FEDERAL COURT OF AUSTRALIA

Lewis v Orchid Avenue Pty Ltd [2014] FCA 739

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| Citation: | Lewis v Orchid Avenue Pty Ltd [2014] FCA 739 |
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| Parties: | **ANDREW PETER LEWIS and MIA TERESA LEWIS v ORCHID AVENUE PTY LTD (ACN 118 752 346)** |
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| File number: | QUD 135 of 2012 |
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| Judge: | **DOWSETT J** |
|  |  |
| Date of judgment: | 11 July 2014 |
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| Catchwords: | **COMPETITION LAW –** misleading and deceptive conduct – contract for sale **–** alleged representations as to capital growth and financial prospects – whether representations made – whether reliance – cross-claim for damages. |
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| Legislation: | *Trade Practices Act 1974* (Cth) ss 51A, 52, 82, 87  *Federal Court of Australia Act 1976* (Cth) s 51A |
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| Dates of hearing: | 27, 28 and 29 May 2013 | |
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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 135 of 2012 |

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| BETWEEN: | ANDREW PETER LEWIS  First Applicant  MIA TERESA LEWIS  Second Applicant |
| AND: | ORCHID AVENUE PTY LTD (ACN 118 752 346)  Respondent |

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| JUDGE: | DOWSETT J |
| DATE: | 11 JULY 2014 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

# THE CONTRACTS

1. On 16 October 2009, the applicants (“Mr Lewis” and “Ms Lewis”) entered into a contract (the “unit contract”) with the respondent (“Orchid Avenue”) for the purchase of a residential unit (the “unit”) in a block of units then being built on the corner of Surfers Paradise Boulevard and Orchid Avenue at the Gold Coast. The unit was identified in the unit contract as Lot 22506 on an attached plan. At or about the same time, they also entered into a furniture package contract with Orchid Avenue (the “furniture package contract”). In these reasons, I need not, in general, distinguish between the two contracts. I shall refer to them collectively as the “contracts”.

# RESCISSION, DETERMINATION, AVOIDANCE AND REPUDIATION

1. On 9 September 2011 the Lewises purported to terminate or avoid the contracts pursuant to nominated statutes and/or other unspecified grounds. They also purported to reserve their rights in respect of unspecified false and/or misleading statements which had allegedly induced them to enter into the contracts.
2. On 16 September 2011 Orchid Avenue purported to terminate the contracts upon the basis that Mr and Ms Lewis had defaulted in performance of both. Orchid Avenue also purported to forfeit the deposit paid pursuant to the unit contract, and to reserve its right to recover from Mr and Ms Lewis any deficiency between the purchase price and any price on re‑sale.

# THE PROCEEDINGS

1. On 23 February 2012 Mr and Ms Lewis commenced proceedings in this Court, seeking an order pursuant to s 87 of the *Trade Practices Act 1974* (Cth) (the “Trade Practices Act”), declaring the unit contract void ab initio, and related relief. They also sought an order that Orchid Avenue release, or authorise the release of the deposit to them. In the alternative they claimed compensation for loss or damage pursuant to s 87 of the Trade Practices Act, interest pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth) (the “Federal Court Act”) and costs.
2. On 13 April 2012 Orchid Avenue filed a notice of cross-claim, seeking an order that Mr and Ms Lewis direct the stakeholder to release the deposit to it, damages for breach of the contracts, interest (either pursuant to the terms of the contracts or pursuant to s 51A of the Federal Court Act) and costs.
3. Mr and Ms Lewis now allege that they entered into the contracts in reliance upon representations made to them by, or on behalf of Orchid Avenue, by Gary Ronald Hendrick (“Mr Hendrick”). Mr and Ms Lewis claim that all of the representations were representations with respect to future matters within the meaning of s 51A of the Trade Practices Act*.* They plead that such representations constituted misleading and deceptive conduct pursuant to s 52 of the Trade Practices Act, having regard to the operation of s 51A, and accordingly claim the relief identified above.
4. By its further amended statement of cross‑claim Orchid Avenue asserts that it determined the contracts for breach in that Mr and Ms Lewis failed to perform their obligations pursuant to those contracts. It therefore seeks the relief outlined above. I turn to the evidence.

# ANDREW PETER LEWIS

1. Mr and Ms Lewis have two sons who, in May 2013, were nearly 12 and nearly 14 years of age respectively. The family lives in Western Australia, occupying a home which they completed in late 2008. In 2009 they came to the Gold Coast for a vacation, leaving Perth on 6 July 2009 and returning on 15 July 2009. On one previous occasion they had acquired an investment property when they purchased a home unit from Mr Lewis’s grandparents. They were moving into a retirement village. Mr and Ms Lewis had never purchased an investment property on the open market, nor had they ever purchased “off the plan” meaning, as I understand it, to purchase a unit in a residential building which is not yet completed. Mr Lewis claims to have known nothing about the real estate market on the Gold Coast. He said that they did not go to the Gold Coast with the purpose of acquiring a property, but rather to enable their sons to enjoy the theme parks. The building in which the unit was located was part of the “Hilton” development. Mr and Ms Lewis became aware of that development when they walked past the construction site, noticing the building and various signs. At a later stage they passed a sales office (the “Hilton sales office”) and saw a large model of the development which contained two towers. They stopped to look at the model and were approached by a Ms Frances Barlow (“Ms Barlow”) who, Mr Lewis understood, was a sales person employed by Three Sixty Project Marketing Pty Ltd (“Three Sixty”), a company which was marketing the Hilton development. After some preliminary discussion she pointed out that the apartments in the development were selling “really quickly”, that the first tower, the “Boulevard Tower”, was sold out and that the second tower, the “Orchid Tower”, was about 50% sold. A sale had just “fallen through” in the Boulevard Tower. That unit was now available for sale at $932,000. It was on the top level and was, in that sense, a “penthouse”.
2. Later that day the Lewis family was walking down the main mall in Surfers Paradise. At the corner of Cavill Avenue and Orchid Avenue they saw a Ray White real estate agency (the “Ray White office”). There they saw another model of the Hilton development on a trolley. They stopped to look at it and were approached by Mr Hendrick who introduced himself as being from Ray White. They had a general discussion about why the Lewis family was in Surfers Paradise. Mr Hendrick asked whether they were interested in property. They said that they were not, and that they were “just window shopping”. They said that they had previously walked past the Hilton sales office, and that a sales person there had told them that they could get an apartment for $932,000. Mr Hendrick said that they would be “crazy” not to take an apartment for under $1 million, as all of the apartments were now being offered or sold at over $1.1 million. He also said that it would be a perfect opportunity because there was nothing else available at that price. He said that an apartment under $1 million would be, “a positively geared investment”, and that there would be good capital growth in it. Mr Hendrick then asked them if they would like to go back to the Hilton sales office, offering to go with them in order to assist them in speaking with the sales people. They agreed to do so. Mr Lewis said that on that day, they were just “wandering around” as it was their “day off”.
3. At the sales office they again met Ms Barlow and were taken to a sales area where they could sit down. Their sons were taken to an adjoining area where there were Play Stations, videos and other forms of entertainment. Mr and Ms Lewis were shown a promotional video, depicting images of the Hilton development, and providing information about it. There was then a discussion about the quality of the building. Mr Hendrick was, “continually telling us how lucky we were to get the opportunity to get an apartment under $1 million”. He asked if they had ever previously bought off the plan. He said that one of the real benefits of buying off the plan was that the price would be “locked in”, without their having to settle for one and a half years, and that they would get capital growth over that time. He said that they could expect 20% in capital growth. There were two reasons for that. Firstly, the building still had to be constructed. The development was originally to be built “through Raptis”, which company had gone into receivership. The ANZ Bank had stepped in to finish the development, and the prices had been reset. Multiplex had been “brought on board” because of the global financial crisis, “and all that sort of stuff”, so that, with the construction time, they could easily get 20% capital growth.
4. They asked about the “development’s competition”. They were told that it would be operated as a five star hotel in the heart of Surfers Paradise, and that the only other five star hotel was the Palazzo Versace which was in Surfers Paradise but “out of the town”. They enquired as to likely room rates and were told that it was in competition with the Palazzo Versace, and that they could expect around $500 a night. It was said that Palazzo Versace was, “up in the mid-thousands”. It was also said that the Hilton development was looking more to the Middle Eastern tourist market, and that it was a “five star service” hotel. When people from places such as Kuwait visited in their hot season, they could get silver service, be picked up from the airport, and have their baggage dropped off at the hotel. Such visitors were often surprised at the absence of services of that kind in Australia. The Hilton development was being marketed to that “high‑end Middle Eastern market”. Mr and Ms Lewis were also given information concerning incoming tourists, Queensland and Surfers Paradise. As to occupancy they were told that there was, at that time, an 80 per cent occupancy rate for five star accommodation.
5. Mr and Ms Lewis were told that there would be a management fee of “33.2 per cent, 33.8 per cent or thereabouts”, a letting fee to manage the apartment which was “13 point something per cent”, a body corporate fee of about $140 a week, and taxes. Those amounts all added up to 47% of receipts. It was said that, “whatever revenue you earn – well, you know, from the room rates … that’s taken off automatically and handed across to us”. They were told that another hotel development known as the “Soul” was on the market at that time. The Hilton development was significantly cheaper than the Soul where units were starting at about $1.8 million. It was also said that the Hilton development would be a fully managed service, so that, notwithstanding the fact that the Lewises were in Western Australia, they would not have to worry about it. It was, “a set and forget type investment in terms of hands-on management”. Mr Hendrick, “continually reminded us how lucky we were to have the opportunity to purchase under $1 million”. They were told that if they could pay a $5,000 holding fee, it would give them a few days to think about it. Such sum would secure the unit but would be fully refundable if they decided not to go ahead. They were told that contracts would not be “subject to finance”. They had concerns about finance as they had only recently completed their house, and had done a substantial amount of further work, so that they were “at the top” of their borrowing capacity against the house. They did not believe that they would be in a position to finance the purchase from their own resources. For this reason Mr Hendrick’s assurance as to positive gearing was important to Mr Lewis. They decided to think about the matter. They had not come to the Gold Coast to purchase an apartment.
6. Between 10 and 13 July Mr Lewis conducted research on the internet, checking the Hilton development and the Palazzo Versace websites. The latter’s daily room rates were between $1,350 or $1,450 and $1,700 for a two bedroom apartment. This led Mr Lewis to believe that the $500 figure for the Hilton had “a level of reality to it”. They otherwise went about their vacation.
7. On 13 July, following a couple of telephone calls from Mr Hendrick, they went back to meet him at the sales office. They had previously told him that they would not be available again until the 13th. At the second meeting both Ms Barlow and Mr Hendrick were present, with Mr and Ms Lewis and their sons. Their sons again went to the play area. The second meeting was similar to the first, although they did not again see the video presentation. They again discussed the building, the costs and the fees. Mr Hendrick repeatedly told them how lucky they were to have the opportunity to acquire the apartment for less than $1 million. Again, the two towers were identified. They were told that in the Boulevard Tower, everything was sold, save for the unit which was being offered to them. In the Orchid Tower all of the apartments were being offered at prices above $1.1 million. A number of the lower level apartments had been sold.
8. One of the key points for Mr Lewis was that he and his wife were at their maximum borrowing level on their existing home. Mr Hendrick stressed that because they would not have to pay for some time, and because the prices had been recently set to reflect the global financial crisis, they could expect a 20% capital growth. He asked if they had arrangements for finance. They said that they had a mortgage broker in Perth whom they had used in the past. Mr Hendrick said that if they had difficulty getting finance in Perth he would be able to put them in touch with Surfers Paradise banks which had special package rates for the Hilton development. A 10% deposit was payable within 14 days of signing the contract. Mr and Ms Lewis did not have that amount available, and so they discussed the possibility of a bank guarantee. They said that they did not want to put their property at risk. Mr Hendrick told them that they could provide, “a deposit bond, which didn’t tie up your property”.
9. Mr and Ms Lewis were told that the apartment was not, “going to last long”. It was again suggested that they pay a $5,000 holding fee to give them time to return to Perth in order to see if they could arrange finance. They decided to do so. Mr Hendrick told them that in Queensland they needed to use a solicitor for the settlement of the contract and gave them a list of lawyers. The first name on the list was Nelson Wockner from Wockner Legal Services. Mr Lewis said that he would be satisfactory. Mr Hendrick put them in contact with Mr Wockner and arranged a meeting for 15 September at 10 am. Although Mr Lewis said “September”, he probably meant “July”. They were flying back to Perth on that day.
10. In his evidence‑in‑chief Mr Lewis was then taken to Tab 5 in exhibit 1, the tender bundle of documents. That document is an email from Mr Lewis to Mr Troy Cameron who was the Lewises’ mortgage broker. The email is of considerable importance in this case as it seems to set out Mr Lewis’s understanding of this project as derived from his discussions with Mr Hendrick. I shall therefore set out its content in full:

Hi Troy,

As discussed Mia and I are considering purchasing a Strata Titled apartment in Surfers Paradise. There is a new 5 star Hilton Hotel and Residences development going up. The apartments are for purchase to live in or rent out either through the Hilton or privately. If going through the Hilton the apartment are treated as an extension of the hotel with all of the same services. The development is currently under construction by Brookfield Multiplex and ANZ are the financier. Nearly 80% of the apartments have been sold. There are two towers. The first “The Boulevard Tower” is 32 levels and is due for completion late 2010 and the second “The Orchid Tower” is 57 levels and due for completion mid to late 2011. The complex will comprise of around 169 hotel rooms and 410 apartments. At least half the apartments are likely to be owner occupied. The project had been on hold as the developer “Raptis” has gone in to receivership. The project has now appointed Brookfield Multiplex as the developer and construction is now well underway. See the attached link below and the BMC/ANZ media release.

http://www.surfersparadiseresidences.com/

This will be the only 5 star hotel in the centre of Surfers Paradise. The only other 5 star hotel “Versace” is out near Sea World approx 10min from the centre of Surfers Paradise.

The apartment we have made an offer on is on level 32 of The Boulevard Tower. This is the top level of this tower. The agreed price is $932,000.00 including the furnishings to the Hiltons requirements. It is 107sqm. I have attached a floor plan for your information.

We have paid a $5K fully refundable holding fee and if we sign contracts then we will have 28 Business Days to come up with the balance of a 10% deposit ($88,200). There is nothing further to pay until construction is complete (late Dec 2010).

I have been crunching the numbers and this appears to be a good positively geared investment. This is based on the following calculations.

Assume an average nightly room rate of $550/night with a 70% Occupancy Rate (256 days/year). Surfers Paradise is currently sitting at around 80% and I am confirming this data via independent reports.

• Income- $140,800

Less

• Hilton Management Fees @ 47% (13.2% Letting Fee & 33.8% Services Fee) - $66,176

• Body Corporate Fees@ $140/week - $7,280

• Rates (no land tax in QLD) - $1,800

• Loan Repayments (P&I $970K@ 5.11%) - $63,276

I have checked with the other 5 star hotel Versace and their current rate for a 2 bedroom apartment currently is $1,300 per night and this is the low season! Any improvement on the assumed $550/night is more money in the bank so to speak.

Mia and I currently have a combined income of $237K ($35K Mia).

Our house was valued last Sept by the bank at around $970-980K when we took out the loan to finish off the house. I assume you have that on file. Now that the house is completely finished I would suggest it is worth well over $1M however the bank will decide this one!!

Current loans are:

House - $792K (current repayments $4.9K per month)

Car Lease 1 $25K (current repayments $677 per month)

Car Lease 2 $45K (current repayments $777 per month)

I have attached a copy of our current budget for your info.

I have also attached a copy of the form we have signed today and a depreciation schedule. I also have a copy of the Hilton Management Agreement however this is only in hard copy.

Let me know if you need any further information.

Regards,

1. The media release is also at Tab 5 of exhibit 1. It demonstrates that the ANZ Bank, Brookfield Multiplex, the Gold Coast City Council and Hilton Hotels were supporting the project.
2. Concerning the figures which appear on the first page of the email Mr Lewis said that they had been told that the figure of $500 to $550 per night would be the average room rate. They had checked the room rate for the Palazzo Versace which, in the email, he identified as $1,300 per night for a two bedroom apartment. He said that Mr Hendrick had indicated that five star apartments had about an 80% occupancy rate. Mr Lewis discounted this to 70% in order to do his calculations, yielding an annual income of $140,800. He then calculated the management fees on the basis of the figures provided by Mr Hendrick and the other outgoings. He had also worked out the annual cost of borrowing from the ANZ Bank. He concluded that income from the unit would adequately cover its expenses. He was then taken to a “budget” which was attached to the email. It appears to be a household budget for the Lewis family. It shows an excess of income over expenses of $23,900.26. It is surprisingly detailed.
3. There is some inconsistency in Mr Lewis’s evidence as to the information provided concerning room rates. In giving his evidence concerning the first meeting, he said that they were told that the room rate would be “around $500 a night” (ts 23 l 11; ts 24 l 24). When asked about his calculations (in which he adopted the figure of $550) he said that they had been told, “… in the order of 500, 550 thereabouts on average nightly room rate.”. Mr Hendrick said that Ms Barlow had offered the figure of $1,000, but that he had offered the more “conservative” figure of $500 (ts 143 ll 1 – 4). The matter is of some importance. It may go to the accuracy of the evidence of the relevant witnesses. It may also go to the question of reliance. I should add that Ms Lewis said that they were given the figure of $500 (ts 85 l 28). The Lewises do not plead that the representation as to room rates was misleading or deceptive, but it must have been a significant element in calculating the alleged representations as to positive gearing and, perhaps, capital appreciation.
4. Mr and Ms Lewis and Mr Hendrick met Mr Wockner on 15 July. They met at the sales office. Ms Barlow also attended. Mr Wockner had a “guide” to the Hilton development and seemed to be familiar with it. He took them through it. Ms Barlow then produced a bundle of contract documents, a disclosure statement and body corporate documents. Mr Hendrick and Ms Barlow asked Mr and Ms Lewis to sign the documents in the presence of Mr Wockner. The Lewises said that as the agreement would not be subject to finance, and as they had not yet organized finance, they could not sign them. They asked Mr Hendrick and Ms Barlow to give them some time to consult with Mr Wockner privately. In their private meeting, Mr Wockner advised them not to sign the documents at that time, but rather to take them away and read them. He also reminded them that if executed, the contracts would not be subject to finance. They should therefore make sure that they were “finance proof” before they signed them. The meeting lasted for only half an hour or 45 minutes. The documents were not signed on that day. Mr and Ms Lewis took them back to Perth.
5. When they returned to Perth they contacted Mr Cameron who, a couple of days later, came to their home to discuss the matter with them. He subsequently sent them a “discussion paper” which appears at Tab 8 of exhibit 1. It is not entirely clear whether the heading “Loan Requirements” refers to the requirements prescribed by Mr and Ms Lewis, or whether such requirements reflected options which Mr Cameron knew were available from the ANZ Bank, with whom Mr and Ms Lewis wished to deal. It seems that he recommended that there be two loans: one to cover the deposit, with repayment of interest only for the first five years of a thirty year term; and the other to cover the balance of the purchase price, with the same arrangements as to repayment. Mr Cameron subsequently discovered that lenders were not prepared to lend on Gold Coast properties at lending ratios above 80%.
6. At this time Mr Hendrick was “continually on the phone” and was sending them:

… emails with brochures and just general information on what was happening on the Gold Coast, calling us every couple of days to see if we had signed the contracts and telling us that the sellers were really keen to get the contract signed because it was the last apartment that now remained unsold.

1. He had previously mentioned to them that they might have difficulty in getting finance in Western Australia because lenders there were not familiar with the Gold Coast market. On or about 21 July, Mr Lewis raised with Mr Hendrick the possibility of contacting the bank manager from Westpac in Surfers Paradise. Mr Hendrick had previously suggested that he might be able to assist in contacting possible financial sources on the Gold Coast. Mr Hendrick suggested that they contact a Mr Heath Mohi who was with the Surfers Paradise branch of Westpac. Mr Mohi was Mr Hendrick’s own personal banker and a good friend who knew the Surfers Paradise market, and had special deals for the Hilton development. At Tab 7 of exhibit 1 is an email sent by Mr Lewis to Mr Mohi on 21 July 2009. Again, because the document presumably reflects Mr Lewis’s state of knowledge at that time, I shall set it out in full:

Hello Heath,

Further to our telephone discussion last week Gary Hendrick of Ray White suggested we discuss our finance options with you. My wife Mia and I are considering purchasing a Strata Titled apartment at Lot 13206 “Boulevard Tower” 3113 Surfers Paradise Boulevard Surfers Paradise QLD 4217. This is in the proposed new 5 star Hilton Hotel and Residences development going up.

The apartment we have placed a gold on is on level 32 of The Boulevard Tower. This is the top level of this tower. The agreed price is $932,000.00 including the furnishings to the Hiltons requirements. It is 107sqm. I have attached a floor plan for your information.

We have paid a $5K fully refundable holding fee and if we sign contracts then we will have 21 Business Days to come up with the balance of a 10% deposit ($88,200). There is nothing further to pay until construction is complete (late Dec 2010).

I have been crunching the numbers and this appears to be a good positively geared investment. This is based on the following calculations.

We have assumed a conservative position in calculating the properties rental income. We have based our calculations on average nightly room rate of $550/night with a 70% Occupancy Rate (256 days/year).

• Income - $140,800

Less

• Hilton Management Fees@ 47% (13.2% Letting Fee & 33.8% Services Fee) - $66,176

• Body Corporate Fees@ $140/week - $7,280

• Rates/Taxes - $1,800

• Loan Repayments (P&I $970K @ 5.11%) - $63,276

I have checked with the other 5 star hotel Versace and their current rate for a 2 bedroom apartment currently is $1,300 per night and this is the low season! Any improvement on the assumed $550/night is more money in the bank so to speak.

Mia and I currently have a combined income of $237K ($35K Mia).

We currently owner/occupy a property (with assistance from the bank) in Woodvale 6026 Western Australia. The property is a new construction (completed Sept 2008) in an established suburb 19km north of the CBD. We suggest the value of the property is between $1M to $1.1M. The property was valued last September at approx $980K by ANZ immediately following construction but prior to any internal and external finishes/improvements being undertaken. The property is now complete with a high standard of finish.

Current loans are:

Property- $792K (current repayments $4.9K per month)

Car Lease 1 $25K (current repayments $677 per month)

Car Lease 2 $45K (current repayments $777 per month). This is covered by a $15K p/a car allowance.

We have attached a copy of our current budget for your Information.

We have also attached a copy of the form we have signed to place a hold on the property in Surfers Paradise. We are in receipt of the contract documents from the seller and are undertaking a review of these documents.

We would like you to confirm whether Westpac would considering providing finance for us to purchase this property? We expect that the total funds we require will amount to approx $980K (which includes stamp duty/legal fees/registration etc). We need to know what the maximum borrowing limit is against this property. Can you also please provide a quote for a long term Deposit Bond for an amount of $93.2K to satisfy the contractual requirement for a 10% deposit?

Our finance broker in Perth has made some investigations and was advising us that lenders are only prepared to lend up to 60% against this property. Given this is a strata title we would expect this to be upwards of 80%.

If you need any further information please give me a call on 0420 308 063 to discuss this further.

Regards,

1. Originally, the Lewises were considering the purchase of a unit in the Boulevard Tower. Eventually, they agreed to acquire a unit in the Orchid Tower. Mr Lewis was asked to explain how this “switch” had come about. It seems that Mr Mohi took some time to respond to their enquiry. At that time, the Lewises were under pressure to sign the contract so that Orchid Avenue could advertise the sale of all units in the Boulevard Tower. Mr Hendrick said that the $5,000 holding deposit was only effective for a period of some days. As a result of those matters they decided to investigate the possibility of acquiring a unit in the Orchid Tower. On or about 30 or 31 July 2009 Mr Lewis had a conversation with a Mr Jamie Ogilvie, apparently from Orchid Avenue. Had they agreed to buy the unit in the Boulevard Tower, settlement would have been due in October 2011. Mr Ogilvie indicated that the Orchid Tower would not be completed for another year, so that Mr and Ms Lewis would have the benefit of an extra year of capital growth. It is common ground that evidence of Mr Ogilvie’s statement is not admissible in these proceedings. It hardly matters. Mr Lewis said that he was willing to change from the Boulevard Tower to the Orchid Tower because it gave him more certainty and an additional window of time to allow for capital growth. Having regard to subsequent aspects of Mr Lewis’s evidence, it seems that Mr Lewis saw the anticipated capital growth as important in his quest to raise sufficient finance to enable him and his wife to acquire the unit. In the course of giving his evidence concerning this matter, Mr Lewis said:

So to buy time essentially we sent a whole lot of questions off back to the seller.

As I understand this statement, it related to the period from 21 July 2009 until about 21 August 2009, during which time the Lewises were under pressure to sign the contract and were awaiting a reply from Mr Mohi as to finance. I understand the “questions” to be the matters identified in the schedule at Tab 38 of exhibit 1. They seem to have arisen out of the documents given to the Lewises on 15 July 2009, relating to the proposed acquisition of the Boulevard Tower unit. Tab 9 of exhibit 1 contains a letter dated 29 July 2009 from Three Sixty to Mr and Ms Lewis. The letter enclosed the conveyancing documents for the sale and purchase of the unit in the Orchid Tower. It seems likely that Mr Lewis’s “questions” were sent prior to the receipt of those documents. However it seems to be common ground that the contracts were in substantially the same terms.

1. There is a further difficulty with Mr Lewis’s evidence. He said that the “swap” of units occurred after he had spoken to Mr Ogilvie on 30 or 31 July 2009. However the letter of 29 July refers to the Orchid Tower unit, so that the proposed “swap” must have been arranged on or before that date. The matter is of little moment other than in connection with any assessment of the reliability of Mr Lewis’s recollections.
2. Mr Lewis was taken to Tab 10 of exhibit 1, an email dated 7 August 2009, and an attachment sent by Mr Hendrick. The email is addressed to Mr Lewis and reads:

I thought you might like to see the attached investment scenario on a higher priced unit than yours, it was done for a client this week who bought another unit from us.

The attached document (the “Jade document”) was prepared by Jade Financial Solutions. This document is the document referred to in para 4 of the amended statement of claim. At a later stage I shall discuss the Jade document in some detail.

1. I have previously referred to the questions which Mr and Ms Lewis sent to Orchid Avenue as a delaying mechanism. On 6 August they received a response through Mr Wockner. Mr Lewis said that the response was “pretty disappointing”. The document at Tab 38 of exhibit 1 contains both Mr Lewis’s questions and Orchid Avenue’s responses. At about this time Mr Lewis sent an email to Mr Hendrick, suggesting that they would have to assess their options, although the document is not in evidence. Subsequently, they had various conversations. Mr Lewis asserted that Mr Hendrick was concerned that they might “walk away” from the purchase. He tried to persuade them to continue with it. Mr Hendrick sent them various emails containing information which might have re‑inforced the apparent attractiveness of acquiring the unit, the last of which documents were the Jade document and covering email. As that email suggested, the Jade document was prepared for an unknown person and concerned a different unit. The document is of some importance to the Lewises’ case. I shall therefore attach a copy of it to these reasons, including the covering email, as attachment A. I draw particular attention to the disclaimer at the foot of p 1.
2. Mr Lewis was asked what he “thought” about the email. He said that it was:

… validation of what Gary had been telling us about the apartment being positively geared, and that we wouldn’t have to put in any funds.

… (the document demonstrated that the) tenant was paying 87% of the costs and the tax man, 13%.

… (that p 3 showed that the) tenant was paying 92% and the tax man, 8%, and you – meaning us, was zero.

He considered that the scenario addressed in the Jade document seemed to be “a reasonable match” with their proposed transaction. He said that a transaction of about $1.1 million appeared to be:

… consistent with the apartment that we were purchasing, given that we were purchasing it for $932,000. And if we were expecting the 20% capital growth when we signed the contract – when we had to pay the money, it would be approximately a $1.1 million apartment.

1. Mr Lewis seems not to have considered the possibility that the unknown purchaser might also have been relying upon such capital appreciation. The notional gross rental in the Jade document was $131,400, which Mr Lewis considered to be roughly consistent with the advice given by Mr Hendrick concerning likely room rates. I am not sure that this was a reasonable conclusion. Mr Lewis had calculated notional gross rental in the amount of $140,800 and his outgoings, including loan repayments and interest at $138,532. Thus his margin was a little over $2,000. The estimated expenses in the Jade document were lower than that produced by Mr Lewis but, again, the margin wasnarrow, at least in the absence of the estimated tax credit. Mr Lewis seems not to have seriously investigated the availability of such credit to him and Ms Lewis. The “bottom line” on p 1 showed “cost” or “(income)” to the investor. Mr Lewis understood the figures to suggest that he and Ms Lewis would be:

Earning an income. So it was positively geared. We didn’t have to spend any of our own money to put into this.

He said that the assumed interest rate was slightly higher than that which he had derived from the ANZ website.

1. He discussed the document with his wife. At that stage they had not progressed very far in obtaining finance. He said that the overall effect was to reinforce their view that they should, “do what we can to get this apartment because it would pay for itself”. He said that they subsequently submitted an application for finance to Westpac and received a conditional approval, subject to valuation and evidence of income. Mr Lewis understood that they were given an unconditional approval on or about 18 September. They signed the contracts on 21 September. Other evidence suggests that the circumstances surrounding any application for finance were rather more complicated than Mr Lewis suggested.
2. Mr Lewis said that had he not been told by Mr Hendrick that the unit would be positively geared, he would not have signed the agreement:

We didn’t have the capacity. We were fully committed on our own property. This was why this opportunity was good because it was going to be self‑sufficient. We didn’t have any other funds to put into it.

He also said that had he not been told by Mr Hendrick that there would be a 20% capital growth he would not have signed the agreement:

Because [of] the capital growth - we could only borrow 80%, so the capital growth was – when we had to pay for it in 2011 or when it was finished, the capital growth would cover that 20%. So our borrowing would have been what our purchase price was. So we wouldn’t have had to pay.

Thus it seems that the alleged positive gearing representation and the alleged capital appreciation representation were closely linked, at least from the Lewises’ point of view.

1. Mr Lewis was asked whether the enquiries which he had made caused him to disregard the information given to him by Mr Hendrick. Mr Lewis said that such enquiries had “validated” Mr Hendrick’s information. In particular, he said that his investigation of the Versace room rates and the rates in the Jade document supported the figures given by Mr Hendrick. Mr Lewis also said that:

The contracts they gave us had the fee breakdowns in it. So that was correct. It just reinforced what we had been told.

1. There is some difficult with this evidence. As far as I can see, there is no documentary evidence of any application to Westpac, in August or September 2009, for finance covering the purchase price of the unit. There is a finance application dated 21 August 2009 for the purpose of refinancing the Lewises’ existing mortgage over their Perth house. At a later stage I shall say more about that application. There is also an approval dated 6 September 2009. These documents are at Tabs 11 and 12 of exhibit 1 respectively. There is a loan application dated 7 August 2011, relating to the acquisition of the unit, but there is no documentary evidence as to the outcome.
2. Mr Lewis was cross‑examined in some detail about his employment. He is an associate director of the “Appian Group”, a group of companies which is involved in property development. As I understand it the group manages major construction projects, mainly for “clients”, presumably meaning the owners for whom buildings are being constructed. Most are government agencies. The group has managed various substantial projects. Mr Lewis’s current curriculum vitae is exhibit 4. He was taken to a number of entries in it, including his “special fields of competence” on p 1. The document indicates that his competence is in the following areas:

• land acquisition and assembly for major projects;

• statutory approvals and authority liaison;

• contract management for major projects;

• design management;

• construction management;

• security and risk management consultation;

• operational procedure development; and

• holder of the security agent’s licence on behalf of Appian Group.

He agreed that his areas of competence include contract management, but distinguished such experience from experience in making contracts. However he agreed that he had some experience in that area. Under the heading “Overview of Experience” the CV asserts that he has worked in the construction industry for 22 years, including 16 years in project and general management roles, and that he has:

… excelled in the management of significant major projects through undertaking diverse tasks from project definition and business case development, design and stakeholder management, project approvals and major land amalgamation processes, through to contract formation and negotiations, contract management and operational process development phases of major projects.

1. He was originally an electrician but his background is “security”, particularly electronic security. He was engaged in preparation of the business case for the Metropolitan Prison Precinct in Perth, particularly in working out how the security environment worked. He was referred to other parts of the document and was asked whether or not he agreed that his experience as set out in the document:

… would suggest that you have a deal of talent and a deal of experience in being methodical, careful and diligent when it comes to analysing a project … .

Mr Lewis agreed and also agreed that he had deployed those talents in relation to the proposed purchase of the unit, “to the extent of the information I had available”. He had read the contracts and, “validated what was told to me”, by checking the figures given to him. He also sought to assess the likelihood that the project would be successful, “based on the information I was given”. He agreed that he understood the need to record important matters, and that in the present case, he had done so in emails and notes. He did not recall keeping notes of the alleged oral representations. He agreed that he knew that things said in the course of negotiations were not always reliable.

1. When he met Mr Hendrick he understood that he was a real estate agent, and that he had an interest in selling something. He agreed that he had told Mr Hendrick about his involvement in a hospital project, and that he had been dealing with Brookfield Multiplex in Perth. In general discussion he told Mr Hendrick that he was an electrician. He said in evidence that he was proud of the fact that he had, “come up through the ranks, so to speak to where I am now”. He agreed that before he spoke to Mr Hendrick, he had heard that a contract had fallen through for a unit in the Boulevard Tower and the price. Mr Hendrick repeated that information. He had particularly focussed on Mr Hendrick’s remarks about positive gearing and capital growth. He understood that the term, “positively geared” meant that, “it would pay for itself”.
2. He and his wife would have to borrow in order to buy the unit, and they were geared to the maximum amount available against the security of their house. He discovered from his mortgage broker that there was no point in applying for a bank loan because, “banks weren’t going to borrow an 80% limit”. The broker also said that the ANZ Bank would only lend up to 60% of valuation for units in the Hilton development. He agreed that if they had borrowed 60% of the sale price of $932,000, “there wouldn’t have been sufficient capital growth”, meaning that they could not have found the balance of the sale price. At p 43 l 44 to p 44 to l 37 the following passage appears:

Yes. And you knew, didn’t you, that if something was to be paying for itself it would depend upon the amount of equity you put in; in other words, the amount of money you put into it? --‑ If the capital growth was there – and this was the discussions we had, if the capital growth was there, we wouldn’t have to put in the money. The 80 per cent loan value of when the apartment would settle would have covered that, so we may have had to – I think in the stuff that Troy gave us that showed $54,000 or something, they had worked out on his calculations from our discussion paper it had about a $54,000 amount which would have been manageable over two years.

You knew, didn’t you … that if you were going to buy this and it was to pay for itself, that fact would depend on how much you put into it ‑ how much money you yourself put into it? ‑-- How much - - -

That’s one of the factors? ‑-- No.

It’s not? --‑ How much equity we would have against it.

Did you think you would not have to put any money at all into it? -‑‑Very little, if any. Yes.

Sorry. What do you mean by very little? ‑-‑ Again, the initial discussion paper we got from Stratique Finance, Troy Cameron, indicated a $54,000 shortfall from memory, thereabouts.

Yes? --‑ So we may have had to put in something but the information we were told that we wouldn’t have to put in anything, and we were expecting not to put in anything.

It would also depend upon the amount that was borrowed, wouldn’t it? Whether it would pay for itself, how much you borrow and at what rate? --‑ Yes.

Right. It would depend upon the income from the rentals, wouldn’t it? --‑ Correct.

It would also depend on the level of the outgoings? --‑ Correct.

It would also depend in part upon the tax regime that applied to you, at what level of tax you were paying? ‑-- Correct.

Right. Anything else? -‑‑ Basically just what the costs and – the likely costs and the likely expenses.

1. Mr Lewis said that he had told Mr Hendrick that they could not pay any part of the deposit from their own funds. He could not recall whether he had ever actually said to Mr Hendrick that he would have to borrow 100% of the purchase price. He did not show Mr Hendrick the budget which he had prepared. He agreed that he knew that the mere fact that a real estate agent made a comment about a property did not mean that he could rely upon it. He also agreed that given his own training, skills and experience he would not normally rely on something said by a real estate agent. He would rather do his own work. He agreed that in July 2009, he knew that the Boulevard Tower was to be completed in December 2010. He also knew that the Orchid Tower was to be completed about one year after that. He understood Mr Hendrick to have said that there would be a 20% capital growth over an 18 month period. He was then asked about the “factors” which might affect the achievement of such capital growth. He identified time, demand and interest rates.
2. He was then asked if he and his wife had raised the question of room rates with Mr Hendrick. He said that they had. It was a logical question to ask in order to ascertain the income from the unit. This was the beginning of his inquiries concerning any possible acquisition. The figures quoted by Mr Hendrick and Ms Barlow for the Versace Hotel room rates were substantially below the rates which he discovered online. In searching for those rates, he was trying to validate the information which he had been given. These rates were nightly rates for a two bedroom apartment. He also used an online calculator to calculate relevant figures concerning any loan. He calculated that he would have to borrow $970,000, of which $932,000 would be for the purchase price. The balance was estimated stamp duty. He then checked online to identify the terms upon which such an amount could be borrowed. In so doing, he was seeking to determine the feasibility of the project. It was suggested to him that he understood that anything Mr Hendrick said as to his capacity, and that of his wife to make the investment would be unreliable because Mr Hendrick was largely ignorant of the Lewises’ personal circumstances. Mr Lewis disagreed with that proposition. On the night of 13 July 2009, after the second meeting (of which Mr Lewis did not keep notes), Mr Lewis sent to Mr Cameron the email which appears at Tab 5 of exhibit 1.
3. It was put to him that the reference to, “crunching the numbers” suggested that he had been crunching the numbers since 10July. Mr Lewis disagreed, saying that he had done so on the night of the 13th. He agreed that his conclusion that the proposal looked like, “a good positively geared investment”, was based upon the information included on p 1 of his email to Mr Cameron, including the assumed nightly room rate of $550, a variation from the figure provided by Mr Hendrick. The occupation rate was also different from that provided by Mr Hendrick from the “independent report” (the “Midwood report”) Mr Hendrick was to supply a copy of this report. The income figure of $140,800 was derived by Mr Lewis using the nightly rate of $550 and an occupancy rate which he had chosen for himself. He said that the information concerning body corporate fees, rates and information concerning land tax all came from the “agents”, presumably Mr Hendrick and Ms Barlow. The loan repayments were derived from Mr Lewis’s own analysis. He said that his analysis led him to the conclusion that it was a good, positively geared investment. It was suggested to him that his own calculations were the basis for this view, and not anything that had been said to him by the agents. He disagreed.
4. With respect to the budget (at Tab 5 of exhibit 1) which was forwarded to Mr Cameron, Mr Lewis said that it was an “ongoing” yearly budget which had not been prepared specifically for the purposes of the proposed investment. Mr Lewis agreed that it was, “quite detailed”. It was suggested to him that this epitomised:

… the way in which you approached this proposal to buy a unit: you wanted to satisfy yourself based on your own analysis.

He replied:

I did analysis based on the information I had to satisfy myself … I wouldn’t go into something if I didn’t believe that it would work out.

1. He agreed that he trusted his own work, his own analysis and his own judgment. He expected a decision from Mr Cameron as to whether he and his wife would be able to borrow the money. Mr Lewis agreed that he had not told Mr Wockner, his solicitor, about the representations which he now alleges were made by Mr Hendrick. Mr Lewis agreed that the extra time for settlement of purchases in the Orchid Tower would have had an impact on whatever capital growth was available, and that occupation rates and interest rates might change. He said that he did not appreciate those matters at the time.
2. On 20 and 21 July 2009 Mr Hendrick and Mr Lewis exchanged emails. They are at Tab 6 of exhibit 1. On 20 July Mr Lewis emailed to Mr Hendrick as follows:

Are you able to provide a copy of the following documents as soon as possible?

• Valuation Report for the development (the Form 30(c) Warning Statement clearly identifies that we should obtain an independent valuation of the property. There is no doubt that one would already have been prepared for the Seller/Developer). A copy of this will save us time having to obtain a new property valuation.

• Midwood Queensland Investment Report (you advised previously that you would provide a copy of this).

• Confirmation that Hilton has entered into the 20 year management agreement for the development as reported in news articles (surely there is something on Hilton letterhead).

Mr Lewis agreed that in seeking the valuation obtained by Orchid Avenue, he was trying to save time and money. He agreed that confirmation that Hilton was committed to the project for 20 years was one of his most important concerns.

1. In the email Mr Lewis then referred to discussions with Mr Cameron and identified areas of concern, particularly the extent of any borrowing which would be available, using the unit as security. Mr Lewis suggested that lenders would discount any valuation by the “$32K rebate”, further reducing the borrowing capacity. He said that lenders were not “looking favourably” on the Gold Coast and were only willing to lend up to 60% on Gold Coast properties. He enquired as to whether Mr Hendrick was aware of any lenders “having a specific lending guideline for this development … .”.
2. On 21 July Mr Hendrick replied, attaching, “some pages from the Midwood report February 2009”, and indicating that he was awaiting a copy of the May 2009 report, “ which show, the accommodation rates increasing back up to an average 74.7% across all types of accommodation units.”. He also included material concerning changes to air services to the Gold Coast Airport, including, “larger planes for international visitors”. He asserted that:

… what you are investing in is the first 24 hour room service 5 star Hotel to be located in the heart of Surfers Paradise. The Westpac and ANZ will lend up to 80% for Australian purchasers conditions apply of course. When I receive the updated report hopefully tomorrow I will send the necessary pages.

Also check out the Gold Coast Airport website below for more routes to be announced.

Mr Lewis agreed that according to his email of 20 July, he was to meet Mr Cameron on the following Monday to confirm, “our discussions and his investigations”. In cross‑examination he said that the investigations involved his looking for finance. Mr Cameron had told him that lenders were not looking favourably on the Gold Coast at that time. Mr Lewis understood this to be a reflection of the market situation. He said:

That’s why we were buying it at what we were told was the low end of the market, because the building had gone into receivership.

It was then put to him, “Low end of the market, with the GFC in full flow?” He replied “Correct”. He agreed that the effect of Mr Cameron’s advice was that lenders were lending at 60% of valuation instead of 80%. It was put to him that the email of 20 July was, “a perfect time”, to obtain confirmation from Mr Hendrick as to the representations allegedly made by him. Mr Lewis said that the purpose of the email was to obtain information rather than to confirm other information. He agreed that he understood the Midwood report to be an independent report in the sense that it did not come from Mr Hendrick or his principals. He also understood that the other documents sent by Mr Hendrick were from independent sources. He said that he did not understand Mr Hendrick’s suggestion, that Westpac and ANZ were lending at up to 80%, to be inconsistent with Mr Cameron’s indication that the ANZ in Western Australia would not lend at 80%. He thought that there would be a difference between what the ANZ in Western Australia would do, and what the ANZ in Surfers Paradise would do. He said that Mr Cameron had forewarned them that they would probably have to get finance through lenders on the Gold Coast.

1. On 21 July 2009 Mr Lewis sent an email to Mr Heath Mohi of Westpac Bank at the Gold Coast, apparently at the instigation of Mr Hendrick. It is at Tab 7 of exhibit 1. I have previously set out the terms of that document. Mr Lewis said that he did not believe, at that time, that he would not be able to get finance, or that the Westpac application was his last chance. He said that it was rather, “the next stage of getting finance”. He agreed that the reference to “crunching” the numbers indicated that he had been making his own assessment as to whether this was a worthwhile investment. His conclusion, as he put it to Mr Mohi, was that, “… this appears to be a good positively geared investment”. The excess of income over outgoings would be about $2,268. It was suggested to him that such amount was, “a very, very skinny investment”. Mr Lewis said that he did not know. He had been conservative with respect to occupancy rates and income.
2. I have previously referred to a discussion paper prepared by Mr Cameron (at Tab 8 of exhibit 1). Mr Cameron’s proposal was, as Mr Lewis agreed, “geared to the hilt”. The net effect of the figures seems to have been that they would need an additional $54,651 in order to fund the deposit and acquisition expenses. Subsequently, Mr Lewis had a conversation with Mr Jamie Ogilvie representing the vendor. As I have previously explained, this conversation led to the “swap” of the Boulevard Tower unit for a unit in the Orchid Tower. It was to be completed later, so that Mr Lewis would have more time to find the funds. The unit was not a penthouse unit (as was the unit in the Boulevard Tower), and it was smaller than the Boulevard Tower unit. However both were two bedroom units. Mr Lewis was asked whether it occurred to him that these differences might have had an impact upon the ability to self‑fund the project and its capital growth prospects. Mr Lewis denied this, saying that the Orchid Tower was the “premium tower”. It had all of the services and the price was the same. It was said to be a “like swap”. The listed price was $15,000 more than that of the Boulevard Tower unit, but Mr Ogilvie said that he would see if it could not be supplied at the same price. In the event, this occurred. Mr Lewis agreed that the statements made to him by Mr Hendrick had related to the Boulevard Tower unit, and not to the Orchid Tower unit.
3. The witness was then taken to Tab 38 of exhibit 1, to which I have previously referred. This document contains comments by Mr Lewis upon the terms of the contract for the Boulevard Tow unit, and responses from Orchid Avenue. Those responses suggest that when they were prepared, Orchid Avenue knew that the Lewises were to acquire the Orchid Tower unit, and not the remaining Boulevard Tower unit. Thus it seems that Mr Lewis prepared the questions prior to the swap, but that they were answered after the swap. The questions raised by Mr Lewis concerning the terms of the contracts are of interest largely because of the terms which he did not question. Some of them appear to be quite inconsistent with the Lewises’ case, and so one might have expected Mr Lewis to have questioned them.
4. Clause 4.4 of the unit contract was a recital of the intention that stage 2 of the project comprise a residential development on the “residential land”, a retail/commercial development on the “retail land” and a hotel development on the “hotel land”. The three parcels of land were identified elsewhere in the contract. The Tab 38 document suggests that Mr Lewis was concerned that land described as “lot 2” was not referred to in the unit contract. Orchid Avenue pointed out that the clause was merely a reiteration of intention. I doubt whether this aspect of the evidence has any relevance at all, save that Mr Lewis seems to have read the relevant clause, understood it and questioned it. Concerning cl 13.1, Mr Lewis sought to ensure that the unit to be acquired in the Boulevard Tower was a penthouse unit. Mr Lewis expressed a similar concern arising out of clause 13.2. Orchid Avenue responded, pointing out that the Lewises were no longer acquiring that unit. Again, the matter is relevant only to the extent that it shows that Mr Lewis carefully considered the terms of the contracts.
5. Clause 25.7(a) recited the intention that Hilton operate the hotel but indicated that it might be operated by a different operator, or using a different brand. Mr Lewis asserted that it had been represented to him that Hilton would be the operator for a period of 20 years. He asked that the clause be amended to reflect this arrangement. Orchid Avenue refused to do so. Clause 25.7(g) recorded that the purchaser had not relied upon any statement or representation regarding the management of the unit development, under any brand or by any entity. Mr Lewis asserted that:

In order for this clause to stand the Seller must provide documentation that substantiates all of the representations that have been made to date in respect of the operator.

The developer indicated that this was, “Not agreed.”. Again, it seems that Mr Lewis had read and understood these clauses and questioned them.

1. Clauses 29.1 and 29.2 provide:

29.1 The contract sets out the entire agreement between you and us, and supersedes all prior negotiations.

29.2 You warrant that you have not relied on any statement made by us (other than one contained in the contract), nor any real estate agent or other consultant appointed by us, and that you have signed the contract after making your own investigations and enquiries. You agree that you do not have any right to make any objection on the ground of any such alleged statements.

Mr Lewis did not take issue with those clauses. However he took issue with cll 29.5 and 29.6 which relate to amendments to the contract, suggesting amendments to which the vendor did not agree.

1. Clause 31.2 provides that:

[The vendor] may elect not to proceed with one or more of the stages in the development.

Mr Lewis commented:

For clarity we request the seller to confirm which stages they have committed to. We are buying into a development that needs to generally reflect what has been represented, i.e. 2 towers, including hotel and 5 star services.

The vendor responded that it was only responsible for stage 2.

1. In cross‑examination, the witness was taken to the “special conditions” at Tab 14 of exhibit 1, p 199. Under the heading “No Representations” the following clauses appear:

1.1 Without limiting clause 29 of the contract, you agree that you have not relied on any statement made by us or any real estate agent or other consultant appointed by us except those statements in this contract.

1.2 In particular, you warrant and agree that neither we or any real estate agent who acts as our agent has made any statement or representation to you in relation to:

(a) any potential capital growth of the lot or any other lot in the development; and/or

(b) any expected or projected return from the letting of the lot or any other lot in the development for residential purposes; and/or

(c) the potential for resale of the lot at a profit prior to the completion of this contract.

1.2(sic) You confirm to us that you have made your own enquiries in relation to the matters referred to in this special condition and you are satisfied with your own enquiries in that regard.

Mr Lewis agreed that he had not taken issue with those clauses. The following passage appears in his cross‑examination at ts 67 ll 29 ‑ 33:

Now, can I suggest to you or put this to you, if in truth, Hendrick had said what you now say he said, that is unquestionably the time at which you would have said, “Hang on. You’re asking me to promise something that isn’t true because Hendrick told me this and that and the other.” But you said nothing about that did you? ‑‑- No. I didn’t say anything about that.

It was then suggested to him that he had not said anything because the representations had not been made. Mr Lewis said that this suggestion was incorrect. The following passage appears at ts 67 ll 38 – 39:

And even if they were said to you, you were happy to promise that you were placing no reliance on them. Isn’t that right? ‑-- That’s correct.

1. The witness was then taken back to the Jade document (at Tab 10 of exhibit 1). Mr Lewis agreed that it was clear that the document had not been prepared by Ray White or by Mr Hendrick. He agreed that he had appreciated that fact at the time. He understood that it had not been prepared for him, that it did not relate to his unit, and that it was for a different unit, at a higher purchase price and for a different client. He did not seek to find out about Jade Consulting or Jade Financial Solutions. He noted at the time that the document dealt with a unit valued at $1.1 million as at July 2009. He agreed that it assumed an initial investment of approximately $375,000 and the borrowing of $773,295, with an “equity” of $326,705. The amount of the borrowing was 70% of the purchase price. Mr Lewis agreed that none of these figures matched his own proposed arrangements. He said that he did not, at the time, consider that the scenario under consideration in the Jade document was different from his own. He accepted that he was always going to be borrowing, “a couple of hundred thousand dollars more than this scenario.”. It was pointed out to him that the document assumed capital growth of 4.5% per annum in 2009, and in each of years 1, 2, 5 and 10. It was put to him that having read the document carefully, he must have noticed the capital growth of 4.5% per annum, and that it was inconsistent with the figure of 20% over 18 months. He said that he had looked at the property value, the gross rent and the interest rate, and that the graphs on the table in the document had “stood out”. It was pointed out to him that the capital growth figure was also mentioned in the summary at the top of p 1. He was asked whether he had noticed it, or whether he did not remember whether he had done so. He replied:

No. I don’t – I’m not a financial person. That didn’t quite stick out to me. The things that stuck out to me in this document was the property value, the gross rent and the interest rate.

He was asked:

Not interested in capital growth obviously?

He replied:

Interested in capital growth.

It was suggested to him that:

… it could not have been plainer but that this financial person was suggesting a capital growth rate of 4.5 per cent per annum and nothing remotely like 20 per cent over 18 months.

He replied:

If you look at that, yes.

1. Mr Lewis agreed that he had looked at the gross rental of $131,400, and that this was nine odd thousand dollars less than the figure which he had calculated. The following passage then appears at ts 70 ll 27 ‑ 29:

So lower loan, lower rent, bigger equity, leave aside capital growth for the moment. Alright, now you say you focussed then on the final line which is cost/(income). Is that what you are saying? ‑-- Yes.

And you would know, wouldn’t you, that any figure in brackets like that means a negative? ‑-- No. It said – in here in brackets it said it was income.

Although counsel persisted in putting this proposition to Mr Lewis, and returned to the matter at a later stage, I consider that Mr Lewis was correct in his reading of that part of the document. He was then taken to p 2 of the document. It shows projections over 25 years. The entry for the first year shows interest of $40,134 and expenses of $50,506, a total of $90,640, with rent amounting to $87,614, a tax credit of $13,013 and a cash contribution by the owner of $9,987. He agreed that the expenses totalled more than the rent, thus creating the need for the contribution of funds by the owner.

1. At ts 70 – 71, referring to p 2 of the Jade document, counsel pointed out that the total of interest payments and rental expenses was $90,640 and the rental income, $87,614, showing a shortfall of $3,026. A “tax credit” of $13,013 was applied against that amount, yielding a net figure of “‑ $9,987”. Again, I accept that the negative figure shows an excess of income over outgoings for the owner, as opposed to the need for a cash contribution by the owner. This figure is then shown on p 1, for year 1, as “after‑tax cashflow” and, if divided by 52, yields the weekly “income” figure of $192. Thus it seems that at least in the Jade document, any excess of rental income over outgoings depended upon the availability of a tax credit, the basis of which is not explained in that document. Although the Lewises’ counsel sought to explain the tax position, there is no suggestion that Mr Lewis investigated the availability of such a benefit before entering into the contracts, particularly as to its applicability to him and his wife. No doubt there would have been some available deductions, but any income could presumably have been divided equally between Mr and Ms Lewis. Presumably, the outgoings would have been similarly apportioned. Her other income was only about $35,000. However the point is that Mr Lewis seems not to have considered any tax benefit in reaching his decision to buy the unit, save to the extent that it was identified in the Jade document.
2. Mr Lewis agreed that the capital growth rate shown on p 1 of the Jade document (4.5%) was inconsistent with his assumed 20% over 18 months. Counsel suggested that, having seen the document, he could not possibly have continued to think that the figure of 20% was true or reliable. Mr Lewis disagreed. He suggested that:

The capital growth, I think from this, was about trying to sell the place, what the property was going to be ending. We were looking to keep an investment for the long‑term. This was about just the growth that was happening during the construction because it is not an operating entity. Because we were buying at the low end of the market and because we were buying off the plan this was, from my understanding, from when the facility, or the unit, became operational. That 2009 was an operational facility, not something that was under construction for two years prior.

In this answer Mr Lewis seems to distinguish between long‑term and short‑term capital appreciation, at least implying that the Jade document showed short‑term capital appreciation, probably over the construction period, whilst he and his wife were interested in long‑term appreciation, during the construction period and also during the operation of the hotel. However that approach sits uneasily with Mr Lewis’s view that he understood that there would be a capital appreciation of 20% during the construction phase. Indeed, he seems to have been depending upon such appreciation for his finance. Mr Lewis asserted that the Jade document backed up:

[E]xactly what we were told and the purpose of it being sent to us, from my discussion with Gary in the morning, in that morning on the 7th, was that he was sending us this because it reflected what we would be doing.

1. It is a little difficult to accept that Mr Lewis did not note the difference between the allegedly represented capital growth rate and that adopted in the Jade document. It is also unlikely that he would have read that document in the selective way which he suggests unless, of course, he did not consider it to be of any particular importance to his decision. Such a view would be quite consistent with the fact that the document addresses the acquisition of a different unit, by a different person, at a different price, with a different financial arrangement, and was subject to a complete abnegation of any responsibility for its content. It is difficult to accept that it supported the proposition that the Lewises’ investment would be self‑funding or the representation as to capital appreciation. Mr Lewis’s failure to address the family’s tax position suggests that he did not really seek to draw a parallel between the scenario described in the Jade document and the transaction being contemplated by him and his wife. There is no plea that Mr Hendrick made any other representation as to a tax benefit.
2. The witness was taken to Tab 11 of exhibit 1, a Westpac loan application made by Mr and Ms Lewis. The purpose of the loan was said to be to refinance an existing mortgage. Mr Lewis said that the ultimate purpose was to finance the deposit on the purchase of the unit by way of bank guarantee. The total amount of the loan sought was $791,000. Other documents at Tab 11 suggest that this figure represented the balance then owing to the ANZ Bank and secured on the Perth house. The witness was then taken to Tab 12 of exhibit 1 which contains a document headed “Loan Entitlement”. It is dated 6 September 2009. It advises approval of an advance in the amount of $745,600. The witness agreed that he needed in excess of $230,000 more than that figure in order to cover the whole of the purchase price of the unit. He said that he had not seen this document until late 2011 (just before the due date for settlement) when he requested confirmation from Westpac that the loan had been approved. In fact, the cross‑examination and answers concerning those documents may have been based on the confusion which seems to surround Mr Lewis’s attempts to obtain finance. As I have said, the Westpac loan was sought in order to refinance the existing debt owed to the ANZ Bank and was to be secured on the Perth house. The bulk of the funds were, no doubt, to be applied in discharging the ANZ debt. However Westpac also agreed, at some point, to provide a bank undertaking to pay the amount of the deposit on the purchase of the unit, in the amount of $92,300. It may be that such contingent liability was also to be secured by the anticipated Westpac mortgage over the Perth house.
3. At ts 74 ll 19 ‑ 22, Mr Lewis seems to have said that until late 2011 he understood Westpac had approved a loan application for the acquisition of the unit, as opposed to having approved refinancing of the ANZ debt secured on the Perth house and perhaps, having undertaken to guarantee the amount of the deposit pursuant to the unit contract. As the deposit was not to be paid at the time of signing the contract (the bank undertaking being accepted in lieu), the deposit was presumably to be paid as part of the full purchase price on settlement. The reference to late 2011 suggests that Mr Lewis was referring to approval of finance for the payment of the purchase price on settlement. He agreed that the documents at Tabs 11 and 12 did not give approval, “to invest in the property”, presumably meaning to pay the purchase price for the unit. However he said that he had, nonetheless, received a document evidencing such approval. Mr Lewis understood that with regard to such approval, Westpac was to value the unit in 2009. He claimed not to have been aware that there would be a further valuation of the unit when finished. It was put to him that:

You’re telling us Westpac were prepared to lend on the valuation 18 months out from when they were going to actually advance the money? …

Mr Lewis replied:

My understanding is, that was the purpose of getting approval. We went and got an approval so that we had comfortable – that we knew we could move ahead. I wasn’t of the understanding that that then had to get reassessed in two years time, because in my world, that’s not an approval.

Mr and Ms Lewis signed the contracts on 21 September 2009. Orchid Avenue appears to have signed on 16 October 2009. The bank undertaking concerning the deposit was dated 30 October 2009. Mr Lewis said that Westpac forwarded loan documents over the Perth house, but no such documents were provided in relation to the unit. Mr Mohi told Mr Lewis that those documents would be provided at a later stage. It was put to Mr Lewis that they then looked for finance from lenders other than Westpac. Mr Lewis said that they had not made any other applications for finance.

1. He was taken to Tab 18 of exhibit 1, an email chain between Mr Lewis and Mr David Farrant of “Balmain Commercial”, apparently an organization which specialized in the “funding of Hilton Surfers Paradise Apartments.”. The emails were sent in August, 2011. The documents suggest that Balmain Commercial was not, itself, a lender. One email refers to, “a unique, tailored funding package via the ANZ which has been specifically designed to support purchasers within the Hilton hotel.”. The package provided for funding up to 80% of the purchase price. Mr Farrant suggested that the “key benefit” of the package was that purchasers could, “borrow the maximum amount in light of current property values.” Mr Lewis seems to have understood that the borrowing limit would not be reduced in the event that the market price declined to a level below the purchase price. Both Mr Hendrick and Brookfield Multiplex/Hilton had referred Mr Lewis to Balmain Commercial.
2. On 8 August 2011 Mr Lewis provided Mr Farrant with relevant financial information and documents. On 10 August Mr Farrant advised that the maximum loan would be in the amount of $521,920, being 80% of an assumed valuation of the unit at $652,400. It seems that Mr and Ms Lewis did not meet ANZ’s requirements for the “tailored funding package” pursuant to which it would fund up to 80% of the purchase price rather than of valuation. It was put to Mr Lewis that the assumed valuation was inconsistent with his expectation of 20% capital growth over 18 months. Mr Lewis said that it raised “significant alarm bells”. He nonetheless inquired as to why he and Ms Lewis did not meet the criteria. Mr Farrant said that although the ANZ was offering to lend up to 80% of the purchase price, its lending policy was otherwise quite restrictive. ANZ was the only lender lending at 80% of purchase price. This was the only reason for Mr Farrant’s dealing with it. Mr Lewis copied the response to Mr Hendrick. In cross‑examination it was put to Mr Lewis that he had not said anything to Mr Hendrick about the disappointment of his capital growth expectations. Mr Lewis said that they had “a lot of discussions” at that time.
3. It seems that in late August or early September 2011, Mr Lewis asked his solicitor, Mr Wockner, to obtain an extension of time for settlement. On 1 September 2011, Mr Wockner wrote to Mr and Ms Lewis, asking if they required a 14 day extension until 29 September 2011. On 2 September 2011 Mr Lewis emailed Mr Wockner, as follows:

We have been informally advised that the valuations are coming in significantly below the selling price (somewhere between $650K& $700K).

Westpac with whom we obtained pre‑approval before signing the contract originally are now advising that their pre‑approval was subject to the valuation of the property upon completion. Westpac did not advise me at the time that their pre‑approval was subject to the valuation of the property upon completion. If they had done this it would have been unlikely that we would have proceeded with the purchase.

Westpac have advised me that they have not yet received the formal valuation as yet.

Can you please request an extension for the settlement date of 90 days?

I am looking at options with the sales agent “Gary Hendrick”, Westpac and other financiers however at this stage I am unsure of the ultimate outcome. One option being considered is looking to on sell the apartment however the valuation may make that option difficult in any case.

I would be grateful for any advice that you may be able to offer us on the best way forward.

In cross‑examination, Mr Lewis said that had he been told that Westpac would only lend 80% of valuation as at the date of completion, he would not have gone ahead with the contracts. It was put to him that such proposition was inconsistent with his claimed belief that there would be 20% capital growth. As I understand this line of questioning, counsel was suggesting that on the one hand, Mr Lewis claimed that he had entered into the contracts in reliance upon the representation as to anticipated capital growth in order to enable him to borrow the requisite funds. On the other hand, he was asserting that he entered into the contracts in reliance upon his understanding that Westpac had agreed to finance the acquisition on the basis of the unit’s value as at the time at which the Lewises entered into the contract or, perhaps, the purchase price. The assertion of inconsistency arises out of the Lewises’ claims that the alleged representation as to capital growth led them to believe that they would be able to borrow the full purchase price on the basis that the value at settlement would induce a financier to lend that full amount. In other words the valuation at settlement would be well above the purchase price.

1. Counsel then put to Mr Lewis that he had not, at that time, said anything to Mr Wockner about earlier representations concerning capital growth. Mr Lewis said that he had been dealing with Mr Wockner as a settlement agent. I understood him to mean that he had not retained Mr Wockner to give legal advice. It was pointed out to him that in the email chain to Mr Hendrick, he said nothing about earlier representations concerning capital growth. Mr Lewis said that he had a number of telephone conversations with Mr Hendrick and that, “This was discussed.”. Mr Hendrick suggested that they sell the unit. One might have expected rather more detailed evidence from Mr Lewis as to any such confrontation concerning the alleged misrepresentations.
2. Mr Wockner had advised Mr Lewis that he knew a lawyer who claimed to be terminating contracts in the Hilton development, leading Mr Lewis to consult their present solicitors. These proceedings were commenced on 23 February 2012. A statement of claim was filed on that day. Counsel pointed out to Mr Lewis that in that statement of claim, there was no reference to the oral representations allegedly made on 10 and 13 July. The only pleaded representation concerned the email of 7 August 2009 with the attached Jade document. Mr Lewis said that he had supplied “the information” to his lawyer.
3. In re‑examination Mr Lewis was referred to Tab 23 of exhibit 1, a letter dated 9 September 2011 from his present solicitors to the solicitors for Orchid Avenue. In it, the Lewises’ solicitors purported to determine the unit contract and the furniture package contract, asserting that:

Further to the above matters, we are instructed that representations made to the Buyer which induced the entry of the Buyer into the contract of sale were false and/or misleading. Accordingly, the Buyer’s rights in relation to any misleading and deceptive conduct and to seek relief from the Court are reserved.

The grounds of termination above and set out below are not intended to be indicative of any order of precedence. The Buyer reserves its right to rely upon any and all rights of cancellation, rescission, avoidance and termination whether or not set out in this letter.

Mr Lewis said that he had spoken to his solicitors a few days before the date of that letter. At the time at which the action was commenced, he had not given a witness statement. He was in Karratha, about 1,500 kilometres from Perth and did not have access to his office or emails. Nor had he, at that time, had a conference with his counsel.

# MIA TERESA LEWIS

1. Mia Teresa Lewis is a “quality specialist”. She has substantial experience in the insurance industry, including in relation to risk management. Prior to July 2009 she had no experience in purchasing investment properties. She had not previously bought anything “off the plan”. She also knew nothing about the real estate market on the Gold Coast. When the family went to the Gold Coast on holiday, they did not intend to buy real estate. They noticed an advertisement for the Hilton development at the Ray White Real Estate office. They met Mr Hendrick. He asked if they were interested in purchasing an apartment in the Hilton development. She had not previously been aware of that development. Her husband said that they were not interested, and that Frances Barlow had just tried to sell them an apartment in the Boulevard Tower for $932,000. Mr Hendrick said that they should really consider purchasing the apartment at that price because anything under $1 million would definitely be worth considering. Mr Hendrick then offered to go with them to the Hilton sales office for a chat with Ms Barlow. The Lewises agreed.
2. When they entered the office Ms Barlow offered them coffee. The boys were taken to the video games area. Mr and Ms Lewis were shown a video of the Hilton development and given a brochure. Mr Hendrick then spoke to them about the cost of the apartment. Ms Lewis said that, “It all sounds a little bit scary. We haven’t done anything like this before.”. They had recently moved into their own home. Their mortgage repayments were at the maximum level of their financial capacity. Mr Hendrick said that:

[B]ecause we were able to go in and purchase it at 932,000, it was – it was going to be a good purchase; we should really consider it, because it would be positively geared and there would be a 20 per cent capital growth during the big development phase – so before settlement.

Ms Lewis said that Mr Hendrick also said:

… because the apartment was well under the $1 million it would be positively geared and that there would be a 20 per cent capital growth during the development stage and that then meant that we wouldn’t need to be paying anything from our own money and that our own home wouldn’t be a part of this investment.

They then had discussions about occupancy rates, Mr Hendrick saying that the occupancy rate would be 80%, and that the room rate would be $500. The Hilton development would be the only five star hotel in Surfers Paradise, apart from Palazzo Versace. It was the only other comparable five star hotel, should they wish to look at its rates. There was also discussion concerning the target market. Ms Barlow said that the clientele would be Middle Eastern visitors to the Sunshine Coast who came to get away from the heat and that, “… we could see this through our visits to the theme parks, if we had a look at the type of clothing that people were wearing.”. The reference to the Sunshine Coast seems to be an error.

1. About three days later they had another meeting at the Hilton sales office. Ms Barlow and Mr Hendrick were present, as were Mr and Ms Lewis and their sons. It was again said that the investment was a good opportunity. A purchase under $1 million would be positively geared, with 20% growth during the development phase. Room rates were again discussed, as was the occupancy rate of 80%. Mr Hendrick pointed out that the unit in the Boulevard Tower was the last unit and a penthouse, and that if they were interested, they needed to act quickly. He said that the lower level units in the Orchid Tower had also already been sold. The starting price for those apartments was $1.1 million and upwards. He said that the Lewises could provide a deposit of $5,000 to secure the apartment whilst they were making their decision. The deposit would be refundable should they decide not to go ahead. Ms Lewis was not sure whether they paid the deposit at that time, but they signed a document by which they undertook to do so.
2. Mr Hendrick enquired as to the identity of their “settlement lawyer”. They did not have a lawyer, and so Mr Hendrick produced a list of about 10 lawyers, identifying the first three as those whom he would use on the Gold Coast. The first was a Mr Wockner. Mr Hendrick suggested that they engage him, offering to organize a meeting for them in two days’ time, that being 15 July. On that day, they were leaving for Perth. They agreed to the meeting and, on that date, met Mr Hendrick and Mr Wockner at Mr Wockner’s office. Ms Barlow also attended. She brought the documents for the “settlement” of the apartment. They were encouraged to sign the documents. Mr and Ms Lewis did not feel comfortable and did not sign them. They asked for a “private moment” with Mr Wockner in order to discuss the documents. Mr Wockner agreed that it was a good idea that they examine the documents before signing. They then returned to Perth. Thereafter, Mr Lewis and Mr Hendrick were in telephone contact. Mr Hendrick called about twice a week.
3. Eventually, Mr and Ms Lewis decided to acquire a unit in the Orchid Tower rather than the unit in the Boulevard Tower. They were unable to raise the necessary finance in Perth. She was happy to change to the Orchid Tower unit because it was to be completed a year after the Boulevard Tower, allowing them to be “ more comfortable with the fact that the unit would have 20% growth in capital and that meant that we were more financially secure.”. She was then referred to the Jade document. She noted from p 2 of the document that the tenant would be paying 87% and the “taxman”, 13% of the costs in the first year. Ms Lewis noted the statement on the next page, “You (0%).”. She also noted the pie graph showing that 92% would be paid by the tenant and 8% by the “taxman”. She and Mr Lewis discussed the document. That discussion confirmed the previous discussions with Mr Hendrick. She, “felt comfortable looking at”, it. She said to Mr Lewis:

So we’re not, essentially, paying anything because the red box, indicating you put nothing towards the investment itself. It is purely paid by tenant and taxman.

She also said to Mr Lewis:

Well, based on this, it backs up what Gary said to us in the first and the second meeting and I am comfortable with that.

Subsequently, they signed the unit contract. Ms Lewis signed it on the basis that Mr Hendrick had said that it was positively geared. If she had not been told that there would be 20% capital growth, she would not have signed the agreement. She did not believe that in those circumstances, they would have obtained finance.

1. In cross‑examination Ms Lewis was asked about her work as a “quality specialist” and her earlier employment. At the time of signing the unit contract, she had about 20 years’ experience as an underwriter in the insurance industry. Her training and experience included the assessment and management of risk. She agreed that her experience and training had made her aware of the importance of note‑taking. However she had generally left the negotiation of this transaction to her husband. She was aware that from a very early stage, he was doing his own research, at least to the extent that he was looking at Versace rates online.
2. Ms Lewis agreed that they had first met Ms Barlow at the Hilton sales office, and that she had told them that a Boulevard unit was available for $932,000, including a furniture package, a recent sale having fallen through. In her evidence‑in‑chief, Ms Lewis had not referred to any meeting with Ms Barlow at the Hilton sales officeprior to their first meeting with Mr Hendrick at the Ray White office. However she had said that Mr Lewis told Mr Hendrick that Ms Barlow “had just tried to sell us one of the apartments at the Boulevard for $932,000.”. This minor discrepancy may not matter.
3. Ms Lewis agreed that when they saw the video, were shown brochures and spoke to the agents she did not take notes. She agreed that they were not essentially interested at that stage. She paid attention to what was being said, but perhaps not to all of it. She noted sufficient of what was said to identify some parts of it as sounding “scary”. She was concerned that as they had just moved into their house, and their mortgage was at maximum capacity, they could not afford it. Although Mr Lewis subsequently consulted their mortgage broker about finance, she doubted whether they would be able to raise it, given their current financial position. At some stage Mr Lewis told her that the transaction looked like a positively geared investment. This conversation occurred when they were discussing the Jade document. He had previously used the same expression concerning their discussion with Mr Hendrick. She was present at the meeting with Mr Cameron, the mortgage broker. The purpose of the meeting was to provide him with information in order that he be able to find finance for them. He was eventually unsuccessful.
4. Ms Lewis said that at the beginning of their dealings with Mr Hendrick, they had not told him about their financial position, other than that they had just moved into their home, and that they were at maximum borrowing capacity. She had no idea at that time as to the extent of the necessary borrowing in order to purchase the unit. When asked what she understood Mr Hendrick to have meant by “positively geared” she said that, “there wouldn’t be any outlay from our own money.”. Ms Lewis agreed that she had effectively been told two things in the preliminary conversations, the first being that the investment would be positively geared, and the second, that there would be a 20% capital growth in the 18 months or so until the completion of the building.
5. Ms Lewis agreed that she would expect somebody, in assessing a risk in relation to insurance, to do some sort of analysis of his or her own, and to make an individual judgment on the risk. She was unsure as to whether she could accept statements made by real estate agents about proposed purchases. She would hope that she could rely on what she was told. She did not immediately accept Mr Hendrick’s statements, “as being gospel”. She thought that they needed to check such matters. Her husband was to do this. He had more expertise in the relevant area than did she. She considered her husband to be very good at detail and very good at analysis. From the beginning Ms Lewis considered the investment to be a risk. She did not wish to take the risk if it would jeopardize her home. She was concerned that they were fully committed on the home. However the statements made to her about positive gearing and capital growth, “told me that our home would not be jeopardized”. At the first meeting with Mr Hendrick, Ms Lewis had no understanding of the factors which might affect positive gearing. However she agreed that she then knew that whether the investment would be positively geared would depend on how much they had to put in, against how much they had to borrow, and that the more they borrowed, the greater the cost. It would also depend upon interest rates, income from the property purchased and the level of outgoings on the property. Ms Lewis agreed that it might also have depended upon their own tax situation, although she did not, at the time, have that understanding.
6. Ms Lewis was asked about her understanding of the term “capital growth”. She understood that the value of the property would start to increase. Although it is not completely clear, it seems that she expected a 20% appreciation by the time of settlement. In the case of the Boulevard Tower building, completion was to be December 2010, a period of 18 months from the conversations in July 2009. At that time she did not understand the factors which might affect capital growth. She agreed that interest rates or availability of loan funds might affect it. There seems to be a degree of inconsistency in this evidence. She agreed that she took no notes of relevant conversations from the 10th of July through to the time at which the contract was terminated. She did not believe that, had she thought any of the representations to be important, she would necessarily have made notes of them. It was put to her that at the first meeting, Mr Hendrick had not made statements about positive gearing or capital growth. She disagreed with this.
7. She said that at the first meeting her husband had asked about room rates. She understood that his purpose was to discover the income to be derived from the investment. She knew that her husband investigated the assertion that the room rate would be $500. She did not look at the rates herself. She agreed that he would have looked into various other details. She did not recall his deciding to adopt a room rate of $550 in his calculations, but recalled his decision to use a 70% occupancy rate. She considered it to be sensible to take 70% as a “worst case scenario”. She was also aware of his using an online calculator to work out how much it would cost to borrow $970,000 from the ANZ Bank. She was not involved in the selection of that figure, nor was she involved in selecting the online calculator to be used. It was put to her that at the meeting on 13 July, nothing was said about positive gearing or capital growth. She denied that proposition.
8. The witness was then taken to Tab 5 of exhibit 1, Mr Lewis’s email of 13 July to Mr Cameron. She knew that her husband had sent an email to Mr Cameron. They had not discussed its contents. She did not see it before it was sent. She said that Mr Lewis had not, at that time, made any comment to her about the proposed acquisition being a good, positively geared investment. She knew nothing about the other outgoings identified in the email. Neither she nor, as far as she can recall, her husband said anything to Mr Wockner, at the meeting on 15 July, concerning the statements which they say were made to them by Mr Hendrick. It was suggested to her that the meeting with Mr Wockner would have been a good time to say something about those representations. However Ms Lewis believed that Mr Wockner was a “settlement agent” for the signing of the contract, and that they would discuss the “financials” in Perth. She agreed that some matters discussed with Mr Hendrick might have been of interest to Mr Wockner, but not the “financials”. She knew that her husband was going to go through the contract and review its terms and conditions. He was good at doing things like that. She was the “secondary person”. I should add that her evidence was that the meeting with Mr Wockner took place at his office. The other witnesses said that it took place at the Hilton sales office.
9. After they had returned to Perth, they met with Mr Cameron. They asked him to advise them about whether they could get finance. Her husband had some concerns about the investment, particularly as to their capacity to finance it. His concern was that they might not have enough money to put into it. Their main concern was that they would not be able to borrow enough. This was a matter of deep concern to her. She expected her husband to analyse the position and work out whether they could proceed, acting with the assistance of somebody in the finance industry such as Mr Cameron. All of this suggests that at this stage, they were not proposing to act on Mr Hendrick’s alleged oral representations.
10. The witness was then taken to Tab 6 of exhibit 1, an email from Mr Lewis to Mr Hendrick asking for various documents. Ms Lewis did not see the email before it was sent. She said that her husband was concerned to obtain confirmation that the Hilton would enter into a 20 year management agreement for the development. Concerning the capacity to borrow referred to in the email, Ms Lewis said that her husband had told her that Perth lenders were not willing to lend up to the amount that they needed, and that perhaps somebody on the Gold Coast would be able to help them, given that they knew the market there. Her main concern was that they did not have enough money to enable them to borrow. She had, herself, read the contract and was happy with it at her “level”.
11. The witness was then taken to Tab 7 of exhibit 1, the email dated 21 July 2009 from Mr Lewis to Mr Mohi at Westpac on the Gold Coast. Ms Lewis did not see it before it was sent, and had not discussed it with her husband. She agreed that she understood that her husband was looking at costs. She did not see the discussion paper prepared by Mr Cameron which is at Tab 8 of exhibit 1.
12. When they decided to buy the Orchid Tower unit rather than the Boulevard Tower unit, Ms Lewis understood that the latter was a penthouse, but the former was not, and that the former was in a different position from the latter. She did not recall that it was a smaller unit, but that was not a matter of significance to her. One of the reasons for deciding to make the switch was that the completion date would be later. They would therefore be in a better financial position, apparently because of the anticipated capital growth.
13. The witness was taken to the Jade document. Ms Lewis understood that the document had been sent by Mr Hendrick to her husband. She understood that Jade Financial Solutions had prepared this financial analysis for another of Mr Hendrick’s clients. She said that her husband gave the document to her but did not initially explain it. She looked quickly at the summary on the first page and then turned to the pie graphs. She knew that it concerned a different property and a different client. She agreed that at the time, they could not have put $375,000 of their own money into the unit as was assumed in the Jade document. She did not note the assumed capital growth rate of 4.5%. Had she seen it, she would have asked, “why we were told 20 per cent”. She agreed that they probably would not have been able to contribute 34% of the total price. She understood that their capacity to do so had something to do with the 20% capital growth, but that was not her area of expertise. She also did not recall noting that the gross rental figure of $131,400 was lower than that assumed by her husband. The witness was then taken to the so‑called pie chart on p 2. Ms Lewis did not look at the numbers below the pie chart but at the chart, itself. She seemed to accept that the numbers showed negative cash flow.
14. When her husband discussed the document with her, he did not say that it showed that the expenses would cover the rent. She said to him that:

… in the first year it looks like the tenant pays 8 per cent and the taxman 13 per cent.

She then said to him that:

… over 10 years the tenant would pay 9 per cent and the taxman 8 per cent and I can see that this indicates we actually pay nothing.

1. She also said that:

… this would actually back up what Gary Hendrick said in the first and second meeting. That it’s positively geared. That we do not have to put anything in and that was pretty well the discussion, as I remember it.

1. She did not wonder why the “taxman” would be paying anything. She understood that the reference meant that they would obtain some deductions. She did not consider whether or not they would have to outlay money in order to get such deductions. She relied upon her husband, acting with the aid of the mortgage broker, to do the analysis of the project in order to see whether it was feasible. She was relying on her husband to get the information which they needed in order to make sure that the family home would not be jeopardized.
2. The witness was then taken to Tab 14 of exhibit 1, which contains the unit contract, and to various provisions dealing with representations and associated matters. In effect it was put to her that her conduct in signing the document containing such provisions was inconsistent with her assertions as to Mr Hendrick’s representations. Her evidence suggests that she had not read much of the unit contract. Her attention was also drawn to the absence, from the original statement of claim, of any reference to such representations. It was suggested that they had not been made. She disagreed.
3. The witness was then taken to Tab 21 of exhibit 1, and to emails between her husband and Mr Wockner in September 2011 concerning an extension of time for settlement. She was not, at the time, aware of this exchange of emails. She was then taken to an email of 2 September 2011 from Mr Lewis to Mr Wockner in which Mr Lewis referred to Westpac’s valuation requirements. She seems not to have known anything about the email at the time at which it was sent. She said that had they known that Westpac would only lend upon a valuation at completion, they probably would not have proceeded with the unit contract. It was then suggested to her that she therefore could not have been operating on the basis that there would be 20% capital growth. She said that she could not say very much about the financials as she left them to her husband.
4. She was taken to Tab 18 of exhibit 1, the email exchange between her husband and Balmain Commercial. She was not, at the time, aware of those emails. She was then taken back to Tab 5 of exhibit 1, the email dated 13 July 2009, the day of the second meeting, and particularly to the statement by Mr Lewis that he had been “crunching the numbers”, and that the investment appeared to be a good, positively geared investment. She said that he did not say that to her at the time. However Mr Hendrick had said as much at the Hilton sales office.

# GARY RONALD HENDRICK

1. Gary Ronald Hendrick is a licensed real estate agent, carrying on business on his own account in Queensland. He previously worked at the Ray White franchise in Cavill Avenue, Surfers Paradise. He has no ongoing connection with Ray White Surfers Paradise. In 2007 he commenced selling apartments in the Hilton development. He was working for Elfbest Pty Ltd, which company was then marketing and selling that development. In about April 2009 he began working in the New Projects division of Ray White Surfers Paradise and continued there until November 2012. He was remunerated for selling apartments in the Hilton development “on commission”. In July 2009 apartments in the development were marketed through a “shopfront”, meaning that Ray White personnel would “meet and greet” people at the Ray White office and walk to the Hilton sales office with them. The Ray White office was on the corner of Orchid Avenue and Cavill Avenue in Surfers Paradise. The Hilton sales office was about 600 or 700 metres away, opposite the Hilton development, in a building called Chevron Renaissance. The sales office was serviced by the Three Sixty marketing team. Team members would give presentations concerning the Hilton development.
2. On 10 July 2009 Mr Hendrick met Mr Lewis at the Ray White office. Mr Lewis was alone. He told Mr Hendrick that he was visiting Surfers Paradise and would like to have a look at the Hilton development. They then walked over to the Hilton sales office. Whilst they were walking, they talked about Mr Lewis’s employment, what he was looking for (ie a one or two bedroom apartment) and his budget. Mr Lewis said that he was looking for a two bedroom apartment under $1 million. He said that he was from Perth and was at the Gold Coast on vacation. He was involved with a company that did feasibility studies and costings for government projects and hospitals. At the Hilton sales centre Mr Hendrick introduced Mr Lewis to Ms Barlow. She then gave the presentation on the Hilton development, showing a video and supplying brochures. Mr Hendrick was present throughout the presentation. Mr Lewis asked questions about the development, including questions as to bedroom size and matters of that kind. Ms Barlow told him that room rates in a comparable five star hotel, namely the Versace, were about $1,000 a night. Mr Hendrick said that a more conservative figure would be approximately $500 per night. Nothing else was said about room rates at that stage.
3. After the presentation Mr Lewis took the brochures and floor plans with him, saying that he would discuss the matter with his wife. Mr Hendrick denied making any statement concerning the advantages of acquiring an apartment at a price under $1 million. He did not suggest that it would be a really good, positively geared investment with good capital growth. He also denied saying that with expected income and costs, an apartment of that kind would pay for itself. He denied saying that an apartment of that kind would make 20% capital growth during the construction phase.
4. A few days later, on 13 July 2009, he met Mr and Ms Lewis at the Hilton sales office with Ms Barlow. After general discussion Ms Barlow again made her presentation. Somebody said that a two bedroom unit at a price under $1 million would suit their budget, and that it was more feasible for them, depending on their situation. At that stage, only the Boulevard Tower had an apartment available at a price below $1 million. He denied saying that they could expect 20% capital growth for an apartment in the Boulevard Tower. He also denied having said that an apartment under $1 million would be positively geared. There was no discussion about investment returns. However Ms Barlow again mentioned room rates.
5. The witness was taken to Tab 7 of exhibit 1, which is the email from Mr Lewis to Mr Mohi at the Gold Coast branch of the Westpac Bank. Mr Mohi was the lending officer for home loans. Mr Hendrick had his own mortgage with Mr Mohi. He had suggested that Mr and Ms Lewis discuss their financial options with him. He felt that they wanted, “to research a little bit further about where they were financially and how to raise the deposit to cover the 10 per cent required for the Hilton contract.”. The witness was then taken to Tab 13 of exhibit 1, a “selling agent’s disclosure” form signed by him. He had received a telephone call from Ms Barlow requesting such a form. The request seems to have been connected with Mr and Ms Lewis’s decision to take a unit in the Orchid Tower rather than the Boulevard Tower. Mr Hendrick had no prior involvement in that “swap”.
6. The witness was then taken to the Jade document (Tab 10 of exhibit 1). That document was presented to Mr Hendrick and others at a sales meeting at which they first met representatives of Jade Financial Services, or perhaps a week or two before that meeting. He said that a financial planner who was offering finance to “our clients” was in the habit of preparing such documents. Mr Hendrick did not know the identity of the client for whom the Jade document was prepared but knew that it was prepared for an overseas client who had probably paid a deposit. On 7 August 2009 he sent the email and attachment to Mr Lewis in response to an email in which Mr Lewis had requested information to enable him to do his own research. He received no response to the document, nor any questions concerning it.
7. In cross‑examination Mr Hendrick said that he had been a certified sales person in real estate for about 20 years. He was aware that Ray White said that “it” was the number one sales office for all of Ray White in Australia and New Zealand. This appears to have been a reference to the Surfers Paradise office, although the witness did not expressly say so. He agreed that he was an effective and experienced sales agent, and a member of an effective sales team. He had been involved with the Hilton development from about 2007, and had sold between 15 and 20 units. At that time he was only selling units in new projects, of which there were about three or four, apart from the Hilton development. He would speak to from six to 10 people per week. He would have been involved in between 30 and 40 presentations at the Hilton sales office. He said that 50% of the commission payable on a sale in the Hilton development would be paid to Ray White upon payment of the 10% deposit. No further payment would be made until settlement. He received 50% of the 50%.
8. He agreed that in selling a unit he would speak about attractive features of the area and the Gold Coast region. With the Hilton development, its own sales team would speak about the site. He said that the people to whom he introduced the Hilton development were either potential owner/occupiers or investors. He spoke to both categories. He was asked if he agreed that investors would be interested in the excess of returns over expenses and the amount of capital growth. He said that they were more concerned about returns. Some would be interested in capital gains. He was asked if he agreed that some would be attracted to negatively geared property. He said that he did not discuss negative gearing. At that time, his only understanding of negative gearing was through his sales training. He had also gathered some information on the subject from the Jade document. He had some general knowledge of the subject, but he was not experienced in it. He thought that it might be important to an investor for tax reasons. He said that if somebody had doubts about making a purchase he would leave it to that person to make his or her own inquiries and any decision. He would give such a person any information which he possessed. He is still involved in marketing the Hilton development as a project, but not on behalf of Ray White. He was not involved in Orchid Avenue’s resale of the Lewises’ unit in the Orchid Tower.
9. Under cross‑examination Mr Hendrick said that at their first meeting, Mr Lewis was alone. However Ms Lewis and their sons accompanied him on 13 July. Mr Hendrick had completed a registration form for the Hilton sales office in which he had mentioned Mr Lewis as being present at the first meeting, and him, his wife and their sons as being present at the second meeting. He did not recall Mr Lewis saying, at the first meeting, that he had previously spoken to Ms Barlow, and that she had offered him a unit for $932,000. He did not recall saying that it was a great opportunity to get a unit under $1 million. However he recalled saying that there was a unit available at under $1 million. He did not recall asking whether or not Mr Lewis had previously bought off the plan. He did not recall saying that one advantage of buying off the plan was to lock in the price, so that the buyer could get gains in capital growth during the building process. He said he would not have said anything like that. The presentation was probably conducted by Ms Barlow. He agreed that it was said that the Orchid Tower would be completed 12 months after completion of the Boulevard Tower. He did not recall saying that the completion time would provide an opportunity for a price rise.
10. He knew that Raptis had gone into receivership, that the ANZ Bank had stepped in through its receiver to finish the project, and that it had engaged Multiplex as an equity partner. He said that he would have told Mr and Ms Lewis that Raptis had gone into receivership. Generally, clients ask about the developer. Mr Lewis had mentioned, in initial discussions, that he was familiar with the activities of Brookfield Multiplex. He was dealing with them in projects in Perth. Mr Hendrick did not say anything about the global financial crisis. He did not say anything to the effect that as a result of the receivership and the global financial crisis, prices had been reset. Although it is not clear, I understood the Lewises’ case to be that “reset” meant “reduced”, thus re‑inforcing the favourable aspects of the proposed acquisition. Mr Hendrick said that prices had actually been raised to over $1 million. He denied suggesting that the circumstances concerning Raptis, the ANZ Bank and the global financial crisis would create the opportunity for capital growth. He said only that Raptis was no longer involved in the project. He denied having said that, for those reasons, capital growth of 20% could easily be attained.
11. He did not recall being told that the Lewises had just finished building their home in Perth, or that they had reached the borrowing limit against the house. He did not recall Ms Lewis saying that the proposal sounded a bit “scary”, although he conceded that she may have said it. He denied having discussed the global financial crisis at any time. He did not say that prices were at the lower end of the market, or that they had been reset because of the receivership. Nothing was said about the Lewises’ current mortgage position or about positive gearing. He agreed that Ms Barlow suggested a nightly rate of $1,000, and that he suggested the more conservative figure of $500. Ms Barlow’s figure was based on the Versace hotel rates. She was holding an A4 page sheet which showed the figures.
12. Mr Hendrick did not recall mentioning an 80% occupancy rate. He said that his recollection was that the statements concerning the Versace room rates were “accompanied with a generalization of the overall occupancy rate for the Gold Coast, which was about 78 per cent at the time”. This figure was produced by Ms Barlow. Mr Hendrick said that the Hilton was promoted as, “a five star equivalent hotel, built from the ground up to accommodate”. He did not recall speaking about the high‑end Middle Eastern market. He was asked if he may have said something about the Middle Eastern market being part of the target market. He said that in about August or September, Middle Eastern visitors come to the Gold Coast. He agreed that he would have talked about recent upgrades to the Gold Coast Airport and rail links along the coast, including the light rail system. He did not say anything about the potential cost to an investor of management fees. That was part of Ms Barlow’s presentation.
13. Mr Hendrick was asked about the commission on units at the Hilton development. He said that it was approximately 4%. He said that at the meetings on 10 and 13 July Ms Barlow did most of the talking. He said that he was involved after the presentation. He disagreed with the proposition that he had done most of the talking. After 13 July he was the point of contact with Mr Lewis. They exchanged emails and telephone calls. He did not accept that he had telephoned two or three times a week. It may have been once a week. It was put to him that Mr Lewis had not said anything to him about having a budget of $1 million to purchase a property. Mr Hendrick disagreed, saying that Mr Lewis had suggested that a two bedroom unit would suit, if under $1 million. He did not recall Mr Lewis saying that he was not looking to buy a property at all. He had heard mention of the rack rates for the Palazzo Versace at earlier presentations. As to the occupancy rate of 80%, his recollection was that the figure of about 74% was regularly used. (He had previously said that Ms Barlow had given the figure of 78%.) He was not aware that there was a letting fee of 13.2%. He understood that the fees were split 50/50 split on a nightly rate. One part went to the Hilton. I am not sure about the other part, but presumably it went to the owner. He knew that the body corporate fees were likely to be in the order of $140 a week, and that the rates would be $1,800 a year. He said nothing to Mr Lewis about land tax. He did not recall saying that there was no land tax in Queensland. He was asked about his capacity to calculate the return to an investor on an investment in a unit. He has never done such a calculation for anything that he has sold. He denied ever using the expression “positively geared”.
14. He remembered a meeting with Mr Wockner on or about 15 July. He said that the marketing group for which Ms Barlow worked had referred Mr and Ms Lewis to Mr Wockner. He had not, himself, done so. He denied having a list of solicitors. He was, however, present at the meeting with Mr Wockner. He suggested to the Lewises that it would be easier if they were to, “take care of their contracts of sale notes” whilst they were there. He was not involved in the preparation of the documents. He said that Mr and Ms Lewis and Mr Wockner took the documents to a private room. Mr and Ms Lewis then said that they were not prepared to sign at that point. They were concerned about the finance and the deposit. There was no mention of a mortgage broker at that stage. It was put to him that a few days after the Lewises had returned to Perth, Mr Lewis said to him that he had been told that the Western Australian banks were only lending up to 60% for Gold Coast properties. Mr Hendrick did not recall that statement. It was suggested that he had said that this was because they did not understand the Gold Coast market. He said that such a conversation had occurred in a later telephone call. Ultimately, he referred the Lewises to Mr Mohi. It was put to him that he thought Mr Mohi was more likely to understand the nature of the required finance, being a person in Surfers Paradise. Mr Hendrick said that Mr Mohi would understand the nature of financing and the deposit.
15. The witness was then taken to Tab 10 of exhibit 1, the Jade document. Mr Hendrick had said that he sent the document to Mr Lewis following a request for further information. It was put to Mr Hendrick that such was not the case, and that he had sent the Jade document after Mr Lewis had sent him an email, suggesting that the seller had not been “very helpful”, that this was disappointing and that they would be “considering our options based on their response.”. However this line of questioning went nowhere as the witness could not recall seeing the email or the attachment which accompanied it. In the end it was marked “B” for identification but was not received in evidence.
16. Mr Hendrick’s attention was then drawn to a document which is now exhibit 5, a circular sent by him to his client base concerning the Hilton development. He agreed that Mr Lewis would have been on the distribution list. It was suggested to Mr Hendrick that it was sent to Mr Lewis on 7 August 2009, following a telephone call between Mr Hendrick and Mr Lewis in which the latter had expressed concern about proceeding with the project. Mr Hendrick denied this, saying that it was a generic circular sent to all clients, whether they had purchased a Hilton property or another property. He disagreed with the proposition that he had sent the Jade document to Mr Lewis pursuant to a promise to provide further information. Mr Hendrick agreed that he had not sent the Jade document to the rest of his client base. It was suggested that it had been sent to Mr Lewis because he (Mr Hendrick) was concerned about whether the Lewises should proceed, and that it was intended to reassure them about the purchase. Mr Hendrick denied this. He said that he sent it because it was information which Mr Lewis had sought. He said he did not send it as something which Mr Lewis could rely upon or take into account in respect of his purchase. He agreed that in the covering email, he had identified the difference in price between Mr Lewis’s unit and that referred to in the Jade document. He denied that it was his intention that Mr Lewis use it as a reasonable basis for his own decision. He said that whether or not a client chose to rely on such information was a matter for the client.
17. The witness was then taken to the figures in the Jade document, particularly the figure of $131,400, being gross rent under the heading “Computer Projections”. Mr Hendrick did not know whether that figure was based on 100% occupancy. His attention was then drawn to the bottom line headed, “Your cost/(income) per week”. He agreed that the figures in brackets were income as opposed to outgoings. He was then taken to the pie chart on p 2. He agreed that it showed an 87% contribution by the tenant and a 13% contribution by the “taxman”. He was asked whether or not he agreed that it indicated that the purchaser would not pay any part of the costs for the first year. He denied this, saying that the green part of the pie was the part that the purchaser would pay. However he then agreed that the green part was the part paid by the tenant. He was asked questions concerning the extent to which the pie chart demonstrated negative or positive gearing. He said that he did not know what “positively geared” meant. It was suggested to him that if the investment were negatively geared, there would be a third portion of the pie chart showing the amount to be paid by the purchaser. He said:

Well, on this case with the gentleman here, in this scenario of a high‑priced unit what he was purchasing, the deposit he was paying, this case scenario meant that he wasn’t contributing anything.

Concerning the first figure of $13,013 in the tax credit column on p 2, the following passage appears at ts 170 ll 11 to 14:

And do you agree that that figure would arise from the fact that there are non‑cash expenses that an investor would have which obtains an income tax deduction. That’s right, isn’t it? ‑-- Well, I don’t know. If this is a tax credit, I don’t know if that relates to income tax. I am not a financial man.

In the course of discussion between counsel and me, it emerged that the amounts allegedly paid by the “taxman” may have been derived from the computer projections on p 1, apparently by calculating the tax benefit attributable to various outgoings, including depreciation. However there is no evidence that Mr Lewis performed this exercise at any relevant time.

1. Mr Hendrick was then asked about the figures on the extreme right of p 2 of the Jade document, headed “Cash/(you)”. It shows a net benefit to the purchaser in each of 25 years, or at least so it appears. The witness was then taken to p 3 of the Jade document. A pie chart shows a breakup of outgoings, 92% to the tenant and 8% to the “taxman”, together with a box which summarizes the information. Mr Hendrick said that he did not understand, at the time, that this meant that the purchaser would be paying nothing over the 10 year period. He simply sent it as an attachment from the consulting company.
2. The witness’s attention was then taken to the “Summary” box on p 1 of the Jade document, and to a document which was marked “C” for identification. However nothing came of this line of questioning as Mr Hendrick denied having seen that part of the latter document at any relevant time. It is not in evidence.
3. Mr Hendrick’s answers in connection with his reasons for sending the Jade document to Mr Lewis are not particularly helpful or informative. However it may be that at the time, his reasons were imprecise. One can accept that he may have considered it to be of interest to the Lewises, without necessarily representing that it provided information upon which they could rely for their own purposes. I consider that a recipient in the situation of the Lewises, would have so understood it. It is reasonable to infer that Mr Hendrick was seeking to encourage the Lewises to purchase the property, rather than not to do so. However the fact that he provided a document which showed capital growth of 4.5% per annum suggests that he was not aware of having said anything different to the Lewises. Further, the Jade document demonstrated an excess of income over outgoings only by reliance on tax credits, not a factor which the Lewises seem to have treated as being significant to their decision.

# FRANCES MARIAN BARLOW

1. Frances Marian Barlow is a project manager with Three Sixty. She was working for that company in July 2009 in connection with the Hilton development. She worked in the sales centre, explaining the project to clients. She had no clear recollection of speaking to Mr and Ms Lewis. She did not recall any particular conversation between Mr Hendrick and Mr Lewis on 10 July 2009. She had no recollection of a conversation involving positive gearing for an apartment under $1 million, or as to its being a good investment. In effect she did not remember any of the specific conversations alleged by Mr and Ms Lewis. In cross‑examination she said that she had been selling units in the Hilton development for about five‑and‑a‑half years. Initially, she was with the Raptis Group but then transferred to Three Sixty. She was paid on a commission basis, as was that company. She said that in 2009 she was seeing 15 to 20 people a day. She was probably involved in the sale of about 80 units. She knew Mr Hendrick as a real estate agent with Ray White. She could not remember any “specifics” of her dealings with the Lewises. She last spoke to Mr Hendrick about five days before giving evidence. They discussed matters unrelated to real estate activities.

# THE CLAIM

1. In this case, Orchid Avenue makes a substantial cross‑claim. However the trial focussed primarily upon the claim. It will therefore be convenient for me to deal with the claim separately from the cross‑claim. I shall deal with the cross‑claim at a later stage.
2. Section 52 of the Trade Practices Act provides:

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

(2) Nothing in the succeeding provisions of the Division shall be taken as limiting by implication the generality of subsection (1).

Section 51A provides:

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

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

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

Section 51A and s 52 are both located in Pt V Div 1 of the Trade Practices Act. Section 82 of the Trade Practices Act provides relevantly as follows:

(1) Subject to subsection (1AAA), a person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

…

(1B) Despite subsection (1), if:

(a) a person (the claimant) makes a claim under subsection (1) in relation to:

(i) economic loss; or

(ii) damage to property;

caused by conduct of another person (the defendant) that was done in contravention of section 52; and

(b) the claimant suffered the loss or damage:

(i) as a result partly of the claimant’s failure to take reasonable care; and

(ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to cause the loss or damage; and

(ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant’s share in the responsibility for the loss or damage.

Section 87 of the Trade Practices Act authorizes the making of other orders by way of compensation: s 87(1), avoiding the contract: s 87(2)(a) or for the refund of money: s 87(2)(c).

1. Mr and Ms Lewis assert that they entered into the contracts in reliance upon representations made to them by Mr Hendrick, which representations were misleading or deceptive for the purposes of s 52 of the Trade Practices Act. To establish the misleading nature of the representations Mr and Ms Lewis rely upon s 51A. They claim:

* damages pursuant to s 82;
* an order that the unit contract is void ab initio;
* the return to them of the deposit paid in respect of the sale;
* interest; and
* costs.

The misleading or deceptive conduct which they allege, and claim to have relied upon in entering into the contracts includes the representations allegedly made on 10 July 2009 by Mr Hendrick that their investment in the unit would be positively geared, and that by settlement they would make 20% in capital growth. They allege that these representations were repeated on 13 July 2009. Mr and Ms Lewis also rely upon the email of 7 August 2009 with the attached Jade document. As I understand the Lewises’ case, they do not seek to establish that any of the representations were actually misleading or deceptive. They rather rely upon s 51A. However, whilst s 51A may operate so as to deem a particular statement to be misleading, it says nothing about reliance or causation of damage.

# CHRONOLOGY

1. A chronology prepared on behalf of Orchid Avenue fairly summarizes the history of the matter. I attach it to these reasons as attachment B.

# THE REPRESENTATIONS

1. As I have previously observed, these proceedings were commenced on 23 February 2012. A statement of claim was filed on that date. The only representations alleged in that statement of claim were those contained in the email of 7 August 2009 and the accompanying Jade document. At para 6 it was alleged that those documents represented that:

The E-mail (by its attached PDF file) presented an investment scenario, which represented to the applicants that (“the Representations”):

6.1 an investment in a unit in the Hilton Development would achieve

(a) a gross rental yield of 7.96% per annum;

(b) a net rental yield of 3.37% per annum;

(c) capital growth for each of the next 10 years of 4.5% per annum;

(d) a taxable return on a property with a $1,100,000 purchase price of $115,000 per annum;

(e) an “after tax” return of 8.59% per annum;

6.2 an investment in a unit in the Hilton Development would be positively geared by reason of the following statements in the investment scenario:

(a) under a heading “Who pays the cost (1st year)”, appeared the statement that 87% of the cost would be payable by the tenant and 13% of the cost would be payable “by the taxman”;

(b) by implication from the above statement, 0% of the cost would payable by the Applicants (as purchaser of the unit);

(c) in a bar graph generated under the heading “Who pays the costs (10 years)”, such graph indicated that the tenant would pay 92% of the costs, “the taxman” would pay 8% of the costs and the Applicants (described as “you”) would pay 0% of the costs;

6.3 the Applicants (as purchasers of the unit) would after accounting for taxation acquire ownership of the unit at no net cost to them;

6.4 the investment scenario had been prepared for another person who had purchased another unit in the Hilton Development;

6.5 by implication, the investment scenario was reasonably based in fact and reasonable inquiries and investigations conducted by Orchid Avenue and/or by Ray White.

1. In para 13 the Lewises alleged that they had entered into the contracts in reliance on such representations. On 5 December 2012 an amended statement of claim was delivered pursuant to an order made on 23 November 2012. By the amendment, the Lewises added paras 3A and 3B as follows:

3A On or about 10 July 2009 Hendrick orally represented to the applicants that if they purchased a unit in the Hilton Development (“the Oral Representations”):

3A.1 the investment would be positively geared;

3A.2 the applicants would make 20% in capital growth by settlement.

3B Hendrick repeated the Oral Representations on or about 13 July 2009.

The introductory words of para 6 were amended to read:

The E-mail (by its attached PDF file) presented an investment scenario, which represented to the applicants that (“the E-mailRepresentations”)… .

The alleged effect of the “scenario” remained as set out in para 6 of the pleading in its original form.

1. Paragraph 13 was amended to allege reliance on the “Oral Representations” and the “E‑mail Representations”. Although the Lewises allege that the Jade document contained representations other than as to capital growth and positive gearing, at the trial, the focus was primarily upon those two matters.
2. Orchid Avenue denies that Mr Hendrick made the representations allegedly made on 10 and 13 July and denies that Mr and Ms Lewis relied upon any such representations. It also denies that the Jade document has the meaning attributed to it by the Lewises, and that the Lewises acted upon any representations in that document. Other matters are raised by way of defence. To the extent necessary, I shall deal with them separately.

# THE MAJOR FACTUAL ISSUES

1. The major factual issues in the case are:

* whether Mr Hendrick made the alleged oral representations;
* the Lewises’ understanding of the email of 7 August 2009 and the attached Jade document, and the reasonable availability of that understanding; and
* whether the Lewises acted in reliance upon the alleged oral representations and/or the Jade document and accompanying email.

# THE ORAL EVIDENCE

1. I have not found any of the oral evidence to be of particular assistance. Of Orchid Avenue’s witnesses, Ms Barlow remembers virtually nothing about her dealings with Mr and Ms Lewis. Mr Hendrick has, as one might expect, limited recollection of his dealings with the Lewises who are but two of the many potential purchasers whom he has met in the course of his involvement with the Hilton development. In my view he sought to play down his involvement in the meetings of 10 and 13 July 2009. I consider it unlikely that he would have played the largely passive role which he described. I accept that, at the Hilton sales office, Ms Barlow made her presentation, but I think it likely that both there and at the Ray White office, he offered at least some encouragement to the Lewises as potential purchasers. These views do not necessarily lead me to conclude that he made the specific oral representations alleged by the Lewises. As to the Lewises’ evidence I have already made some comments. The transcript and my comments to this point demonstrate various unsatisfactory aspects of Mr Lewis’s evidence. As to Ms Lewis’s evidence, she concedes having attended to only some aspects of the conversations, and to have relied on Mr Lewis to attend to the matter after those conversations. In argument counsel for the Lewises sought to establish reliance by Ms Lewis upon Mr Hendrick’s alleged representations, quite apart from Mr Lewis’s reliance on them. However the evidence suggests that Ms Lewis really relied upon his views and his research, such as it was. I am satisfied that Ms Lewis would not have entered into the contracts had Mr Lewis not been in favour of so doing.
2. Superficially, the Lewises’ oral evidence as to the making of the alleged oral representations was quite specific. Obviously, from their point of view, the transaction was at least unusual. It is therefore not surprising that their recollections should be clearer than those of Mr Hendrick and Ms Barlow. However the Lewises’ oral evidence was not without its deficiencies. As I have said, Ms Lewis conceded that she gave more attention to some parts of the conversations than to others. Where a witness has only a partial recollection of the context in which important events have occurred, one must always consider the extent to which such a patchy recollection of events bespeaks reconstruction. In some cases, the important events may be so unusual or shocking as to make it understandable that they have been remembered, whilst other, more commonplace events have been forgotten. However that is not so much the case where the evidence in question is as to conversations where context may often influence understanding and affect meaning. Given that Ms Lewis subsequently left the matter to Mr Lewis, there is a real possibility that her recollection has been influenced by statements which he has made to her.
3. Three aspects of her evidence reflect the possible relevance of these observations. Mr Hendrick said that Ms Lewis and their sons were not present at the first meeting. There is some reason to believe that Mr Hendrick is correct. He made a note of those in attendance. Secondly, Ms Lewis said nothing in her evidence‑in‑chief about any earlier meeting with Ms Barlow, although she said that Mr Lewis referred to Ms Barlow’s having said that a unit was for sale. In cross‑examination, she said that she had previously met Ms Barlow. The effect of Mr Hendrick’s evidence was that he did not recall any mention of Ms Barlow at the first meeting with Mr Lewis at the Ray White office. Thirdly, Ms Lewis said that the meeting with Mr Wockner on 15 July occurred at the latter’s office, whilst the other evidence suggests that it occurred at the Hilton sales office. Whilst none of these matters is individually of particular significance, they may suggest an alternative sequence of events to that proposed by Mr Lewis. They are consistent with Mr Lewis having had his interest aroused at a meeting with Ms Barlow, at which meeting his wife and sons were not present. This may have led him, at a later stage, to approach Ray White, again by himself. No such suggestion was put to Mr Lewis, and I do not put weight upon it. However counsel for the Lewises made very forceful, but very general assertions in favour of their credibility and Mr Hendrick’s lack of it. These discrepancies undermine those assertions.
4. Although Mr Lewis’s evidence as to the representations was firm, it was not necessarily convincing. His assertion that Ms Lewis and their sons were present at the first meeting with Mr Hendrick is in conflict with Mr Hendrick’s evidence that Mr Lewis spoke to him alone on that occasion. As I have said, unlike Mr Lewis, Mr Hendrick had notes of those present at the conversations on 10 and 13 July. No attempt was made by counsel for the Lewises to challenge his claim to have made the notes, or as to their accuracy.
5. Mr Lewis’s evidence as to the context in which the representations were initially made also appears a little unlikely. Mr Lewis said that they had made it clear to Mr Hendrick that they were not interested in acquiring a property and were “window‑shopping”. In those circumstances it seems unlikely that the mere mention of a unit being available at $932,000 would immediately have caused Mr Hendrick to say that they would be crazy not to take advantage of the opportunity, given that he knew nothing about their financial position. It seems unlikely that a salesman would assume that everybody who was walking through Surfers Paradise was able to fund the acquisition of a unit costing almost $1 million. Similarly, without some knowledge of their financial situation, it seems unlikely that he would have immediately launched into a discussion about positive gearing and capital growth, other than in a most general way.
6. Neither Mr Lewis nor Ms Lewis can be described as lacking commercial experience, although neither may have had substantial experience in property investment. Mr Lewis was clearly familiar with aspects of property development and construction, whilst Ms Lewis was no doubt quite familiar with many aspects of business in the context of her insurance work. There is no reason to believe that either lacked common-sense when it came to the assessment of business propositions. In this light, their claims call for close examination.

# events occurring between mid‑july 2009 and execution of the contractS

1. The alleged representations were made in mid‑July and early August 2009. The Lewises signed the contracts on 21 September 2009. Orchid Avenue seems to have signed them on 16 October 2009. Thus Mr and Ms Lewis had ample opportunity to consider the matter at their leisure, and they seem to have done so. In that period at least six relevant incidents occurred. They were:

* Mr Lewis’s “investigations” and the content of his instructions to Mr Cameron;
* the receipt of Mr Cameron’s discussion paper and advice;
* the decision to acquire a unit in the Orchid Tower rather than a unit in the Boulevard Tower;
* receipt of the contracts, Mr Lewis’s comments concerning them and Orchid Avenue’s responses;
* receipt of the Jade document and accompanying email; and
* the making of the 2009 application or applications for finance and the outcome or outcomes.

## Mr Lewis’s Investigations

1. Mr Lewis certainly considered the Versace Palazzo website in order to obtain some idea of its room rates. He chose to adopt a room rate of $550, rather that the figure of $500 which Mr Hendrick and Ms Lewis say that Mr Hendrick had suggested. Indeed, even Mr Lewis’s evidence suggests as much. I accept the evidence of Mr Hendrick and Ms Lewis on this point. Mr Lewis then used a “conservative” occupancy rate of 70%. However Mr Hendrick said that Ms Barlow had suggested 78%. He had previously heard a figure of 74% but does not claim to have offered any view to the Lewises. I am inclined to accept his evidence on that score. Mr Lewis’s choice of 70% is more consistent with his having been given a figure in the 70s than the figure of 80%. The suggestion that he took a conservative approach is hardly consistent with his use of the room rate of $550 rather than $500. I do not understand the Lewises to claim to have relied on anything said by Ms Barlow. Nor is it suggested that Mr Hendrick somehow adopted anything that Ms Barlow said. In the email of 21 July 2009 (Tab 6), Mr Hendrick suggested that the May Midwood report showed an increase up to an average of 74.7% across all types of accommodation units. As I have said, it seems unlikely that Mr Hendrick would have referred to the occupancy rates in that way if he had previously said that the relevant rate was 80%.
2. In any event, the point is that Mr Lewis seems to have used his own judgment in choosing the parameters upon which he relied in making his business judgment. In his email to Mr Cameron, Mr Lewis said nothing about capital appreciation. In particular, he did not suggest that he was depending on capital appreciation to enable him to borrow the full purchase price. One might have thought that this would have been a critical aspect of his instructions to Mr Cameron. Mr Lewis also said nothing to Mr Mohi about his reliance on capital appreciation. His conclusion that the unit would be self‑funding seems to have depended to some extent, upon figures other than those supplied by Mr Hendrick. Further, he did not suggest, either to Mr Cameron or to Mr Mohi, that Mr Hendrick had expressed the opinion that any such purchase would be a good, positively geared investment. If he were relying on Mr Hendrick’s view, one might have expected him to have said so.

## Mr Cameron’s Discussion Paper and Advice

1. In July 2009 Mr Lewis seems to have thought that he and his wife had “equity” of over $200,000 in the Perth house. Mr Cameron’s strategy assumed a 90% borrowing ratio of its estimated value of $1.1 million, yielding an “equity” of $171,000 which might be applied in paying the deposit on the unit and associated expenses. Assuming a lending ratio of 80% on the unit, Mr Cameron’s calculations showed a shortfall of $54,651. By this stage, Mr Lewis knew that Perth lenders were willing to lend only up to 60% of a unit’s value.

## The Decision to Acquire the Orchid Tower Unit

1. On 29 July 2009, Three Sixty (Ms Barlow’s employer) wrote to Mr and Ms Lewis, forwarding the draft contracts relating to the Orchid Tower unit. I infer that by this time, Mr Lewis had identified the benefit of deferring the time for settlement, presumably because of the emerging problems with finance. Hence it seems that by that time he no longer expected that the 20% capital appreciation would occur in time for him to raise the necessary finance against any increased value of the unit. Further, even if such appreciation were realized, it would yield a figure of $1,118,400. If the Lewises were to borrow 80% of that amount, the loan would be $894,720, not $932,000. Of course, they may have hoped to borrow a larger amount, but there is no evidence of any such expectation.
2. The Lewises seem not to have considered the possibility that the Orchid Tower unit would not be as valuable as the Boulevard Tower unit. It was at least possible that a non‑penthouse unit in the Orchid Tower might not be as attractive a letting proposition as a penthouse unit in the Boulevard Tower, particularly as the former unit was smaller than the latter. Mr Lewis said that there were significant additional services available in the Orchid Tower. That may well be so. Of course, the listed prices for the Orchid Tower units were above the price at which the Lewises were offered both units. However it seems that the price of the Boulevard Tower unit had been reduced in order to induce a quick sale so that the marketers could say that all units in that tower had been sold. Mr Ogilvie was willing to sell the Orchid Tower unit to the Lewises at the same price as that at which they had been offered the Boulevard Tower unit. I draw no conclusion as to the relative values of the units. I observe only that the Lewises seem not to have addressed the possibility that, whatever Mr Hendrick had said to them, it might not apply to a purchase of the Orchid Tower unit, or to an acquisition which was to be settled in two and a half years’ time rather than one and a half, with the increased risk of fluctuations in the market prices.
3. The Lewises seem to plead that the alleged oral representations were made concerning the acquisition of any unit in the Hilton development. The evidence does not disclose whether Mr Hendrick was, at the relevant times, aware of the actual unit which was being offered by Ms Barlow. Mr Lewis said that at the initial meeting at the Ray White office, Mr Hendrick said something about “positive gearing”. However, according to him, the capital appreciation figure of 20% was mentioned later, at the Hilton sales office, apparently after Ms Barlow’s presentation in which the unit may have been identified. The case seems not to have been conducted, by either side, upon the basis that the alleged representations did, or did not relate to a specific unit. However one would have expected that if the Lewises, in considering the purchase of the Boulevard Tower unit, were influenced by certain representations, they would, in considering the swap, have considered whether those representations applied equally to the Orchid Tower unit.

## Receipt of the Contracts, Questions and Responses

1. Plainly, Mr Lewis carefully read the contracts concerning the Boulevard Tower unit. As those contracts were in the same form as those for the Orchid Tower unit, I infer that he understood the terms of the latter contracts, even if he did not read them with the same care. To the extent that Ms Lewis read either set of contracts, she seems to have done so in a fairly cursory way. The unit contract contained numerous clauses which provoked comment from Mr Lewis. Many of his comments are not relevant for present purposes, save to the extent that they demonstrate his close examination of the documents. One such term concerned the penthouse “status” of the Boulevard Tower unit. Mr Lewis was concerned that the plans might be amended in such a way that the unit was no longer a penthouse. He sought to ensure that any change in plans would not produce that result. Orchid Avenue responded, pointing out that he was no longer acquiring that unit. Mr Lewis was also concerned that Hilton might not be the operator of the hotel, about which matter specific representations had been made to him. He understood that cl 25 deprived him of the right to rely on that representation and complained accordingly. He also read and objected to cll 29.5 and 29.6 concerning amendments to the contract.
2. However he did not question cll 29.1 and 29.2 which asserted that the unit contract superseded all prior negotiations, that the Lewises had not relied on pre‑contractual statements, that they had made their own investigations, and that they had no right to object, “on the ground of any such alleged statement”. Similarly, he did not complain about the “No Representations” clauses in schedule 7.
3. Notwithstanding such waivers, misleading or deceptive statements may nonetheless attract the sanctions imposed by the Trade Practices Act. However it is difficult to accept that if Mr Lewis, with his business experience, were relying upon such statements, he would have agreed to the inclusion of those terms in the contracts, particularly when he had identified and questioned other provisions, including provisions dealing with representations.

## The Jade Document and Accompanying Email

1. The Lewises submit that in forwarding the Jade document and accompanying email to them, Mr Hendrick effectively represented that the information and comments contained therein applied to their acquisition of the Orchid Tower unit. They submit that they relied upon the representations in those documents, and that the documents re‑inforced the oral representations allegedly made by Mr Hendrick upon which the Lewises also relied.
2. In the covering email, Mr Hendrick made it clear that the Jade document did not relate to either the Lewises or the unit which they were buying. It is not clear whether, at that stage (7 August 2009) he knew about the “swap”. The disclaimer at the foot of the first page of the Jade document was quite prominent and easily understood. Of course, that disclaimer was not directed to Mr and Ms Lewis. Nonetheless it demonstrated that the projections were calculated upon various assumptions, and that the document was not intended to be a guarantee of future performance. It was also made clear that the creator of the document accepted no legal responsibility for it. Those circumstances, by themselves would, in my view, cause a third party, who had not previously dealt with Jade Financial Solutions, seriously to doubt the wisdom of relying on those documents. Of particular importance to the Lewises was the anticipated capital appreciation rate and the expectation that the unit would be in effect, self‑funding. The capital appreciation rate in the Jade document was much lower (4.5%) than the 20% allegedly represented by Mr Hendrick. One would have expected such a discrepancy to have led the Lewises to doubt the reliability of the figure in the Jade document and any understanding which they had concerning the considerably higher figure allegedly provided by Mr Hendrick. As to the unit being self‑funding, the Lewises plead no specific oral representation concerning tax credits. They did not consider the availability to themselves of any such credits. Neither Mr Lewis nor Ms Lewis satisfactorily explained how they reconciled these matters with their claim to have acted in reliance upon both the oral representations and the Jade document. Perhaps of even greater importance is the fact that the Lewises were looking to borrow the entire purchase price whilst the Jade document contemplated a substantially lower borrowing ratio.
3. In theory, if I do not accept that Mr Hendrick made the alleged oral representations, the Lewises might nonetheless succeed in establishing reliance upon the representations said to have been made in the Jade document and the accompanying email. The question of such reliance really depends substantially upon the way in which persons in the positions of Mr and Ms Lewis would have understood the document. As I have previously indicated, I consider that Ms Lewis relied upon Mr Lewis’s views concerning the proposed transaction. Thus it is his understanding which is relevant for present purposes.
4. Nothing that Mr Hendrick said in the covering email imparts to the Jade document any meaning beyond that which its terms disclose. Whilst the Jade document might have advanced an encouraging view of an investment in the Hilton development, I doubt whether it went much further than that. Mr Hendrick’s letter suggests only that it is an “investment scenario”. I find it difficult to construe his email as doing any more than representing that the Jade document sets out the opinion of an unidentified person, based upon various assumptions and projections. Whilst Mr Hendrick may have considered that the Lewises would be interested in such an opinion, it is difficult to construe his email as adopting or endorsing its content, or implying that the Lewises should act upon it.
5. I turn to the specific representations pleaded in para 6 of the amended statement of claim as being contained in the Jade document. In para 6.1 it is alleged that the Jade document represents that an investment in the Hilton development would achieve certain results. Of the five pleaded results, three (gross rental yield, net rental yield and capital growth) are clearly labelled as assumptions. The reference in the pleading to “taxable return on a property with a $1,100,000 purchase price” seems to refer to the figure of $115,000, also shown as an “assumption”. As to “taxable income”, I am inclined to think that the term refers to the taxable income of the relevant taxpayer from all sources, rather than the income from the relevant investment property. Such information may have been relevant to the “tax credit” used in the calculation of “after tax cashflow”. However the matter is unclear. The “after tax” return of 8.59% is clearly based on the various assumptions, of which at least two did not apply to the Lewises’ position: the extent to which the purchase price was to be met other than by borrowing and the capital growth rate. Mr Hendrick may well have represented that the person who prepared the Jade document had made assumptions, but I find no basis for inferring that he represented that the assumptions were valid. Should I accept the Lewises’ evidence as to earlier representations said to have been made by Mr Hendrick, it might be arguable that the assumptions “re‑inforced” those representations to the extent that they were consistent with them. However, as I have pointed out, there are various areas of inconsistency.
6. At para 6.2 the Lewises allege that the Jade document represented that an investment in a unit in the Hilton development would be positively geared. This representation is said to be contained in the information on pp 2 and 3 of the Jade document. The Lewises submit that p 2 shows that the “cost” in the first year of an investment would be shared as to 87% by the tenants, and 13% by the “taxman”, with the investor contributing nothing. They submit that p 3 shows that over 10 years, the tenants would contribute 92%, the “taxman”, 8%, and the investor, nothing. The tax regime in question was not identified. Mr Hendrick understood that the scenario had been prepared for an overseas client. The Lewises may not have known that, although the reference in Mr Hendrick’s email to “PIA from Hilton – HK dollars and Australian dollars” may have suggested as much. In any event the point is that the document said nothing about the circumstances in which the “taxman” would provide the benefit. Thus it is difficult to construe the Jade document as representing that any investment in a unit in the Hilton development would be positively geared because of the capacity of any buyer to enjoy such a tax benefit. In particular, there is no evidence as to any tax benefit available to the Lewises. Indeed, there is no suggestion that they gave any consideration to their tax positions.
7. In para 6.3 it is alleged that the Jade document represented that the Lewises would, after accounting for taxation, acquire ownership of the unit at no net cost to them. The meaning of the words, “after accounting for taxation” is not immediately clear. The most likely meaning is that it means, “taking into account available tax benefits”. However as I have said, the evidence does not support the proposition that the Lewises were likely to enjoy any such benefits. More importantly, there is no evidence that they considered their availability. Thus I am unable to conclude that they relied upon this representation.
8. In para 6.4 the Lewises allege a representation that the investment scenario had been prepared for another person who had purchased another unit in the Hilton development. Mr Hendrick gave evidence to this effect. I see no reason to doubt that proposition. However it offers no support for the Lewises’ case. In para 6.5 the Lewises allege that “by implication” the scenario was reasonably based in fact, and reasonable enquiries and investigations had been conducted by Orchid Avenue and/or by Ray White. The basis for such implication is unclear. As I have said, were I to accept that the earlier oral representations had been made then, to the extent that the Jade document was consistent with them, it may have re‑inforced those representations. However I find it difficult to conclude that the document, by itself, constituted any representation concerning the matters set out therein.
9. It may be that para 6 of the amended statement of claim simply seeks to engage s 51A. However s 51A will be engaged only if there is a representation as to a future matter. As far as I can see, Mr Hendrick represented only that somebody had prepared the document for somebody else, upon the basis of certain assumptions, and without accepting liability for its contents. There was no representation as to a future matter.
10. No doubt the passing on of a document may, in some circumstances, involve a tacit representation that its contents are accurate, so that representations as to future matters contained in it will become representations by the person passing on the document. In the present circumstances, it is clear that the person who made the document was not representing that the assumptions or conclusions were reliable, and was not accepting responsibility for them. In those circumstances, it is difficult to see any basis for concluding that Mr Hendrick’s conduct in some way converted the document into a representation as to future matters.
11. Although I have dealt with these representations, allegedly arising out of the Jade document and the accompanying email, the Lewises’ case is based primarily upon the oral representations, together with such support as can be derived from those documents. Although the Jade document and the email were the only bases for the claim as originally pleaded, the evidence demonstrates that the Lewises were fully committed in principle to the acquisition prior to their receipt of those documents. In such circumstances, the Jade document and accompanying email probably have little significance, save to the extent that they support earlier representations.

## The 2009 application (or applications) for finance

1. I have already dealt with Mr Cameron’s discussion paper which disclosed that the Lewises were unlikely to be able to raise sufficient funding through the ANZ Bank in Perth. As a result of conversations with Mr Hendrick, Mr Lewis contacted Mr Mohi on 21 July 2009. On or about 24 August 2009, they made a formal application for finance in the amount of $791,000, the stated purpose of the loan being to “refinance existing mortgage”. I have previously discussed this application. It was approved. It seems likely that the advance was applied in refinancing the existing ANZ loan, secured on the Perth house and in providing the bank guarantee of payment of the deposit pursuant to the unit contract.
2. There is no documentary evidence of any approval of finance for the balance of the purchase price pursuant to the unit contract. Mr Lewis asserted in evidence that, prior to their signing the contracts, Westpac had indicated its willingness to provide such finance. Further, Mr Lewis claimed that he understood the approval to be free of any requirement for a further valuation. It seems curious that there should be no documentary evidence of such an application in 2009, or of any approval. It is also surprising that Westpac should have approved finance so far in advance of completion of the construction, and with no valuation of the completed unit.
3. It may be that Mr Lewis believed, or convinced himself that Mr Mohi had approved, or would approve the necessary loan. It may be that Mr Mohi gave Mr Lewis reason to believe that finance would be available. None of this assists the Lewises. If Westpac was contractually bound to provide finance for the entire purchase price, then any loss suffered by the Lewises would be attributable to Westpac’s breach of its agreement. If Westpac said that it would provide finance, but was not contractually bound to do so, then the Lewises entered into the contracts in reliance on that statement. In effect, the Lewises’ claim that they would not have entered into the contract but for Mr Hendrick’s allegedly misleading or deceptive conduct. That proposition is inconsistent with Mr Lewis’s claim that they would not have entered into the contract, but for their belief that funding was available.

# THE LEWISES’ CONDUCT AFTER EXECUTION OF THE CONTRACTS

1. Until August 2011, little seems to have happened after execution of the contracts by the Lewises on 21 September 2009. Orchid Avenue executed the contracts on 16 October 2009. The bank undertaking to pay the deposit was dated 30 October 2009. On 7 August 2011 the Lewises applied to Westpac for finance to enable them to settle. On 8 August 2011, Mr Lewis also contacted Mr Farrant, although there had been some prior contact. Mr Lewis claims that until about this time, he understood that Westpac had agreed to finance the whole of the purchase price, without any requirement for a further valuation of the unit. If Mr Lewis had previously understood that finance had been approved, the Westpac application of 7 August 2011 must have been made after he had been disabused of such understanding. By this stage, the Lewises were proposing to pay $100,000 from their own funds, with the balance of the purchase price of $932,000, plus transaction costs of $43,000, to come from Westpac. I again point out that the deposit had not been paid. Westpac’s undertaking was presumably to be replaced by actual payment on settlement. It is not clear how the Lewises proposed to pay the amount of $100,000. It may be that their equity in the Perth house was, by that time, sufficient to allow them to offer such contribution. However neither Westpac nor Mr Farrant was able to assist them with the balance of the purchase price.
2. On 31 August, Orchid Avenue’s solicitors appointed 15 September 2011 as the settlement date. Mr Lewis and Mr Wockner discussed the possibility of seeking an extension. Mr Lewis attributed his difficulty to the fact that despite his understanding that Westpac had given unconditional approval to a 2009 application for finance, it now required a further valuation. Such valuation was not yet to hand. Mr Lewis considered on‑selling but, as he was not expecting a satisfactory valuation, that step was unlikely to assist. In his email of 2 September 2011 to Mr Wockner, he did not mention any earlier representations by Mr Hendrick. Rather, he said that he was exploring “options” with him, Westpac and other financiers.
3. On 6 September 2011, as the settlement date approached, and as a sufficiently long extension of time seemed unlikely, Mr Wockner referred the Lewises to, “a lawyer who claims to be terminating contracts in (the Hilton) development.”. On 9 September k2 Law, the Lewises’ present solicitors, purported to terminate, avoid or rescind the contracts. Although they purported to rely on certain statutory provisions, no factual basis was given. At the same time, the solicitors asserted unspecified false and/or misleading representations and purported to reserve the Lewises’ rights to seek relief in that regard. They did not, at that time, seek to rely upon such alleged misrepresentations as justifying termination, avoidance or rescission of the contracts On 13 September Orchid Avenue’s solicitors wrote, refusing to accept the asserted termination and calling for settlement on 15 September 2011. The Lewises’ solicitors affirmed their previous position. Settlement did not occur on 15 September. On 16 September, Orchid Avenue purported to terminate the contracts, relying upon the Lewises’ “failure to complete”. At no stage, up to that point, had any specific misleading or deceptive statements been alleged.
4. On 23 February 2012 the Lewises commenced these proceedings, delivering a statement of claim which relied upon the Jade document and accompanying email. On 5 December 2012, pursuant to an order made on 23 November 2012, an amended statement of claim was filed, alleging the current oral representations by Mr Hendrick. The intention to make such allegations may have been raised with Orchid Avenue or its lawyers prior to the application for leave to amend but, on any view of it, such allegations were not raised until long after the commencement of these proceedings. Further, as far as I can see, prior to the commencement of the proceedings no express complaint was made concerning the Jade document. The mention of unspecified misrepresentations in the solicitors’ letter of 9 September 2011 can hardly be said to have raised any express complaint.

# FINDINGS AS TO RELIABILITY

1. I have, in effect, disregarded the evidence of Ms Barlow. As to the other three witnesses, notwithstanding the difficulties associated with their evidence, I do not reject any of it out of hand. However I consider that the contemporaneous and subsequent documents and the conduct of the parties (including Mr Hendrick) between July 2009, and the filing of the amended statement of claim in December 2012 may assist in resolving this matter.
2. Only two aspects of Mr Hendrick’s subsequent conduct are particularly relevant. First, his email of 21 July 2009 referred specifically to the Midwood report for May 2009, showing, “accommodation rates increasing back up to an average 74.7% across all types of accommodation units”. Coming so shortly after the conversations of 10 and 13 July, and given that the Lewises were not yet contractually bound, it seems unlikely that he understood himself to be providing information which was substantially inconsistent with that which had previously been provided to them. He said in evidence that Ms Barlow had given an occupancy rate of 78%. The evidence may suggest different occupancy rates for different categories of accommodation, but the case was not conducted on the basis that this distinction was of any significance. Further, the Lewises’ case was not conducted on the basis that the Lewises had relied on any statement by Ms Barlow. I have already held that Mr Hendrick referred to a nightly rate of $500, not $550. In those circumstances, it is difficult to see how the Lewises can assert that any view which they may have had as to the self‑funding capacity of any investment in the unit was attributable to Mr Hendrick’s oral statements. To the extent that the Lewises relied upon the Jade document, their failure to investigate the significance to them of any tax credits suggests that they did not refer to the figures in that document in concluding that the investment would be “positively geared”. I am not satisfied that Mr Hendrick made any such representation as to occupancy rates.
3. Secondly, his conduct in providing the Jade document to the Lewises is inconsistent with the suggestion that he had previously represented that the unit would appreciate in value by 20% over an 18 month period. Even a cursory reading of the document discloses that it assumed a capital growth rate of 4.5% per annum. Following so closely upon the July conversations it seems unlikely that he would have so plainly contradicted his early statements.
4. Those matters, by themselves, would not necessarily have led me to accept Mr Hendrick’s evidence and to reject that of Mr and Ms Lewis. However their conduct over the period between July 2009 and December 2012 seems to have been entirely inconsistent with their allegations concerning the oral representations, their asserted understanding of the Jade document and any reliance upon such matters. I do not accept all of the suggestions put to Mr and Ms Lewis in cross‑examination, as to the various points in time at which they might have been expected to raise, with Mr Hendrick or Mr Wockner, their allegations of misleading or deceptive conduct, both oral and in the Jade document. However, had the allegations been true, they would have been formally raised at a much earlier time than they were. They may well have been raised prior to the signing of the contracts, given the difficulties which arose in connection with finance, apparently attributable to the fact that they were seeking to borrow the whole of the purchase price. In Mr Lewis’s evidence, considerable emphasis was placed upon the anticipated capital appreciation as enabling an appropriate level of borrowing in order to complete the contracts. However nothing was said about capital appreciation in the email to Mr Cameron of 13 July 2009 or in Mr Cameron’s eventual discussion paper. Nothing was said of the matter to Mr Mohi in the email of 21 July 2009. In his email to Mr Hendrick of 19 July 2009, Mr Lewis sought to obtain a valuation which he assumed was in existence. However he said nothing about capital appreciation. My conclusion is bolstered by their claim not to have noticed the different anticipated capital appreciation rate in the Jade document, and their failure to make any allegation as to such representation prior to 2012. I do not accept Mr Lewis’s rather glib assertion that the matter had been raised in conversations between him and Mr Hendrick.
5. The first mention of any misrepresentation was in the solicitors’ letter of 9 September 2011. It seems unlikely that any specific allegations had been made by the Lewises at that time. Had such allegations been made to their solicitors, one would have expected that rather more would have been said, even if full instructions had not yet been received. Nothing was apparently said for a further period of five months, when proceedings were commenced in February 2012. Even then, there was no reference to the oral representations by Mr Hendrick which, in the end, have been far more important to the case than the Jade document.
6. Mr Lewis sought to justify this absence of any earlier complaint about misleading or deceptive statements by asserting that he had not been able to give his solicitors proper instructions. He was absent from Perth and had no access to his office or his records. That explanation is not satisfactory. The matter was undoubtedly of great importance to the Lewises. If they believed that their problems had been caused by Mr Hendrick’s conduct, they would certainly have raised the matter, both formally and informally, at a much earlier time. Further, Mr Lewis’s selective objections to terms of the contracts suggest that he was not concerned about being excluded from relying on the representations which he now alleges. I reject the evidence of Mr and Ms Lewis as to the representations concerning capital growth and the self‑funding nature of any investment. Whilst it is possible that those topics were touched upon in a general way, I do not accept that the pleaded representations were made.
7. As to the Jade document and the accompanying email I have concluded that I do not accept that by their delivery to the Lewises, Mr Hendrick made the representations alleged. He asserted only that somebody else had made assumptions and expressed opinions about a particular scenario involving another purchaser. There is no basis for finding that he represented that the scenario contained in the Jade document was in any way comparable to the Lewises’ situation, save that some of the figures (as to income and outgoings) may have been comparable to those which were provided by Mr Hendrick or Ms Barlow. As I have said I do not accept that Mr Hendrick’s supply of the Jade document to the Lewises was a representation as to a future matter upon which s 51A might operate.
8. I also conclude that the Lewises did not rely upon any perceptions which they may have had as to the alleged representations. Mr and Ms Lewis did not execute the contracts until mid‑September, two months after the meetings in July and after receipt of the Jade document. In that time they had spoken to their mortgage broker, Mr Cameron. He told them that they would be unable to raise the amount of money which they needed, at least in Perth. On Mr Lewis’s account of events occurring between mid‑July and mid‑September 2009, it is difficult to understand how the Lewises ended up in the position in which they find themselves. If, as Mr Lewis said, he would not have entered into the contracts had he not been assured of finance, then he must have understood that Westpac had either contractually committed itself to providing the finance or represented that such finance would be available. In either case, as I have previously indicated, the Lewises signed the contracts in reliance upon the contract with Westpac or on its representations, and not upon anything that had previously been said by Mr Hendrick.
9. I should add that in the course of argument, counsel for Orchid Avenue abandoned any defence based on the denial of Mr Hendrick’s authority or ostensible authority relevantly to bind that company.
10. My reasons and findings lead inevitably to the conclusion that on the claim, there must be judgment for the respondent.

# THE CROSS‑CLAIM

1. My reasons and findings also lead to the conclusion that in failing to perform their obligations pursuant to the contracts on 15 September 2011, the Lewises were in default. In those circumstances there is no challenge to the validity of Orchid Avenue’s determination of the contracts on 16 September 2011. Orchid Avenue seeks amounts payable to it pursuant to the unit contract and/or damages. It makes no claim arising out of the furniture package contract. Only a few matters remain in issue. First, Orchid Avenue claims a loss incurred on resale.
2. Had the Lewises performed their obligations under the unit contract, Orchid Avenue would have received:

$932,000.00 (total sale price)

less $ 27,960.00 (commission and marketing fees)

less $ 900.00 (legal fees)

$903,140.00

On re‑sale, Orchid Avenue received:

$624,000.00 (total sale price)

plus $ 13,980.00 (50% discount on original commission)

plus $ 93,200.00 (forfeited deposit under unit contract)

less $ 24,960.00 (commission and marketing fees on re‑sale)

less $ 12,480.00 (service fee payable to Three Sixty)

less $ 900.00 (legal fees)

less $ 16,052.89 (holding costs)

$676,787.11

Net Loss $226,352.89

1. The credit for the deposit paid by the Lewises reflects the fact that the relevant amount was paid to Orchid Avenue’s solicitors as stakeholders, presumably by Westpac. Orchid Avenue seeks an order for its release to that company. Thus it is appropriate that the amount should go in reduction of Orchid Avenue’s claim.
2. At para 5.2 of the further amended defence to the further amended cross‑claim, the Lewises plead that the claimed commission was illegal, being in excess of the amount permitted by the *Property Agents and Motor Dealers Regulations 2001* (Qld). However this defence was abandoned in the course of oral argument. A further matter in dispute was whether Orchid Avenue was required to give credit for the 50% discount on the commission payable on the sale to the Lewises. Orchid Avenue accepts that it must allow the credit.
3. The only remaining issue concerns the rate at which interest should be allowed on the amount of any judgment. Clause 15 of the unit contract provides

15. Breach of the Contract

15.1 You breach the contract if:

(a) you fail to comply with any of your obligations under the contract; or

(b) you, being a natural person:

(i) are sentenced to imprisonment for a term exceeding 1 month; or

(ii) are committed to a psychiatric hospital or in our opinion become of unsound mind; or

(c) you, being a company:

(i) are subject to an application for your winding up;

(ii) are ordered to be wound up;

(iii) enter into a scheme of arrangement with your creditors:

(iv) resolve to go into voluntary liquidation;

(v) enter into a scheme of arrangement for reconstruction purposes; or

(vi) become subject to any form of external administration referred to in the *Corporations Act*.

15.2 If you breach the contract, we may affirm or terminate the contract.

15.3 If we affirm the contract, we may:

(a) sue you for damages for breach, or sue for specific performance and damages in addition to or instead of specific performance; and

(b) recover from you as a liquidated debt any part of the deposit that you have failed to pay, and the amount recovered by us must be paid to the deposit holder.

15.4 If we terminate the contract we may:

(a) declare any part of the deposit paid by you forfeited and/or sue you for breach; or

(b) declare any part of the deposit paid by you forfeited and/or re-sell the lot, and any deficiency in the price on a resale and the expenses arising from the re-sale shall be recoverable by us from you as liquidated damages,

and in either case we may recover from you as a liquidated debt any part of the deposit that you have failed to pay.

15.5 Our rights under this clause are in addition to any other rights which we may have at law or in equity.

15.6 If you fail to pay on the due date any money payable by you under the contract, you must pay interest at 15% per annum on the amount outstanding from the due date until (and including) the date of actual payment. Interest will be calculated and payable by you at the same rate on the amount of any judgment we obtain against you, from the date of judgment until the date of actual payment. All interest will be paid on the settlement date or, if settlement does not occur, on demand.

1. When Orchid Avenue terminated the unit contract on 16 September 2011, it purported to act pursuant to cl 15.2 of that contract. There is no reason to conclude otherwise. Clause 15.4 is engaged only in the event of a breach by the purchaser, and an election by the vendor to terminate. It follows that the parties’ intention must have been that cl 15.4 would operate notwithstanding such termination. Thus any amount payable as liquidated damages pursuant to s 15.4(b) is money payable under the unit contract. Hence interest is payable pursuant to s 15.6.
2. It may be arguable that upon termination, the Lewises ceased to be liable to pay the purchase price and instead became contingently liable to pay liquidated damages pursuant to cl 15.4. It may also be arguable that in those circumstances, there was a period during which the purchase price was no longer due, but liquidated damages had not yet been quantified, and so were not due, in which circumstances interest would not be payable pursuant to cl 15.6.
3. The better view is that cl 15.6 prescribes an interest regime which applies whenever default in payment occurs, commencing from the due date and continuing until payment. When the proceeds of resale are received, they are to be applied against the outstanding purchase price, so reducing the outstanding amount, and therefore the amount on which interest is payable. The outstanding balance remains unpaid and continues to attract interest pursuant to cl 15.6.
4. I would award interest at 15% per annum upon all outstanding amounts up until judgment. Orchid Avenue has not expressly sought any order for interest thereafter. The

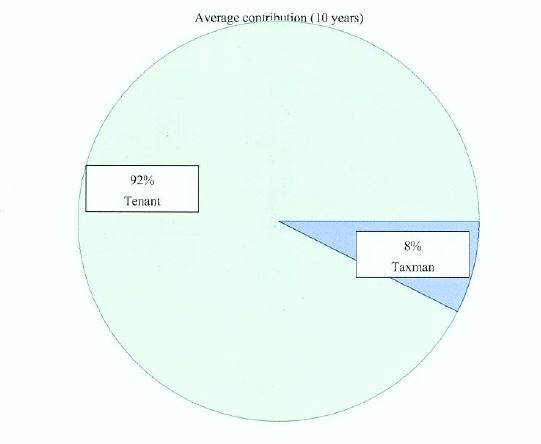
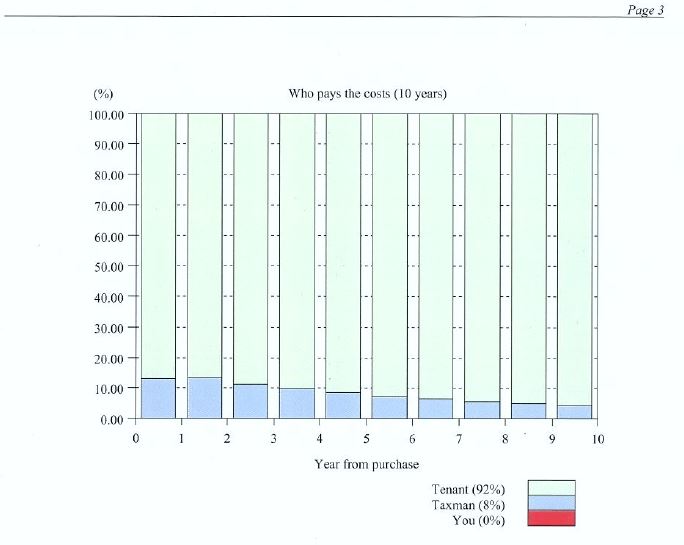
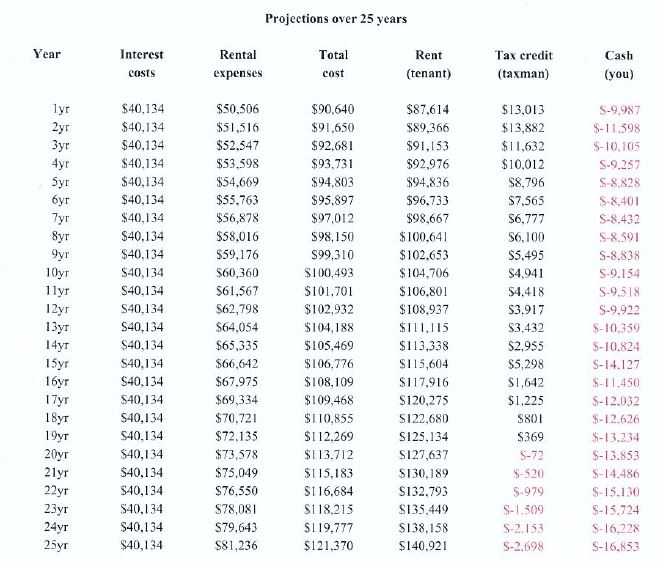
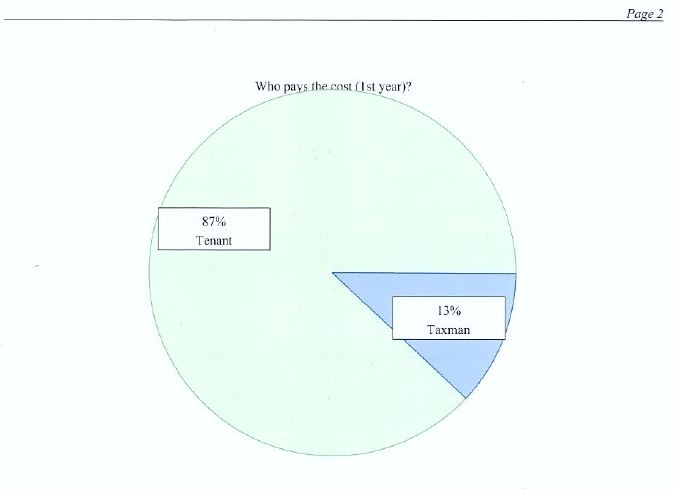
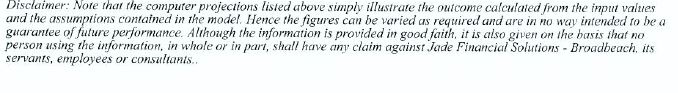
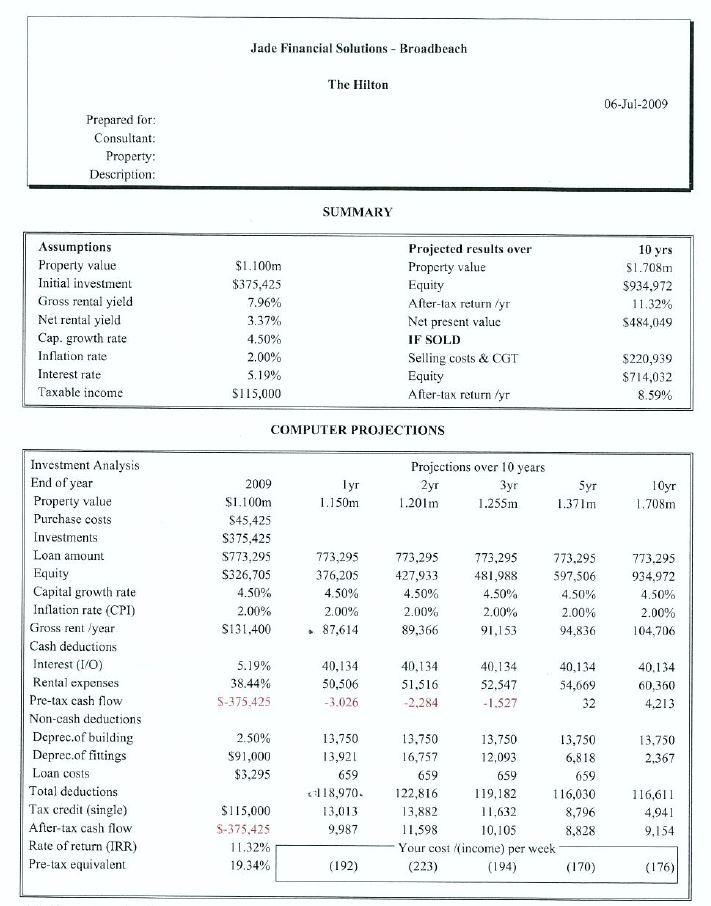
parties may wish to prepare further calculations and make appropriate submissions, including as to appropriate orders. I shall hear submissions as to costs.

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| I certify that the preceding one hundred and seventy-four (174) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett. |

Associate:

Dated: 11 July 2014

# aTTACHMENT A



# ATTACHMENT B

