to put the land, occupied by the former quarry, to an economic alternative use; (f) the extent of work required for the removal, as necessary, of the timber consisting of the trees occupying parts of Property B; (g) the extent of excavation and earthworks required generally to achieve the optimum use of Property B; and (h) the work required for the drainage of the land, to gain approval for any subdivision of the land into residential allotments, having regard in particular for the upstream and downstream requirements of the existing watercourse intersecting Property B.
>
> In addition to the physical uncertainties and associated legal uncertainties described, other legal uncertainties (including the foregoing reference to heritage protection requirements) existed, due to foreshadowed intentions to amend the statutory planning provisions applicable to the land. Those intentions had been announced but had not been given effect at the relevant date.
>
> The proposed changes to the Yarra Ranges Planning Scheme, affecting the land, were unlikely to be detrimental but involved nevertheless a significant degree of uncertainty because of the customary extensive delays in the making of amendments to statutory planning schemes and in the potential for controversy in the present case because the proposed amendments were initiated by the Victorian government and not by the responsible authority, being the Yarra Ranges Shire. Other questions of legal uncertainty related to the future drainage of storm water on and from property B and of the status of rights, in the case of Property B, to connect any future development of the land to existing utility services, such as water and electric power (including the adequacy of those services to meet the requirements of the newly created residential allotments resulting from the subdivision of the land).

198. I accept the evidence of Mr Dowling.

Mr Wheate

199. The Liquidators called Paul Geoffrey Wheate ('Mr Wheate') of Colliers as an expert witness on the question of the adequacy of the marketing campaign for the Properties. Mr Wheate was of the opinion that it was not possible to reliably value the Maroondah Hwy properties by reason of the factors detailed within the Taylors Report which he read for the purposes of preparing his expert report. In particular, Mr Wheate made reference to:

· the cost and timeframe for remediation of the former quarry site, which were unknown and would have to await an environmental audit which could be produced at a cost within a range of $125,000$190,000;

· the stands of Yarra gum trees on the site, which have a State level of significance together with eucalyptus trees, which would require a permit for removal to enable a sub-division project to proceed, and had the potential to adversely impact of the development potential of the site and the potential dwelling/lot yield;

· the potential need to accommodate an open waterway and the need to enter into discussions with Melbourne Water as to the treatment of Melbourne Water's Nelson Road drain and the provision of flood modelling and flow calculations in relation to any future development. Further, a reservation of a 20-30 metre strip along the eastern boundary of the site to accommodate the waterway would reduce the developable area and the development potential of the site;

200. Mr Wheate concluded that:

> Therefore having considered the unquantifiable nature of the potential costs and timeframes required to remediate the site together with a possible reduction of the developable area as detailed within the Contamination, Vegetation and Drainage sections of the Taylors Report it is my opinion that it was not possible to reliably value 441 and 443 Maroondah Highway, Lilydale as at 20 March 2013.
>
> It is my professional opinion the further investigations required to allow 441 and 443 Maroondah Highway, Lilydale to be reliably valued as at 20 March 2013 would have been the appointment of suitably qualified professionals to determine a cost and the timeframe required to remediate the site, to determine the cost and possible site area to be surrendered to accommodate or offset the trees and vegetation and to determine a cost/site area to be surrendered to accommodate the open waterway. Upon receipt of advice from such professionals the valuer would be better able to determine value making adjustments accordingly.
>
> For these reasons detailed and in the absence of further information there were too many uncertainties to value 441-443 Maroondah Highway, Lilydale accurately as at the date of valuation.

201. I accept the evidence of Mr Wheate.

Expert Witnesses for the Defendants

Mr Papworth

202. The Defendants called Bradly William Papworth ('Mr Papworth') as an expert witness to provide a retrospective valuation for the Maroondah Hwy properties as at 20 March 2013. In so doing Mr Papworth valued the properties together on the basis of a freehold interest with vacant possession. He used a direct sales comparison valuation methodology.

203. Subject to the assumptions and qualifications contained in his report, Mr Papworth assessed the market value of the Maroondah Hwy properties as at 20 March 2013 on a figure which he rounded down to $6,400,000.

204. Mr Papworth expressed his opinion of value in a retrospective valuation undertaken some two years after the sale of the properties on 20 March 2013. His valuation is to be approached with caution in the light of the sale price that was actually achieved on that date, which is more likely to have reflected the market value at that time.

Mr Bettiol

205. The Defendants called Gregory Wayne Bettiol ('Mr Bettiol') as an expert witness on the question of the adequacy of the marketing campaign for the Properties.

206. In summary, Mr Bettiol concluded as to the sales campaign:

(a) The initial sole appointment by the Liquidators of a New South Wales-based real estate agency to market a development site located in the outer eastern suburbs of Melbourne was a mistake as that agent lacked a local office base from which to service prospective buyers and were unlikely to have a local database of target buyers, such as developers and builders that would obviously be interested in the sites. These factors alone would have an effect on the end sale price of the properties.

(b) The pre-marketing preparation by Foxwood was substandard. More should have been done in carrying out a proper due diligence of the property and realising that it was a complex site that required a detailed Information Memorandum including a specialist Development Consultants report to be prepared prior to commencement of the marketing program. Little things like copy errors in the initial advertisements, signage not being erected until the third week of the campaign and constant changes in the advertising schedule and closing date of the tender show poor preparation.

(c) The marketing campaign was flawed from the outset, the timeframe of 4 weeks was too short for this type of complex property and should have been spread over at least a six to eight week or so period to allow prospective buyers enough time to carry out sufficient due diligence. With the appointment two weeks into the campaign of a Melbourne based co-agent, a land specialist who had extensive prior knowledge of the sites combined with the continual changing of the marketing and advertising campaign, further highlighted that the Liquidators were doing things on the run. The tender closing date had been changed three times in the space of three weeks. At this point it would have been better to have

stopped the marketing campaign and relaunched once more due diligence of the sites had been done by the Liquidators and a comprehensive Development Consultants report had been prepared and ready to be circulated to prospective purchasers earlier on in the campaign.

(d) By the time the Liquidators realised and agreed that a Development Consultants report was required, the marketing campaign was well underway. The Taylors report became available on 8 March 2013, six days prior to the tender closing date, thus leaving prospective buyers with very little time to digest it.

(e) In the end there were three tenders submitted, the accepted tender price of $3,000,000 for both sites combined was well below previous valuations and in my opinion was largely due to the rushed and poorly prepared marketing campaign. Foxwood had warned the Liquidators during the campaign that to maximise the value of the sites the due diligence reports were vital or else the likely outcome was they would receive conditional offers with due diligence periods or low unconditional offers and this is what appears to have happened (refer to email from Foxwood dated 29 January 2013).

207. Mr Bettiol's opinion reflects the position that the decisions and courses of action which the Liquidators were called upon to consider in the course of the marketing of the Maroondah Hwy properties were of a business or commercial character, as to which competent experts, assisted with the benefit of hindsight, may have differences of opinion.

Conference of Expert Witnesses

208. A conference of expert witnesses was undertaken on 7 May 2015. Participants at the conference were: Mr Dowling (together with Ms Samantha Ace, an assistant valuer at Mr Dowling's firm), Mr Sutherland and Mr Bettiol. No expert who had prepared a valuation of the properties attended the conference of expert witnesses, including Mr Papworth. There was nothing of substance in relation to the adequacy of the marketing of the properties that was unanimously agreed.

Conclusion as to Expert Evidence

209. However, on the question of the adequacy of the marketing campaign, I prefer the expert evidence of Mr Sutherland, Mr Dowling and Mr Wheate to that of Mr Bettiol.

210. By way of conclusion, I do not consider that the shortcomings with the sales campaign for the Properties resulted in the sale process being not reasonably conducted in all the circumstances or had a provable detrimental effect on the sale price ultimately achieved.

Valuations Prior to the Sale

211. The Liquidators sold the Maroondah Hwy properties on 20 March 2013 for $3,000,000.

212. Prior to the sale, a number of valuations had been obtained for the Maroondah Hwy properties which are set out in the table below. These had no bearing on the conduct of the sales campaign and are included for completeness.

TABLE of VALUATIONS

Report Date	Property	Prepared By:	Prepared For:	Estimate:
31 March 2009	443 Maroondah Highway	PRP	Racso Pty Ltd and Troutfarms Australia Pty Ltd	$4,550,000 (direct comparison valuation)
15 July 2009	441 Maroondah Highway	Egan	Banksia Mortgages Limited	$2,400,00 (direct comparison valuation)
28 June 2010	443 Maroondah Highway	PRP	ING Funds Management Limited	$4,550,000 (direct comparison and discounted cash flow analysis approach)
24 August 2011	441-443 Maroondah Highway	Charter Keck Cramer	GRD Lilydale Property	$10,900,000 (direct sale comparison approach)
30 December 2011	443 Maroondah Highway	Charter Keck Cramer	National Australia Bank Limited	$5,750,000 (direct sale comparison)
27 August 2012	443 Maroondah Highway	M3property Strategists	OnePath Australia Limited	$5,000,000 (direct comparison approach)
6 December 2012	443 Maroondah Highway	Colliers	Jirsch Sutherland	$3,600,000 (as is)
17 December 2012	441 Maroondah Highway	Colliers	Jirsch Sutherland	$2,000,000 (as is)

213. To this must be added the retrospective valuation of Mr Papworth dated 3 February 2015 which placed the value at $6,400,000 on 20 March 2013.

Agency Allegation of the Defendants

214. The Defendants contended that the Liquidators, at all material times, both in their capacity as administrators and liquidators, acted as the agents of Perpetual and in accordance with its direction. They allege that the Liquidators acted 'as agent for and/or at the direction' of the Perpetual.

215. They say, therefore, that Perpetual is liable to pay damages to them for the defaults of the Liquidators, which claim, they say, they are entitled to set off against Perpetual's claim. The Liquidators submit that this misconstrues the nature of their appointment, and it is both wrong in law and in fact.

216. In the light of my findings as to the duty of care and unconscionable conduct, it is strictly unnecessary for me to make any findings as to the allegations of agency. However, for completeness, I make the following findings on the allegation.

217. Arnautovic and Crisp were not appointed as controllers under Perpetual's charge or mortgage. The terms of the Racso charge, in particular the power to appoint a receiver and manager, have no bearing on the issue of the alleged agency of the administrators or the liquidators.

218. Arnautovic and Crisp were initially appointed as administrators under s 436(1) of the *Corporations Act* . This provision provides that a person (in this case, Perpetual) who is entitled to enforce a security interest in the whole, or substantially the whole, of a company's property, may appoint an administrator to the company if the security interest is enforceable.

219. The powers and duties of administrators are defined by the *Corporations Act* . An administrator has control of, and may carry on and manage, the company's business, property and affairs, may dispose of the company's property and may perform any of the functions that the company's officers could previously perform. Section 437B provides expressly that, when performing a function, or exercising a power, as administrator, the administrator is taken to be acting as the *company's* agent.

220. During the sale process Arnautovic and Crisp became the Liquidators of Racso, and effected the sale of the Properties in this capacity.

221. Liquidators' duties are defined by the *Corporations Act* , in particular ss 477 and 506 .

222. The Liquidators, both in their capacities as administrators and liquidators, in taking steps to sell the Maroondah Hwy properties, did so pursuant to their appointments as agents of Racso, not Perpetual.

Legal Principles as to When an Agency Arises between a Mortgagee and a Receiver/Liquidator

223. However, although an administrator and a liquidator, pursuant to their appointments as such, are appointed as the agents of the subject company, in certain circumstances, an administrator and a liquidator may become an agent of the appointing person who is entitled to enforce a security interest.

224. The statements of law on this issue commonly pertain to receivers. However, the statements are sufficiently broad to invite application by analogy to liquidators.

225. In *Medforth v Blake* [81] Scott V-C stated the following principle:[82]

> If a mortgagee establishes a relationship with the receiver he has appointed under which the receiver exercises his powers in accordance with instructions given by the mortgagee, I can see the force of an argument that if the receiver is liable to the mortgagor then so will the mortgagee be liable. If the mortgagee chooses to instruct the receivers to carry on the business in a manner that is a breach of the receiver's duty to the mortgagor, it seems to be quite right that the mortgagee, as well as the receivers, should incur liability. This conclusion does not in the least undermine the receivership system. What it might do is to promote caution on the part of mortgagees

in seeking to direct receivers as to the manner in which they (the receivers) should exercise their powers. I would regard that as salutary.

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[81] [2000] Ch 86 .

[82] Ibid 95.

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226. In *Bank of Western Australia Ltd v Abdul* Croft J took a similar approach. [83] Applying *State Bank of NSW v Chia* ,[84] his Honour remarked that a receiver is obliged to inform the mortgagee about the sale process and that such communication 'is not to be confused with direction, interference and instruction necessary to displace the agency with the mortgagor, the secured debtor'. [85] Communications between the two are 'proper' and 'desirable'. [86] Further, his Honour commented: [87]

> Communication between the receiver and the mortgagee, the secured creditor, is entirely proper and will not lead to displacement of the agency relationship unless it goes beyond mere consultation or the communication of preferences by the mortgagee, the secured creditor. This position is unsurprising, as it is the mortgagee, the secured creditor, that appoints the receiver and pays the receivers fees during the course of the receivership. In general terms, both parties, the mortgagor and mortgagee, have a direct interest in the outcome of the receivership, but the mortgagee significantly more so where the secured assets are unlikely to realise sufficient funds to meet the principal, interest and costs associated with the default and realisation of assets. The present circumstances are just such a case. It is for these practical and commercial reasons that more than mere consultation or the communication of preferences, is required. As is indicated by the judgment in *Chia* , it is necessary to establish in a case like the present that the mortgagee, the secured creditor, was 'heavily involved' in the performance of the activities of the receiver. The evidence must show that the mortgagee, the secured creditor, was so intimately involved in the performance of the receiver's activities as to transform the character of the relationship between the mortgagee, the secured creditor, and the receiver into one of principal and agent.

Conclusion as to Agency

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[83] [2012] VSC 222 .

[84] (2000) 50 NSWLR 587 .

[85] *Bank of Western Australia Ltd v Abdul* [2012] VSC 222 [41] .

[86] Ibid [37] .

[87] Ibid [41] .

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227. In the present case, I am not satisfied that the involvement of Perpetual in the sales process of the Properties went materially beyond mere consultation or the communication of preferences on the part of Perpetual. Perpetual was not so intimately involved in the performance of the Liquidators' activities as to transform the character of the relationship in this way.

228. The role of Mr Gilchrist of Perpetual in the sale process did not have the effect of giving rise to a relationship of principal and agent between Perpetual and the Liquidators. Although there was a suggestion in one email that, prior to its appointment, Foxwood was known to Mr Gilchrist and indeed was '*one of Jamie Gilchrist's mates*', I accept Mr Gilchrist's view that Foxwood was his preferred appointment because of their 'realistic selling range' and their 'proven track record'. He was also of the opinion that Foxwood should not be provided with the valuations from Colliers of December 2012 in order to maximise the sale price.

229. However, I am satisfied that Mr Gilchrist was involved in the process as the person principally responsible for Perpetual's attempt to recover its debt and as the person who would know at what point Perpetual would be willing to provide a discharge of its mortgage.

230. Mr Gilchrist's involvement also arose from the fact that Perpetual was funding the sale process and the liquidation generally, which the evidence discloses amounted to some $60,000 of expenditure. For example, Perpetual agreed to a $5,000 fee to Taylors to secure provision of its summary report to assist the sale process. Perpetual also agreed to pay an additional 'over rider' fee of 1 per cent for the engagement of Biggin & Scott as co-agent.

231. The Defendants pointed to an email sent by Mr Gilchrist dated 4 December 2012 to Mr Samarasinghe of Perpetual in which he wrote '[i]t is my view that we should appoint Foxwood …'. It was submitted that the use of the pronoun 'we' demonstrated that the administrators were 'acting in conjunction as a team or as a group' with Perpetual and evidenced a relationship of agency. To my mind, this reads too much into the email and makes no allowance for loose expressions which not uncommonly find their way into electronic communications.

232. Overall, I am satisfied that Mr Gilchrist's involvement was not such as to transform the relationship into one of agency as submitted by the Defendants. Although there was undoubtedly regular communication between the Liquidators and Perpetual relating to the sales and marketing campaign, Arnautovic and Crisp did not cross the line as the appointed Liquidators to exercise their powers on Perpetual's instructions.

233. There was nothing exceptional about Mr Gilchrist's communications in the particular circumstances of the sales of the Maroondah Hwy properties, which had unique physical drawbacks, such as to 'transform the character of the relationship between mortgagee, the secured creditor [Perpetual in this case], and the receiver [the Liquidators in this case] into one of principal and agent'. [88]

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[88] *Bank of Western Australia Ltd v Abdul* [2012] VSC 222 [41] .

Statutory Unconscionable Conduct

234. The Defendants also rely on s 21 of the Australian Consumer Law [89] ('ACL') which prohibits persons engaging in unconscionable conduct. It provides:

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[89] *Competition and Consumer Act 2010* (Cth) Sch 2 .

A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

235. The ACL does not apply by reason that, the conduct of the Liquidators, in all the circumstances was not in connection with 'the supply or possible supply of goods or services' to any person. There were no goods supplied, and the only relevant supply of services was the supply or funds pursuant to the original OnePath loan facilities funding arrangement.

236. The term 'in connexion with' was considered in the context of s 87B of the *Competition and Consumer Act 2010* (Cth) in *Australian Competition and Consumer Commission (ACCC) v Woolworths (South Australia) Pty Ltd*. [90] Justice Mansfield applied the test in *Berry v Federal Commissioner of Taxation* to the effect that there needs to be a substantial relationship, in a practical sense, between the conduct complained of and the undertaking accepted. [91] His Honour also noted the view expressed by Wilcox J in *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* that the test did not require 'an immediate causal relationship'. [92]

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[90] (2003) 198 ALR 417 .
[91] (1953) 89 CLR 653, 658-9 .
[92] (1987) 16 FCR 465, 479-80 .

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237. The facts of this case demonstrate no 'substantial relationship, in a practical sense', between the supply of the original loan funds to Racso by OnePath and any conduct on the part of the Liquidators appointed by Perpetual in realising the assets of Racso in the course of its ultimate liquidation.

238. The Defendants also rely on s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) . This section prohibits unconscionable conduct in connection with the supply or possible supply of financial services. It is similar in form to s 21 of the ACL and provides:

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of financial services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of financial services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

239. Again, for the reasons earlier canvassed, the facts of this case demonstrate no 'substantial relationship, in a practical sense', between the supply of the original financial services by way of the provision of loan funds to Racso by OnePath and any conduct on the part of the Liquidators appointed by Perpetual in realising the assets of Racso in the course of its ultimate liquidation.

240. Further, I am satisfied that neither Perpetual or the Liquidators engaged in unconscionable conduct in any respect in effecting the sales of the Maroondah Hwy properties, either under the statutory provisions referred to, or under the general law applying equitable principles.

241. As to conduct which may constitute 'unconscionable conduct', this is not the subject of any statutory definition. It has been said that unconscionable conduct in the context of provisions such as ss 21 and 22 of the ACL is constituted of 'serious misconduct, something clearly unfair or unreasonable', [93] 'showing no regard for conscience'. [94] Some moral fault is likely required in addition to mere unreasonableness or unfairness. [95] As to moral fault, '[n]ormally it might be expected that this would involve either a deliberate act, or at least a reckless act'.[96]

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[93] *Cameron v Qantas Airways Ltd* (1995) 55 FCR 147, 179 (Beaumont J).

[94] *Qantas v Cameron* (1996) 66 FCR 246, 262 (Davies J).

[95] See *Australian Competition and Consumer Commission v 4WD Systems Pty Ltd* (2003) 200 ALR 491, 544 [185] (Selway J).

[96] Ibid.

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242. I find that there is no foundation for the allegation that Perpetual, or the Liquidators, acted unconscionably. The Liquidators took professional advice, conducted an advertised sale of the properties and ultimately accepted the best offer which was forthcoming in the circumstances.

Implied Term of Good Faith

243. The Defendants contended there is an implied term of the Guarantee that 'the parties would act in good faith'. I do not accept that the Guarantee contained any such obligation.

244. While an obligation to act in good faith is not yet to be implied *simpliciter* in commercial contracts, it has been said that, in particular cases, it may be appropriate to import such an obligation 'to protect a vulnerable party from exploitative conduct which subverts the original purpose for which the contract was made'. [97]

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[97] *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL (receivers and managers appointed)* [2005] VSCA 228 [25] (Buchanan JA).

245. Here, however, there is no evidence that either of the Defendants were vulnerable parties in this particular sense.[98] The Guarantors entered into their Guarantees for commercial purposes and for financial gain. They were astute investors, and it was not suggested that at the time they were otherwise. The advancing of the loan funds by OnePath was critical to the financial arrangements negotiated by the Guarantors on behalf of Racso to finance the purchase of the Maroondah Hwy properties. The provision of the written Guarantees was one form of security which the loan provider required for the provision of funds, and which the Guarantors provided. The loan funds were provided when the security was in place.

[98] As opposed to them being vulnerable in the sense described at [128]–[129] in relation to a factor relevant to the finding of a duty of care.

246. Further, there was no 'exploitive' conduct on the part of Perpetual or the Liquidators in the sale process of the Properties which subverted the original purpose for which the loan transaction was made. Nor did the Liquidators or Perpetual in the course of the sales process act in a way which subverted the original purpose for which the Guarantees were entered into, which was to provide security — although not necessarily absolute and total security — for the loans.

247. The best price at the time which the market was prepared to offer was accepted. The Liquidators in all the circumstances acted reasonably and on professional advice in the conduct of the sale. In accepting the price, in all the circumstances, Perpetual and the Liquidators did not act capriciously or for any ulterior purpose or unconscionably. [99] Accordingly, there was no breach of any implied obligation of good faith, even if it could be implied into the Guarantees.

[99] Ibid [28].

Conclusion and Orders

248. It follows that the Plaintiff succeeds in its claim against the Defendants, and the Second Defendant's counterclaim must be dismissed.

249. I will hear the parties on the orders which should be made to reflect these reasons and the orders as to costs which should be made.
