

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : THILLAGARATNAM -v- DOAN [2022] WASC 185

CORAM : CURTHOYS J

HEARD : 16 - 20 NOVEMBER 2020

DELIVERED : 27 MAY 2022

FILE NO/S : CIV 1461 of 2018

BETWEEN : SARAH THILLAGARATNAM
Plaintiff

AND

HENRY DOAN
First Defendant

THI VAN ANH NGUYEN
Second Defendant

Catchwords:

Breach of contract - Sale of strata lot - Vendor's warranty - General Conditions - No knowledge of anything materially affecting use or enjoyment - Fraudulent misrepresentation - Representation by contract - Misleading or deceptive conduct - Private sale of land - Whether sale occurred in trade or commerce

Legislation:

Australian Consumer Law (Cth), s 18
Australian Consumer Law (WA), s 18

Result:

Judgment for plaintiff granting rescission of contract and damages

Category: B

Representation:

Counsel:

Plaintiff : G D Cobby SC
First Defendant : P McGowan
Second Defendant : P McGowan

Solicitors:

Plaintiff : Roe Legal Services
First Defendant : Smart Legal WA
Second Defendant : Smart Legal WA

Cases referred to in decision:

Angus v Clifford [1891] 2 Ch 449
Ardizzone v Valentino Nominees Pty Ltd [2019] WASC 55
Barton v Armstrong [1976] AC 104
Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 205
Concrete Constructions (NSW) Pty Ltd v Nelson [1990] HCA 17; (1990) 169 CLR 594
Derry v Peek (1889) 14 App Cas 337
Gould v Vaggelas [1985] HCA 75; (1985) 157 CLR 215
Henville v Walker [2001] HCA 52; (2001) 206 CLR 459
Jonval Builders Pty Ltd v Commissioner for Fair Trading [2020] NSWCA 233; (2020) 104 NSWLR 1
Kelly v Wilson [2012] WASC 146
Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007] HCA 61; (2007) 233 CLR 115
L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235
Lloyd v Grace Smith & Co [1912] AC 716
Mealey v Mountains Development Group Pty Ltd [2003] NSWSC 830
Nadinic v Drinkwater [2017] NSWCA 114; (2017) 94 NSWLR 518
O'Brien v Smolonogov (1983) 53 ALR 107
Oscar Chess Ltd v Williams [1957] 1 WLR 370
Potts v Miller [1940] HCA 43; (1940) 64 CLR 282
Rasch Nominees v Bartholomaeus [2013] SASCFC 23; (2013) 115 SASR 473
Sargent v ASL Developments Ltd [1974] HCA 40; (1974) 131 CLR 634
Scott v Davis [2000] HCA 52; (2000) 204 CLR 333
Shone v Davies [2012] WASC 83
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8; (2009) 236 CLR 272
Taheri v Vitek [2014] NSWCA 209; (2014) 87 NSWLR 403
The Australian Customer Target Information Company Pty Ltd v Cabool Holdings Pty Ltd [2004] NSWSC 302

CURTHOYS J

CURTHOYS J:

Introduction

1 This case illustrates the folly of litigation.

2 On 20 May 2015, the plaintiff, Sarah Thillagaratnam, entered into a
contract with the defendants, Henry Doan and Thi Van Anh Nguyen, to purchase a
ground floor unit in a strata complex in Perth.

3 Ms Thillagaratnam brings a claim against Mr Doan and Ms Nguyen
seeking rescission of the contract and alternatively damages for breach of contract,
fraudulent misrepresentation and misleading or deceptive conduct.

4 This case arose as a result of the disruptive conduct of Laurence
Pratt, the neighbour who lived in the first-floor unit immediately above the unit
purchased by Ms Thillagaratnam.

5 Mr Pratt is not a party to these proceedings. There is, accordingly, no reason
for him to desist from the conduct identified in these reasons. I do not know whether
consideration was given to suing him in nuisance. It should have been. Had he failed
to comply with any orders made by this court restraining him from his conduct then
contempt orders could have been sought which could have led to substantial fines or
imprisonment. These are the only sanctions which seem likely to restrain Mr Pratt's
conduct.

6 Regrettably, senior counsel was not engaged until Ms Thillagaratnam
changed solicitors shortly before trial. Had senior counsel been engaged earlier it is
likely that wiser and calmer heads might have prevailed.

7 The trial lasted for five days.

8 Mr Doan and Ms Nguyen operate a fish and chip shop. The probability is
that they have very limited funds to meet any judgment entered against them. They
were unemployed at the time they moved into the property. They have had to sell the
family home to meet their legal fees. In these circumstances, the probability is that any
judgment against them will drive them into bankruptcy.[\[1\]](#)

9 Ms Thillagaratnam is a relatively young person. In the event of the
bankruptcy of Mr Doan and Ms Nguyen, she will be left with a significant legal bill
from her own lawyers for a five-day trial. Her victory is likely to be pyrrhic.

10 The point of litigation is to obtain actual and not merely theoretical
relief. In the circumstances of this case, Ms Thillagaratnam is unlikely to obtain actual
relief and will have incurred significant unrecoverable legal fees.

The property

11 The property the subject of these proceedings is a strata-titled
residential unit known as Lot 6, 34 Bulwer Street, Perth on Strata Plan 5961 (Lot 6).

12 Lot 6 forms part of a strata titled complex of 20 residential units at
34 Bulwer Street Perth. It is on the ground floor of the complex. There are 11 ground
floor units and nine first floor units.

13 Lot 16 is on the first floor of the complex, directly above Lot 6.

14 Mr Pratt owns and resides in Lot 16 and has done so since October
1980.[\[2\]](#)

The respective cases

15 Ms Thillagaratnam's case is that Mr Doan and Ms Nguyen did not
disclose to her, as they were obliged to do, that Mr Pratt habitually engaged in
antisocial behaviour which had the capacity to affect her use or enjoyment of Lot 6.

16 Ms Thillagaratnam's case further alleges that Mr Doan and Ms Nguyen,
by their agent, represented that Lot 6 included an enclosed courtyard area when it did
not.

17 Ms Thillagaratnam alternatively alleges breach of contract, fraudulent
misrepresentation and misleading and deceptive conduct by Mr Doan and Ms Nguyen,
contrary to s 18 of the *Australian Consumer Law* (ACL), alternatively s 18 of the
Australian Consumer Law (WA) (ACLWA).[\[3\]](#)

18 Mr Doan and Ms Nguyen said that they only experienced Mr Pratt's
antisocial conduct on three occasions. They allege that they had no knowledge of any
other incidents or of Mr Pratt's criminal history.

19 They further contend that they did not mislead Ms Thillagaratnam into
believing that Lot 6 contained an enclosed courtyard.

20 For the reasons which follow, I find that Mr Pratt did engage in
antisocial behaviour during the time that Mr Doan and Ms Nguyen were resident in
Lot 6 and that Mr Doan and Ms Nguyen failed to inform Ms Thillagaratnam of
Mr Pratt's behaviour.

21 In these circumstances how an agent could publish an advertisement
stating that Lot 6 included a 'huge secure courtyard' is beyond me.

The relief sought

22 Ms Thillagaratnam seeks rescission of the contract made on 20 May
2015 between her and Mr Doan and Ms Nguyen pursuant to which she purchased Lot 6

from them in 2015.^[4] Further, Ms Thillagaratnam claims damages in the alternative to, and in addition to, rescission.^[5]

The issues

23 The legal issues can be summarised as follows:

- (1) Did Mr Doan and Ms Nguyen's failure to disclose their knowledge of Mr Pratt's conduct constitute a breach of contract?
- (2) Did Mr Doan and Ms Nguyen make a fraudulent misrepresentation by representing to Ms Thillagaratnam that they did not know of anything which could materially affect Ms Thillagaratnam's use or enjoyment of Lot 6?
- (3) Did Mr Doan and Ms Nguyen's representations in respect of the use or enjoyment of Lot 6 and the presence of a secure enclosed courtyard constitute misleading or deceptive conduct pursuant to s 18 of the ACL, alternatively s 18 of the ACLWA?
- (4) Is Ms Thillagaratnam entitled to rescission and/or damages?

Relevant factual events and findings

Mr Doan and Ms Nguyen's ownership of Lot 6

24 Mr Doan and Ms Nguyen purchased Lot 6 in February 2010 for \$355,000. They were resident in Queensland at the time.^[6] They thereafter leased the property until April 2014.^[7]

25 Mr Doan and Ms Nguyen placed Lot 6 on the market for sale from time to time while they were living in Queensland. For example, they advertised Lot 6 for sale in July 2013, but it did not sell.^[8]

26 Lot 6 was advertised for sale by Mr Doan and Ms Nguyen via their agents on at least 12 occasions between February 2010 and May 2015.

27 Lot 6 was advertised for rent by Mr Doan and Ms Nguyen via their agents on at least seven occasions between December 2010 and March 2014.

28 Mr Doan and Ms Nguyen provided an exclusive management authority to Perth Real Estate Centre to manage the rent of Lot 6 from 1 June 2013 until 1 June 2015.

29 Mr Doan and Ms Nguyen derived income by renting Lot 6 to tenants from February 2010 to 1 June 2014.

30 Mr Doan and Ms Nguyen occupied Lot 6 for approximately 14 months prior to its sale in mid-2015.

31 Mr Doan accepted that he always wanted to sell Lot 6 and that it was never intended that he and his family would live there for any period of time.^[9]

32 Ms Nguyen always wanted to sell Lot 6.[\[10\]](#)

33 However, the fact is that they did move in with their family, including
Ms Nguyen's parents, for a very short period and occupied it as their principal
residence for approximately 14 months.

The marketing of Lot 6

34 In early February 2015, Mr Doan and Ms Nguyen placed Lot 6 on the
market for sale with Acton Real Estate (Acton).

35 From about 17 February 2015, Lot 6 was marketed for sale by Acton.
The advertisements included reference to a 'huge rear courtyard (secure)'.[\[11\]](#)

36 I find that no mention was ever made to Ms Thillagaratnam of
Mr Pratt's antisocial behaviour. Mr Doan and Ms Nguyen do not submit to the
contrary. Their case was that they were unaware of any antisocial behaviour other than
on three occasions and that in the circumstances they were under no obligation to do
so.

Offer and acceptance

37 On 20 May 2015, Ms Thillagaratnam entered into a contract with
Mr Doan and Ms Nguyen for the sale and purchase of Lot 6 by offer and acceptance.
The purchase price was \$390,000.

38 Clause 3 of the contract incorporated the 2011 General Conditions for
the Contract of Sale (General Conditions) by reference.

39 Ms Thillagaratnam's case principally relies on cl 10.2(c) of the General
Conditions.

40 Clause 10.2 of the General Conditions relevantly provides:

Representation and Warranty

Except to the extent disclosed in writing by the Seller to the Buyer before the Contract
Date, or as otherwise specified in the Contract, the Seller represents and warrants to the
Buyer at the Contract Date and at the date of Settlement as follows.

...

(c) Except for anything:

- (1) apparent on an inspection of the Strata Lot and the parcel of which it
forms part; or
- (2) registered or recorded on the Strata Plan; or
- (3) specified in the Strata Company by-laws,

*the Seller does not know of anything which will materially affect the Buyer's use
or enjoyment of the Strata Lot or of the common property comprised in the Strata
Scheme. (emphasis added)*

Financing the purchase

41 Ms Thillagaratnam entered into a loan agreement with ING in respect
of two loans totalling \$250,000 - one loan of \$125,000 at a fixed interest rate and
another loan for the balance at a variable rate - to finance part payment of \$250,000 of
the purchase price for the property.

42 Settlement of the sale and purchase of Lot 6 occurred on 1 July 2015
and Ms Thillagaratnam was registered as the proprietor of Lot 6 on 2 July 2015.

Renovations

43 After settlement of the purchase but prior to her moving into the unit,
Ms Thillagaratnam had works carried out on Lot 6 at a total cost of \$29,717.06. These
were paid for by her parents as a gift.

Mr Pratt's conduct

44 The central factual issue in this case is Mr Pratt's conduct during the
period of occupation of Lot 6 by Mr Doan and Ms Nguyen, that is, from April 2014 to
June 2015.

Mr Pratt's conduct prior to Mr Doan and Ms Nguyen moving in

45 Mr Pratt has a long history of breaches of violence restraining orders,
common assault and disorderly behaviour relating to other occupiers of the strata
complex and in particular Lot 6, dating from at least 2001.[\[12\]](#)

46 For example, on 8 August 2003 a Strata Titles Referee ordered that
Mr Pratt immediately cease 'the use of language likely to cause offence or
embarrassment' to other members of the complex and the 'making [of] any undue
noise'.[\[13\]](#) The owners of Lot 6 at that time had complained about 'an excessive
amount of noise' created by 'repeated banging on their ceiling, apparently caused by
hammer blows' as well as 'extremely foul language and loud cursing'.[\[14\]](#)

47 Further, the minutes of the annual general meeting of the strata plan
held on 10 August 2005 indicate Mr Pratt's conduct was disruptive for members of the
complex. The minutes refer to 'Mr Pratt's unacceptable behaviour towards
owners/tenants and trades people attending the complex' and 'the alleged damage
caused to the complex by Mr Pratt'.[\[15\]](#)

Eoin Carroll

48 Prior to moving into Lot 6, Mr Doan and Ms Nguyen leased the unit to
Eoin Carroll and Eimar O'Connell from about June 2013 to April 2014. The lease was
terminated early because of the tenants' desire to move from Lot 6 and Mr Doan and
Ms Nguyen's decision to live there for a period of time.

49 Ms Thillagaratnam called Mr Carroll to give evidence at trial.

50 Mr Carroll gave evidence that Lot 6 was the worst place he had ever
lived. He said that Mr Pratt made their lives misery because they could not make any
noise above a whisper including by turning on the hot water for fear of triggering an

'angry backlash' from him.^[16] If Mr Pratt could see you, he would scream out the window at you. If he could not see you, he would turn up his music to a 'ridiculous level' or start making noise by hammering the floor which would cause their entire unit to reverberate with noise.^[17] There might be two weeks without any disturbance from Mr Pratt before two to three days of constant noise. Mr Carroll said that he called the police an average of once a week for the approximately eight months he and Ms O'Conner lived in Lot 6.^[18]

51 Mr Carroll was a totally credible witness and I have no reason to doubt his evidence.

52 The evidence set out above establishes that from at least 2001 until Mr Doan and Ms Nguyen moved into Lot 6, Mr Pratt was an obnoxious occupier who overreacted to any noise from Lot 6 by banging on his floor playing his television and stereo at an excessive noise level and swearing at the other occupiers of the complex, and in particular the occupiers of Lot 6. His behaviour was completely irrational and unacceptable.

Mr Pratt's conduct during Mr Doan and Ms Nguyen's occupation of Lot 6

53 Mr Doan and Ms Nguyen moved to Western Australia in July 2013.
^[19] They took up residence in Lot 6 on 18 April 2014.^[20]

Ashley Howard

54 Ashley Howard lived in Lot 11 from July 2014. Ms Thillagaratnam called him to give evidence at trial.

55 Mr Howard gave evidence of Mr Pratt yelling abuse at him and others. Eventually, he obtained a violence restraining order against Mr Pratt.^[21]

56 Mr Howard also gave evidence of seven videos he had taken of Mr Pratt.^[22] The videos show Mr Pratt's swearing and abusive behaviour. The videos evidence that Mr Pratt was a totally obnoxious neighbour. Mr Doan accepted that the videos were a fair example of how Mr Pratt behaved.^[23]

57 Mr Howard was a totally credible witness and I have no reason to doubt his evidence which is confirmed by the videos he took. I do not accept that he provoked Mr Pratt in any way.

Mr Doan and Ms Nguyen

58 Mr Doan and Ms Nguyen originally moved into Lot 6 with their two children and Ms Nguyen's parents, but her parents returned to Vietnam after about seven days because the unit was too small.^[24] Mr Doan and Ms Nguyen were aware from when they moved into Lot 6 that it was too small to accommodate the family including Ms Nguyen's parents.^[25]

59 Ms Nguyen's mother, Thi Anh Thu Vu, gave evidence as to Mr Pratt's behaviour. However, she resided in Lot 6 for such a short period of time that I do not give her evidence any weight.

60 Mr Doan and Ms Nguyen were each called to give evidence.

61 Mr Doan and Ms Nguyen's case was that there were only three incidents involving Mr Pratt during the period they occupied Lot 6.

62 The first incident involved the fencing and paving of the area behind Lot 6. In May 2014, shortly after they moved into Lot 6, Mr Doan and Ms Nguyen caused a fence to be erected by a Sergio De Campo at the rear of the unit.[\[26\]](#) The effect of erecting the fence was to form a secure courtyard behind Lot 6.[\[27\]](#)

63 Mr Doan and Ms Nguyen did not seek the approval of the strata company prior to the construction of the fence or the consequent enclosure of the common property.

64 During the course of the construction of the fence Mr Pratt 'hurled insults' at Mr Doan and Mr Campo. Mr Doan called the police and contacted the strata manager.[\[28\]](#)

65 The police incident report dated 18 May 2014 records that the 'neighbour is using a hammer and banging and swearing a lot today' and that Mr Doan's 'kids are scared'. The report indicates that at 4.05 pm, police spoke to Mr Pratt who appeared to be 'aggressive' and 'very agitated when police spoke to him'. Police warned Mr Pratt of his behaviour.[\[29\]](#)

66 In the course of cross-examination, Mr Doan denied that he told the police that Mr Pratt had been banging all day.[\[30\]](#)

67 There is no reason to conclude that the police did not take an accurate note of what Mr Doan told them. The note is a contemporaneous record of the incident.

68 On 19 May 2014, Mr Doan sent an email to Julie Miloseski of the strata management company regarding Mr Pratt's conduct. In that email, Mr Doan stated that the 'man upstairs] ... swears all day when he hears any noise, for example somebody driving in or out or talking to each other (they try to speak to each other very small).' Mr Doan further stated that 'almost every time we go out or in, he swears, or he [has] used something like [a] hamer [sic] to bang the floor ... [W]e rang the police yesterday and the police told us to talk to the manager of the strata, we need your help'.[\[31\]](#)

69 Once the fence was completed Mr Doan undertook some paving in the courtyard area. The paving took about a week. Mr Pratt again 'hurled insults' at Mr Doan. Mr Doan again called the police.[\[32\]](#)

70 The email of 19 May 2014 establishes that Mr Pratt's behaviour towards Mr Doan and Ms Nguyen was far more extensive than their pleadings and evidence suggest. It is a contemporaneous document prepared and sent by Mr Doan and I have no reason to find that it is anything other than an accurate account of

Mr Pratt's behaviour. There is nothing in the email to suggest that this behaviour was solely related to Mr Pratt's reaction to the fencing and paving.

71 The second incident admitted by Mr Doan and Ms Nguyen involved Ms Nguyen using a mincer. This incident occurred about two months after the paving incident. Mr Pratt stood at the windows of his unit and insulted Mr Doan and Ms Nguyen. They called the police.[\[33\]](#)

72 The third incident admitted by Mr Doan and Ms Nguyen occurred in September 2014 when Ms Nguyen was using a vacuum cleaner. Mr Pratt banged on his floor with what seemed to be a hammer. Mr Doan contacted the strata manager.[\[34\]](#)

73 In early December 2014, Mr Doan contacted the Head of Strata Management, Robert Klemm.

74 On 1 December 2014 at 11.58 am, Mr Klemm sent an email to the chair of the Council of Owners, Rebecca Rigoni, in which he advised that 'an owner' had contacted his office 'distressed at the behaviour of Mr Pratt who has been swearing, stalking the owners [sic] wife while she is hanging out washing and smashing the floor of his unit with a hammer'. He noted that the owner had contacted the police who spoke to Mr Pratt.[\[35\]](#)

75 There is no reason to doubt that Mr Klemm's email is an accurate contemporaneous statement of what Mr Doan told him.

76 Shortly before sending the above email to Ms Rigoni, Mr Klemm sent an email to Mr Doan in which he requested Mr Doan's mobile phone number and further advised that he had contacted the police and the Council of Owners. Mr Klemm said that he had been advised by police that 'an officer will attend to assess the situation but they are very busy and cannot tell me when this will happen'. He encouraged Mr Doan to contact police 'each time there is a problem and let me know'.[\[36\]](#) Mr Doan responded to Mr Klemm's email on 2 December 2014 thanking Mr Klemm and providing his mobile phone number.[\[37\]](#)

77 It is clear from Mr Doan's response that there was an incident in December 2014 as described in Mr Klemm's email.

78 On 3 September 2018, Mr Doan and Mrs Nguyen filed an affidavit sworn by Mr Doan in support of an application to set aside default judgment. The affidavit stated that the problems that Mr Doan and Ms Nguyen had had with Mr Pratt were similar to what Ms Thillagaratnam had listed in par 7 of her statement of claim 'such as yelling and shouting banging on the floor playing loud music or TV'.[\[38\]](#)

79 Paragraph 7 of the statement of claim stated that at all material times from 2 July 2015, Ms Thillagaratnam's use or enjoyment had been materially affected by the conduct of Mr Pratt. That conduct was relevantly particularised as follows:

- (i) Yelling and shouting a tirade of verbal abuse from within Lot 16 and from the common property.

- (ii) Banging of the floor of Lot 16 by an implement consistent with a hammer being used.
- (iii) Playing loud music from speakers positioned at the front of Lot 16.
- (iv) Turning the television in Lot 16 to a high volume.
- (v) The conduct described in paragraphs [(i) - (iv)] is frequent at all hours, day and night.

80 There is clear evidence from Mr Doan that Mr Pratt's antisocial behaviour, prior to Mr Doan and Ms Nguyen moving into Lot 6, continued after they moved into Lot 6.

81 At trial, Mr Doan described Mr Pratt as 'quite a normal person'.[\[39\]](#) He tried to justify his description of Mr Pratt in the course of cross-examination.[\[40\]](#) It is difficult to accept that the behaviour of a 'normal person' would cause Mr Doan to call the police.

82 A 'normal' person does not react so adversely to noise, they do not hammer on the floor, they do not abuse their neighbours by swearing and insulting them. While loud music is perhaps not unusual, the persistence of it by Mr Pratt and the fact that he turned the music up after relatively minor instances of noise shows that it was a deliberate and unjustifiable reaction to common household activities by Mr Doan and Ms Nguyen.

83 You do not react to the conduct of a normal person by calling the police. A 'normal' person does not scare children with their conduct. A 'normal' person does not react to cars and people coming in and out of the complex in the manner Mr Pratt did.

84 Mr Doan's persistent description of Mr Pratt as a 'normal' person was an attempt to downplay Mr Pratt's behaviour.

85 In his affidavit in support of the application to set aside default judgment, Mr Doan stated that he and Ms Nguyen regarded Mr Pratt's behaviour as part of normal neighbourhood disputes and not as something related to their property or the sale thereof.[\[41\]](#) He contended that while Mr Pratt is an unpleasant and antisocial person, his behaviour was not a matter they considered to be relevant to the sale of their property or a matter that would materially affect Ms Thillagaratnam's use or enjoyment of the property.[\[42\]](#)

86 I do not accept Mr Doan and Ms Nguyen's evidence that they regarded Mr Pratt's behaviour as normal. His conduct was clearly extreme and not that of a normal occupier in a strata complex. Mr Doan and Ms Nguyen did not disclose Mr Pratt's conduct because they knew it would affect the sale of Lot 6 and that the sale would probably not have proceeded had they done so.

87 Even allowing for the difficulties of translators and the poor English of Mr Doan, and in particular, Ms Nguyen, I do not accept their evidence that there were only three incidents.

88 There were clearly more than the three incidents that Mr Doan and
Ms Nguyen described. Those incidents extended to at least the conduct set out above.

Mr Pratt's conduct after Ms Thillagaratnam moved in

89 Ms Thillagaratnam gave evidence that almost as soon as she moved
into Lot 6 in August 2015, Mr Pratt started shouting 'in a really intimidating way',
growling, swearing and using a hammer on the floor of his unit.[\[43\]](#) The hammering
would continue for 10 to 45 minutes.[\[44\]](#)

90 Ms Thillagaratnam stated that Mr Pratt was often 'set off' by the sound
of her getting ready for work in the morning. When she used the shower, Mr Pratt
would start hammering above her. She was also afraid to use the hairdryer because
Mr Pratt would respond by hammering and 'ranting' in a loud and intimidating way. As
soon as Ms Thillagaratnam left the house, Mr Pratt would start abusing her from his
balcony.[\[45\]](#) Mr Pratt would repeatedly say words such as 'Fucking wanker. Fucking
moron. Lunatic'.[\[46\]](#) The verbal abuse also occurred when Ms Thillagaratnam returned
home from work. Mr Pratt would play his music or television 'really, really loud' and
would sometimes place his speakers close to the window. His disruptive conduct could
occur 'at any time'.[\[47\]](#)

91 Ms Thillagaratnam said that she 'did a whole range of things' about the
noise including calling the police, complaining to the strata company and eventually
contacting the City of Vincent. Officers from the City of Vincent installed noise
recording equipment in her unit which resulted in the council issuing fines against
Mr Pratt for excessive noise and confiscating his speakers for one or two weeks.[\[48\]](#)

92 Ms Thillagaratnam maintained a log of incidents with Mr Pratt which
confirms his continuing antisocial behaviour.[\[49\]](#)

93 Mr Pratt's conduct clearly had a devastating impact on
Ms Thillagaratnam. She described the impact as 'huge' and affecting her mentally,
emotionally and eventually physically. When Mr Pratt hammered his floor,
Ms Thillagaratnam would be so shocked that she would shake uncontrollably for 10
minutes.[\[50\]](#) She lived in a constant state of fear, whether she was leaving the house,
returning from work or simply being in the house.[\[51\]](#) Mr Pratt would 'torment' her
with his behaviour, 'all day, almost everyday'. Ms Thillagaratnam could not sleep
because Mr Pratt would have his music playing until early the next morning. She
became sick, suffered hair loss and was constantly attending medical appointments.
She was 'just surviving' and 'really, really depressed'.[\[52\]](#)

94 Ms Thillagaratnam obtained restraining orders against Mr Pratt and
attempts were made to have him dealt with by the police and mental health services.
[\[53\]](#)

95 In addition to the specific findings in relation to Mr Doan and
Ms Nguyen above, I find it entirely improbable that Mr Pratt had an interregnum of
good conduct during the 14 months that Mr Doan and Ms Nguyen occupied Lot 6. His
behaviour beforehand was antisocial; his behaviour afterwards was antisocial. It is

more than probable that his behaviour was equally antisocial during the period they occupied Lot 6.

Ms Thillagaratnam vacates Lot 6

96 Ms Thillagaratnam claims that Mr Pratt's continuing conduct forced her to vacate Lot 6 in December 2016. She returned briefly to Lot 6 in early 2017 in Mr Pratt's absence, but vacated again when Mr Pratt returned in May 2017.

97 Ms Thillagaratnam's case is that Mr Pratt's behaviour has been such as to prevent her use or enjoyment of Lot 6. She has not attempted to let, nor attempted to sell, Lot 6 since vacating it.

98 Ms Thillagaratnam's evidence was that she did not put Lot 6 on the market because she did not see how she could sell it.[\[54\]](#)

The courtyard

99 Ms Thillagaratnam's case is that the enclosed courtyard was important to her. She owned a dog which she intended to have the run of the enclosed courtyard.

100 There was no reference to the courtyard in the writ of summons filed on 16 March 2018[\[55\]](#) or the statement of claim filed on 5 June 2018.[\[56\]](#) Mr Doan and Ms Nguyen submitted that this establishes that the courtyard was not a factor in Ms Thillagaratnam's decision to buy the unit.

101 Despite the best efforts of counsel over the years to convince me that a failure to mention in the pleadings something later relied upon in a party's case is evidence against the credibility of that party I have never really been convinced. The failure of the party's lawyer to refer to parts of a party's case in the pleadings is as likely an explanation of that failure as a failure of the party. This is another case that joins that long list. I accept Ms Thillagaratnam's evidence that it was a factor in her decision to buy the unit, particularly the fact that she wanted an enclosed area for her dog. I do not draw any adverse inference from the failure to mention it in earlier pleadings.

102 Neither Mr Doan and Ms Nguyen nor their agents disclosed that the fence enclosing the courtyard area had been constructed without authority from the strata title company, or that the courtyard area was not for the private use of the owner of Lot 6.

The letter of 16 August 2017

103 Ms Thillagaratnam's case is that she would never have purchased the property had she known of Mr Pratt's conduct, or the fact that the property did not have a secure enclosed rear courtyard (in the sense that the use of that area and its enclosure was never authorised by the strata company).

104 By letter to Mr Doan and Ms Nguyen dated 16 August 2017, Ms Thillagaratnam alleges that she gave notice, in effect, of her rescission of the contract for sale and purchase of Lot 6.[\[57\]](#)

105 The letter stated that Ms Thillagaratnam only became aware of Mr Pratt's conduct when tradespeople carrying out renovations to her property informed her that Mr Pratt had on several occasions verbally abused them and threatened them with physical harm. Ms Thillagaratnam noted that her mother had also been subjected to Mr Pratt's 'unruly behaviour'. It was only once Ms Thillagaratnam made enquiries with some of the other owners at the strata complex did she learn of Mr Pratt's long history of antisocial behaviour.[\[58\]](#)

106 The letter further stated that Ms Thillagaratnam had 'no doubts' that Mr Doan and Ms Nguyen were both subjected to the same treatment while resident in Lot 6 and had made several complaints to police about Mr Pratt's behaviour but did not disclose this information at sale.[\[59\]](#) This failure to disclose, Ms Thillagaratnam asserted, amounted to deceptive conduct and contravened Mr Doan and Ms Nguyen's obligations under the contract and the ACL. Ms Thillagaratnam stated that she 'would not have bought the subject property if [Mr] Pratt's unneighbourly conduct had been disclosed' to her. She asserted that she was unable to sell the property because of Mr Pratt and claimed against Mr Doan and Ms Nguyen for damages. She requested that Mr Doan and Ms Nguyen notify her within seven days whether they admit liability failing which legal proceedings would be commenced against them.[\[60\]](#)

107 Ms Thillagaratnam did not receive a reply to the letter.

Jenny Quek

108 During the trial an issue was raised as to whether a Jenny Quek was Ms Thillagaratnam's agent. Ms Thillagaratnam's evidence was that she did not discuss her offer of \$375,000 with Ms Quek.[\[61\]](#) I accept that evidence. I find that Ms Quek was not her agent. I also note that statement in the offer and acceptance that Ms Quek was the seller's agent.

Breach of contract claim

109 Ms Thillagaratnam's case is that Mr Pratt's conduct is such that it materially affects her use or enjoyment of Lot 6, with the consequence that Mr Doan and Ms Nguyen breached cl 10.2(c) of the General Conditions by failing to disclose their knowledge of his behaviour.

110 By cl 10.2(c), the seller represents and warrants to the buyer that except for anything apparent on inspection of the strata lot and the parcel of which it forms part, or registered or recorded on the strata plan, or specified in the strata company by-laws,[\[62\]](#) 'the Seller does not know of anything which will materially affect the Buyer's use or enjoyment of the Strata Lot'.

111 The question is whether on a proper construction of cl 10.2(c), Mr Doan and Ms Nguyen's knowledge of Mr Pratt's conduct falls within the scope of cl 10.2(c).

What is the proper construction of cl 10.2(c)?

112 Ultimately, both parties accepted that whether Mr Pratt's conduct falls within the scope of cl 10.2(c) is a question of degree.[\[63\]](#)

Ms Thillagaratnam's construction

113 Mr Cobby, for Ms Thillagaratnam, submitted that Mr Pratt's conduct is the type of conduct contemplated by cl 10.2(c). In support of this submission, Mr Cobby referred to a number of standard by-laws under the *Strata Titles Act 1985* (WA) that prohibit other persons in a strata complex from engaging in various forms of disruptive conduct.[\[64\]](#) In view of these by-laws, Mr Cobby submitted that it is not unexpected that the General Conditions include an obligation to disclose matters that may materially affect the use or enjoyment of strata property outside the matters specified in cl 10.2(c)(1) - (3).[\[65\]](#)

114 Mr Cobby contended that the consequences of breaching cl 10.2(c) may vary widely such that it may or may not materially affect the use or enjoyment of a lot. For this reason, he submitted that cl 10.2(c) should be construed as an intermediate term.[\[66\]](#)

Mr Doan and Ms Nguyen's construction

115 Mr McGowan, for Mr Doan and Ms Nguyen, submitted that cl 10.2(c) requires actual knowledge and that there is no scope for the claim in contract to assert that Mr Doan and Ms Nguyen should have known of Mr Pratt's conduct.[\[67\]](#) He further asserted that the clause is not a representation about conduct that occurs after the date of contract or the date of settlement.[\[68\]](#)

116 In Mr Doan and Ms Nguyen's written submissions, it was argued that cl 10.2(c) imposes no obligation on the seller to disclose or provide information regarding the conduct of other occupants within the strata complex.[\[69\]](#) It was submitted that as the conduct of owners or occupiers are matters specifically addressed in the strata company by-laws, on a proper construction of cl 10.2(c), such matters are excluded from a seller's obligation of disclosure.[\[70\]](#)

117 However, in closing, Mr McGowan stated that it was not his submission that the conduct of an upstairs neighbour could not fall within cl 10.2(c). He acknowledged that the words of the clause are 'sufficiently broad', particularly in relation to the use of the expression 'use or enjoyment', to capture the conduct of someone who occupies another lot that is not the subject of a particular sale.[\[71\]](#)

118 Nevertheless, Mr McGowan submitted that construing cl 10.2(c) so as to include the conduct of other occupants in the strata complex may have wide ranging implications by requiring disclosure of 'someone upstairs that you find annoying, frustrating, difficult to deal with, a neighbour you would rather not have but in many respects that's the nature of close living in an apartment complex such as this'.[\[72\]](#)

The proper construction of cl 10.2(c)

119 Although both parties made submissions as to the defendants' knowledge and whether it required actual or imputed knowledge, given that I have found that Mr Doan and Ms Nguyen had actual knowledge of Mr Pratt's behaviour it is unnecessary to resolve whether imputed knowledge falls within cl 10.2(c).

120 I accept that Mr Doan and Ms Nguyen's knowledge of Mr Pratt's
conduct falls within the scope of cl 10.2(c), for the following reasons.

121 First, I am satisfied that cl 10.2(c) contemplates an obligation of
disclosure regarding the conduct of other occupants within a strata complex where that
conduct will materially affect the buyer's use or enjoyment of a strata lot. The terms of
the clause, particularly the reference to 'anything' affecting 'use or enjoyment', are
sufficiently broad to encompass matters relating to the conduct of other occupants.

122 Second, I disagree with Mr Doan and Ms Nguyen's submission that the
clause does not compel the disclosure of such conduct on the basis that the conduct of
occupants is specifically addressed in the strata company by-laws. Although the by-
laws provide for certain restrictions relating to the conduct or behaviour of strata
occupants that may limit a buyer's use or enjoyment, they plainly do not inform a
potential buyer of specific nuisances within the strata complex that may affect use or
enjoyment.

123 Third, Mr Pratt's disruptive conduct is not a matter which a buyer could
identify from any of the matters specified in cl 10.2(c)(1) - (3), that is, it would not be
apparent upon an inspection of the strata lot and the parcel of land, the strata plan or
the strata company by-laws. The only way in which a person would become aware of
Mr Pratt's behaviour was as an occupant of Lot 6. Mr Pratt's conduct is a matter which
falls squarely within 'anything which will materially affect the Buyer's use or
enjoyment of the Strata Lot'.

Is cl 10.2(c) a condition, warranty or intermediate term?

124 A contractual term may be classified as a condition, a warranty or an
intermediate term.^[73] A term should be classified on the basis of the intention of the
parties, to be discerned from the construction of the contract in question.^[74]

125 A condition is a contractual term so important that any breach of the
term gives rise to a right to terminate the performance of the contract, in addition to the
promisee's remedy in damages for breach of covenant. A breach of a warranty gives
rise to a right to damages, but not to terminate the contract.

126 In the case of an intermediate term, the consequences of any particular
breach depend upon an assessment of whether the breach goes to the root of the
contract 'such as to deprive the injured party of a substantial part of the benefit to
which he is entitled under the contract'.^[75]

127 A breach which goes to the root of the contract is 'a conclusory
description that takes account of the nature of the contract and the relationship it
creates, the nature of the term, the kind and degree of the breach, and the consequences
of the breach for the other party.'^[76]

128 Taking into account the text, context and purpose of cl 10.2(c), it is
properly characterised as an intermediate term.

129 Clause 10.2 is headed 'Representation and Warranty'. It provides that
'the Seller represents and warrants to the Buyer' the matters specified in subclauses
(a) - (m). Subclause (c) is a representation to the buyer that except for the matters
enumerated in subclause (c)(1) - (3), the seller does not know of anything that will
materially affect the buyer's use of enjoyment.

130 The use of the word 'warranty' in cl 10.2 is not determinative of the
question of how the clause should be classified, since the term is frequently used in
senses other than its strict legal meaning.^[77] When a vendor states that 'I warrant it' at
the time of the sale, that statement will ordinarily be intended as a contractually
binding promise, in the sense of saying, 'I guarantee it' or 'I give my word on it'.^[78]
The reference to 'warranty' and 'warrants' in cl 10.2 simply denotes a binding promise
to the buyer; it is not indicative of a contractual term that does not justify termination.

131 The characterisation of cl 10.2(c) as an intermediate term is supported
by the decision of Archer J in *Ardizzone v Valentino Nominees Pty Ltd*,^[79] in which
her Honour held that the similarly worded cl 9.1(a) in the General Conditions was an
intermediate term.

132 The objective intention of the parties was that the remedies available
for a breach would depend upon whether the breach went to the root of the contract.
As I will now turn to explain, I am satisfied that Mr Doan and Ms Nguyen's breach
went to the root of the contract.

Did the defendants breach cl 10.2(c)?

133 In view of the factual findings made above,^[80] I am satisfied that
Mr Doan and Ms Nguyen had knowledge of Mr Pratt's conduct and knew that his
conduct would materially affect the use or enjoyment of Lot 6. They were aware of
Mr Pratt's conduct and they were aware from their own experience that it materially
affected their use or enjoyment of Lot 6. They failed to disclose this knowledge to
Ms Thillagaratnam either personally or through their real estate agent at any time prior
to or at the date of settlement.

134 Mr Doan and Ms Nguyen's failure to disclose their knowledge of
Mr Pratt's conduct constituted a breach of cl 10.2(c).

135 The breach went to the root of the agreement between the parties. The
severity and regularity of Mr Pratt's conduct and the strong likelihood that it would
materially affect Ms Thillagaratnam's use or enjoyment of Lot 6 means that Mr Doan
and Ms Nguyen's failure to disclose their knowledge of Mr Pratt's conduct was such as
to deprive Ms Thillagaratnam of a substantial part of the benefit to which she is
entitled under the contract.

136 The serious nature of the breach initially entitled Ms Thillagaratnam to
terminate the agreement.

Fraudulent misrepresentation claim

137 Further and alternatively to the breach of contract claim,
Ms Thillagaratnam claims that Mr Doan and Ms Nguyen made a fraudulent

misrepresentation by representing that they did not know of anything which could materially affect Ms Thillagaratnam's use or enjoyment of Lot 6.

Principles of fraudulent misrepresentation

138 The elements of fraudulent misrepresentation were stated by Viscount Maugham in *Bradford Third Equitable Benefit Building Society v Borders*,^[81] in a passage quoted with approval by Gleeson CJ in *Magill v Magill*:^[82]

First, there must be a representation of fact made by words, or, it may be, by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit. Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true. Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him. If, however, fraud be established, it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made. Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing.

139 Thus, the elements which a plaintiff must prove in such an action are as follows:

- (1) a false representation of fact;
- (2) that the representation was made fraudulently;
- (3) that the representor intended for the representee to act on the representation; and
- (4) that the representation induced the representee to enter the contract as a result of which the representee suffered loss.

Is there a false representation of fact?

140 Ms Thillagaratnam submits that the effect of Mr Doan and Ms Nguyen executing the contract was to make the representations contained in the General Conditions, relevantly, the representation at cl 10.2(c) that they did not know of anything which would materially affect Ms Thillagaratnam's use or enjoyment of Lot 6.^[83]

141 A false representation of fact may be made by words (either written or oral) or by conduct.^[84] Whether such words or conduct constitute a representation in the circumstances of a particular case is ultimately a question of fact. However, mere silence, however morally wrong, is insufficient to support an action of fraudulent misrepresentation at common law. ^[85]

142 Mr Doan and Ms Nguyen seek to characterise Ms Thillagaratnam's fraudulent misrepresentation action as a case of 'mere silence'. Accordingly, they submit that a mere failure by a party to disclose a fact cannot amount to an intention to defraud.^[86]

143 The present case is not one of 'mere silence'. It involves the execution
of a contract by Mr Doan and Ms Nguyen which contains a series of written
representations to Ms Thillagaratnam as purchaser of Lot 6.

144 I acknowledge that Mr Doan and Ms Nguyen may have a poor
command of English and there is no suggestion that the contract was translated into
Vietnamese for them. However, Mr Doan and Ms Nguyen did not seek an explanation
as to the content of the contract and ultimately chose to sign the relevant documents.

145 According to the High Court in *Toll (FGCT) Pty Ltd v Alphapharm
Pty Ltd*:[\[87\]](#)

where a person has signed a document, which is intended to affect legal relations,
and there is no question of ... [any] vitiating element, the fact that the person has
signed the document without reading it does not put the other party in the position
of having to show that due notice was given of its terms.

146 While Mr Doan and Ms Nguyen might not have fully understood the
terms of their agreement with Ms Thillagaratnam, they nevertheless signed the
settlement documents intending for them to have legal effect and must therefore bear
the legal consequences.

147 I am satisfied that by signing the contract accepting the offer and
acknowledging they had received a copy of the General Conditions, Mr Doan and
Ms Nguyen represented to Ms Thillagaratnam that they did not know of anything
which would materially affect Ms Thillagaratnam's use or enjoyment of Lot 6.

148 Although Ms Thillagaratnam only had direct interactions with Mr Doan
and Ms Nguyen's real estate agent, Mr Heldt, there is established authority that any
fraudulent representation made by an agent of a contracting party acting within the
scope of their apparent authority can provide a basis for holding the contracting party
liable.[\[88\]](#) Mr Doan and Ms Nguyen can thus be held liable on the basis of any
fraudulent representation made by Mr Heldt as their agent.

149 Having already established that Mr Doan and Ms Nguyen had
knowledge of Mr Pratt's conduct, their representation was a false representation of fact.

Is the representation fraudulent?

150 A representation is fraudulent where the maker of the representation
lacks belief in the truth of the representation or makes it recklessly, not caring whether
it was true or false.[\[89\]](#)

151 It is important to emphasise that a representation made recklessly must
be distinguished from one made negligently. 'Recklessness' involves not caring
whether the statement is true, that is, an indifference to the truth.[\[90\]](#) The inquiry in
cases of fraud must always be as to the subjective state of the representor's mind.

152 Ms Thillagaratnam submits that Mr Doan and Ms Nguyen's
representation was fraudulent at the very least, for indifference, or their recklessness as
to the truth of the representation made.[\[91\]](#)

153 Mr Doan and Ms Nguyen clearly knew of Mr Pratt's conduct and were aware that it was of such a nature as to materially affect the use or enjoyment of Lot 6.

154 Again, while Mr Doan and Ms Nguyen might have a poor command of English, by signing the contract out of their own free will they adopted the representations within it. There is no evidence that Mr Doan and Ms Nguyen attempted to understand the meaning of the contract and their representations to Ms Thillagaratnam.

155 Mr Doan and Ms Nguyen's execution of the contract despite their knowledge that Mr Pratt could materially affect the use or enjoyment of Lot 6 was at the very least, made recklessly, not caring whether it was true or false. For this reason, I find that the defendants' representation was made fraudulently.

Did Mr Doan and Ms Nguyen intend for Ms Thillagaratnam to act on the representation?

156 While a person making a statement fraudulently must intend for the representee act on the representation,^[92] the representor's ultimate motive or purpose in making the representation is irrelevant as a matter of law.^[93]

157 Nevertheless, the requirement for intent should not be seen as a significant hurdle for the representee to overcome. It serves more to define the range of potential claimants who are entitled to pursue an action in fraudulent misrepresentation.^[94] In other words, the requirement aims to ensure that the statement was consciously directed at the claimant.

158 The representation at cl 10.2(c) of the General Conditions was specifically directed at Ms Thillagaratnam as purchaser of Lot 6. As is the case with any parties to a contract, Mr Doan and Ms Nguyen plainly intended for Ms Thillagaratnam to rely on the terms of the contract, including cl 10.2(c).

159 I am therefore satisfied that Mr Doan and Ms Nguyen intended for Ms Thillagaratnam to rely on their representation.

Did the representation induce Ms Thillagaratnam to enter the contract?

160 Whether Mr Doan and Ms Nguyen's fraudulent misrepresentation induced Ms Thillagaratnam to enter the contract is an issue of fact.

161 The principles applicable to inducement were summarised by Wilson J in *Gould v Vaggelas*:^[95]

1. Notwithstanding that a representation is both false and fraudulent, if the representee does not rely upon it he has no case.
2. If a material representation is made which is calculated to induce the representee to enter into a contract and that person in fact enters into the contract there arises a fair inference of fact that he was induced to do so by the representation.

3. The inference may be rebutted, for example, by showing that the representee, before he entered into the contract, either was possessed of actual knowledge of the true facts and knew them to be true or alternatively made it plain that whether he knew the true facts or not he did not rely on the representation.
4. The representation need not be the sole inducement. It is sufficient so long as it plays some part even if only a minor part in contributing to the formation of the contract.

162 As his Honour suggests, the onus of proving inducement rests with the representee. However, if the representation is calculated to induce the representee to enter into a contract and that person in fact enters into the contract, it will be inferred that the representation induced the representee to enter the contract. In such cases, the representor may displace the inference by showing that there was in fact no reliance by the representee.

163 The threshold for establishing inducement is relatively low. It would be no defence to a claim based on fraudulent misrepresentation to show that the representee might well have entered the contract absent any fraudulent misrepresentation.[\[96\]](#)

164 Ms Thillagaratnam's case is that her inducement to enter the contract can be inferred from her conduct.[\[97\]](#)

165 Ms Thillagaratnam's evidence is that she read the General Conditions on 13 April 2015, the day on which she made an offer to purchase Lot 6.[\[98\]](#)

166 Ms Thillagaratnam's counsel also referred to letters which she sent to Mr Doan and Ms Nguyen and Acton in October 2015 and August 2017 as evidence of inducement.

167 The first letter, dated 7 October 2015, was addressed to Mr Doan and Ms Nguyen courtesy of Acton. In the letter, Ms Thillagaratnam states that she 'would never have bought the property had [she] known of the problems that Mr Lawrence [sic] Pratt had caused you and the neighbourhood'.[\[99\]](#)

168 The second letter, dated 7 August 2017, was addressed directly to Acton. Ms Thillagaratnam alleges that she 'would not have bought the subject property if [Mr] Pratt's unneighbourly conduct had been disclosed'.[\[100\]](#)

169 The third letter, dated 16 August 2017, was addressed to Mr Doan and Ms Nguyen. In this letter, Ms Thillagaratnam repeats her allegation that she 'would not have bought the subject property if [Mr] Pratt's unneighbourly conduct had been disclosed'.[\[101\]](#)

170 In view of the above correspondence and in the absence of any evidence to the contrary, I am satisfied that the representation induced Ms Thillagaratnam to enter the contract.

171 Accordingly, I find that the representation that Mr Doan and Ms Nguyen did not know of anything which could materially affect

Ms Thillagaratnam's use or enjoyment of Lot 6 amounted to a fraudulent misrepresentation.

Misleading or deceptive conduct claim

172 Ms Thillagaratnam alternatively claims that Mr Doan and Ms Nguyen engaged in misleading or deceptive conduct, or conduct likely to mislead or deceive, contrary to s 18 of the ACL, alternatively s 18 of the ACLWA. The State and Commonwealth regimes are effectively in the same terms.

173 The misleading and deceptive conduct claim is in effect made in respect of:

- (1) Mr Doan and Ms Nguyen's silence in not disclosing to Ms Thillagaratnam their knowledge of Mr Pratt's conduct; and
- (2) the representation that Lot 6 included a large secure courtyard suitable for keeping a dog.[\[102\]](#)

174 Section 18 of the ACL provides:

Misleading or deceptive conduct

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in Part 3 - 1 (which is about unfair practices) limits by implication subsection (1).

175 The issue of whether Mr Doan and Ms Nguyen's conduct occurred in trade or commerce was disputed by the parties.

176 The phrase 'in trade and commerce' is not defined in the ACL. In *Concrete Constructions (NSW) Pty Ltd v Nelson*,[\[103\]](#) Mason CJ, Deane, Dawson and Gaudron JJ, speaking of s 52 of the *Trade Practices Act 1974* (Cth), said:

It is well established that the words 'trade' and 'commerce', when used in the context of s 51(i) of the Constitution, are not terms of art but are terms of common knowledge of the widest import ... The real problem involved in the construction of s 52 of the Act does not, however, spring from the use of the words 'trade or commerce'. It arises from the requirement that the conduct to which the section refers be 'in' trade or commerce.

...

The phrase 'in trade or commerce' in s 52 has a restrictive operation. It qualifies the prohibition against engaging in conduct of the specified kind ... [T]he reference to conduct 'in trade or commerce' in s 52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character ...

What the section is concerned with is the conduct of a corporation toward persons ... with whom it ... has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character ... In some areas, the dividing line between what is and what is not conduct 'in trade or commerce' may be less clear and may require the identification of what imports a

trading or commercial character to an activity which is not, without more, of that character.

177 The private sale of land is one such area where the dividing line between what is and what is not conduct 'in trade or commerce' is less clear. However, the general principles to be applied in such cases have been set out in previous decisions of this court.[\[104\]](#)

178 The private sale of land, particularly a residential property, is not ordinarily regarded as being in trade or commerce. The relevant question is whether anything can be identified in the transaction in question which imports a trading or commercial character to the activity without which the transaction would not have that character.[\[105\]](#)

179 Ms Thillagaratnam contends that, in all the circumstances, Lot 6 was not intended to be Mr Doan and Ms Nguyen's family home but should be properly characterised as an investment property, such that the sale occurred in trade or commerce.[\[106\]](#) In support of this contention, Ms Thillagaratnam submits that:[\[107\]](#)

- (a) Mr Doan and Ms Nguyen contracted to purchase Lot 6 on 2 February 2010 already tenanted;
- (b) Mr Doan and Ms Nguyen purchased Lot 6 without having seen it in person, while resident in Queensland;
- (c) Lot 6 was advertised for sale by Mr Doan and Ms Nguyen or via their agents on at least 12 occasions between February 2010 and May 2015;
- (d) Lot 6 was advertised for rent by Mr Doan and Ms Nguyen or via their agents on at least seven occasions between December 2010 and March 2014;
- (e) Mr Doan and Ms Nguyen provided an exclusive management authority to Perth Real Estate Centre to manage the rent of Lot 6 from 1 June 2013 until 1 June 2015;
- (f) Mr Doan and Ms Nguyen derived income by renting Lot 6 to tenants from February 2010 to 1 June 2014; and
- (g) Mr Doan and Ms Nguyen occupied the property for approximately 14 months prior to its sale.

180 Mr Doan and Ms Nguyen dispute that the sale of Lot 6 occurred in trade or commerce and instead allege that it involved the sale of a residential property between private parties.[\[108\]](#) To this end, they submit that:[\[109\]](#)

- (a) they purchased Lot 6 intending it to be their residence;
- (b) from May 2014 until Lot 6 was sold to Ms Thillagaratnam in or about June 2015 Mr Doan and Ms Nguyen and their children lived in Lot 6 as their main residence, and that Lot 6 was their family home that was occupied by them and Ms Nguyen's parents;

(c) they sold Lot 6 because it was too small to accommodate them, their children and Ms Nguyen's parents; and

(d) it is common cause that the last tenancy of Lot 6 was terminated by the tenant on or about 25 March 2014 and the property vacated on or about 18 April 2014.

181 The essential question is whether anything can be identified in the sale of Lot 6 which imports a trading or commercial character.[\[110\]](#)

182 Mr Doan and Ms Nguyen purchased Lot 6 for investment purposes. They purchased the property without viewing it in person and while resident in Queensland. Within months of the sale, Mr Doan and Ms Nguyen provided exclusive management authority to Perth Real Estate Centre to rent Lot 6 and manage the tenancies. This engagement lasted until June 2015.

183 Lot 6 was advertised for rent on several occasions between 2010 and 2014. Mr Doan and Ms Nguyen leased the property to third parties for approximately four of the five years or so that they owned the property. Although they resided at Lot 6 for 14 months, it is my view that the property was primarily purchased as an investment property.

184 Nevertheless, the isolated sale of an investment property is insufficient in itself to lead to the conclusion that the sale occurred in trade and commerce.[\[111\]](#)

185 Both Mr Doan and Ms Nguyen as vendors and Ms Thillagaratnam as purchaser are private individuals.[\[112\]](#) Although Mr Doan and Ms Nguyen might have been carrying on the business of investment by engaging property managers to lease Lot 6 to third parties, the property was only leased to private tenants; it was not leased for commercial purposes or subject to a commercial lease.[\[113\]](#) This is not a case where the land was used for the purposes of business.[\[114\]](#)

186 Ms Thillagaratnam purchased Lot 6 as her residence. The sale was with vacant possession. There is no evidence that Ms Thillagaratnam or Mr Doan and Ms Nguyen were in the business of buying and selling property or that the land was sold or purchased having regard to its commercial use.[\[115\]](#) The parties do not engage in property development or have discussed the prospect of developing Lot 6.[\[116\]](#)

187 There is no evidence that Lot 6 was marketed on the basis that it would be suitable for commercial or industrial use. The sales brochure merely stated that 'For investors, you can expect solid returns as tenants will love the generous internal space, the "at your front door" parking and the free public transport from their street to the CBD'.[\[117\]](#) This statement is insufficient to import a trading or commercial character to the transaction.

188 In these circumstances, I am not satisfied that the sale of Lot 6 was anything more than the private sale of a property; the transaction did not have a trading or commercial character. Mr Doan and Ms Nguyen's use of a real estate agent in the transaction did not change its non-commercial nature.

189 Accordingly, Ms Thillagaratnam's misleading or deceptive conduct
claim fails.

The relief sought

190 Ms Thillagaratnam seeks by way of primary relief rescission of the
contract. Her case is that she was entitled to rescind the contract by reason of the
defendant's breach of cl 10.2(c) of the General Conditions, termination and rescission of
an agreement being available where the consequences of the breach of an intermediate
term are sufficiently serious. Ms Thillagaratnam also contends that she was entitled to
rescind the contract by reason of the fraudulent representation.

191 Ms Thillagaratnam further and alternatively seeks damages for the
breach of contract and the fraudulent misrepresentation.

Rescission

192 Ms Thillagaratnam contends that she communicated the rescission of
the contract to Mr Doan and Ms Nguyen by her letter of 16 August 2017, by which she
demanded payment of all amounts spent in relation to Lot 6 on the basis that she would
return the property to Mr Doan and Ms Nguyen.

193 Mr Doan and Ms Nguyen submit that Ms Thillagaratnam had by her
conduct affirmed the contract.[\[118\]](#)

194 Any election to affirm a contract must be communicated with clear and
unequivocal words or conduct to the other party.[\[119\]](#) Mere delay is not necessarily
evidence of election.[\[120\]](#)

195 Rescission of a contract induced by fraudulent misrepresentation is
available both at law and in equity.

196 In the case of a contract induced by fraud, no election is made by a
claimant unless it is established that they possessed knowledge of both the facts
constituting the fraud and of the right to rescind the contract. Knowledge of the facts
giving rise to the entitlement to rescind alone is not sufficient in cases of fraud.[\[121\]](#)

197 An agreement can be rescinded in equity notwithstanding that precise
restitutio in integrum is not possible, provided that the court can do what is practically
just between the parties.[\[122\]](#) Further, there is power in equity to not only order
rescission but to include an indemnity for loss directly caused by the fraud.[\[123\]](#)

198 Mr McGowan for Mr Doan and Ms Nguyen asserted that rescission
would not be appropriate in this case for two reasons.[\[124\]](#)

199 First, Ms Thillagaratnam affirmed the contract by remaining in Lot 6
despite having known of Mr Pratt's conduct since at least September 2015. Her
commitment to the property was also evidenced by her election to the council of
owners. I have concluded that neither of these matters amounted to an affirmation of
the contract. They show that Ms Thillagaratnam did not walk away lightly. She
endeavoured to make her occupation of Lot 6 work until she could stand it no more.

200 Second, the substantial renovations to the bathroom and kitchen of Lot 6 before Ms Thillagaratnam moved in places the case in a category where restitutio in integrum would not be possible. In my view, the fact that renovations were carried out does not prevent restitution being ordered. Lot 6 remained substantially as it was, namely a two-bedroom unit with a kitchen and bathroom. If anything, the renovations can only have improved Lot 6.

201 There is a further problem for Mr Doan and Ms Nguyen in that if Ms Thillagaratnam's conduct could be said to be an election, that election was not communicated to them.

Damages

Breach of contract

202 A party who sustains loss by reason of a breach of contract is to be placed in the same situation as if the contract had been performed, so far as money can do it.[\[125\]](#)

203 That Ms Thillagaratnam might incur financing costs in purchasing Lot 6 were within the contemplation of the parties, the contract being subject to finance.

204 In this case, placing Ms Thillagaratnam in the position she would have been had her enjoyment of Lot 6 not been impaired by the conduct of Mr Pratt involves compensating her for the difference between the market price of Lot 6, evidenced by the price Ms Thillagaratnam paid for it, and its true value as at the date she acquired it, being 1 July 2015.

Fraudulent misrepresentation

205 The measure of damages for fraudulent misrepresentation is the difference between the position in which the plaintiff would have been had the representation not been made and her actual position.[\[126\]](#)

206 In this case, the measure would be the same as for breach of contract.

The expert evidence

The value of the property

207 Two experts gave concurrent evidence on the value of the property. Ms Thillagaratnam called David Moore of Opteon. Mr Doan and Ms Nguyen called Blake Lieschke of LMW. Mr Moore and Mr Lieschke each prepared a valuation report which were tendered as part of the trial bundle.

208 Typically, value evidence is based on a comparative exercise having regard to similar sales. That approach proceeds on the basis that there are similar sales.

209 Mr Moore valued Lot 6 as at 15 May 2015 at \$200,000. He gave evidence that he utilised two methods of valuation. The first was a 'market-based

approach' which involves comparing the subject property with market evidence of transactions involving some blight or effect to the value because of circumstances associated with the sale. The second was a 'life tenancy calculation' which involves assessing the value of a property that would be vacant or uninhabitable by the owner. Mr Moore determined that the life tenancy calculation method was the appropriate method of valuation.[\[127\]](#)

210 Mr Lieschke valued Lot 6 as at 15 May 2015 at \$290,000 if Ms Thillagaratnam's evidence was broadly accepted. He analysed market evidence of properties that had also been affected by various forms of stigma. This evidence allowed him to establish a discount rate of 7.5% to 32.5%. Mr Lieschke determined that the market value of the subject property without any form of stigma was \$390,000. He then applied two scenarios, each with a differing severity of stigma, to produce two affected values. The first scenario was based on the account of Mr Pratt's conduct as pleaded in Mr Doan and Ms Nguyen's defence. Mr Lieschke determined that this account warranted a discount rate of 10% resulting in an affected market value of \$350,000. The second scenario was based on the account of Mr Pratt's conduct as pleaded in the statement of claim. The associated discount was determined to be 25% which resulted in the affected market value of \$290,000.[\[128\]](#)

211 The problem with the comparative approach was that there were no relevant comparative sales.

212 In his valuation report, Mr Moore used two examples of properties in which people had died and their corpses had remained in the premises for some period as evidence of blight or stigma.[\[129\]](#) It does not require expert knowledge to conclude that the fact that someone has died in a property and their corpse has remained there for some time does not provide a meaningful comparison to Mr Pratt's conduct. Mr Moore concluded that there were no directly comparable sales, and in particular, that those provided by Mr Lieschke were not comparable.[\[130\]](#) I accept Mr Moore's evidence that the sales were not comparable.

213 Mr Lieschke relied upon six properties with various stigma as comparative sales.[\[131\]](#) One of the properties was a property on Leach Highway in the suburb of Melville where the stigma was heavy traffic. The noise from heavy traffic is in no way comparable to Mr Pratt's conduct. Traffic noise is general and undirected and is quite distinct from hammering on the ceiling, repetitive verbal abuse and the other aspects of Mr Pratt's antisocial behaviour. Similarly, the fact that a property has a prison or a mental health facility nearby is not comparable to conduct which is specifically directed at someone over a long period of time, even if a prison or a mental health facility constitutes a stigma.

214 Even taking the six comparable sales at their best, Mr Lieschke can only point to three comparable sales, only one of which, namely, the property in Stirling Street, Perth, is even remotely close to Lot 6.

215 Mr Lieschke used the six properties to establish a discount rate for stigma of 7.5% to 32.5%. This discount range helped inform Mr Lieschke's conclusion

that the effect of Mr Pratt's conduct on the value of Lot was a reduction in value of 10% to 25%.

216 It does not require expert knowledge to conclude that the sample size of Mr Lieschke's report is too small and that the range of the discount rate is too broad to be meaningful. I do not accept Mr Lieschke's evidence. That is a reflection of the difficulty of the task rather than his ability.

217 I am left in the position where neither expert could provide meaningful comparative sales evidence.

218 Mr Moore provided an alternative method of valuation known as a life tenancy calculation. Mr Moore's description of the life tenancy model in his valuation report is as a model that quantifies the loss in value because of the life tenancy by using the loss in market rent for the life expectancy of the tenant and the anticipated return from the property that is not achievable and applying a 'Discounted Cash Flow analysis' for the expected term of the life tenancy. It was by using this method that Mr Moore calculated the value of Lot 6 at \$200,000.[\[132\]](#)

219 Mr Moore's calculation is based on an assumption that Lot 6 would be uninhabitable for the balance of Mr Pratt's life calculated using the Australian Bureau of Statistics life expectancy tables.[\[133\]](#) Obviously, the calculation of the value is highly dependent on the period for which Lot 6 is uninhabitable.[\[134\]](#)

220 In cross-examination, it was put to Mr Moore that in using the life expectancy tables he was applying the general to the specific.[\[135\]](#)

221 Mr Moore's assumption that Lot 6 would be uninhabitable is based on Ms Thillagaratnam's belief that Lot 6 cannot be safely occupied whilst Lot 16 is occupied by Mr Pratt.[\[136\]](#)

222 It does not follow from Mr Pratt's life expectancy being approximately 20 years from 2015 that Lot 6 would be uninhabitable for that period. Mr Pratt at 85 years of age will be a very different person from Mr Pratt at age 65 to 70. His ability to harass the occupant of Lot 6 is likely to diminish as he ages. Although Ms Thillagaratnam believes that Lot 6 is uninhabitable it does not follow that a male in his 20s or 30s would have the same reaction as her to Mr Pratt. They might well 'hit back' and direct noise at Mr Pratt when he starts hammering on the floor of his unit. They might bring an action in nuisance. Mr Pratt might be unable to access Lot 16 as he ages. There are any number of possible variables. I accept the point made in cross-examination that Mr Moore is applying the general to the specific without making allowance for the particular facts relating to Lot 6.

223 I do not accept that Mr Moore's life tenancy approach provides a valid means of assessing the value of Lot 6.

224 I am therefore left in the position that there is no acceptable evidence from Mr Moore nor Mr Lieschke as to the impact of Mr Pratt's conduct on the value of Lot 6. Had Ms Thillagaratnam sold Lot 6 after making appropriate disclosure of

Mr Pratt's behaviour then that would have provided a basis for assessing the impact of Mr Pratt's behaviour on the value of Lot 6.

225 A judge is obliged to assess damages if at all possible but there must be some acceptable evidence to form a basis for the calculation. In this case, there is no such evidence, and am therefore unable to ascribe a value to Lot 6.

Rental value

226 Ms Thillagaratnam called real estate agent, Helen Watson, to give evidence. Her written report was tendered into evidence.[\[137\]](#) Ms Watson is not a valuer and she did not have any qualifications or training in valuation.[\[138\]](#)

227 Ms Watson's report did not identify any comparative properties.[\[139\]](#)

228 I am unable to accept that Ms Watson qualified as an expert.

229 Although Mr Moore and Mr Lieschke referred to rental yield in their reports, they did not identify any comparative properties so as to provide a basis for the yield.

Calculation of loss and damage

230 I find that Ms Thillagaratnam is entitled to rescind the contract for the purchase of Lot 6 on the basis of a breach of cl 10.2(c) and on the basis of a reckless fraudulent misrepresentation by Mr Doan and Ms Nguyen.

231 Ms Thillagaratnam's calculation of her claim for loss and damage is set out in annexure A to this judgment. I accept that the calculation in the schedule arising from the rescission are broadly correct.

232 The only amount with which I take issue is the lost rental income. First, it is not possible to make a finding as to what the lost rental income was. Second, since Ms Thillagaratnam did not intend to rent Lot 6, I do not see how she can make a claim for lost rental income.

233 By reason of the fact that I have found that Ms Thillagaratnam is entitled to rescission, it is unnecessary to accept the alternative claim. Due to the fact that I am unable to make a finding as to the value of Lot 6 as at 15 May 2015, I would have been unable to make a finding as to the loss suffered by her had rescission not been ordered.

Conclusion

234 I find for Ms Thillagaratnam in relation to her breach of contract claim and her fraudulent misrepresentation claim against Mr Doan and Ms Nguyen. I find against her in relation to her misleading and deceptive conduct claim.

235 I will hear from the parties as to the appropriate orders and costs.

236 If the parties are unable to agree a minute of orders, they should each file a minute of the orders they seek.

ANNEXURE A

PLAINTIFF'S CALCULATION OF COMPENSATION AND LOSS AND DAMAGE

1. The plaintiff claims not less than \$527,627.82 by way of compensation, comprised as follows:

(a) The Plaintiffs Acquisition costs to acquire Lot 6 totalled \$404,395.93 (inclusive of GST) and consisted of:

Plaintiff's acquisition costs

<i>Date of invoice/ document</i>	<i>Item</i>	<i>Amount</i>	<i>Exhibit</i>	<i>Page</i>
26/06/2015	Purchase price	\$390,000.00	3	1-2
26/06/2015	Termite inspection	\$150.00	3	3-4
29/06/2015	Stamp duty	\$12,540.00	3	5
2/07/2015	Settlement Agent fees (inc GST)	\$1,679.93	3	9
Total		\$404,395.93		

(b) The Plaintiff paid outgoings in respect of Lot 6 from 1 July 2015, consisting of:

- (i) Strata Levies;
- (ii) City of Vincent Rates;
- (iii) Water Corporation service charges; and
- (iv) Electricity utility charges.

A list of these outgoings are contained in Schedule "A". Electricity charges are only shown from 17 June 2017 (being the date from which the Plaintiff no longer resided at Lot 6). As at 31 October 2020 these outgoings totalled \$25,965.03 (inclusive of GST).

(c) The Plaintiff has incurred financing costs of \$45,716.86 as at 30 June 2020 as a consequence of having borrowed \$250,000.00 in two loans from ING (a variable loan and a fixed rate loan of \$125,000.00 each) on 1 July 2015 to acquire Lot 6. The financing costs incurred by the Plaintiff consist of:

Financing costs and ING interest

<i>Date of</i>				

<i>invoice/ statement</i>	<i>Item</i>	<i>Amount</i>	<i>Exhibit</i>	<i>Page</i>
30/06/2015	Gadens - Costs and Disbursements for ING Mortgage (inc GST)	\$244.20	3	6-7
1/07/2015	Gadens bank charges (inc GST)	\$11.00	3	8
30/06/2016	ING interest for financial year ending 30 June 2016	\$10,382.21	3	31
30/06/2017	ING interest for financial year ending 30 June 2017	\$9,241.05	3	45
30/06/2018	ING interest for financial year ending 30 June 2018	\$9,380.22	3	57
30/06/2019	ING interest for financial year ending 30 June 2019	\$8,802.78	3	69
	ING interest for financial year ending 30 June 2020	\$7,655.40	Ex 5	
	Total - interest only	\$45,461.66		
	Total financing costs	\$45,716.86		

(d) The Plaintiff has not received any rent for Lot 6. The Plaintiff vacated Lot 6 on 16 June 2017. As at the date of commencement of trial, the Plaintiff has lost rent of \$51,910, being affected rent of \$290 per week for 179 weeks.

2. As to the plaintiff's alternative claim for loss and damage, the plaintiff has lost not less than \$258,020.89, comprised of:

(a) The loss and damage suffered by the Plaintiff is \$190,000.00, being the difference between the amount of \$390,000.00 paid by the Plaintiff for Lot 6 and its true value as at 20 May 2015 of \$200,000.00: Ex 1.576.

(b) The sum of \$7,505.00, being additional stamp duty which the Plaintiff would not have been required to pay had the purchase price been \$200,000.00: Ex 3.5.

(c) The additional financing costs incurred by the Plaintiff as a consequence of having borrowed an additional \$190,000.00 from ING at from 1 July 2015 until judgment, when she would not otherwise have done so, totalling \$34,550.86 as at 30 June 2020, calculated in Schedule "B" and as follows:

(i) Interest paid on \$250,000.00 for that period, being \$45,461.66;

(ii) Less the interest payable on \$60,000.00 over that period, being \$10,910.80.

(d) The outgoings paid by the plaintiff, as in paragraph 1(c) above.

Schedule 'A' Outgoings

OUTGOINGS

a. Vicus Strata levies

<i>Date of invoice</i>	<i>Amount (inc GST)</i>	<i>Exhibit</i>	<i>Page</i>
3/07/2015	\$895.00	3	10

31/08/2015	\$895.00	3	18
30/11/2015	\$895.00	3	22
1/03/2016	\$895.00	3	23
2/06/2016	\$579.99	3	28
28/02/2017	\$1,580.00	3	41
29/05/2017	\$1,580.00	3	42
2/11/2017	\$628.75	3	47
4/12/2017	\$628.75	3	48
26/02/2018	\$628.75	3	49
8/06/2018	\$628.75	3	54
19/10/2018	\$616.56	3	61
1/12/2018	\$622.56	3	64
26/02/2019	\$622.56	3	67
28/05/2019	\$622.56	3	68
2/09/2019	\$616.56	3	71
2/12/2019	\$616.56	3	72
3/03/2020	\$616.56	4	367
2/06/2020	\$616.56	4	372
14/10/2020	\$700.00	4	382
Total	\$15,485.47		

b. City of Vincent Rates

<i>For period</i>	<i>Amount</i>	<i>Exhibit</i>	<i>Page</i>
Rates 01/07/15 -30/06/16	\$1,089.29	3	14
Rates 01/07/16 to 30/06/17	\$1,198.06	3	34
Rates 01/07/17 to 30/06/18	\$1,306.83	3	46
Rates 01/07/18 - 30/06/19	\$1,450.98	3	58
Rates 01/07/19 - 30/06/20	\$1,456.11	3	70
Rates 01/07/20			

- 30/06/21	\$1,381.66	4	379
Total	\$7,837.94		

c. Water Corporation Service Charges

<i>Date of invoice</i>	<i>Amount (in GST)</i>	<i>Exhibit</i>	<i>Page</i>
27/07/2017	\$172.03	All: Ex 3, Pages 75-76	
2/10/2017	\$169.27		
11/12/2017	\$169.27		
25/05/2018	\$169.27		
25/01/2018	\$163.71		
13/08/2018	\$180.04		
1/10/2018	\$177.13		
29/01/2019	\$171.33		
26/11/2019	\$179.35		
26/03/2020	\$179.35		
26/05/2020	\$179.35	4	370
25/09/2020	\$163.72	4	380
Total	\$2,073.82		

d. Electricity - Synergy Tax Invoices

<i>Date of invoice</i>	<i>Amount (inc GST)</i>	<i>Exhibit</i>	<i>Page</i>
26/06/2017	\$148.05	3	43-44
30/04/2018	\$59.80	3	50-51
30/04/2018	\$127.30	3	52-53
27/06/2018	\$58.85	3	55-56
24/08/2018	\$58.55	3	59-60
24/10/2018	\$63.20	3	62-63
12/12/2018	\$52.05	3	65-66
Total	\$567.80		

Schedule 'B'

- (a) The additional financing costs total \$34,550.86 as at 30 June 2020, calculated as follows:
- (i) Interest paid on \$250,000.00 totals \$45,461.66;

- (ii) Proportional interest that would have been paid on \$60,000.00 is \$10,910.80;
- (iii) Difference between \$45,461.66 and \$10,910.80 is \$34,550.86.

CURTHOYS J

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

SB
Associate to the Honourable Justice Curthoys

27 MAY 2022

- [1] Exhibit 1, 528 [66].
- [2] Statement of agreed facts filed 20 February 2020, point 2 (Statement of Agreed Facts).
- [3] Further Re-Amended Statement of Claim filed 4 November 2020 [10(a)], [11], [18C] (Statement of Claim).
- [4] Statement of Claim [10(e)], [13(a)], [18E], [24].
- [5] Statement of Claim [10(f)], [13(b)].
- [6] Statement of Agreed Facts, point 4.
- [7] ts 188 - 189 (18/11/2020).
- [8] ts 169 - 170 (18/11/2020).
- [9] ts 238 (18/11/2020).
- [10] ts 279 (19/11/2020).
- [11] Exhibit 1, 136, 139.
- [12] Exhibit 2.
- [13] Exhibit 1, 16 [41]
- [14] Exhibit 1, 11 [13].
- [15] Exhibit 1, 25.
- [16] ts 130 (17/11/2020).
- [17] ts 130 - 131 (17/11/2020).
- [18] ts 131 (17/11/2020).
- [19] ts 168 (18/11/2020); ts 265 (19/11/2020).
- [20] ts 168, 170 - 171 (18/11/2020); Plaintiff's chronology filed 13 November 2020, point 17 (Plaintiff's Chronology).
- [21] ts 138 - 139 (17/11/2020).
- [22] Exhibit 1, tab 126.
- [23] ts 214 (18/11/2020).
- [24] ts 172 (18/11/2020).
- [25] ts 198 (18/11/2020).
- [26] ts 174 (18/11/2020); Exhibit 3, 17.
- [27] ts 173 (18/11/2020).
- [28] ts 176 - 177 (18/11/2020).
- [29] Exhibit 4, 41.
- [30] ts 204 (18/11/2020).
- [31] Exhibit 4, 42 - 43; Exhibit 11; Exhibit 12.
- [32] ts 178 - 179 (18/11/2020).
- [33] ts 180 (18/22/2020).
- [34] ts 180 - 181 (18/11/2020).

[35] Exhibit 4, 77; Exhibit 11; Exhibit 12.
[36] Exhibit 4, 78; Exhibit 11; Exhibit 12.
[37] Exhibit 4, 78; Exhibit 11; Exhibit 12.
[38] Affidavit of Henry Doan sworn 31 August 2018 as translated in the Affidavit of Linh Nguyen sworn 3 September 2018 [33] (Doan Affidavit).
[39] ts 182 (18/11/2020).
[40] ts 208 - 209, 251 - 252 (18/11/2020).
[41] Doan Affidavit [36].
[42] Doan Affidavit [47].
[43] ts 72 (16/11/2020).
[44] ts 73 (16/11/2020).
[45] ts 73 (16/11/2020).
[46] ts 74 (16/11/2020).
[47] ts 74 (16/11/2020).
[48] ts 74 (16/11/2020).
[49] ts 75 - 77 (16/11/2020); Exhibit 4, 330 - 339.
[50] ts 80 (16/11/2020).
[51] ts 80 - 81 (16/11/2020).
[52] ts 81 (16/11/2020).
[53] ts 75 - 80 (16/11/2020); Exhibit 1, 282 - 288, 304 - 308, 322, 324 - 325.
[54] ts 113 (17/11/2020).
[55] Exhibit 6.
[56] Exhibit 7.
[57] Plaintiff's substituted outline of submissions for trial filed 13 November 2020 [27] (Plaintiff's Submissions).
[58] Exhibit 1, 453.
[59] Exhibit 1, 453 - 454.
[60] Exhibit 1, 454.
[61] ts 97 (16/11/2020).
[62] 2011 General Conditions for the Contract of Sale cl 10.2(c)(1) - (3).
[63] ts 50 (16/11/2020); ts 365 (20/11/2020).
[64] See *Strata Titles Act 1985* (WA) sch 2 bl 2(b), bl 4, bl 12(b).
[65] ts 384 (20/11/2020).
[66] ts 384 (20/11/2020); Plaintiff's Submissions [45].
[67] First and second defendants' opening submissions filed 11 June 2020 [5]; ts 364 (20/11/2020) (Defendants' Submissions).
[68] ts 364 (20/11/2020); Defendants' Submissions [6] - [7].
[69] Defendants' Submissions [12]; see also Further Re-Amended Defence filed 5 November 2020 [8(a)] (Defence).
[70] Defendants' Submissions [13] - [14].
[71] ts 366 (20/11/2020).
[72] ts 366 (20/11/2020).
[73] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61; (2007) 233 CLR 115 [51] - [53] (Gleeson CJ, Gummow, Heydon & Crennan JJ).
[74] *Koompahtoo* [47] - [48] (Gleeson CJ, Gummow, Heydon & Crennan JJ).
[75] *Koompahtoo* [55] (Gleeson CJ, Gummow, Heydon & Crennan JJ).
[76] *Koompahtoo* [54] (Gleeson CJ, Gummow, Heydon & Crennan JJ).
[77] See *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, 250 - 251 cited in *Mealey v Mountains Development Group Pty Ltd* [2003] NSWSC 830 [7].
[78] *Oscar Chess Ltd v Williams* [1957] 1 WLR 370, 374.
[79] *Ardizzone v Valentino Nominees Pty Ltd* [2019] WASC 55 [539] - [543].
[80] See [86] - [88], [95].
[81] *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205, 211.
[82] *Magill v Magill* [2006] HCA 51; (2006) 226 CLR 551 [37].
[83] ts 389 (20/11/2020).
[84] *Magill* [37] (Gleeson CJ).
[85] See *Bradford Third Equitable Benefit Building Society v Borders* (211) (Viscount Maugham).
[86] Defendants' Submissions [22].
[87] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 [54].
[88] *Lloyd v Grace Smith & Co* [1912] AC 716, 733; *Scott v Davis* [2000] HCA 52; (2000) 204 CLR 333 [34] (McHugh J).
[89] *Magill* [59], [113] (Gummow, Kirby & Crennan JJ).
[90] *Angus v Clifford* [1891] 2 Ch 449, 471 (Bowen LJ).
[91] ts 50 (16/11/2020).
[92] *Magill* [37] (Gleeson CJ).
[93] *Derry v Peek* (1889) 14 App Cas 337, 373 (Lord Herschell).
[94] Cartwright J, *Misrepresentation Mistake and Non-Disclosure* (5th ed, 2019) 66 [3-50].
[95] *Gould v Vaggelas* [1985] HCA 75; (1985) 157 CLR 215, 236; see also *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459 [107] (McHugh J).

[96] *Barton v Armstrong* [1976] AC 104, 118 - 119; *Taheri v Vitek* [2014] NSWCA 209; (2014) 87 NSWLR 403 [73] - [76].

[97] ts 390 (20/11/2020).

[98] ts 93 (16/11/2020).

[99] Exhibit 1, 313.

[100] Exhibit 1, 450.

[101] Exhibit 1, 454.

[102] Statement of Claim [16], [18C].

[103] *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594, 602 - 604.

[104] See *Kelly v Wilson* [2012] WASC 146 [130]; *Shone v Davies* [2012] WASCA 83 [110] - [112]; *Ardizzone v Valentino Nominees Pty Ltd* [591].

[105] *Shone v Davies* [110] - [112].

[106] ts 391 (20/11/2018); Plaintiff's Submissions [76].

[107] Statement of Claim [14]; Plaintiff's Submissions [73] - [75].

[108] Defendants' Submissions [24] - [32].

[109] Defence [9]; Defendants' Submissions [27] - [31].

[110] *Shone v Davies* [110] - [112]; *Ardizzone v Valentino Nominees Pty Ltd* [591].

[111] *The Australian Customer Target Information Company Pty Ltd v Cabool Holdings Pty Ltd* [2004] NSWSC 302 [133].

[112] Cf *Ardizzone v Valentino Nominees Pty Ltd* [593].

[113] Cf *Kelly v Wilson* [132]; *Ardizzone v Valentino Nominees Pty Ltd* [594]; *Rasch Nominees v Bartholomaeus* [2013] SASCFC 23; (2013) 115 SASR 473 [91].

[114] See *O'Brien v Smolonogov* (1983) 53 ALR 107.

[115] *The Australian Customer Target Information Company Pty Ltd v Cabool Holdings Pty Ltd* [132]; *Rasch Nominees v Bartholomaeus* [90].

[116] Cf *Ardizzone v Valentino Nominees Pty Ltd* [593]; *Kelly v Wilson* [132]; *Shone v Davies* [111].

[117] Exhibit 1, 138.

[118] Defence [8]; Defendants' Submissions [43].

[119] *Sargent v ASL Developments Ltd* [1974] HCA 40; (1974) 131 CLR 634, 647, 655.

[120] *Sargent v ASL Developments Ltd* (641, 656).

[121] *Sargent v ASL Developments Ltd* (644 - 645, 657 - 658).

[122] *Vadasz v Pioneer Concrete (SA) Pty Ltd* [1995] HCA 14; (1995) 184 CLR 102, 111, 113 - 114.

[123] *Nadinic v Drinkwater* [2017] NSWCA 114; (2017) 94 NSWLR 518 [33] - [35]; *Jonval Builders Pty Ltd v Commissioner for Fair Trading* [2020] NSWCA 233; (2020) 104 NSWLR 1 [33].

[124] ts 373 (20/11/2020).

[125] *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8; (2009) 236 CLR 272 [13].

[126] *Potts v Miller* [1940] HCA 43; (1940) 64 CLR 282, 297; *Gould v Vaggelas* (220 - 221, 242 - 243, 254 - 255).

[127] ts 290 (19/11/2020).

[128] ts 293 - 295 (19/11/2020).

[129] Exhibit 1, 535 (Valuation Report of 6/34 Bulwer Street, Perth by Opteon, 20 [13.1]).

[130] ts 321 (19/11/2020).

[131] Exhibit 1, 655 (Valuation Report of 6/34 Bulwer Street, Perth by LMW, 38).

[132] Exhibit 1, 598 (Valuation Report of 6/34 Bulwer Street, Perth by Opteon, 23).

[133] Exhibit 1, 598 (Valuation Report of 6/34 Bulwer Street, Perth by Opteon, 23).

[134] See also ts 346 - 347 (19/11/2020).

[135] ts 348 (19/11/2020).

[136] Exhibit 1, 597 (Valuation Report of 6/34 Bulwer Street, Perth by Opteon, 22).

[137] Exhibit 13.

[138] ts 354 (19/11/2020).

[139] ts 355 - 358 (19/11/2020).