JURISDICTION	**:**	DISTRICT COURT OF WESTERN AUSTRALIA IN CIVIL
LOCATION	**:**	PERTH
CITATION	**:**	BERNHARD -v- ELLIS [2016] WADC 10
CORAM	**:**	BOWDEN DCJ
HEARD	**:**	24-27 NOVEMBER 2015
DELIVERED	**:**	29 JANUARY 2016
FILE NO/S	**:**	CIV 3731 of 2012
BETWEEN	**:**	LESTER ROY BERNHARD First plaintiff PAMELA KATHLEEN BERNHARD Second plaintiff AND PAUL ELLIS First defendant GRAHAM FILES Second defendant DREAM MONEY PTY LTD Third defendant

Catchwords:

Sale of rent roll - Misleading or deceptive conduct - Turns on its own facts

Legislation:

Competition and Consumer Act 2010 (Cth)
Fair Trading Act 1987 (WA)
Income Tax Assessment Act 1997 (Cth)

Result:

Judgment for the plaintiff

Representation:

Counsel:

First plaintiff	:	Mr J Healy
Second plaintiff	:	Mr J Healy
First defendant	:	Mr S Standing
Second defendant	:	No appearance
Third defendant	:	Mr S Standing

Solicitors:

First plaintiff	:	Cullen Macleod
Second plaintiff	:	Cullen Macleod
First defendant	:	Galic & Co
Second defendant	:	Not applicable
Third defendant	:	Galic & Co

Case(s) referred to in judgment(s):

Argy v Blunts & Lane Cove Real Estate Pty Ltd (1990) 26 FCR 112
Clambake Pty Ltd v Tipperary Projects Pty Ltd [No 5] [2009] WASC 141
Commonwealth v Amann Aviation (1991) 174 CLR 64
Embelton Motor Co Pty Ltd v St Kilda Beach Taxi School and Staffing Pty Ltd [2014] WASCA 183
Enzed Holdings Ltd v Wynthea Pty Ltd (1984) 57 ALR 167
Global Sportsman Pty Ltd v Mirror Newspapers Ltd (1984) 2 FCR 82
Gould v Vaggelas (1985) 157 CLR 215

Henville v Walker [2001] HCA 52; (2001) 206 CLR 459
HTW Valuers (Central Qld) v Astonland [2004] HCA 54; (2004) 217 CLR 640
Johnson v Perez (1988) 166 CLR 351
Jones v Schiffmann [1971] HCA 52; (1971) 124 CLR 303
Kizbeau Pty Ltd v WG & B Pty Ltd (1995) 184 CLR 281
Marks v GIO Australia Holdings Ltd [1998] HCA 69
Merost Pty Ltd v CPT Custodian Pty Ltd [2014] FCA 97
Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd [2010] HCA 31
Newmarket Corporation Pty Ltd v Kee-Vee Properties Pty Ltd [2003] WASC 157
Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd (2011) 248 FLR 193; [2011] WASCA 76
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd [1982] HCA 44; (1982) 149 CLR 191
Pennington v Norris (1956) 96 CLR 10
Podrebersek v Australian Iron & Steel Pty Ltd (1985) 59 ALR 529
Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd [No 2] [2009] WASCA 183
R v Godinho (1911) 7 Cr App Rep 12
R v Noble [2000] QCA 523, (2000) 117 A Crim R 541
Reiffel v ACN 075 839 226 Ltd [2003] FCA 194
St Kilda Beach Taxi School and Staffing Pty Ltd v Central Taxi Management Pty Ltd [2012] WADC 114
Zorom Enterprises Pty Ltd v Zabow [2007] NSWCA 106; (2007) 71 NSWLR 354

1 **BOWDEN DCJ**: From late 2002 the plaintiffs operated a real estate business in Waikiki under the corporate entity Dream Team Investments Pty Ltd (DTI) and traded initially as Warnbro Realty and later as Elders Rockingham.

2 The real estate business' principal source of income was from commission on the sales of property and from management fees for leasing properties (rent roll).

3 Mr Bernhard and Mr Ellis had known each other for about 30 years.

4 Mr Ellis worked in the real estate business on a salary/commission basis as a salesman from about 2005 until 2008 and then as sales manager from 2010. Mr Ellis has been a director of DTI since July 2010 and was the owner of one of the 100 issued shares in that company.

5 In or about December 2010 Mr and Mrs Bernhard were making plans to retire from the business and entered into negotiations with Mr Ellis for the latter to purchase the business.

6 Eventually agreements were reached whereby:

(a) Dream Money Pty Ltd (DM) purchased for $650,000 the rent roll from DTI (the rent roll agreement) (exhibit 1);

(b) Mr Bernhard and Mr Ellis sold their shares in DM to interests associated with Mr Ellis and Mr Files for $53 (the share agreement) (exhibit 2);

(c) Mr and Mrs Bernhard and Mr Ellis sold their shares in DTI to DM for $6,450 being $99 for the shares and $6,351 for the goodwill and equipment (goodwill agreement) (exhibit 3);

(d) Mr and Mrs Bernhard lent DM $250,000 to assist DM to purchase the rent roll. Repayments were at $4,200 per month over five years (vendor finance agreement, sch C to exhibit 1) and were personally guaranteed by Mr Files and Mr Ellis (the guarantee) (exhibit 4).

These agreements were signed on 31 July 2012.

(e) DM leased the recently purchased rent roll to DTI (now controlled by Mr Ellis and his associates) (ts 55).

7 Mr and Mrs Bernhard say that DM defaulted on repayments under the vendor finance agreement and a default notice was issued in November 2012 to Mr Ellis and Mr Files as guarantors, and upon default, they became liable for repayment of the entire amount outstanding together with interest and indemnity costs which they claim is $245,800.

8 It is not disputed by Mr Ellis or DM that monies remain unpaid pursuant to the vendor finance agreement, however they have counterclaimed against Mr and Mrs Bernhard alleging misleading or deceptive conduct in connection with the sale of the rent roll. This led them, they say, to pay $116,652, as pleaded, too much for the rent roll.

9 They seek orders that the guarantee be declared void or set aside or varied so as to reduce Mr Ellis' liability by $116,652 and DM seeks damages of the same amount.

10 Mr and Mrs Bernhard deny any misleading or deceptive conduct.

11 As pleaded, if Mr Ellis' and DM's counterclaim is successful, it would reduce their debt to the Bernhards by those amounts and the Bernhards would recover $129,148. If the counterclaim was not successful, the Bernhards would recover the full $245,800.

12 As the Bernhard's case against Mr Ellis and DM was admitted, it was appropriate that Mr Ellis and DM gave evidence first.

13 It is not in dispute that during these transactions Mr Bernhard acted on his and his wife's behalf and Mr Ellis acted on his and DM's behalf.

The plaintiffs' case against the second defendant

14 The second defendant, Mr Files, did not appear at the trial.

15 He advised the court by emails:

> Please accept this return email as notification that I will not be attending the abovementioned court case on 24 November to 28 November.
>
> … I want this silliness dealt with at the appropriate time as stated or I will take your court system to public forum to let people know how ridiculous this is.

16 Mr Bernhard applied for default judgment on the basis that by his pleadings Mr Files had admitted the plaintiffs' pleaded case with the possible

exception of par 4 of the plaintiffs' amended writ of summons endorsed with an amended statement of claim of 8 April 2014, wherein it was pleaded that the plaintiffs issued a notice of demand to the third defendant dated 7 November 2012 demanding it pay the balance of the principal sum (at that date, the amount of $245,800).

17 The plaintiffs argue that notwithstanding this particular was not specifically admitted, Mr Files' amended statement of defence and counterclaim of 20 March 2013 (par 6 and par 8) impliedly admitted the demand was served.

18 Paragraph 6 of that pleading provides:

> … concerning the demand upon the defendant it is pleaded that the second defendant could not comply with this as the second defendant is seeking a guarantee, under which the plaintiff [sic] is suing the second defendant, be set aside on the basis of misrepresentation by the first plaintiff, being Lester Roy Bernhard …

19 Mr Files' amended statement of defence and counterclaim deals with the plaintiffs' amended statement of claim paragraph by paragraph in sequential order, and accordingly the reference to 'concerning the demand' appearing in par 6 of that document can only be a reference to par 4 of the plaintiffs' amended statement of claim of 8 April 2014 and is an implied admission that the notice of demand was served.

20 In any event, I accept that exhibit 36 being the notice of demand dated 7 November 2012 and notice of demand to the guarantors of 13 November 2012 was served upon Mr Files whose defence is not based on the non-service of notices of demand but rather on misrepresentations.

21 Clause 2(3) of exhibit 4 provides that if the borrower defaults the guarantor must indemnify the lender against all losses, liabilities, damages, costs and expenses (including legal expenses on a full indemnity basis) which may be incurred (directly or indirectly) by the lender by reason of that default or failure.

22 Pursuant to the clauses in exhibit 4 relating to 'interest on overdue amounts' and cl 4.1 of sch C, exhibit 1 the guarantor is liable to interest on the unpaid portion of the principal sum owing at the rate of 1% per annum compound.

23 In those circumstances it is appropriate to allow costs on the contractual

basis: ***Clambake Pty Ltd v Tipperary Projects Pty Ltd [No 5]*** [2009] WASC 141 [13].

24 I accept the interest calculations in the affidavit of Ms Williams sworn 27 November 2015 and accordingly will make orders dismissing the second defendant's counterclaim and enter judgment against the second defendant for the amount claimed and interest. I will also order the second defendant pay the plaintiffs' costs on an indemnity basis.

25 If this leads to conflicting decisions in that having heard the merits of the case, I effectively find that Mr Ellis and DM are indebted to the Bernhards for a lesser amount as a result of misleading or deceptive conduct by Mr Bernhard, that is, the consequence of the manner in which the second defendant chose to conduct the litigation. This position has arisen previously: ***St Kilda Beach Taxi School and Staffing Pty Ltd v Central Taxi Management Pty Ltd*** [2012] WADC 114 [38]; ***Embelton Motor Co Pty Ltd v St Kilda Beach Taxi School and Staffing Pty Ltd*** [2014] WASCA 183 (although the issue was not raised on appeal).

26 The fact that default judgment will be entered against Mr Files is not in any shape or form evidence against Mr Ellis and DM whose cases are to be determined on the merits.

The evidence

27 Each party called three witnesses. Mr Ellis and DM's witnesses were Mr Ellis, Mr Fahie and Mr Milne. Mr Bernhard called himself, Mr Mast and Mr Vernal.

Consideration of the evidence

The general context

28 The evidence establishes that Mr Bernhard had been involved in the real estate industry for about 25 years. He had been a licensee since 1993. He originally commenced the business in 2002 as Warnbro Real Estate which later became known as Elders Rockingham.

29 Both Mr Bernhard and Mr Ellis agree that they met in the early 80s. Mr Ellis went to work as a salesperson for Warnbro Reality after he had

retired from the police force in about 2005. Mr Ellis remained so employed until approximately 2008 when he left to work for other real estate companies but returned in 2010 as a sales manager.

30 In 2010 he was given one share (out of 100) in DTI and appointed director of the company. It is common ground that from about 2011 Mr Ellis and Mr Bernhard discussed the future of the business in the context of Mr Bernhard's pending retirement.

31 Mr Ellis said that on a number of occasions Mr Bernhard explained how a rent roll was valued, which essentially was that you take the income of the properties under management over a 12-month period and multiply that by a figure (the multiplier, the valuation methodology) (ts 40).

32 Mr Bernhard said he knew from past experience that the market value of a rent roll was determined by what the rent roll could earn over 12 months times the applicable multiplier (ts 411). He recalled explaining and discussing this with Mr Ellis (ts 370).

33 In January 2012 Mr Bernhard obtained the January appraisal (exhibit 5) of the value of the rent roll. At this stage Mr Ellis was the sales manager marketing and promoting the business and running the sales team, and the overall manager of the business was Mr Bernhard. The appraisal was prepared by Mr Mast from GMO Business Brokers (GMO). Mr Mast had been involved in valuing the rent roll when Mr Bernhard bought out the other partners of Warnbro Reality in 2008 from which date the latter and his wife were the effective owners of the business.

34 To enable the preparation of the January 2012 appraisal, Mr Mast requested a copy of the Gee Dee rent roll valuation report, which is a report generated by the Gee Dee accounting software of the business which discloses the number of properties under management and the rental earned from those properties. It does not disclose when the written authorities for the properties under management expire.

35 Mr Bernhard provided the Gee Dee report to Mr Mast. Mr Bernhard said he was not aware that Mr Mast assumed for the purposes of the appraisal that all the property management authorities (PMA) relating to the properties on the Gee Dee rent roll report would be re-signed for a further 12 months from the date of any sale of the business, however he knew that the value of the business rent roll was calculated by applying a multiplier to the

income earned from the properties under management over a 12-month period.

36 Mr Bernhard said he was not sure if he provided a copy of the January 2012 appraisal to Mr Ellis but said he certainly discussed it with Mr Ellis because he knew Mr Ellis was interested in buying the business. Mr Ellis says that he was provided with a copy of the appraisal and they discussed it (ts 40, 133, 170, 412).

37 Mr Mast said the underlying assumption in valuing a rent roll was that new PMAs valid for at least a 12-month period will be in place for the new owner as at settlement and said this was also a requirement of financial institutions looking to provide credit facilities for the purchase of rent rolls (ts 340). He prepared the January appraisal on that assumption.

38 I accept Mr Mast's evidence. He was an honest straightforward witness.

39 Mr Bernhard knew the January 2012 appraisal was prepared using the valuation methodology (ts 344, 400).

40 Mr Ellis was interested in purchasing the business, subject to finance, and had friends and relatives who were prepared to invest in this venture. Eventually he spoke to the National Australia Bank and for the purposes of obtaining finance needed to obtain a valuation of the rent roll because the appraisal was more than three months old.

41 Mr Ellis said that Mr Bernhard told him he should probably use Mr Mast for the valuation. Mr Bernhard denied this and said he gave Mr Ellis Mr Mast's phone number and told Mr Ellis that there were other valuers. He said he told Mr Ellis that he would have to pay for the valuation.

42 I find that it is inherently more probable that everybody was happy with Mr Mast preparing the valuation, as he had prepared a valuation in 2008 and the January appraisal. I find that Mr Ellis instructed Mr Mast.

43 Mr Ellis contacted Mr Mast and asked him to prepare a valuation (exhibit 30) and Mr Mast prepared the March valuation (exhibit 6). Mr Bernhard knew Mr Mast was preparing the March valuation and provided the March Gee Dee rent roll valuation report (March Gee Dee report) to Mr Files in circumstances where he knew and intended that it would be forwarded to Mr Mast.

44 The March valuation explicitly stated:

> 'It is assumed all properties are under valid management authorities. Moreover, it is assumed all management authorities will be valid for a period of at least 12 months in the event of a sale of the portfolio. (exhibit 6 at D iv)

45 The January appraisal and the March valuation used the same valuation methodology and had the same underlying assumption that all PMAs will be valid at the sale and remain valid for 12 months from the date of the settlement.

46 Mr Ellis said he gave the March valuation to Mr Bernhard who read it in his presence and they discussed it (ts 47, 48). Mr Bernhard said he never saw the March valuation but knew Mr Ellis was obtaining the valuation and asked either Mr Ellis or Mr Files the result of the valuation in a general sort of way one day when they were in the office and was told their valuation was about the same as his appraisal (ts 416).

47 Mr Ellis' evidence was that in reference to the rent roll Mr Bernhard told him 'it was a very good business to get into' (ts 41), 'it was a great business to buy' (ts 41), the rent roll was an 'excellent business' (ts 46, 47), the rent roll was 'very good' (ts 49, 181), it was 'an extremely good rent roll' (ts 160, 179), the rent roll was a 'solid rent roll' (ts 98) and it was 'a very solid rent roll' (the rent roll representation) (ts 181).

48 I reject the plaintiffs' submission that at ts 165 Mr Ellis' evidence was that Mr Bernhard said it was 'a good solid business'. The context of that passage makes it clear that Mr Ellis was referring to the position he hoped he would find himself in and not purporting to recount Mr Bernhard's words.

49 Mr Bernhard's evidence was that he did not make any specific reference to the rent roll, but rather spoke of the business as an entirety which included the rent roll, the goodwill, the furniture and fittings, tax losses and the like.

50 In that context Mr Bernhard said he told Mr Ellis 'it was a good business, it had made a good living for me over the years' (ts 369), 'the business was a good business, it had potential to grow', it had supported him well (ts 413, 414, 427).

51 Mr Bernhard said he was aware that Mr Ellis and his backers were trying to obtain finance from the National Australia Bank who were the bankers for Elders Rockingham. He said he became aware in about May

2012 that Mr Ellis was unable to raise the $650,000 and Mr Ellis approached him about providing vendor finance which he agreed to do. Mr Ellis disputed this and said Mr Bernhard offered vendor finance and he accepted.

52 Mr Ellis said that eventually he and Mr Bernhard attended a meeting at the Macquarie Bank where the March valuation was discussed (ts 49, 144, 266). Mr Bernhard said he attended a meeting at the Macquarie Bank with Mr Ellis and the Macquarie Bank discussed whether he was prepared to provide $250,000 worth of vendor finance with his security to rank as subordinate to the bank's securities. He said that he was told that the loan was going to be approved. He said there was no discussion with the Macquarie Bank about the March valuation.

53 Mr Ellis submits that it is inherently unlikely that the March valuation was not discussed at the meeting at the Macquarie Bank meeting, bearing in mind that the meeting was about raising funds to purchase the business and the rent roll was in effect the business. Further, he says that Mr Bernhard was a careful businessman who was discussing with other potential buyers the sale of either the rent roll in isolation or the business as a whole and that he knew the March valuation had been prepared and would have wanted to see it.

54 I consider it inherently probable that all the bank were concerned about was to ensure that any security Mr Bernhard obtained by way of protecting his vendor finance agreement, was subordinate to their security.

55 Mr Bernhard knew about the March valuation and provided the information necessary for its preparation. He knew that it would have been prepared on the same basis as all valuations, that is, the fees from the properties under management over 12 months times the multiplier. There is no compelling reason for Mr Bernhard to want to see the March valuation. He had the January appraisal, he provided the March Gee Dee rent roll report to Mr Mast, he knew the valuation methodology, and he could easily calculate the figure that Mr Mast would arrive at. There is nothing inherently more probable that leads to a conclusion that he saw or discussed the March valuation. In any event, I accept his evidence that he knew the result of the valuation was about the same as his January appraisal (ts 364) and his evidence that he was not going to sell for anything less than $650,000.

56 Mr Bernhard accepted that at no time did he discuss the duration of the

property management agreements with Mr Ellis (ts 181, 374, 375, 421). Although the Gee Dee system provided a monthly report on the property management authorities that were about to expire and when the most recent renewal letters were sent to the property owner to encourage them to renew the authority (ts 270, 281, 283, 406 - 410), he did not forward those to Mr Ellis. I accept Mr Bernhard's evidence that as part of his normal business practice he was continually trying to have the PMAs updated or renewed when they expired (ts 410).

57 Mr Bernhard, I find, gave little attention to the question of renewing the PMAs because of his previous experience with Summit Reality in 1998/1999. On that occasion, Mr Bernhard sold his previous real estate business to Summit Reality and there was no difficulty re-signing all of the PMAs into the new business entity's name (Summit Reality) without losing any customers (ts 374).

58 Further, Mr Bernhard considered this transaction to be an internal transaction, that is, Mr Ellis was buying not only the rent roll but also the shares in DTI and Mr Bernhard believed that the PMAs did not need to be assigned to a new corporate entity. Further, Mr Bernhard expected that he would be continuing in the business after Mr Ellis took it over and if there were any difficulties with the clients he believed he would be able to encourage them to leave things as they were, as had occurred in the Summit transaction (ts 374, 421, 422).

59 Mr Bernhard, I find, did not consider there would be any issue with property owners continuing to have their properties managed by Elders Rockingham because owners in his view 'don't like change' (ts 422). He may have been overly optimistic in this view, but I find that was his honest opinion.

60 Mr Ellis said that in about August 2012, a few days before settlement, he was told by Mr Files that there might be a problem with the expiry date of some PMAs. Mr Ellis said he spoke to Mr Bernhard and asked him about the expiry dates. He said that conversation occurred in the office and Mr Bernhard pointed to a pile of PMAs on the ground in the property management office and said 'they've all been done, they just haven't been put on the computer yet' (the August representation) (ts 53, 105, 176, 177, 178).

61 Mr Bernhard's evidence was that when he was driving across the overpass near Burswood, he spoke on the hands-free phone to Mr Ellis who

raised the query that some of the PMAs were not current. Mr Bernhard replied that perhaps 'Steve had not entered them into the computer'. Mr Bernhard said Mr Ellis then told him that the property managers were trying to steal some of the managements and he had called the police and then hung up (ts 424).

62 Mr Bernhard initially agreed with Mr Standing that the conversation occurred two weeks before settlement then when asked whether the conversation occurred before settlement, he replied 'no, after settlement, the end of the week after settlement' (ts 424, 425) and thereafter maintained the conversation took place after settlement.

63 Exhibits 26 and exhibit 28 show that by 7 March 2012 some 81 PMAs had expired.

Some significant disputed factual issues

64 To establish their case, Mr Ellis and DM, inter alia, relied on a number of express oral representations, allegedly made by Mr Bernhard, which when taken with other conduct is said to constitute misleading or deceptive conduct. Additionally, they rely on implied representations and non-disclosures.

65 The express oral representations relied upon were that Mr Bernhard said to Mr Ellis words the substance of which was that:

(a) the rent roll should be valued, and the price for its sale arrived at by reference to the management fees that the properties in the rent roll would generate over a period of 12 months (valuation representation);

(b) the rent roll was a solid business investment (rent roll representation); and

(c) all of the PMAs for properties the subject of the rent roll were signed up and to the extent that the computer records of the business indicated the authorities for some of the properties had expired, those authorities had been renewed but had not yet been entered into the computer records of the business (the August representation).

66 I shall consider each representation in turn.

67 Mr Ellis and Mr Bernhard were the only persons present when these oral representations were allegedly made who gave evidence. Credibility is an important issue.

Credibility

68 I have not found that either Mr Bernhard or Mr Ellis deliberately set out to deceive or mislead the court nor are they dishonest men.

69 There were some aspects of Mr Ellis' evidence which require comment.

70 Mr Ellis feels aggrieved as is evidenced by his frank admission that due to the losses he incurred, the hours he had worked trying to keep the business running, and the energy and hard work he had put into the business he did not consider he owed Mr Bernhard any money at all notwithstanding that only one payment of $4,250 had been made on the $250,000 guarantee.

71 Mr Ellis was clearly offended by the manner in which, on his evidence, Mr Bernhard terminated his services as sales manager in June, and made his wife redundant and by Mr Bernhard's refusal to negotiate some form of compromise to this action. He also complained of Mr and Mrs Bernhard's conduct towards the salesmen, his wife and himself (ts 93, 195, 197, 199).

72 Mr Ellis appeared dogmatic in some of his views. For example, he maintained that he had an extremely good memory, claiming he remembered things 'really well' and 'very, very clearly' (ts 103, 104).

73 Mr Ellis also had strong views on the effect of the *Real Estate and Business Agents Act 1978* (WA) (ts 177, 180, 190, 272, 273) on Mr Bernhard's obligation to disclosure the terms of the PMAs.

74 By themselves or in combination these matters do not cause me any concerns about Mr Ellis' credibility. Litigants always feel aggrieved by their opponents and often have strong views.

75 Of some significance however were Mr Ellis' answers to questions relating to screen shots of the Gee Dee reports provided by Elders Rockingham to Mr Milne (exhibit 30).

76 When Mr Ellis was shown the screen shots he firmly stated:

> We never provided anybody with screen dumps. We don't allow screen dumps to go out of the office, because that's private information, and under the Privacy Act we've got to – we have to secure that information (ts 120).
>
> … It looks to me like it's stolen information, unlawfully obtained, and it's - looks like to me that someone has seriously breached the Privacy Act by releasing this information to someone cos it's stolen (ts 121).
>
> … it's been illegally obtained … (ts 122)
>
> … I would say he [Mr Milne] certainly didn't get it from our office … (ts 124).

77 The uncontradicted evidence shows that the screen shots were provided to Mr Milne by the property manager of Elders Rockingham for the purpose of valuing the rent roll as at August 2012 at the request of Mr Ellis and DM's solicitors (ts 290, exhibit 30, 31) at a time when Mr Ellis was running that business. Dream Money is a company effectively controlled by Mr Ellis.

78 The screen shots clearly and uncontradictably came from Mr Ellis' business, and the fact that Mr Ellis' immediate reaction was to allege that the screen shots were stolen, or illegally obtained and 'certainly' did not come from his office is not only incorrect but shows that Mr Ellis, with respect, has strong dogmatic views which he does not hesitate to express and views which are on occasions demonstrably incorrect. It demonstrates that Mr Ellis can be a person, who on occasions, jumps to forceful and incorrect conclusions.

79 That does not mean that I find Mr Ellis to be a dishonest person, but it causes me to be cautious about his evidence. Generally I would not be prepared to accept Mr Ellis' evidence unless it is corroborated by business documents or other credible evidence or his version of events is inherently more probable.

80 Mr Bernhard's evidence is said to have been inconsistent because his evidence of the August 2012 conversation was originally that it occurred before settlement but later he said the conversation occurred after settlement.

81 When the transcript in its entirety is ready, it is clear Mr Bernhard immediately corrected himself upon further questioning and confirmed on several occasions that the conversation took place after settlement (ts 424 - 426, 431). I do not find this inconsistency causes me to doubt Mr Bernhard's evidence which was otherwise straightforward and credibly given.

82 Mr Fahie who is currently looking after the property management department of the business, gave evidence in relation to the Gee Dee system. He gave his evidence in an honest straightforward manner and his evidence is accepted by me, however in the overall scheme of things, it is of little assistance. Mr Mast, Mr Milne and Mr Vernal also gave evidence. My findings on their evidence and credibility are dealt with in the course of this judgment.

The valuation representation

83 I am satisfied that in or about March 2012 Mr Bernhard did discuss the method by which a rent roll was valued, that is, by considering the management fees received from properties under management over 12 months and applying a multiplier. Both Mr Bernhard's and Mr Ellis' evidence was to this effect.

84 I am satisfied the valuation representation was made and in circumstances where the asset under discussion was the rent roll, this representation necessarily extended to a representation that the price for its sale was determined by that method.

The rent roll representation

85 The plaintiffs submit that because of the number of different versions Mr Ellis used to describe what Mr Bernhard said, Mr Ellis' evidence lacks clarity and further says that words actually used by Mr Ellis in evidence were not pleaded and therefore cannot support the pleaded representation that the rent roll was a solid business investment (ts 181 – 185).

86 I do not find any merit in these submissions.

87 A witness is entitled to give evidence of the substance of what was said: *Wigmore on Evidence (Chadbourne Rev)* par 2097; ***R v Godinho*** (1911) 7 Cr App Rep 12, 14; ***R v Noble*** [2000] QCA 523, (2000) 117 A Crim R 541, 544.

88 The plaintiffs' submission ignores the fact that when it was directly put to Mr Ellis that Mr Bernhard never said the rent roll was a solid business investment Mr Ellis replied he was told that on numerous occasions (ts 192).

89 The submission also overlooks the pleading's reference to Mr Bernhard

'using words "*the substance of which*" was that the rent roll was a solid business investment'.

90 I accept Mr Ellis' evidence that Mr Bernhard said words to the effect that the purchase of the rent roll was a solid business investment.

91 It is inherently more probable that the rent roll was discussed separately from the other assets of the business. Although there are other assets such as goodwill, a lease, furniture and fittings, and potential tax losses, the overwhelming value of a real estate business is its rent roll. Mr Mast, Mr Bernhard and Mr Ellis all agreed that the major value of a real estate business is its rent roll. The other assets in the transaction were valued by the parties at about $6,500, the rent roll at approximately $650,000.

92 The rent roll was the subject of a separate contract. It was purchased by DM (exhibit 1). The other assets such as the equipment and the goodwill remained with DTI. Mr and Mrs Bernhard sold their shares in DTI to Mr Ellis and associated interests pursuant to a separate contract (exhibit 3). Other aspects of the business were dealt with by other contracts. Whilst they were parts of one overall transaction it supports my conclusion that the rent roll was discussed separately as it was by far the most significant asset of the business. It was the only asset appraised and valued by experts. I am satisfied it was the focus of the discussions between the parties. At the time of the initial discussions relating to the proposed sale, the parties treated the rent roll as the business and discussion about the rent roll and its value were treated by both parties in discussions about the business and its value.

93 It is inherently probable that Mr Bernhard as a willing seller whilst discussing the sale of the rent roll made a representation to the effect that its purchase was a 'solid business investment' in circumstances where he had controlled the rent roll since the business' inception in 2002 and no doubt believed it was a 'solid business investment' (ts 387).

94 In those circumstances, notwithstanding my reservations as to Mr Ellis' evidence, I accept that the rent roll representation was made.

The August representation

95 The first and third defendants urged me to accept Mr Ellis' version of events because he was 'rock solid' in his recollection of the August representation and it was inherently likely that as settlement approached, Mr

Files and Mr Ellis would be talking about the rent roll and PMAs. They also say Mr Bernhard's evidence in this regard was not entirely consistent and Mr Bernhard's version of the conversation was not put to Mr Ellis, suggesting it had therefore only just occurred to Mr Bernhard.

96 I accept that Mr Bernhard originally replied that this conversation took place before settlement but upon further questioning he immediately corrected that stating it occurred after settlement. I find Mr Bernhard was genuinely confused when first asked the question.

97 I do not think there is any inherent probability that Mr Files and Mr Ellis would have discussed the PMAs just before the settlement as opposed to discovering the PMAs were not current after settlement.

98 The fact that Mr Bernhard's version of the conversation was not put to Mr Ellis causes me to doubt the accuracy of Mr Bernhard's evidence on this issue. However, the onus is on the first and third defendants to satisfy me that the representation as pleaded was made, and I am not satisfied to the required standard that this representation was made given my reluctance to accept Mr Ellis' evidence and lack of any inherent probability that the conversation occurred in the manner alleged by Mr Ellis.

The implied representation

99 Mr Ellis and DM plead in par 16.8 of the further amended substituted defence and counterclaim of 20 November 2015 (final counterclaim) that there is an express or implied representation that all of the properties the subject of the rent roll had authorities that were valid (in the sense that the terms of such agreements not having expired) as at the date of the March valuation, and further that those management agreements would be valid (in the sense of the terms of those agreements not expiring) for a period of at least 12 months from 19 March 2012 or alternatively from the completion date of the sale of the rent roll (the implied representation). There is no evidence supporting an express representation in these terms.

100 They say the implied representation was made by reason of the matters pleaded in par 16.2 - 16.7 of the final counterclaim. Those matters can be briefly summarised as follows:

1. Mr Bernhard offered to give to Mr Ellis one share in DTI and a directorship in DTI in about July 2011.

2. About March 2012 Mr Bernhard made the valuation representation.

3. Mr Bernhard proposed that Mr Mast should perform the March valuation and provided the information used by him in that valuation.

4. In March 2012 Mr Bernhard discussed with Mr Ellis the March valuation which was expressly based upon the assumption that all properties the subject of that valuation were under valid management authorities and those authorities would be valid for at least 12 months in the event of the sale of the rent roll.

5. Mr Bernhard failed to disclose that a large number of the PMAs for the properties the subject of the March valuation had already expired and in addition a large number of properties had authorities which would expire within 12 months of the March valuation.

6. Mr Bernhard failed to disclose to Mr Ellis that the assumptions made in the March valuation were materially incorrect because not all the properties the subject of the March valuation were then under valid management authorities, and other properties had authorities which would cease to be valid within 12 months of the March valuation.

7. Mr Bernhard made the August representation to Mr Ellis.

101 Before determining whether an implied representation was made, it is necessary to set out some findings of fact.

102 The facts that I find are as follows.

103 Dream Team Investments was the owner of the business known as Elders Rockingham. Whilst Mr Ellis has been a director and shareholder (1 share out of 100) of DTI since about 2010, the business was effectively controlled by Mr Bernhard and his wife.

104 Although the business in its entirety was being sold, by far the most valuable asset was the rent roll. This was known to both Mr Bernhard and Mr Ellis. At the time of the discussions relating to the proposed sale the parties treated the rent roll as the business and discussions about the rent roll and its value were treated by both parties as discussions about the business and its value. Both parties treated the value of the rent roll as effectively determining the value of the business.

105 It was a universal industry practice that the income earned from the properties under management authorities over a 12-month period formed the essential basis of the rent roll's valuation and that those PMAs would be valid for 12 months from the date of any sale of the rent roll. Mr Mast confirmed this and Mr Ellis proceeded on these assumptions.

106 Mr Bernhard knew that rent roll was valued by applying a multiplier to the income earned from the properties the subject of management authorities over a 12-month period. Mr Bernhard had explained that to Mr Ellis.

107 Both the January appraisal (exhibit 5) and the March valuation (exhibit 6) were based on the industry wide assumption that the properties the subject of the rent roll were under a valid PMA as at the date of the valuation and those authorities would be valid for a period of 12 months from the date of any sale (settlement).

108 Mr Bernhard was aware that Mr Ellis was obtaining the March valuation from Mr Mast and with that knowledge, provided the March Gee Dee rent roll report to Mr Mast, via Mr Files, as to the number of properties and the rental income earned from the management of those properties for the purposes of the valuation. The Gee Dee report refers to 207 properties, however the March valuation by its terms makes it clear that the number of properties valued was 204.

109 During the course of negotiations Mr Bernhard represented on several occasions to Mr Ellis that the purchase of the rent roll was a solid business investment. That representation was made in the context that both Mr Bernhard and Mr Ellis knew that the value of the rent roll would effectively determine the value of the business.

110 I reject Mr Bernhard's evidence that he did not know Mr Mast assumed in the March valuation that the PMAs would be in place for 12 months following the sale (ts 400). He had used Mr Mast's services in 2008 and for the January appraisal. Mr Bernhard had extensive experience in the real estate industry and management of rent rolls. He knew the valuation methodology and knew that buyers are interested in the income a rent roll will bring over the 12 months (ts 400) following the sale. His experiences with the Summit sale were all the property owners were re-signed, albeit after the sale, with the new business owner without any problems shows that he was aware of the expectation that the new owner would have PMAs valid for 12 months post-sale. This conclusion is reinforced by Mr Bernhard's

evidence (ts 374 - 375), effectively, that PMAs did not need to be re-signed because it was in his opinion an internal transaction, not that the new owners of the rent roll were not entitled to signed PMAs. The only conclusion to draw from the combined weight of this evidence is that Mr Bernhard was aware of the industry wide assumption referred to above, and contrary to his evidence, I find he was aware that the March valuation was based on that assumption. He was also aware that the valuation was being used by Mr Ellis in connection with obtaining finance for the purchase of the rent roll from DTI.

111 Mr Bernhard did not disclose to Mr Ellis that some of the properties the subject of the March valuation had PMAs that had expired (in the sense that the fixed 12-month term had expired) or would expire within 12 months of the date of settlement.

112 This non-disclosure occurred because Mr Bernhard did not think that there would be a problem with property owners continuing to have their properties managed by what he considered to be the same business entity even though its proprietors had changed. His previous experience with the Summit Realty sale, where he was able to persuade all of the owners to re-sign even for a different business entity, and his belief that he would remain working in the business, at least in the short-term, after settlement and therefore if any issues developed with owners he would be able to 'talk them around' by reassuring them that, although it was now Mr Ellis' business, things remained the same, contributed to this thinking.

113 Mr Bernhard made a deliberate decision not to disclose for those reasons. He over-optimistically thought that problems would not arise. It may well be that he did not think through the issues with sufficient clarity. I make no finding of dishonesty against Mr Bernhard.

114 A large number of the PMAs had either expired by the valuation date or would expire within 12 months of settlement. Mr Bernhard had, at the very least, constructive knowledge of this fact. Mr Bernhard was the proprietor of the business. He was a 'hands on' manager. The business was under his control, he had access to the Gee Dee system which provided the number of properties under management, the rent received and when the PMAs expired and, on his own evidence, he assigned other employees the task of following them up with the aim of having them re-signed.

115 I am not satisfied that the August representation was made as alleged

by Mr Ellis nor that Mr Bernhard proposed that Mr Mast perform the March valuation or discussed the March valuation in any detail with Mr Ellis.

116 I find that the settlement of the various sales agreements occurred on 27 August 2012.

Conclusions on the implied representation

117 A number of matters pleaded by Mr Ellis as matters which should lead me to find the implied representation have not been established by the evidence.

118 Notwithstanding this, based on the facts I have found including the relevant surrounding circumstances and industry wide assumption referred to above, Mr Bernhard's conduct including his non-disclosure does give rise to an implied representation that the properties the subject of the March valuation were under valid PMAs as at the date of that valuation and those authorities would be valid for a period of 12 months from the completion date of the sale of the rent roll.

The law

119 Pursuant to s 18 of the *Australian Consumer Law* (the 2nd sch) *Competition and Consumer Act 2010* (Cth) (ACL) and s 10 of the *Fair Trading Act 1987* (WA) misleading or deceptive conduct by a person in trade or commerce is unlawful. Mr Bernhard's conduct in making the representations was clearly in trade and commerce.

120 Conduct is misleading or deceptive if viewed as a whole it has a tendency to lead a person into error. Whether the conduct is misleading or deceptive is a question of fact to be determined objectively in light of all the surrounding facts and circumstances: ***Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd*** (2011) 248 FLR 193; [2011] WASCA 76 [220].

121 Whether or not the misleading or deceptive conduct is deliberate does not matter. It does not matter whether a person intended to mislead or deceive or acted honestly and reasonably: ***Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*** [1982] HCA 44; (1982) 149 CLR 191 [197].

122 Conduct is likely to mislead if at the time the conduct occurred there is

a real or not remote chance or possibility of it being misleading or deceptive: ***Global Sportsman Pty Ltd v Mirror Newspapers Ltd*** (1984) 2 FCR 82 (87).

123 For conduct to be misleading or deceptive it is not necessary that it conveys express or implied representations. It is sufficient that it leads or is likely to lead into error and conduct for such purposes can include representations or non-disclosure of facts: ***Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*** [2010] HCA 31 [15] (French CJ & Keifel J).

124 Non-disclosure can, because of common assumptions or established practices or other relevant surrounding circumstances, give rise to an implied representation that an undisclosed fact did (or did not, as a case may be) exist. The making of such an implied representation is the doing of an act: ***Owston Nominees*** [64].

125 Silence or non-disclosure has been held to constitute misleading or deceptive conduct where the circumstances are said to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed: ***Miller and Associates v BMW Australia*** [19].

126 In ***Miller*** French CJ and Kiefel J said [20] - [21]:

> In commercial dealings between individuals … characterisation of conduct will be undertaken by reference to its circumstances and context. Silence may be a circumstance to be considered. The knowledge of the person to whom the conduct is directed may be relevant. Also relevant, as in the present case, may be the existence of common assumptions and practices established between the parties or prevailing in the particular profession, trade or industry in which they carry on business …
>
> To invoke the existence of a reasonable expectation that if a fact exists it will be disclosed is to do no more than direct attention to the effect or likely effect of non-disclosure unmediated by antecedent erroneous assumptions or beliefs or high moral expectations held by one person of another which exceed the requirements of the general law and the prohibition imposed by the statute

127 Non-disclosure can itself satisfy the definition of 'engage in conduct' within s 4(2) of the *Competition and Consumer Act 2010* (Cth) (CCA) and s 18(1) of the ACL as the definition includes 'doing or refusing to do an act'.

128 An omission to do an act cannot itself constitute conduct because for the purposes of the section 'refusing to do' an act involves refraining otherwise than inadvertently from doing the act in question. Thus 'to refrain

otherwise than inadvertently' requires a deliberate decision to withhold information, thus the defendant must advert to the question and form an intention not to disclose: ***Owston Nominees*** [59].

129 The need to establish a deliberate omission will only arise if the actual conduct together with all the relevant surrounding circumstances is objectively incapable of giving rise to the misleading or deceptive contextual conduct complained of.

130 In ***Owston Nominees*** McLure P said [66]:

> … In that event the circumstances in which deliberate non-disclosure may be misleading or deceptive conduct will be limited; perhaps where the defendant is aware of another's misapprehension in the type of situations where relief is available for unilateral mistake … or where the plaintiff's misapprehension is caused by, but it is not objectively attributed to, the defendant's conduct.

Was the conduct misleading or deceptive?

131 There is no other conclusion available on the evidence, in my opinion, other than the entire negotiations for the sale of the business proceeded on the basis that it was the value of the rent roll which would determine the value of the business. In turn, the rent roll was to be valued on the basis of 12 months' income received from the property management times the applicable multiplier. Mr Bernhard knew this was the manner in which rent rolls were valued. He provided information to Mr Mast to enable the rent roll to be valued.

132 I have found that there was a representation that all of the properties the subject of the rent roll had authorities that were valid as at the date of the March valuation and further that those management agreements would be valid for a period of at least 12 months from the completion date of the sale of the rent roll. Mr Bernhard did not disclose that some of the properties the subject of the valuation did not have valid PMAs and some of the PMAs that did exist would expire within 12 months from the settlement date of any proposed sale.

133 Mr Ellis submits that the implied representation is misleading or deceptive because it had the tendency to lead to the erroneous assumption that all of the PMAs were and would remain valid for 12 months after settlement.

134 Mr Bernhard said the implied representation did not have tendency to lead to this erroneous assumption because of Mr Ellis' evidence that he would have been happy if all the PMAs were valid for 12 months from the sale agreement (23 July 2012) even though this was less than 12 months from settlement (23 August 2012) (ts 181) as he was 'not that strict' (ts 181).

135 This answer must be viewed in the context of the cross-examination occurring whereby Mr Ellis had just said he would have settled at any time after 23 July 2012 depending on the bank. He also said it was Mr Bernhard's responsibility to have 12-month PMAs signed (ts 180) or let him know they had not been and that Mr Bernhard should have made sure the PMAs were all signed prior to the settlement (ts 181).

136 Essentially Mr Ellis was saying, that as a matter of fact he would not have complained if the PMAs had 12-month terms from the contract dates. It does not in my opinion affect whether the representation as matter of fact or law leads to the assumption referred to or was misleading or deceptive.

137 Mr Bernhard also says the sale process was an internal transfer and therefore the re-signing of all PMAs was not necessary. In support of this proposition he refers to exhibit 1. Exhibit 1, cl 6.1 provides a warranty by DTI (at that stage controlled by Mr Bernhard and his wife) that:

> The vendor has disclosed to the purchaser all material facts, information and circumstances relating to the rent roll or otherwise relating to the subject matter of this deed which might if disclosed reasonably be expected to effect the decision of the purchasers to enter into this deed or the price on which or the terms of which the purchaser might be willing to purchase the rent roll and the vendor will, if any such facts, information or circumstances come to their attention after execution of this deed and pending the completion date, make full disclosure of them to the purchaser immediately.

138 Clause 6.2 provides:

> All representations and warranties contained in cl 6.1 are given as at the date of this deed and at the time immediately before completion and remain in full force and effect after completion despite completion.

139 Whilst I accept that Mr Ellis' action is based on Australian consumer law and not contractual terms, the submission that resorting to the terms of exhibit 1 in some way supports a view that there was no conduct on Mr Bernhard's part that had a tendency to lead to the erroneous assumption is fanciful.

140 Additionally, it was not strictly an internal transaction. The sale of the rent roll did not just involve a change of shareholders in DTI. The rent roll was sold by DTI to DM. Dream Money is a separate corporate entity to DTI. The PMAs needed to be assigned from DTI to DM.

141 The PMAs should have been re-signed so that effective from settlement date all the properties would be valid for 12 months.

142 I reject Mr Bernhard's submission that there is no misleading or deceptive conduct in relation to any PMA that has exceeded its 12-month term because the terms of the authorities provide that at the conclusion of that term they are extended until 28 days' written notice of termination is given by either party. This submission is contrary to the implied representation that the PMAs the subjects of the March valuation were valid at settlement and would be valid for 12 months from the date of settlement. Settlement occurred on 27 August 2012.

143 Mr Bernhard's conduct including as it did his silence in those circumstances was misleading or deceptive and had a tendency to lead to the onerous assumption that the authorities were valid as at the date of settlement and would remain valid for 12 months after the sale. The circumstances clearly give rise to the reasonable expectation that if the properties the subject of the March valuation were not under valid property management authority at the valuation date and those authorities were not valid for a period of 12 months from the settlement date that fact would be disclosed.

144 I am satisfied that Mr Bernhard's actual conduct, together with the relevant surrounding circumstances including his non-disclosure, constitutes the misleading or deceptive conduct complained of and therefore it is not strictly necessary to determine whether or not the non-disclosure by itself is properly characterised as misleading or deceptive conduct.

145 However, in my view it would not. It is the combined weight of the non-disclosure and surrounding circumstances including, but not restricted to, the industry's wide assumption, the valuation representation, the rent roll representation, the provision of essential information to the valuer for the March valuation and Mr Bernhard's knowledge that Mr Ellis was relying on that valuation for the finance which give rise to the misleading and deceptive conduct. Without those circumstances the non-disclosure by itself would not be misleading or deceptive conduct.

146 The March valuation by its very terms makes it clear that the number of properties valued was 204.

147 As at settlement date Mr Ellis' estimate was that there were about 105 properties with no PMAs whatsoever, about 39 had a contract for 12 months, and about 66 had a contract that expired sometime within the 12 months (ts 54 - 55). I accept Mr Ellis' evidence in this regard supported as it is by his examination of the business records.

148 It is clear that there were a substantial number of properties that were not the subject of valid PMAs as at settlement.

149 I am satisfied that the implied representation was misleading or deceptive because it had the tendency to lead to the erroneous assumption that all of the PMAs were valid at settlement and would remain valid for 12 months after settlement.

Reliance

150 Mr Ellis and DM must prove that the loss or damage claimed to have been suffered was because of the conduct of Mr Bernhard: s 236, sch 2 ACL.

151 The conduct does not need to be the sole cause of the loss and damage: ***Henville v Walker*** [2001] HCA 52; (2001) 206 CLR 459. It is sufficient if it plays a part in Mr Ellis and DM suffering loss and damage.

152 There are cases where a party has been so negligent in their failure to protect their own interests that the proper finding is that the misleading or deceptive conduct was not the real inducement to them entering into the contract: ***Argy v Blunts & Lane Cove Real Estate Pty Ltd*** (1990) 26 FCR 112.

153 In assessing whether the conduct was a real inducement to enter the contract, the parties' respective conduct can be considered: ***Argy v Blunts and Lane Co Real Estate Pty Ltd***.

154 It is not necessary for the reliance on the misleading or deceptive conduct to be reasonable conduct or that Mr Ellis or DM not be careless or otherwise at fault unless their conduct is such as to destroy the causal connection between the contravention and the loss or damage: ***Henville v***

Walker; ***Newmarket Corporation Pty Ltd v Kee-Vee Properties Pty Ltd*** [2003] WASC 157 (McLure J).

155 Nor is it necessary that reliance be established by direct evidence; it is open to infer the effect the representation is taken to have had: ***Gould v Vaggelas*** (1985) 157 CLR 215.

156 Mr Bernhard points to exhibit 13, an email from Mr Ellis to Mr Mast of 12 March 2012 stating:

> … Les had accepted an offer from myself for the business and the NAB (David Dibble) have requested a full valuation on the rent roll, as I will be borrowing against the rent roll. Could you please advise me where we need to go from here to have this done and a cost.

157 It is submitted by Mr Bernhard that there is no relevant causal connection between the implied representation and the loss because exhibit 13 shows the decision to proceed with the purchase of the business had already been made before the preparation of the March valuation. I do not accept this submission.

158 It is clear on both parties evidence that Mr Ellis did not commit to the purchase until after he received the March valuation (ts 135, 137) and Mr Bernhard said that he did not consider there was any deal locked away in March or April and he was keeping his options open by talking to other persons in the real estate industry about the purchase of the rent roll and/or the business as an entirety (ts 390, 391).

159 Mr Bernhard knew the March valuation was necessary for Mr Ellis to obtain bank finance. The sale agreements (exhibits 1 - 3) were subject to bank finance. Notwithstanding exhibit 13, I find there was no formal agreement until the various agreements were signed in July 2012. Even if an agreement in principle had been reached that is no agreement. A representation made prior to the execution of formal agreements can induce reliance notwithstanding an agreement in principle to proceed had been reached: ***Newmarket Corporation Pty Ltd v Kee-Vee Properties Pty Ltd*** [296] (McLure J).

160 Mr Bernhard also submits that as Mr Ellis was a director working in the business with considerable experience in the real estate industry and had access to the business records and the opportunity to undertake due diligence, he did not rely on the implied representation but relied on his own

business acumen. I reject this submission.

161 I accept Mr Ellis' evidence that they had known each other for a considerable period of time, he considered Mr Bernhard to be a mentor and it would appear based on the length of the parties' relationships that there had not been any major difficulties between them over many years and they had worked successfully together for a lengthy period of time.

162 I accept Mr Ellis' evidence that he considered Mr Bernhard to be trustworthy and a mate (ts 47, 105, 106, 195, 54, 106, 170, 178, 194). Mr Bernhard's evidence essentially supported Mr Ellis in this regard. I accept Mr Ellis' evidence that Mr Bernhard kept the accounts to himself (ts 36, 165, 166, 174, 199) including the Gee Dee account (ts 174, 175) and the PMAs (ts 175). It is inherently probable that this occurred. Mr Bernhard had every right to do so. In effect it was his business.

163 Mr Ellis was a director but in circumstances where he had one share out of 100, both parties effectively treated the business as Mr Bernhard's.

164 Mr Ellis may have been somewhat naïve and inexperienced in the sale and purchase of a business but I do not find that there was any carelessness or extreme carelessness where it could be said that Mr Bernhard's conduct was not a real inducement to DM and Mr Ellis entering into the various agreements.

165 Mr Bernhard then says that Mr Ellis has failed to prove he would not have entered into the transaction if he knew the truth of the representation or what he would have done had he known the truth of the representation and therefore is not entitled to damages. I reject this submission. I agree with Mr Ellis' submission that as a matter of common sense it can be inferred that the effect of Mr Ellis' evidence is that had he known the true state of the rent roll he would not have purchased at the price he did.

166 I find that Mr Ellis and DM relied on Mr Bernhard's implied representation as the basis for entering into the various sale agreements at the agreed prices and entering into the vendor finance agreements (exhibits 1 - 3) and the guarantee agreements (exhibit 4) and in proceeding to settle on those agreements.

Causation

167 The above reasoning also establishes that the loss and damage was caused by the misleading or deceptive conduct of Mr Bernhard.

168 Such conduct does not need to be the sole cause of the loss. It simply has to be a cause and I am satisfied that the misleading or deceptive conduct can be said to have caused Mr Ellis and DM to enter into the agreements referred to and in proceeding to settle on those agreements.

169 The conduct must be considered in its overall context in the sense of asking was the conduct such as would tend to induce the injured party to act to its detriment, if so, causation is established: ***Reiffel v ACN 075 839 226 Ltd*** [2003] FCA 194.

170 The misleading or deceptive conduct in representing the 204 properties the subject of the March valuation had PMAs that were valid at the date of valuation and would remain valid for 12 months after the sale settlement as a matter of common sense and experience has a causal connection with the loss and damage suffered.

171 Making such a representation when it was untrue clearly had a tendency to induce the purchase of the rent roll for a price greater than its true value.

172 I am satisfied that the loss and damage was caused by the misleading or deceptive conduct of Mr Bernhard.

Contributory negligence

173 Section 137B of the CCA allows a court to reduce damages if the person suffering loss has contributed to the loss by failing to take reasonable care: ***Merost Pty Ltd v CPT Custodian Pty Ltd*** [2014] FCA 97.

174 The question of contributory negligence involves arriving at a 'just and equitable' apportionment as between parties of the 'responsibility for the damages'.

175 This involves a consideration of the degree of departure from the standard of care of the reasonable man, the relative importance of the acts of the parties causing the damage and an examination of the whole conduct of the parties: ***Pennington v Norris*** (1956) 96 CLR 10; ***Podrebersek v Australian Iron & Steel Pty Ltd*** (1985) 59 ALR 529.

176 In this regard the degree of departure from the standard of care of a reasonable vendor by Mr Bernhard was considerable. He was the source of the information provided to the valuer. He effectively controlled the business. He was aware of the valuation method and the underlying industry assumption forming the basis of the implied representation. He had access to all the relevant information. He did not provide the information as to the number of PMAs that had or would expire.

177 The degree of departure from the standard of a reasonable purchaser by Mr Ellis and/or DM is significantly less. I do not consider that justice and equity require any reduction in the amount that Mr Ellis or DM may recover from Mr Bernhard.

178 I reject Mr Bernhard's submissions that Mr Ellis or DM was contributorily negligent to the extent that damages ought to be reduced to reflect that contributory negligence. **Damages**

179 If the court finds that some loss or damages occurred as a result of the misleading or deceptive conduct it must do the best it can to quantify the loss and that may involve a degree of speculation and/or guesswork: ***Enzed Holdings Ltd v Wynthea Pty Ltd*** (1984) 57 ALR 167.

180 The fact that it is difficult to estimate damages does not relieve the court from estimating damages as best it can even where precise evidence is not available: ***Commonwealth v Amann Aviation*** (1991) 174 CLR 64.

181 The court often cannot make a precise calculation but are obliged to make a reasonable assessment. The assessment may involve some guesswork, not in the sense of picking a number at random, but recognising that the reasoning, in the circumstances, may be less than compelling: ***Jones v Schiffmann*** [1971] HCA 52; (1971) 124 CLR 303, 308; ***Commonwealth v Amann Aviation*** (143); ***Zorom Enterprises Pty Ltd v Zabow*** [2007] NSWCA 106; (2007) 71 NSWLR 354 [84].

182 The usual approach to assessing damages is to form an assessment of the difference between the price paid for the asset and the true value at the time of acquisition: ***Professional Services of Australia Pty Ltd v Computer Accounting and Tax Pty Ltd [No 2]*** [2009] WASCA 183 [100] - [101] (Martin CJ).

183 In determining the true value of the business a court is permitted to use the actual earnings of a business subsequent to the misleading or deceptive

conduct but a distinction is drawn between subsequent effects that arise from the nature or use of the business itself and other matters which affect value but are independent or extrinsic or supervening to the misleading inducement.

184 If something is independent, extrinsic or supervening then notwithstanding that it may affect the value it is not taken into account in proving the true value of the business.

185 Mr Bernhard says Mr Ellis has failed to articulate whether the claim for damages is based on a 'no transaction' basis or an 'alternate transaction' basis. I do not accept this submission. I think it is obvious from the pleadings, the opening submissions, the closing submissions both oral and written that the claim for damages is based on the alternate transaction basis.

186 Mr Ellis' damages claim is as follows.

187 He says it was, inter alia, an implied representation that the properties the subject of the March valuation had valid PMAs at the valuation date and for 12 months post-settlement. Exhibit 10 shows that 12 months' post-settlement 50 properties were no longer under property management by the business. The PMAs on 43 properties had ceased during the 12-month post-settlement period and seven properties which were listed on the March valuation were not subject to PMAs even at the date of completion.

188 Mr Ellis says that of the 50 properties, 14 were sold during the 12 month period and pursuant to the PMA, the business would have been entitled to liquidate damages equivalent to 50% of the management fee for the unexpired period of the time (exhibit 8, cl 3.2). The 50% is calculated from the latter of the date when the property ceased earning management fees and the date when the PMA expired. Mr Ellis submits that it was only when the PMA had expired that DM lost the chance to seek payment of 50% of the management fees.

189 Mr Ellis says that you can infer that the remaining 36 properties were lost because the owners did not continue having their properties managed by the business because they were not bound by binding PMAs. If the authorities had been in place, it is argued, none of the income in respect of the authorities would have been lost. I accept this submission.

190 Based on this method of calculation, Mr Ellis says that the management fees which would have been received from these properties but was 'lost'

was $44,958.65. The total management fees calculated by Mr Mast in the March valuation was $262,040. If $44,958.65 is deducted, a figure of $217,081.35 is reached. You then apply the midway point between the two multipliers referred to in the March valuation of 2.5 and 2.63 and arrive at a figure of $556,813.66 representing what Mr Ellis says is the true value of the rent roll. As Mr Ellis paid $650,000 there is a loss of $93,186.34.

191 Mr Bernhard says that exhibit 10 cannot be relied upon, inter alia, as it is inconsistent with exhibit 11 because exhibit 11 lists income from 160 properties 12 months' post-settlement therefore by inference 44 properties were 'missing' whereas exhibit 10 lists 50 properties as missing (the defendant's submissions that exhibit 10 lists 52 properties is incorrect, it lists 50 properties).

192 Additionally there are properties which are on both lists. A property cannot be listed as 'missing' on exhibit 10 and then appear as a property that was not missing on exhibit 11.

193 I find that an inconsistency between exhibits 10 and 11 is established.

194 Mr Bernhard points out Mr Ellis raises in his closing submissions the argument that he is entitled to damages for any properties sold during the relevant period and correctly says this argument was never raised in the pleadings or during the trial or during the oral closing submissions and is contrary to Mr Ellis' evidence that if a property was sold there was 'not much we can do about it' (ts 79).

195 Mr Bernhard essentially invited me to infer that whatever the strict legal position is, if a property under management was sold Mr Ellis would not pursue the liquidated damages he now seeks to recover but just move on and let it go.

196 Insofar as the pleading point is concerned, I would not uphold the objection. However, in view of Mr Ellis' evidence it seems to me that those properties that were sold would not have been the subject of any 'recovery proceedings' by Mr Ellis, or indeed by Mr Bernhard when he ran the business. For reasons of goodwill, business and common sense and courtesy both Mr Ellis and Mr Bernhard seem to take the view that if an owner sold a property during the currency of the property management agreement that portion of the management fees that would have been earned after the sale is just written off.

197 Mr Bernhard submits that some of the information in column B of exhibit 10 (row 25, 27 and 39) purports to show dates taken from PMAs but at least three properties had PMAs that did not match up with the expiry date shown in column B. At most, this shows Mr Ellis' initial evidence that all the dates in that column were taken from the PMAs was incorrect. Mr Ellis explained that he arrived at the date shown in column B (ts 245 - 251) in relation to the two properties he was questioned about (rows 25 and 27) after examining other business documents. I accept his explanation. It does not cause me to doubt the accuracy of those rows.

198 Mr Bernhard submits column C, rows 2, 3, 4, 5, 6, 8, 11, 17, 18, 20, 22, 26, 35, 36 and 38 had issues with the management expiry dates being before the dates the properties were actually lost.

199 However the submission in this regard is not correct. Rows 2, 5, 11, 18, 20 have management expiry dates that pre-date the date the property was lost. The other nine rows have PMA expiry dates which post-date the date of actual loss. Row 17 expires the same date as the property loss. In view of Mr Ellis' evidence (ts 223 - 227), which I accept, that he calculated the date in column C from other business documents, I have no concern as to the accuracy of those dates.

200 Mr Bernhard also says Mr Ellis' evidence as to how he prepared exhibit 10 varied. For example, in relation to column A Mr Ellis said (ts 78, 79) he checked the Gee Dee reports and the RP Data systems to see if a property had been sold whereas at ts 217 he agreed he had not advised the court that a particular property had been sold. This does not establish that the source of the inputs for exhibit 10 are unknown, it simply establishes at the most that Mr Ellis made an error.

201 In respect of column B, Mr Bernhard submits that Mr Ellis confirmed that he obtained the expiry date by reviewing exhibit 8 (the PMAs) and inserting the date into the table (ts 245) but later said he obtained the expiry dates from the Gee Dee system and confirmed that date by looking at the PMAs (ts 246 - 251). In my opinion at most this is a minor inconsistency of no real consequence.

202 In respect to column C, being the date lost, Mr Bernhard submits that Mr Ellis in effect changed his evidence from saying that he looked at the last date they received money (ts 231) to saying he checked the Gee Dee system and the actual management authorities (ts 227). In my opinion at most this

is a minor inconsistency of no real consequence.

203 In relation to column E, Mr Bernhard points out that Mr Ellis said he took the figure from the Gee Dee system without doing an independent calculation and also checked other documents as well. Mr Ellis acknowledged that in respect of one property the figure was wrong. In addition Mr Ellis has not produced the Gee Dee printouts from which he took the figures nor the documents he used to make the check. The documents he used to perform the check are different documents to the ones produced to the court (exhibit 8). These deficiencies do not cause me to doubt the accuracy of column E.

204 The Bernhards submit that taking these points individually or in combination, the amended version of exhibit 10 (attached to the Mr Ellis' written closing submissions) should not be accepted by the court as a valid basis for calculating damages. I do not accept this submission. Exhibit 10 can be relied upon to assist in the calculation of damages.

205 As an alternative method of establishing his damages Mr Ellis relies on exhibit 11 which is the total income actually earned from managing the 204 properties the subject of the March valuation 12 months post-settlement.

206 Mr Ellis' evidence was that he calculated these figures from exhibit 9 (ts 83 - 85, 232 - 235). After adjustments for errors in GST calculations and typographical errors, it is said that the total income earned from the properties was $214,101.45 applying the midway point between the two multipliers referred to in the March valuation of 2.5 and 2.63 calculates to a figure of $549,170, which represents what Mr Ellis says was the true value of the rent roll using Mr Mast's methodology and as Mr Ellis paid $650,000, there is a loss of $100,830.

207 Mr Ellis accepts that the sales and vacancies affect overall income from the rent roll, however he says those matters are inherent in the operation of a rent roll and are not supervening, extrinsic or unexpected events and for the purposes of calculating true value using the actual earnings of the business, the sales and the vacancies are to be ignored: ***HTW Valuers (Central Qld) v Astonland*** [2004] HCA 54; (2004) 217 CLR 640; ***Kizbeau Pty Ltd v WG & B Pty Ltd*** (1995) 184 CLR 281, 291. In general I accept this submission.

208 As a further alternative, Mr Ellis says his damage via exhibit 10 is $93,186.34 or via exhibit 11 is $100,830, with a midway point of

$97,008.17. I decline to assess damages on that basis as I find exhibit 11 cannot be relied upon.

209 Mr Bernhard says exhibit 11 cannot be relied upon, inter alia, for the following reasons:

(a) The Gee Dee is only as accurate as the date input. The database can be overwritten and the backup files have not been discovered. The court cannot therefore have any confidence that the information recorded on the Gee Dee is accurate.

210 Mr Bernhard points to Mr Ellis' evidence when shown the screen shots (exhibit 30) and his statements that those documents could not be relied upon.

211 I do not find any merit in these submissions. Any database can be overwritten. It is not unusual for backup files not to be discovered and any information is only as accurate as the date input.

(b) Exhibit 11 purports to show the actual income earned from 160 properties 12 months post-settlement and there is no evidence of what has happened to the other 44 properties.

212 I do not find any merit in this submission. Mr Ellis' evidence (ts 84) was that those properties had been lost, that is, there were 44 properties from which they were earning no income. For reasons explained later when calculating the true value of the rent roll using actual earnings the vacancies are to be ignored and I reject Mr Bernhard's submission that the damages should in some way be reduced to reflect the fact that some of those 44 properties may have been under PMA's but vacant.

(c) Some of the source documents were not discovered and Mr Bernhard could not test the information used to produce exhibit 11.

213 Notwithstanding this deficiency, that alone does not cause me to doubt the accuracy of exhibit 11.

(d) Mr Ellis did not know how to calculate GST therefore the sum of $221,000 that exhibit 11 produced cannot be relied upon.

214 I note Mr Ellis was cross-examined on the basis that 10% of what was received should be deducted for GST*: The Australian Master Tax Guide* 56th ed at [34-000] says 1/11th of the consideration received will be regarded as being GST. I accept, however, that there are some mathematical miscalculations in relation not only to GST but other areas, however the total involved in these discrepancies in the overall scheme of things is somewhat minor.

(e) There are discrepancies between exhibit 11 and March Gee Dee rent roll valuation report referred to in the March valuation (exhibit 6).

215 For example, there are 207 properties on the March Gee Dee rent roll valuation report, 79 of which do not appear on exhibit 11. Further, there are 34 properties listed in exhibit 11 which are not on the March Gee Dee rent roll valuation report. Mr Bernhard says there has been no explanation provided by Mr Ellis for these discrepancies.

216 Even if allowances are made for the fact that the March Valuation explicitly states that it is based on 204 of the 207 properties and Mr Ellis' evidence that 14 properties were sold at the most favourable for Mr Ellis it brings the number of properties which do not appear on exhibit 11 down to 62. This is far different to the 50 missing properties (including the 14 sold) in exhibit 10 or the 44 missing properties on Mr Ellis' version of exhibit 11. The unexplained discrepancies in relation to exhibit 11 are such that I would not place any reliance on it.

217 Mr Bernhard also submits that in relation to the August representation a comparison needs to be made between exhibit 11 and the Gee Dee rent roll valuation report as at 26 August 2012 (exhibit 24). I do not need to consider this submission as I am not satisfied the August representation was made.

218 In addition Mr Bernhard says that Mr Ellis has failed to establish that he suffered any loss because he failed to lead any evidence as to the value of the entirety of the Elders Rockingham business as at the date of the alleged representations or the date of the sale contracts (31 July 2012) or the date of settlement (27 August 2012). He points to Mr Milnes' evidence (ts 286 - 296).

219 Mr Milne is a licensed valuer. He gave his evidence in a straightforward credible manner. He said that in valuing the shares of a company you look at the entire assets of the company including not only the rent roll but the property, plant and equipment, goodwill and the like and although he said that from a valuer's point of view the taxation status (tax losses) is not considered, it is normally considered by accountants (ts 288).

220 Mr Bernhard says absent evidence of the value of these assets it is impossible for the court to determine any loss or damages and for Mr Ellis to prove that even with the true position of the rent roll, the business is worth less than the $650,000 purchase price.

221 Further, Mr Bernhard says there has been no evidence led by Mr Ellis as to why the property owners did not remain for 12 months after completion and there may be many reasons why they did not such as their property being vacant, property being sold, getting a better deal from somewhere, dissatisfaction with the service and efforts by Mr Ellis to increase the property management fees (ts 185).

222 Mr Bernhard says the effect of this is that Mr Ellis is not able to establish that any rent roll customer was not being managed 12 months after completion because of the alleged misleading or deceptive conduct.

223 Mr Ellis' damages are calculated by showing the difference between the true value of the rent roll when purchased and the price he paid for it. The matters referred to above (with the exception of management fees from properties sold within the 12-month period) are irrelevant to the calculation of the value of the rent roll. Mr Mast, Mr Ellis and Mr Bernhard all agree on the method used to value a rent roll, that is, 12 months' income earned from the rent times the multiplier.

224 There is no evidence that any of those other matters are taken into account in performing such a calculation and the submission in this regard is rejected. I have found the misleading or deceptive conduct causative of the loss suffered.

225 Mr Mast's evidence was that a certain percentage of the purchase price may be retained pursuant to a retention clause to offset any management contracts that 'don't come across' (ts 341). Mr Bernhard agreed that he knew there was no retention clause in exhibit 1 as he did not see the need for one (ts 423). Mr Ellis said leakage was not discussed in much detail and the fact

that Mr Bernhard was providing $250,000 in vendor finance 'sort of covered that' (ts 48). Neither counsel explored these issues any further.

226 Matters such as vacancies, dissatisfaction etc, are matters that could have been be covered by a retention allowance. The parties could have made a retention allowance in the contracts to cover this 'leakage', however they chose not to. Damages should therefore be assessed on the basis that I have referred to without any deduction for matters that would otherwise be covered by a retention allowance, with the exception of properties sold in the 12-month post-settlement period. Mr Bernhard did not see the need to make an allowance in the contract for leakage and nor should one now be made in assessing damages.

227 If in fact Mr Bernhard's submission in this regard went not to quantum but was a submission that Mr Ellis could not prove his damages because of the failure to call such evidence, I reject that submission. Mr Ellis is able to prove the true value of the rent roll as at the date of its purchase and what he paid for it and I have found the misleading or deceptive conduct causative of the loss suffered.

228 Generally the true value/price paid assessment method is a means of ascertaining the position a person would have been in had there been no misleading or deceptive conduct. Under the ACL damages do not necessarily coincide with damages awarded in torts or deceit: ***Marks v GIO Australia Holdings Ltd*** [1998] HCA 69; ***Wardley Australia Ltd v State of Western Australia*** (1992) 175 CLR 514. The wronged party should receive damages which provide fair compensation: ***Johnson v Perez*** (1988) 166 CLR 351.

229 In view of Mr Ellis' evidence which effectively was that he would not pursue income lost from properties sold within the 12-month period after settlement, I would not allow any damages in respect of that lost income. I consider that overall that approach provides fair compensation.

230 I am satisfied damages can be assessed in accordance with exhibit 10 making no allowance for 'leakage' and dealing with properties sold in the manner I have referred to.

231 In addition Mr Bernhard says Mr Ellis' calculations have not taken into account the fact that Elders Rockingham business has improved since it was purchased as Mr Ellis has been able to exploit the opportunities created from

managing that business. Mr Bernhard also says that Mr Vernal's evidence (ts 440 - 445) establishes that the tax losses of the business could have been carried forward because although DTI would have been unlikely to pass a continuity of ownership test (due to its change of shareholding) they would have been able to pass the small business test (SBT). Mr Vernal was an accountant and registered tax agent. He gave his evidence in a straightforward, credible manner and I accept his evidence, however he did not venture an opinion as to whether DTI would pass the SBT.

232 The effect of his evidence and the legislation is that a company satisfies the SBT if it carries on the same business the year it claims the tax deduction as it carried on immediately before the 'test time'. It does not satisfy the SBT where it obtains assessable income during the SBT period from a business of a kind that it did not carry on before the test time or a transaction of a kind that it had not entered into in the course of its business operations before the test time: *Income Tax Assessment Act 1997* (Cth), s 65 - 210. The test time is the last time the company can show that it satisfied the continuity of ownership test. Although it is not necessary for me to decide, I reject the submission that DTI would pass the SBT. Although the matter is not free from doubt *The Australian Master Tax Guide* 56th ed at [3-120] gives many examples where businesses have failed the SBT (*Avondale Motors, Case N 109*) and DTI's business has changed in that post-sale it was the lessee and not the owner of the rent roll.

233 However in my opinion, Mr Bernhard's 'whole business' submission is misconceived.

234 The implied representation, the very basis of the misleading and deceptive conduct, related to the rent roll. The parties only sought appraisals and valuations for the rent roll and the evidenced established that the rent roll was the main asset of the business (Mr Bernhard ts 397, Mr Mast ts 338, Mr Ellis ts 161, 193).

235 The parties chose to structure the transaction so that the rent roll was purchased exclusively by DM and other parts of the business being its goodwill, furniture and the like stayed with DTI and were the subject of purchase under a separate agreement.

236 Further, the misleading or deceptive conduct was only in respect of the rent roll and as a result of that conduct DM paid more for the rent roll than its true value and whatever value can be attributed to the other assets in the

hands of different parties, i.e., DTI, is irrelevant when considering DM's position.

237 Subsequently to the misleading or deceptive conduct and relying on the representation impliedly made, DM and Mr Ellis entered into various agreements including DM purchasing the rent roll for more than its true value and Mr Ellis entering into the vendor finance agreement and the guarantee.

238 The parties treated the rent roll as separate from the other assets of the business and the value and opportunities arising from those other assets are irrelevant to the assessment of damages based on the misleading or deceptive conduct relating to the rent roll.

239 I reject Mr Bernhard's arguments that it is essential to factor into any assessment of damages the value of the business opportunity acquired by Mr Ellis and DM which resulted in the properties under management increasing to 345 by August 2013 and the rent roll income thereby increasing and sales commission income increasing in the subsequent financial years after completion.

240 I would not make allowance for these factors as any increase in sales commission earned by DTI are in relation to the purchase of the rent roll by DM and their damages irrelevant. Any increase in income from the number of properties under management by DM occurred in different conditions, i.e., different management, different economic conditions and would not result in any allowance by way of a deduction being made.

241 Mr Bernhard also criticises Mr Ellis' method of calculating his damages because he says Mr Ellis used a multiple of 2.56 to value the rent roll whilst in both the January appraisal and the March valuation (exhibits 5 and 6) Mr Mast used a multiple of 2.63. Whilst this is correct in respect of the January appraisal (exhibit 5), it is not correct in respect of the March valuation (exhibit 6). The valuation does not use a multiple of 2.63 but uses a range from 2.5 to 2.63 to calculate market value of $655,101 to $688,623. Mr Ellis sensibly took the midway point between 2.5 to 2.63 in calculating the multiplier to apply. Mr Bernhard's criticism is without merit.

242 The correct total of the revised exhibit 10 is $42,032.10 not $44.958.65 as calculated by Mr Ellis or $40,331.05 as calculated by Mr Bernhard.

243 Mr Ellis should not be entitled to damages calculated at 50% of the

management fees for any property sold. This results in a deduction of $6,145 on the 14 properties identified as sold by Mr Ellis in the revised exhibit 10 and $1,179.36 in relation to property 44 as it was sold 22 May 2013 (exhibit 12, ts 82). No deduction should be made for property 50 as it was sold before settlement (exhibit 22), (ts 214).

244 The damages claimed for these properties should not be allowed because I do not accept that a loss would have actually been incurred as I have found that as a matter of goodwill management fees not received after properties were sold would not be pursued.

245 I reject Mr Bernhard's claim that I should not allow items 13, 27, 46. None of these properties were sold within the 12 months' post-settlement period (exhibit 12 'C', 'M' and 'M' (ts 82)).

246 Therefore I calculate damages as per revised exhibit 10 as follows:

Management fees	$262,040
Deduction	$ 34,708 ($42,032 - $7,324)
Management fees less deduction	$227,332 x 2.5 $568,330 x 2.63 $597,883
Midway point	$583,106
Price paid $650,000 less $583,106	$66,894

247 In accordance with this judgment and subject to the parties' submissions and adjustments for interest, the orders I propose are:

1. The first defendant's liability under the guarantee be reduced by the amount of $66,894.

2. The second defendant's counterclaim be dismissed.

3. Judgment be entered against the second defendant in the sum of $253,918.83 plus interest to the date of judgment.

4. The plaintiffs do pay the third defendant damages of $66,894.

5. The third defendant do pay the plaintiffs the sum of $253,918.83 plus interest.

6. The damages awarded to the third defendant of $66,894 be set off against the damages awarded against it of $253,918.83 plus interest and the first and third defendants jointly pay the balance of that sum to the plaintiffs.

7. The second defendant do pay the plaintiffs' costs on a full indemnity basis.

248 I shall hear counsel on the precise terms of the order and costs.