

AUSTRALIA / JUDGMENT

Chowder Bay Pty Ltd v Paganin [2017] FCA 332

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FEDERAL COURT OF AUSTRALIA

Chowder Bay Pty Ltd v Paganin [2017] FCA 332

File number: WAD 461 of 2013

Judge: BARKER J

Date of judgment: 3 April 2017

Catchwords: CONSUMER LAW – whether respondents engaged in misleading or deceptive conduct under s 52 of the Trade Practices Act 1974 (Cth) – where applicants invested in joint venture for development of a resort pursuant to syndicate agreements – joint venture debt to be repaid from sale of villas comprising the resort – whether first and second respondents were involved or engaged in misleading or deceptive conduct as directors of companies – companies applied to bank for a loan facility to finance the development – securities given by applicants to bank in respect of loan facility – whether valuations prepared by the third and fourth respondents for bank were misleading or deceptive

CONSUMER LAW – whether applicants suffered loss or damage pursuant to s 82 of the Trade Practice Act 1974 (Cth) – applicants claim bank relied on valuations in providing financing for resort development – whether such reliance caused applicants to suffer loss – whether applicants entitled to damages for loss of opportunity to have development property sold – whether applicants entitled to recover legal costs incurred in related proceedings – whether related proceedings commenced as "defensive proceedings"

Legislation: Trade Practices Act 1974 (Cth) ss 52, 82

Fair Trading Act 2012 (WA)

Legal Profession Act 2008 (WA)

Cases cited: ABN AMRO Bank NV v Bathurst Regional Council (2014) 224 FCR 1; [2014] FCAFC 65

Advanced Buildings Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd (1995) ATPR (Digest) 46-144; [1995] FCA 236

Bennett v Elysium Noosa Pty Ltd (in liquidation) (2012) 202 FCR 72; [2012] FCA 2011

Caason Investments Pty Ltd v Cao [2015] FCAFC 94

De Bortoli Wines Pty Ltd v HIH Insurance Ltd [2012] FCAFC 28

Digi-tech (Australia) Pty Ltd v Brand (2004) 62 IPR 184; [2004] NSWCA 58

Finishing Services Pty Ltd v Lactos Fresh Pty Ltd (2007) ANZ ConvR 93; [2006] FCAFC 177

Hampic Pty Ltd v Adams [1999] NSWCA 455
I&L Securities Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109; [2002] HCA 41
Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd (2008) 73 NSWLR 653;
[2008] NSWCA 206
Janssen-Cilag Pty Ltd v Pfizer Pty Ltd (1992) 37 FCR 526
JLW (Vic) Pty Ltd v Tsiloglou [1994] 1 VR 237
Marks v GIO Australia Holding Ltd (1998) 196 CLR 494; [1998] HCA 69
McBride v Christie's Australia Pty Ltd [2014] NSWSC 1729
McCarthy v McIntyre [1999] FCA 784
QNI Resources Pty Ltd v Sino Iron Pty Ltd [2016] QSC 62
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332; [1994] HCA 4
Townsend v Roussety and Co (WA) Pty Ltd (2007) 33 WAR 321; [2007] WASCA 40.
Travel Compensation Fund v Tambree (2005) 224 CLR 627; [2005] HCA 69
Date of hearing: 14-18, 21-24, 29 March and 4 May 2016
Date of last submissions: 30 May 2016
Registry: Western Australia
Division: General Division
National Practice Area: Commercial and Corporations
Sub-area: Regulator and Consumer Protection
Category: Catchwords
Number of paragraphs: 481
Counsel for the Applicants: Mr GS Clarke QC with Mr PJ Hannan
Solicitor for the Applicants: Feinauer Commercial Lawyers
Counsel for the First Respondent: Ms PE Cahill SC with Mr DM Fairweather
Solicitor for the First Respondent: Cardinal Litigation + Dispute Resolution
Counsel for the Second Respondent: The Second Respondent appeared in person
Counsel for the Third and Fourth Respondents: Mr SM Davies SC with Mr SC Sudweeks
Solicitor for the Third and Fourth Respondents: Jackson McDonald
ORDERS
WAD 461 of 2013
BETWEEN: CHOWDER BAY PTY LTD ACN 008 898 959
First Applicant
MARK PATTERSON
Second Applicant
BADENPORT PTY LTD ACN 008 931 842 (and others named in the Schedule)
Third Applicant
AND: DAVID ARTHUR PAGANIN
First Respondent
CHARLES WILLIAM EDWARD ROBERTSON
Second Respondent
M3PROPERTY (WA) PTY LTD ACN 074 470 563 (and another named in the Schedule)
Third Respondent
JUDGE: BARKER J
DATE OF ORDER: 3 APRIL 2017

THE COURT ORDERS
THAT:

1. As against each respondent, the application be dismissed.
2. Unless a respondent indicates within 7 days of today that it wishes to move for a costs order on some other terms, the applicants do pay the costs of each respondent, to be taxed if not agreed.

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

REASONS FOR JUDGMENT

BARKER J:

1 In November 2006, Ibex Capital Pty Ltd provided to each of the applicants, amongst other prospective investors, an Investment Memorandum by which they were invited to join in a proposed joint venture called the Aqua Development syndicate. The joint venture proposal involved the redevelopment of a former caravan park at Busselton, in the South West of Western Australia, as a short-stay resort development.

2 On 27 March 2007, each of some 23 syndicate members, including the applicants, executed syndicate agreements and subscribed the sum of \$500,000 to the joint venture. The syndicate agreements comprised the following documents:

a Unit Trust Deed 2007 between Aqua Resort Pty Ltd as trustee and the syndicate members as unit holders;

an Investor Agreement between Ibex Capital, Aqua Resort (as trustee for the Aqua Unit Trust), Ibex Aqua Pty Ltd and other syndicate members as investors;

the Aqua Joint Venture Agreement between Ibex Capital, Aqua Resort (as trustee for the Unit Trust), Ibex Aqua and other syndicate members as joint venturers; and

the Aqua Development Management Agreement between Ibex Capital, Aqua Resort (as trustee for the Unit Trust), Ibex Aqua and other syndicate members as villa owners.

3 The syndicate agreements disclosed the following structure:

- (a) Under the Unit Trust Deed, each syndicate member held one twenty-third of the units issued in the Unit Trust, the trustee of which was Aqua Resort.
- (b) The construction and development of the resort would be undertaken by the three participants in the joint venture, being Ibex Capital as to a 9.89% undivided share, Aqua Resort as to a 43.65% undivided share and the 23 syndicate members as to a 2.02% undivided share each (totalling a 46.46% collective total share).
- (c) Ibex Aqua was appointed by the joint venturers as development manager for the construction and development of the syndicate resort.

- (d) Each syndicate member would be allocated a separate portion of the resort property, together with a share of the common property as tenants in common on registration of the plan of subdivision and partition, and syndicate members would become registered as the proprietor of such land, on which a Grove Villa would be constructed by the syndicate.
- (e) Syndicate members would execute irrevocable powers of attorney in favour of Ibex Aqua.
- (f) Apart from the \$500,000 paid by each syndicate member, joint venture costs and expenses to construct and complete the development would be paid by borrowed monies, giving rise to joint venture debt, which debt was to be repaid from the sale of villas comprising part of the developed resort, other than syndicate members' villas and Ibex Capital's villas, and being 13 Resort or Grove Villas and four Ocean View or Bay Beach Villas (Sale Villas).
- (g) Any profits from the sale of the Sale Villas, after the retirement of all joint venture debt, would be distributed to the joint venturers, according to their respective interests in the joint venture.
- (h) The interest of each syndicate member comprised:
 - (i) Their interest in the joint venture.
 - (ii) Their units in the Unit Trust.
 - (iii) Prior to allocation of the separate lots on which their allocated Resort or Grove Villas would be built, as tenants in common, with others, on the land at 605 Bussell Highway, Broadwater, Western Australia, being the land comprising and described as lot 100 on diagram 78126 on Certificate of Title Volume 1949 Folio 200 (the resort property).
 - (iv) After allocation of their lots, and partition of their respective interests, as a registered proprietor of the lots of land at the resort property on which their allocated Resort or Grove Villas would be built, together with their share of the common property of the resort property.

4 On 18 April 2007, the syndicate members received units in the Unit Trust.

5 In April and May 2007, the syndicate members executed irrevocable powers of attorney in favour of Ibex Aqua.

6 On 21 October 2009, the syndicate members were registered as proprietors of the following lots on survey strata plan 54628, together with a share of the common property as tenants in common with other syndicate members. The applicants were registered in respect of the following lots:

Lot 38 – Chowder Bay Pty Ltd;

Lot 37 – Mr Mark Patterson;

Lot 28 – Badenport Pty Ltd;

Lot 4 – Lesuer Pty Ltd;

Lot 29 – Mr Teddoro Del Borello; and

Lot 8 – Arredo Pty Ltd.

7 While the applicants do not seek relief in this proceeding by reference to any representations conveyed by the Investment Memorandum, they do plead that by the Investment Memorandum the Ibex companies (Ibex Capital, Ibex Aqua and Aqua Resort) misleadingly represented to members of the public, including them, that generally:

an investment was likely to achieve a return on completion of the proposed resort development;

the Sale Villas were likely to be able to be sold at their estimated sale price on completion, to pay off the debt used to finance the development and construction of the resort;

the 13 Resort or Grove Villas that were to be sold to the public were likely to sell between \$950,000 and \$1.1 million based on comparable sales in which such prices had been achieved with arguably inferior locations, and lower levels of amenity and quality of design;

upon completion of the development, there existed reasonable grounds to estimate that the Resort or Grove Villas of syndicate members would be worth \$990,000 or thereabouts;

it was realistic for the syndicate members to achieve a 61.5% gross return on equity;

the estimated selling prices of completed Resort or Grove Villas and Ocean View or Bay Beach Villas were based on reasonable assumptions and were likely to be achieved, and the estimated selling price of completed villas were based upon comparable sales evidence of similar villas;

syndicate members' liability would be limited to their interest in the syndicate;

it was reasonable to expect that syndicate members would be required to pay their share of the outstanding balance on the completion of the construction and development of the syndicate resort, in the vicinity of \$105,000, subject to other matters, pleaded as follows:

- if such amount was not paid, a syndicate member's liability was limited to the member's villa being sold, with the proceeds of sale being remitted to the member less the member's share of the outstanding balance and any costs associated with the sale;

- no recourse would be had to individual investors beyond their interest in the project or the value of that interest, to repay the cost of the construction and development of the syndicate resort.

8 In April 2008, the Ibex companies applied to St George Bank (amongst other financial institutions) for a loan facility to fund the construction and development of the resort pursuant to the syndicate agreements.

9 In May 2008, the Bank made an indicative finance proposal to the Ibex companies.

10 In June 2008, the Bank commissioned a valuation from Egan Valuers (now M3Property (WA) Pty Ltd, the third respondent) in relation to:

the resort property "As Is", being an unencumbered freehold title;

the resort property "As If Complete", with 42 vacant survey strata lots; and

the resort property "As If Complete", with the resort fully constructed and developed.

11 In about mid-July 2008, the Bank received a written 1 June 2008 Egan valuation from Egan Valuers representing the following values as at 1 June 2008:

an "As Is" unencumbered freehold value of \$17.2 million, GST inclusive;

an "As If Complete" value, with 42 vacant survey strata lots, of \$32.268 million, GST inclusive; and

a fully constructed and developed value of \$69,856,500, GST inclusive.

12 In late October 2008, the Bank commissioned an updated valuation from Egan Valuers, who then provided in early November 2008, the 30 October 2008 Egan valuation, which was to the effect that the values had not changed since the 1 June 2008 Egan valuation.

13 By a 3 October 2008 letter, Ibex Capital wrote to syndicate members attaching various materials, including an extract of a valuation table from the 1 June 2008 Egan valuation.

14 By a facility offer dated 10 November 2008 from the Bank as lender to Ibex Aqua and Aqua Resort as borrowers, the Bank offered to provide the borrowers with a loan facility with a total limit of \$32.3 million, on terms that included a loan-to-value ratio (LVR). The offer was accepted.

15 As security for the facility, each syndicate member was required to provide, and did provide, guarantees and indemnities, as well as mortgages over their lots registered in the resort.

16 The Bank advanced the first drawdown under the facility on or about 23 December 2008.

17 The resort was constructed and completed in about November 2010.

18 On 10 December 2010, the Ibex companies corresponded with syndicate members, including the applicants, advising that their villa values were significantly below the Egan valuation figures of 2008, represented in the 3 October 2008 letter to syndicate members; that the Ibex companies were unable to sell the remaining Sale Villas; and that the facility was required to be repaid in full by 31 December 2010.

19 The applicants say that this was the first notice they had received that suggested there were financial problems with the joint venture.

20 Mr David Arthur Paganin (the first respondent), who with Mr Charles William Edward Robertson (the second respondent), was one of the two directors of the Ibex companies, and resigned as a director of the companies on 26 November 2010. Mr Robertson remained as a director.

21 In April 2011, the Bank appointed Messrs Theobald and Herbert as receivers and managers to the borrowers, pursuant to the charges it held. In October 2011, the receivers issued demands to syndicate members for payment of the outstanding balance said to be due and owing under the syndicate agreements in sums well beyond the values of their villas at that time, even though the sale of the remaining Sale Villas had not yet occurred or been completed.

22 Between November 2011 and December 2011, the Bank also issued demands and default notices to syndicate members.

23 As a consequence of the demands issued by the receivers and managers of the borrowers and the Bank, the applicants, among other syndicate members, commenced proceeding WAD497/2011 in this Court on 8 December 2011 (which is referred to in these reasons as the 497 Proceeding). The 497 Proceeding was settled on 11 June 2013 between the relevant syndicate members and Westpac Banking Corporation (as successor to the Bank); and on 13 November 2013, between them and the receivers and managers of the borrowers.

24 Chowder Bay, the first applicant in this proceeding, and Sienna Holdings WA Pty Ltd (which is not a party to this proceeding), commenced a separate proceeding in this Court, WAD277/2011, in July 2011, seeking relief from the enforcement of contracts each had made independently of the joint venture for the purchase of an Ocean View or Bay Beach villa (which proceeding is referred to in these reasons as the 277 Proceeding). The 277 Proceeding was settled between Chowder Bay and the receivers and managers of the borrowers in May 2013.

25 The applicants now allege that:

M3Property (as Egan Valuers) engaged in misleading or deceptive conduct at material times in contravention of Commonwealth and Western Australian consumer legislation; and seek an award of damages against it;

Mr Blake William Smith (the fourth respondent), who at material times was a director of Egan Valuers and was involved in the preparation of the two valuations provided by Egan Valuers to the Bank, was knowingly concerned or involved in Egan Valuers' misleading or deceptive conduct; and engaged in misleading or deceptive conduct by his own conduct in contravention of the relevant consumer legislation; and seek a consequential award of damages against him; and

each of Mr Paganin and Mr Robertson (who are referred to in places in these reasons as the directors) engaged in misleading or deceptive conduct; and were knowingly concerned in or involved in misleading or deceptive conduct by the Ibex companies in contravention of the relevant consumer legislation; and seek an award of damages against each of them.

26 The applicants claim that they suffered the following loss and damage as a result of the matters of which they complain:

- (1) Loss of their \$500,000 initial subscription to the syndicate.
- (2) Loss of their interest in the joint venture property.

- (3) Alternatively, loss of the value of their respective registered properties as at the date of the deed of settlement with Westpac in the 497 Proceeding.
- (4) Loss and damage resulting from their compliance with the terms of the deed of settlement with the Ibex companies.
- (5) Legal costs in relation to their conduct of the 497 Proceeding.

27 In summary, the applicants say that, but for the contraventions they have pleaded, the Bank would not have lent the funds for the resort development and they would not have been exposed to the losses they now claim.

28 Chowder Bay makes a separate, but similar, claim for damages in respect of its acquisition of the Bay Beach Villa it separately agreed to buy, including for the costs associated with the 277 Proceeding.

29 The applicants submit that nine propositions underlie their pleaded cases, and that, having regard to the evidence adduced at trial, each proposition has been made out so that they are entitled to the relief they seek.

30 The nine propositions are put in the following terms:

Proposition 1: The 1 June 2008 Egan valuation and the 30 October 2008 Egan valuation were misleading or deceptive, such that had they not been so misleading or deceptive, the "As If Complete" valuations of the resort would have been substantially lower than \$69,856,500 (including GST) (\$67,785,197 excluding GST).

Proposition 2: The presale schedules provided by the Ibex companies to Egan Valuers were misleading or deceptive.

Proposition 3: The Ibex companies engaged in misleading or deceptive conduct between the receipt of the 1 June 2008 Egan valuation and the 30 October 2008 Egan valuation by failing to provide instructions to Egan Valuers to correct the 1 June 2008 Egan valuation.

Proposition 4: The 3 October 2008 letter to each applicant as a syndicate member was misleading or deceptive.

Proposition 5: Mr Smith was liable for, or in relation to, the 1 June 2008 Egan valuation and 30 October 2008 Egan valuation on the basis that he was the author of the two valuations and involved in their preparation.

Proposition 6: Mr Paganin and Mr Robertson are liable for, or in relation to, the presale schedules, and the failure to correct the 1 June 2008 Egan valuation.

Proposition 7: Mr Paganin and Mr Robertson are liable for, or in relation to, the 3 October 2008 letter to syndicate members, including the applicants.

Proposition 8: The applicants relied upon the 3 October 2008 letter, such that, had the valuation table of the villas of the resort provided with the letter disclosed substantially lower values, they would not have executed the guarantees and mortgages which the Bank required as securities for the facility to Ibex Aqua and Aqua Resort.

Proposition 9: The Bank relied upon the Egan valuations in agreeing to provide the facility, such that, if the "As If Complete" valuations of the resort had been substantially lower than \$69,856,500 (GST included) (\$67,785,197 GST excluded), and the applicants had not provided the guarantees and mortgages, the Bank would not have provided the facility and the resort would not have been built.

31 Each of the respondents deny the allegations made against them or that the applicants are entitled to the relief sought against them in any event.

32 In the circumstances, it is appropriate to determine the pleaded liability questions by answering the question or questions posed by each of the nine propositions relied on by the applicants. The answers have regard to the applicants' cases as pleaded.

Were the 1 June 2008 Egan valuation and the 30 October 2008 Egan valuation misleading or deceptive, such that had they not been so misleading or deceptive the "as If Complete" valuations of the resort would have been substantially lower than \$69,856,500 (Including gst) (\$67,785,197 excluding GST)?

33 This question reflects the applicants' Proposition 1.

The pleadings

34 The applicants submit that the allegations in [38] to [44] of the statement of claim have been proven. In those paragraphs the applicants plead:

38. (a) Neither the 1 June 2008 Egan Valuation, nor the November 2008 Egan Valuation were provided to or seen by the applicants before the events referred to in paragraphs 36 and 37.
 - (b) However, Ibex Capital provided an extract of the 1 June 2008 Egan Valuation to Syndicate Members, including the applicants, under cover of a letter dated 3 October 2008 (the 3 October 2008 letter).
 - (c) The said extract from the 1 June 2008 Egan Valuation was a one page document entitled 'Proposed Aqua Resort Gross Realisation As If Complete', which provided, inter alia, a 'Value/ Contract Price (GST incl)' for each of the Syndicate Members' Allocated or Grove Villas, the Ibex Villas and the Sale Villas, totalling \$69,856,500 (the Egan Valuation Table). Copies of the Egan Valuation Table, in colour and in black and white, are Annexure B hereto.
39. The 1 June 2008 Egan Valuation provided, inter alia, as follows:
- (a) On page 3 of the Executive Summary:

The Aqua Resort site was purchased in May 2007 by Ibex Capital Pty Ltd and Aqua Resort Pty Ltd together with a further 25 separate parties. The 25 individual parties will each acquire one residence within the completed resort and we understand Ibex Capital will retain two units. The parties have made considerable contributions to the acquisition price of the land and these contributions will form part of the overall purchase price of the individual residences and strata lots. Bearing this in mind, a total of 27 units may be considered presold, leaving a further 15 units comprising 12 Grove Beach Houses and 3 Bay Beach Houses to be sold on the open market. We understand that a further three of these units are now Under Contract. Two of the three under arm's length contracts are residences 18 and 21, both of which are Bay Beach Houses.

(b) On page 4 of the Executive Summary:

Purpose of Valuation:

To determine the current market value of the freehold interest in the above-mentioned property 'as Is' and 'As if Complete' assuming issue of vacant survey strata lot titles and completion of the proposed beach houses. The valuation has been prepared for asset management and mortgage security lending purposes.

(c) On pages 5 and 6 of the Executive Summary:

Assumptions, Conditions and Limitations:

2. This valuation is current as at the date of valuation only. The value assessed herein may change significantly and unexpectedly over a relatively short period (including as a result of general market movements or factors specific to the particular property). We do not accept liability for losses arising from such subsequent changes in value.
12. We have assumed that the 25 existing investors have entered into presale contracts for the purchase of vacant survey strata lots and construction of the proposed beach houses.
13. Liability for the valuation is extended to St Gorge Bank Limited for lending purposes subject to the bank sighting the additional contracts and being satisfied that the 25 presales are legitimate market transactions with reasonable deposits or investment funds forwarded to and held by the developer.
14. We have assumed that the presale contracts will reach settlement at the contracted prices within a 2 month time frame from completion of the civil works and issue of individual Certificates of Title. The valuation is based on the construction time frame included with the Sizer Builder's Cost Estimate (16 months) with further allowance of 4 months for construction of civil works prior to the building contract commencing.

(d) On page 1 of the Valuation:

1. Instructions & Terms of Reference

In response to instructions received from Mr Jenny Sheldrick of Ibex Capital Pty Ltd and Kylie Gilbey, Business Development Manager, Property Finance WA, St George Bank Ltd, an inspection has been made of the above-mentioned property on 1 June 2008 for the purpose of advising the current market value 'As Is' and 'As If Complete' assuming issue of 42 survey strata titles, for asset management and mortgage security lending purposes.

In accordance with the Land Valuers Licensing Act 1978, Licensed Valuers Code of Conduct and the Australian Property Institute, value 'As If Complete' means:

A valuation that assumes the proposed development to be in a completed state as at the date of valuation and reflects current market conditions as at the date of valuation. The market value of the proposed improvements as detailed in the report assumes that all construction has been satisfactorily completed in all respects at the date of this report. The valuation reflects the valuer's view of the market conditions existing at the date of the report and does not purport to predict the market conditions and the value at the actual completion of the improvements because of the time lag. Accordingly, the 'as If Complete' valuation must be confirmed by a further inspection by the valuer, initiated and instructed by the lender, on completion of improvements. The right is reserved to review and if necessary, vary the valuation in this report if there are any changes in relation to the project itself or in property market conditions and prices.

40. By the 1 June 2008 Egan Valuation, and the November 2008 Valuation, Egan Valuers represented in trade or commerce to St George (the Egan representations) that:
- (a) 25 Syndicate Members had entered into presale contracts for the purchase of vacant survey strata lots and construction of the proposed beach houses at the prices indicated in the 'Value/Contract Price (GST incl)' column of the Egan Valuation Table.
 - (b) The 25 Syndicate Member presale contracts at those prices were legitimate market transactions with reasonable deposits or investment funds forwarded to and held by the developer.
 - (c) The 25 Syndicate Member presale contracts would reach settlement at the contract prices indicated in the said column, within a two month time frame from completion of the civil works and issue of Certificates of Title.
 - (d) Residences 18 and 21, both Bay Beach Houses, or Ocean View Villas, had been presold under arm's length contracts, with a purchase price for each of \$3,031,500.
 - (e) Residences 19 and 24, also both Bay Beach Houses, had been presold under contracts to Ibex Capital, with a purchase price for each of \$3,031,500.
 - (f) The As If Complete value of the Grove Beach Houses and the Bay Beach Houses of the syndicate resort as at 1 June 2008, and as at November 2008, was \$69,856,500.
41. The Egan representations were misleading or deceptive, or likely to mislead or deceive as:

- (a) There were 23 Syndicate Members , not 25.
- (b) The 23 Syndicate Members had not entered into any presale contract for the purchase of vacant survey lots and construction of the proposed Grove Beach Houses, on their respective Syndicate Members' Lots, at the prices indicated in the 'Value/Contract Price (GST incl)' column of the Egan Valuation Table, or at any price. The Syndicate Members had subscribed \$500,000 to join the Aqua Joint Venture, and had agreed to be subject to the obligations of, and enjoy the rights under, the Syndicate Agreements.
- (c) There were no presale contracts by the 23 Syndicate Members at those prices, or any other prices, and no deposits were paid and no investment funds had been forwarded to and held by the developer. Syndicate Members' \$500,000 subscription was paid to or at the direction of Ibex Capital by them by the end of March 2007, and had been used to fund the purchase of the Aqua Resort Property land, and the issuance of units to Members in the Aqua Unit Trust.
- (d) There was to be no settlement of the 23 Syndicate Member presale contracts at those prices, within a two month time frame from completion of the civil works and issue of the Certificates of Title, or at all. Syndicate Members were under no obligation under any presale contracts, or under the Syndicate Agreements, to pay any further monies to the developers at those times.
- (e) Residences 18 and 21, both Bay Beach Houses, had been presold under contracts dated 8 March 2008, each at purchase prices of \$2,795,000, not \$3,031,500.
- (f) Residences 19 and 24, also both Bay Beach Houses, had not been presold under any contracts to Ibex Capital with a purchase price of \$3,031,500, or at any other purchase price.
- (g) The As If Complete value of the Grove Beach Houses and the Bay Beach Houses as at 1 June 2008, and as at November 2008 was not \$69,856,500, but substantially less than that.

42. Further:

- (a) The dollar figures contained in the column of the Egan Valuation Table entitled 'Buildings Pool and Fitout (GST incl)', being \$819,500 in relation to the Grove Beach Houses and \$1,336,500 in relation to the Bay Beach Houses, were misleading or deceptive or likely to mislead or deceive as:
 - (i) those construction cost figures were substantially above the construction cost figures referred to in the 1 June 2008 Egan Valuation at pages 18 and 19; and
 - (ii) those figures had no reasonable basis.

- (b) The 'Value/Contract Price (GST inc)' figures in the Egan Valuation Table concerning the Grove Beach Houses, and the Bay Beach Houses, had no reasonable basis in comparable sales because the 1 June 2008 Egan Valuation had no regard to the contractual limitations on Syndicate Members' ability to re sell or re-finance their Grove Beach Houses indicated in paragraphs 21(a), (b), (c), 24(a), (b), 25(a), (b) and 33(c), (e) hereof (the Contractual Limitations).
 - (c) The 'Value/Contract Price (GST) incl' figures in the Egan Valuation Table concerning the Grove Beach Houses and the Bay Beach Houses had no reasonable basis.
 - (d) The valuation of the Grove Beach Houses and the Bay Beach Houses in the November 2008 Egan Valuation were misleading or deceptive, or were likely to mislead or deceive, because no allowance was made for adverse changes in market conditions between 1 June 2008, and the end of October 2008.
43. Accordingly, the 'Value/Contract Price (GST incl)' figures in the Egan Valuation Table concerning the Grove Beach Houses and the Bay Beach Houses, were misleading or deceptive or likely to mislead or deceive.
44. Had the 1 June 2008 Egan Valuation and the November 2008 Egan Valuation not been misleading or deceptive as aforesaid, then the As If Complete valuations of the Grove Beach Houses and the Bay Beach Houses by Egan Valuers would have been substantially lower than \$69,856,500.

(Emphasis as in original.)

The evidence

35 In his primary evidence – most of which is not challenged as to its narrative aspects, but is challenged as to the question of the relevance of the price schedules to the valuation opinions he formed in preparing the two Egan valuations for the Bank – Mr Smith explained that on 16 April 2008, Mr Jonny Sheldrick of Ibex Capital telephoned him about providing a valuation for the resort development for mortgage security purposes and that he then met with Mr Sheldrick and Mr Robertson on 21 April 2008. That was the only meeting he could recall with either man prior to completing the 1 June 2008 Egan valuation. There were other communications, however, by email or telephone.

36 Soon after this, Ms Kylie Gilbey of the Bank formally instructed Mr Smith and Egan Valuers (together, the valuers) to conduct the valuation for mortgage security purposes and the report was to become and remain the property of the Bank, and to be kept confidential. This evidence, which I accept, means that the Bank, not the Ibex companies, were Egan Valuers' client.

37 Soon after, by email dated 5 June 2008, Mr Sheldrick provided Mr Smith with materials including the strata plan, the typical Bay Beach (Ocean View) and Grove (Resort) Villa plans, the Shire of Busselton development application approval, the land purchase contract, a villa price list and sale schedule, and a list of third party sales.

38 Mr Sheldrick advised Mr Smith in an email that the Bank's lawyers were reviewing the sales contract documentation and that Ibex would forward the sales contract to him once any amendments had been made, and that the construction pricing and contract terms were still being finalised but that information would be forwarded to him when it was finalised. As explained below, there is no contest that such information was relevant to the valuation task, as was the material referred to in the preceding paragraph.

39 By about 9 July 2008, when he had not had received these additional materials, Mr Smith emailed Mr Sheldrick and, in particular, asked whether the sales contract had been completed yet, and that if the documents that he sought were not available he would need to make comment in his report.

40 Later that day he received from Mr Sheldrick a range of other documents, but not the sales contract he had asked for. That same day he also received some other information about the main pool costings, a third party sales schedule and the builder's schedule of costings. He was told that the final sales contract was being "updated/amended" and should be completed by the end of that week.

41 On 11 July 2008, Mr Sheldrick emailed Mr Smith a copy of a proforma contract of sale by offer and acceptance and power of attorney.

42 On 13 July 2008, Mr Smith requested details of the costs of tennis courts, plunge pools, the fit out and window treatments.

43 Following further exchanges, on 15 July 2008, Mr Smith emailed Mr Sheldrick to ask whether Australian Securities and Investments Commission (ASIC) had provided confirmation that the project was not a managed investment scheme (MIS). He made this inquiry, he said, because he wanted to ensure that a particular exclusion clause in Egan Valuers' professional indemnity insurance was not enlivened. He was advised the same day that the syndicate was not considered by Ibex to be a MIS.

44 Mr Smith worked on the Egan valuation during May and June 2008, and into July 2008.

45 He said he obtained title searches for the property, visited and inspected the property and made handwritten notes and sketches. He also took photographs of it, which he later attached to his valuation report. He also believes he carried out some internet searches to obtain publicly available information about the property, which revealed that Ibex Capital had purchased the land in April 2007 for \$9,483,663.

46 He said he reviewed the planning consent and did not consider any of the conditions of the development to be particularly onerous, in the sense that they would either delay the development or be very expensive to meet.

47 He did not consider the short-stay condition would impact adversely on the value of the villas to be constructed.

48 He considered all conditions could be satisfied within four months.

49 He reviewed the construction costings, planning materials and other documentation which had been provided to him by the Ibex companies.

50 He said he reviewed the proforma contract of sale and power of attorney documentation for the project, which had been sent to him, and understood that individual purchasers would be required to settle the land component of the acquisition upon the availability of titles and the individual purchasers would appoint Aqua Resort (the developer) to enter into a building contract for a fixed lump sum on their behalf to construct and furnish the villas, and complete the common area infrastructure and improvements.

51 He understood the balance of the contracted purchase price of the individual villas would be payable within seven days of practical completion of the construction contract.

52 He also understood that Aqua Resort Management Pty Ltd (the property manager) would be responsible for letting the individual beach villas once completed.

53 He said the contract of sale outlined the substance of the power of attorney and the proposed terms and conditions of the letting agreement and the property management agreement, and he understood purchasers would be required to enter into them as a condition of entry into the contract of sale.

54 Mr Smith said he researched and considered recent sales activity involving similar properties in the region, comprising both vacant land suitable for development and short-stay tourist accommodation. He said his analysis was set out at Pt 11 of the 1 June 2008 Egan valuation at p 24 and onwards. He said that in order to identify recent comparative sales, he accessed Landgate sales data, which he produced in evidence.

55 He said that when undertaking the valuation process in June 2008, he also had access to listings of properties that were on the market at that time, but not sold. He said it was, and is, his practice to review the websites of real estate agencies to access information relating to current listings.

56 He was not, however, he said, aware of and was not provided with the agreements that governed the relationship between syndicate members and the Ibex companies. He said he did not ask for any such agreements as he did not consider them relevant to the market valuation assessment.

57 He also said that at the time he did the 1 June 2008 Egan valuation, he held the view that any limitations on the investors' rights to dispose of or deal with their villas were irrelevant, as the purpose of the valuation was for the Bank to ascertain how much it could realise if it had to take possession. Accordingly, he said he valued the resort property on the assumption that there were 42 unencumbered survey strata titles in accordance with the draft survey strata plan annexed to his valuation, and that the nature of any rights that the Ibex companies held was irrelevant.

58 Having had regard to the details of the proposed resort development, Mr Smith said that in June 2008 he had recently performed valuations of the Vasse residential development in Newtown and the Provence industrial development in East Busselton, and was aware of the state of the market at that time and outlined his views as to the state of the market at pp 21 and 22 of the 1 June 2008 Egan valuation. He said that, while he appreciated the market had slowed, he had no way of estimating the extent to which the market may slow or fall beyond the date of the valuation. He said the number of property transactions at the time had reduced significantly, which meant the sales evidence that was available was relatively limited and made it difficult to predict the extent of any market movements. He was of the view that the project would be successful in the sense that the developers would be able to sell the villas. Significantly, in my view, that was because he understood from the information provided to him that the majority had been presold, leaving only 15 villas to be sold. He said that given the time it would take to construct the resort, the developers had a window of 12 to 18 months to sell the remaining lots, which he considered sufficient time.

59 Ultimately, he said, having regard to comparable sales evidence, he formed the opinion that the land commanded a market value in the order of \$480 per square metre to \$500 per square metre and that this was well supported given the beachfront position, extensive presales and planning consent received by that time. That yielded a total value of \$16,796,160 to \$17,496,000 and so he arrived at an estimate of \$17.2 million inclusive of GST (\$16,498,515 exclusive of GST). His view concerning the "extensive presales" should be noted.

60 He said that, in addition to the direct comparison method, he used two other methods – the static valuation analysis and a discounted cash flow analysis – as a "checking mechanism" to test the veracity of his preliminary opinion. Both methods are based on an assessment of potential gross realisation from the sale of the developed villas. Each involved the preparation of a "reverse feasibility". In his evidence he explained the methodology involved. It is not particularly contentious, in my view.

61 In order to consider the potential revenue that could be derived from the sale of the proposed villas in the resort, he took into account sales evidence from within local tourist accommodation resorts, permanent residential areas and satellite towns, including Eagle Bay and Bunker Bay. He came to the view that the proposed Bay Beach Villas at Ibex's asking price of some \$3 million to \$3.2 million were priced at the upper end of the market. However, given what he considered to be their absolute beachfront position, he thought the price range was within market parameters. He also took into account instructions that four of the seven Bay Beach Villas had already been sold, which indicated a reasonable level of demand, even though they were sales to parties associated

with the development.

62 He noted that the asking price of the Grove Beach Villas, inclusive of all costs, was \$1,058,000 to \$1,708,500, depending on proximity to the beachfront. He took into account the longer than average development timeframe and the length of time that would be available to sell the villas, and provided for a risk allowance of 25%. The results of each of the static valuation analysis and the discounted cash flow analysis, in the region of \$16.5 million, he said, gave him "comfort". I accept that it did. The estimated value he had arrived at using a direct comparison approach, he concluded, represented a fair market value of the land on an "as is" basis.

63 He further valued the vacant survey strata lots at \$32,268,000 (GST inclusive) or \$30,196,697 (GST exclusive).

64 In accordance with the Bank's instructions, he also provided an "in one line" value for the resort on an "as if complete" basis of \$55,660,000 nett of GST by applying a discount of 20.32% on gross realisation inclusive of GST, and 17.89% of gross realisation excluding GST.

65 As to the presales that he referred to in the valuation, Mr Smith said it was, and is, his practice to sight copies of any presale contracts. He said the level of presales before development impacts upon value because it provides some guidance as to demand and confirms acceptance in the marketplace, and so reduces the risk to the developer.

66 He noted in his evidence that, under cover of an email dated 5 June 2008, Mr Sheldrick sent him various materials including a document entitled "Aqua-Villas Price List", which he referred to in his evidence as the "presale schedule".

67 He said he noted that the presale schedule listed various villas that would be developed, the size of each and the price, broken down into land and building components. He noted the column which indicated whether a villa was "Available" or "Sold". Of the 41 villas, he observed 28 were described as "Sold". He said he understood from that, that 23 had been sold to syndicate members, two to the Ibex companies or associated entities, and three to third parties (two of which, being villas 18 and 21, were Bay Beach Villas).

68 He added that based on his review of the contract of sale, the power of attorney, the presale schedule, and the third party sale schedule he had received, he understood that syndicate members and third parties were to purchase villas on the terms set out in the contract of sale. These purchases, he considered, provided the revenue for the development that he assumed for the purpose of his reverse feasibility alternative valuations.

69 He said that, having requested a copy of each of the presale contracts, but not having received any, he indicated in his 1 June 2008 Egan valuation, statements to the Bank that he had not had access to them and had not been able to verify them. I note that the statements read:

12. We have assumed that the 25 existing investors have entered into presale contracts for the purchase of vacant survey strata lots and construction of the proposed beach houses.

13. Liability for the valuation is extended to St George Bank Limited for lending purposes subject to the bank sighting the additional contracts and being satisfied that the 25 presales are legitimate market transactions with reasonable deposits or investment funds forwarded to and held by the developer.

70 In relation to the later, confirmatory 30 October 2008 Egan valuation, Mr Smith explained that on 28 October 2008, Ms Gilbey of the Bank sent him an email advising that the Bank had approved a facility for the resort development and requesting an updated valuation from him or, alternatively, an extension of the date of the 1 June 2008 Egan valuation so the Bank could rely on it for an additional three months.

71 I note that in the email, Ms Gilbey asked Mr Smith, amongst other things, to "confirm the current level of presales". As to this, in her email Ms Gilbey told him that she would get Mr Robertson ("Charlie") to confirm the current level of presales with him. Accordingly, Mr Smith said, he did not understand the Bank required him personally to verify the presales. On the face of it, I accept Mr Smith's understanding was not unreasonable. Later, he received an email from Mr Sheldrick saying he understood the Bank had forwarded instructions and confirmed the Bank had requested that Ibex Capital provide him with confirmation of the level of presales. Mr Sheldrick then annexed an updated schedule of presales.

72 Mr Smith said he inspected the property on 30 October 2008 and took photographs. He then reviewed the 1 June 2008 Egan valuation, considered Ibex Capital's confirmation of presales and the updated schedule of presales, which included a further sale since June to another third party, and considered "data on the state of the market at that time, including recent comparable sales and listings".

73 He then prepared an updated report dated 3 November 2008 (the 30 October 2008 Egan valuation) and emailed it to the Bank. In it, he confirmed that he had received the updated presales schedule that indicated a further villa had been sold. He did not detail the "data" he said he had also considered.

74 In a covering letter dated 3 November 2008, Mr Smith again cautioned the Bank to obtain copies of the presale contracts to confirm their authenticity, as liability for the valuation was extended subject to them being confirmed as acceptable to the Bank. The letter contained the following statement:

We have been provided with an updated presale schedule from Ibex Capital (copy attached) indicating one further sale since our original valuation. Proposed Lot 1 has been sold at list price however, as with our original assessment, a copy of the contract has not been provided. We recommend that St George Bank obtain copies of the presale contracts to confirm their authenticity as liability for our valuation is extended subject to these contracts being confirmed as arm's length.

(Emphasis as in original.)

75 Very soon after this, Ms Gilbey, by email dated 4 November 2008, informed Mr Smith:

We also note that 25 of the pre-sales are not arms length as they are syndicate members involved in this deal and one is to the builder so, could you please confirm the valuation on this basis.

76 Mr Smith then amended the earlier 3 November 2008 covering letter as follows:

We have been provided with an updated presale schedule from Ibex Capital (copy attached) indicating one further sale since our original valuation. Proposed Lot 1 has been sold at list price however, as with our original assessment, a copy of the contract has not been provided. We recommend that St George Bank obtain copies of the presale contracts to confirm their authenticity as liability for our valuation is extended subject to these contracts being confirmed as acceptable to the Bank.

(Emphasis as in original.)

77 In other words, the Bank's advice that the investors' transactions were not arm's length did not affect the substance of the valuation, but Mr Smith remained concerned to ensure the contracts existed, and left it to the Bank to be so satisfied.

78 He said he used bold type when making the last statement as it was a matter of importance. He wanted to ensure the Bank understood he had not sighted any of the contracts. I accept his explanation.

79 As to the value in November, Mr Smith said that when he reviewed the 1 June 2008 Egan valuation he appreciated that market activity remained slow. He said the slowdown limited the amount of direct sales evidence that was available. For that reason, he said, it was not until the first three to six months of 2009 that the extent of the downturn in the market started to become apparent. He said that at the time he prepared the 30 October 2008 Egan valuation, however, he did not appreciate the extent to which the market would fall over the coming months.

80 In cross-examination by senior counsel for the applicants, Mr Smith confirmed that he assumed that the 25 existing investors had entered into presale contracts for the purposes of vacant survey strata lots and construction of the proposed beach houses, and that they existed. He also confirmed that he had assumed that the presale contracts would reach settlement at the contracted prices within a two month timeframe from the completion of the civil works and issue of individual certificates of title.

81 When asked, by reference to the Aqua villa price list schedule he had received, whether he had considered it appropriate to adopt what the developer had put forward as to the land value of the investor villas, Mr Smith answered, "Yes", adding: "The market evidence I considered supported the pricelist".

82 A little later, in relation to fitout costs, when asked whether his evidence was that he took the list price and made adjustments and was content with the list price, Mr Smith answered "No. They were contract prices as far as I was concerned".

83 He further added that, where it said "Sold" on that schedule, he accepted that as a fact, and confirmed that what he did was he took the proforma contracts and made adjustments based on the assumption that the structure applied across the board – that is, to the "sales" of all villas.

84 When asked whether he was satisfied, given all of the work he did to consider the market, that it all worked out that the developers had got it exactly right, including GST, in the price list, Mr Smith responded:

Valuation is not an exact thing. If you – there's a range and if the – if the contract price falls within what the evidence says is reasonable, then there's no reason why the contract price can't be adopted. After all, it is a negotiation between two parties.

(transcript p 818).

85 This evidence, in my view, is of some significance, as explained further below, in the circumstances of this valuation.

86 When further pressed by counsel about the value of, say, lot 2 as disclosed on the schedule, whether he had made a calculation to reach \$1,096,500 as though there was a contract, when there was not one, he said, "No" and that the value was based on the evidence that he had market evidence, and also the presale contracts which he considered provided "reasonable evidence and a reasonable guide". This latter evidence, as explained below, I also consider significant.

87 Senior counsel for the applicants cross-examined Mr Smith as to the comparable evidence that Mr Smith said he had relied upon in coming to his initial valuation, within which he said the prices were comparable, including unit 14, 77 Gifford Road, Dunsborough, which was "for sale" in May 2008. Mr Smith explained that, once sold, a valuer has conclusive evidence as to what the property would have achieved.

88 Mr Smith was further cross-examined by senior counsel for the applicants concerning his statement that, at the time he made the valuation, he could not have foreseen the downturn in the market, by reference to the Commonwealth Treasury and other material. I should say here that I do not consider that Mr Smith should have come to some different view to that which he did about the downturn in the market any earlier than he did by reference to those materials.

89 Cross-examination also dealt with the question of the 30 October 2008 Egan valuation and the question of whether Mr Smith in fact considered any "recent comparable sales and listings" when he renewed the 1 June 2008 Egan valuation. When asked what data he had taken into account and whether he had checked whether the Gifford Road property, which had been advertised for sale in May 2008 for \$2.8 million, had been sold, he said that he had, and recalled it had sold for \$2.45 million.

90 When further pressed as to how that sale would be comparable to a Bay Beach Villa, as at 31 October 2008, Mr Smith considered that sale was "within the basket of evidence". He was pressed as to how it would justify a value for a Bay Beach Villa in the resort at a figure of more than \$3 million as at 31 October 2008. In my view, his attempts to do so lacked cogency.

91 Mr Smith did not accept, as Mr John Martin had in his expert report and evidence when earlier called by the applicants, that prices had peaked in the Western Australian property market in 2007. He did accept, however, that the Regency Beach Club sales to which Mr Martin had referred, were comparable and to be taken into account. He accepted it was one of the "few pieces of evidence" to which one could actually draw a comparison.

92 When cross-examined by senior counsel for Mr Paganin, Mr Smith acknowledged that he inferred at material times that all the units, other than lots 18, 21 and 27 were not third party sales, but rejected the suggestion that they were not "arm's length sales". He stated that he was more than comfortable that they were arm's length sales – at least in June 2008.

93 He confirmed that he took into account two of the resort development third party sales. When he was asked whether he had included the syndicate member lots, he answered "no", but then indicated he did not see a "great distinction" between a third party sale and a syndicate member sale and confirmed they were not "in there" – meaning, not mentioned in the valuation. When challenged that there was a reason for that, Mr Smith replied: "The reasons would be – no, I don't see a big distinction; but then I ...".

94 When he was then asked:

And they don't form any part of your assessment of the comparable sales evidence. For the comparable sales method of deriving ... the total revenue from the developed lots being sold; that's the case?

95 He replied:

They're not – yes. No. They're not in the basket of evidence.

96 When pressed again by senior counsel for Mr Paganin as to whether the reason he had stated in his report that a total of 27 units "may be considered" presold was because he understood that for the syndicate members they were not arm's length transactions, he responded that his understanding was that the syndicate members would enter into a contract similar to any outside purchaser and that they would then enter into a contract or a construction contract through a power of attorney (transcript p 838). He thus did not contradict his earlier evidence on this question and did not, in my view, accept the premise of the question that, at material times in June, he did not consider the investor "sales" to be arm's length.

97 When asked if he had not had the price list information, would he not have undertaken the same exercise of taking that price list and seeing how the comparable sales in the market aligned to it, he answered, "yes". And he said he would have come to the same conclusion because the price list met with the market evidence, thereby suggesting the prices were not material to his valuation.

98 As to the warning to the Bank, concerning not having sighted the presale contracts, in the 30 October 2008 Egan valuation, and the change in wording from the warning given in the 1 June 2008 Egan valuation, he was asked whether the reason for the change was because he now had to

modify the assumptions and treat the syndicate members transactions as not arm's length transactions, and had to assume that for the purposes of the valuation, he answered, yes. But it must be said that up until that point, Mr Smith plainly assumed the investor transactions were arm's length.

99 In re-examination, Mr Smith added that he not only had regard to the Regency Beach Club as providing a reasonable guide for comparable analysis purposes, but also Smith's Beach, Bunker Bay and Caves Ridge Development. He said there was nothing along the Broadwater area (near the project site) because the development was unique in that location. He said he also considered Gifford Road, Halcyon, Dunsborough Beach Cottages and Geographe Bay Resort Cove.

100 He said he did not agree with Mr Martin's proposition that rarely will costs equate to value, although in some cases it does.

101 When he was asked again about the use he had made of the presales to syndicate members information, he answered that he considered that:

Because there were 23 sales, they couldn't be ignored. It's not a huge market and so if those syndicate members were the types of buyer that would buy in that type of development in that location then they should be taken into consideration as market evidence.

This answer, I consider to be of some significance, as explained below.

102 Mr Martin gave valuation evidence on behalf of the applicants before Mr Smith gave his. It is appropriate now to consider his opinion about value and methodology in the light of Mr Smith's evidence. Mr Martin considered that, without any regard to the 23 syndicate members' lots, the highest value that could be placed on the resort, as at 1 June 2008, was \$45,550,000.

103 Mr Martin, an experienced valuer with Australian Property Consultants (APC), prepared what he described as a "retrospective report and valuation" of the Aqua resort. He was asked to provide his opinion as to what the valuation of that property was at 1 June 2008 and 30 October 2008 on an "As If Complete" fully constructed, gross realisation GST exclusive market value of the whole of the resort basis. At that same date, he was also asked to provide the market value of the land only, being a single englobo site; and as to the market value of each individual survey strata lot. He later made a supplementary report, which I will come to, which had regard to the two Egan valuations.

104 Mr Martin acknowledged at the outset of his report and in his oral evidence that, in preparing a retrospective valuation, with the benefit of hindsight he may have had a different perspective on market and economic conditions and future trends than those prevailing as at the retrospective dates of valuation: the physical characteristics of the property may have changed; and in conducting a retrospective assessment, there can be a greater degree of subjectivity and possible "margin of error" in comparison to current valuations – especially when the timeframe between the dates of inspection and valuation are significant due to the difficulty in accessing and confirming factual data applicable as at the retrospective date of valuation.

105 For his first report, Mr Martin was provided with the certificate of title and other documents most, if not all of which, Mr Smith originally had. He was not, however, initially provided with the villa price list that Mr Sheldrick had passed on to Mr Smith prior to the completion of the 1 June 2008 Egan valuation.

106 Mr Martin observed in his report, however, that it was prudent to comment that prior to undertaking the valuation in 2008, he would have sought a copy of detailed working drawings and specifications, costings, price lists, and contracts of sale to be able to complete the valuation. Instead, he said, he had to rely on information as provided, which appeared "incomplete". It follows from these observations that Mr Martin would indeed, as a matter of standard practice in conducting the valuations in 2008, have regarded the Ibox price lists with which Mr Smith was supplied.

107 As to prevailing market conditions up to 1 June 2008, Mr Martin explained that because the dates of valuation were some six years before he did his report, it was necessary to access archival information and disregard material facts subsequent to 1 June 2008 and 30 October 2008, or thereabouts. He considered that in June 2008 the property market was experiencing a slow down as uncertainty about the impacts of the global financial markets on the economy began to gain momentum. He considered that the upward movement in interest rates implemented by the Reserve Bank of Australia (RBA) evidenced an overheated market where the RBA was trying to reign in consumer spending and control inflation. He noted that as the market began to slow and concerns about global financial stability impacting on consumer confidence grew, the RBA held interest rates at 7.25%. He said that unlike the stock market, there is a much longer time lag before reliable real estate trends emerge, particularly in a downward adjusting market where transactions are fewer. He noted that three months prior to the relevant date, the RBA had increased interest rates to 7.25%; the fourth 25 basis point increase in five months. He also noted statements issued by the Governor of the RBA between November 2006 and June 2008. In summary, he considered the evidence indicated a slowing economy and increased uncertainty due to global markets.

108 Mr Martin also had regard to a snapshot of articles in the property section of The West Australian newspaper in the first half of 2008. He considered, in summary, the sample of headings provided in his report reflected a slowing property market primarily influenced by the US financial crisis and emerging problems in the banking sector in Europe.

109 He also had regard to quarterly reports provided by the Real Estate Institute of Western Australia (REIWA) between December 2007 and September 2008, and noted that in June 2008 it stated that regional Western Australian markets had not been immune to the economic uncertainties that had shaken the Perth market. He considered the negative picture was very widespread in a significant number of regions, particularly those with discretionary holiday home markets. Following [18.65] of his report, Mr Martin provided a chart list of what he considered to provide a reasonable snapshot of market trends. He said that the trends shown (which were generally downward) supported the view that, after values escalated during 2006/2007, the Perth metropolitan market reflected a falling demand trend emerging; and an

increasing number of properties available for sale which, coupled with consecutive interest rate rises in early 2008, resulted in softening conditions, including extended selling periods. It showed the movement in median house prices in Perth. He considered similar trends were evident for Busselton, Dunsborough and Broadwater.

110 He expressed the opinion that the data to which he referred and the commentary supported the fact that, in the first half of 2008, the market was in decline as external factors began to emerge. He noted that from late 2007 to late 2008, the Australian dollar went from around 85 cents to close to \$1 against the US dollar. He said that in 2008 increasing concerns about global financial issues were beginning to surface. He considered this resulted in a withdrawal of Perth investors in the South West as concerns grew about the impact of global financial markets on the stock market, particularly high net worth individuals.

111 Mr Martin, after showing a graph of the Australian Stock Exchange (ASX) All Ordinaries Index 10 year chart from 2003 to 2013, observed that in a rising interest rate environment, coupled with a falling stock market, investment properties (discretionary spending) suffer as debt consolidation occurs.

112 In particular, he considered the increase in supply in the South West property market provided prospective purchasers with alternative purchase options and that, in summary, the market in 2008 was characterised by oversupply and poor demand.

113 He noted that unit 14, a six bed, four bath, dual key beachfront villa at Regency Beach Club was reported available for sale around mid-2008 in the sum of \$2.8 million.

114 Having said all of that, by way of general comment, Mr Martin again noted that the requirement to go back six years and provide an accurate commentary on the prevailing market conditions specific to the proposed development "is difficult". He said that mid-2008 was a particularly difficult period to gauge accurately what was occurring locally in the knowledge of the emerging Global Financial Crisis (GFC).

115 Nonetheless, he expressed the view that there was nothing extraordinary happening in the Busselton area to suggest that the town was experiencing significantly differing residential property market conditions than the Perth metropolitan area.

116 However, he also noted there was no doubt that between 2004 and 2008 there had been a number of tourist holiday oriented short-stay developments reflecting the popularity of the South West as a tourist/holiday destination.

117 In that regard, he said of the Investment Memorandum issued in 2006 to investors that it would appear to be based on the very buoyant, strong property market conditions prevailing at the time and the belief that a very high quality, exclusive development unlike any other in the region would be highly sought after. He observed that there was no doubt that the proposed development was a pioneer and somewhat unique in nature, which would have added to its appeal and saleability.

118 Mr Martin also added, at [21.8] of his report, that his recollection of the market around 1 June 2008 was that interest rate rises impacted on the lower end of the market but had less effect on the higher end of the market, until after the full extent of the GFC was evident. He added that in mid-June 2008, while the GFC was well known, its impacts on the WA property market were not fully understood or known, but in such a market, "it would in my mind been prudent to adopt a conservative approach to likely future trends, where prices peaked in 2007".

119 With that introduction, Mr Martin, like Mr Smith, adopted a sales comparison approach for the purpose of valuation, but also noted the other approaches available, being hypothetical development feasibility and summation.

120 In dealing with the comparative sales approach, he regarded the Regency Beach Club at 77 Gifford Road because of the short-stay lots/units comparison. He also considered Halcyon Bay at 89 Gifford Road and the Geographe Cove Resort at 83 Gifford Road. He also took into account Smith's Beach at Lot 2 Smiths Beach Road, Yallingup and Caves Ridge in Yallingup Beach Road. Finally, he had regard to the Bunker Bay Resort and the Injidup Retreat in Cape Clairault Road, Yallingup. Most, if not all of these, Mr Smith regarded at material times. Additionally, Mr Martin noted traditional residential property sales along the coast between Dunsborough and Busselton, acknowledging that short-stay accommodation is not directly comparable to it.

121 In his sales summary, at [25.0] of his report, Mr Martin reflected on the attributes and limitations of the comparable sales data that he considered of primary relevance. He concluded that the Regency Beach Club provided the best evidence of "water influenced short stay accommodation property". He noted that none of the Resort or Grove Villa lots afforded ocean views. He considered they were all very similar and cost the same. The main difference was distance to the ocean/communal pool, ancillary buildings and the highway. He considered ocean proximity was more desirable than highway proximity. Mr Martin expressed the view that a likely selling price range for Grove Villas would be between \$400,000 on the highway end and \$550,000 on the ocean end.

122 He considered the Ocean View (Bay Beach) Villas lots were considerably smaller than the Regency Beach Club lots, that the lots overlooking a common area pool would command a slightly lesser value than the lots west of the walkway access due to increased noise and privacy issues, and that the Ocean View Villa lots were setback and views were not panoramic due to the retention of trees.

123 Based on the sales evidence, he concluded that the likely vacant survey strata lot selling price range in the case of the Ocean View Villas would be between \$1 million and \$1.2 million, and in the case of the Resort Villas between \$400,000 and \$550,000.

124 For the purpose of making an englobo valuation of vacant land, Mr Martin conducted an additional comparative sales analysis by reference to two caravan park sites at Gnarabup and Binningup, a residential subdivision site at Halls Head and another property at Falcon. In this regard, Mr Martin concluded that the negotiated land purchase price fitted the definition of market value, that is, \$9.5 million as a single landholding suitable for a tourism development. He

said while there may have been uplift in values since the contract was entered into in 2007, he was not convinced by the sales considered and a slowing market that in 2008 there was a significant change in the price paid for the site.

125 In relation to the improved property value of the lots, Mr Martin considered the sales at Halcyon Bay, Geographe Cove Resort and Dunsborough Beach Cottages provided the best guide for pricing of the Resort or Grove Villas with no ocean views.

126 He considered the basket of evidence provided a wide range of values, not unusual given the individual unique characteristics each property provided. He reiterated that while no existing development was directly comparable to the subject land, the sales from Regency Beach Club provided a reasonable guide to what price levels were likely to have provided prospective purchases seeking a high quality modern short-stay accommodation with prime beach and ocean frontage in the region.

127 He noted, however, that the euphoria of a very buoyant property market in 2006 and 2007 was in decline by early to mid-2008. However, he considered there remained a reasonable level of confidence in the local economy, albeit uncertainty surrounding global financial markets was evident.

128 Mr Martin also noted the three contracts of sale with which he had been provided, in relation to lots 18, 27 and 21 of the resort development.

129 He also noted his understanding that there were presales of both the Resort or Grove Villas and the Ocean View or Bay Beach Villas. He assumed that in June 2008 and October 2008, a valuer would have sighted asking price/marketing brochures and all sales contracts. He stated that the contract prices would form part of the basket of evidence, mindful they were negotiated in a stronger market.

130 Noting an article from The West Australian newspaper from 13 February 2008, concerning the sale of a South West Bay Beach Villa fetching up to \$2.8 million, Mr Martin said that the article also referred to the price levels being at the upper end of expectations.

131 He considered that the question was what weighting a valuer would have placed on presales and asking prices set by the developer. He noted that the prices according to the Investment Memorandum statements were based on advice from local real estate agents at the time.

132 Mr Martin expressed the opinion that reliance or weighting on presale contracts within a proposed development had been a contentious issue for many years. In this instance, he considered, the contract arrangement and process was somewhat complicated when compared to the majority of other similar style, strata title, short-stay accommodation property transactions in the South West.

133 He considered that given the existence of these sales contracts, in which seven purchasers (two related parties) were prepared to pay the asking price for the Ocean View or Bay Beach Villas, he would have wanted to sight all contracts and make contact with the purchasers to check the bona fide nature of negotiations, that is, that the purchaser had acted knowledgeably, prudently and without compulsion. For him, the question would be whether the level of pricing or presales was supported by other evidence.

134 He noted that the Investment Memorandum estimated average selling prices for the 13 Resort or Grove Villas to be sold to the public was between \$950,000 and \$1.1 million.

135 He concluded in his report, at [26.15], that while presale contracts form part of the basket of evidence, the three contract prices provided seemed high in comparison to sales evidence, the majority of which were transacted in a more buoyant market. However, he considered it could not be ignored completely, provided they were bona fide arm's length transactions that met the market value definition.

136 In the result, he concluded that the following price parameters were applicable, as at 1 June 2008:

Ocean View (or Bay Beach) Villas \$2.1 million to \$2.3 million

Resort (or Grove) Villas \$800,000 to \$950,000

137 He then set out his opinion of the individual survey strata lot values and the "As If Complete" values of the Resort or Grove and Ocean View or Bay Beach Villas as at 1 June 2008, the former equating to a gross realisation or aggregate of the market values, being the sum of \$23.9 million GST exclusive.

138 As to the June 2008 villas "As If Complete" value, he considered a gross realisation value of \$45,550,000 GST exclusive was almost the same as the estimated total development gross end value.

139 In relation to the 30 October 2008 valuation date, Mr Martin approached the question by reference to data available during that period. In particular, he considered that in October 2008 the Western Australian economy and property market were showing signs of a slowdown and, subsequently, there was a significant change in economic and property conditions as a result of the GFC. He said that while the full impact of the crisis was not expected to be known until 2009, there was evidence of a cut in discretionary spending as consumers adjusted to rising unemployment trends.

140 After referring to other economic and market factors, he said that in the absence of any comparable sales the correction in values was difficult to quantify, but added there was no doubt that property values were in decline in 2008, particularly the last half. What was unclear was the level of downward correction in values.

141 He expressed the opinion that, on the basis that he was back in October 2008 with no certainty as to what would happen in 2009 and beyond, he would have taken a conservative approach and likely to have adjusted the 1 June 2008 opinions of value downwards by between 10% and 20%, adopting 15% as a guide. I should state at this point that I do not consider Mr Smith can be said to have made any significant error as to his opinion, at the time, that there had been no appreciable downward movement in the market between June and October 2008.

142 As a result of his view, however, Mr Martin would have adjusted the values of the individual vacant survey strata lots from the June 2008 valuation, which he equated to a gross realisation or aggregate of the market values of \$20,275,000 GST exclusive. He considered that the October 2008 villas "As If Complete" equated to a gross realisation or aggregate of the market values of \$38,675,000 GST exclusive, rounded to \$39 million. Again, he stated that he had relied predominately on the sales comparison approach as the prime method. He added that he considered it prudent to comment that securing finance without significant pre-commitments or equity would have been highly unlikely in October 2008.

143 Mr Martin also supplied a supplementary report. For this report, he was provided with a number of documents, including the 1 June 2008 Egan valuation and the 30 October 2008 Egan valuation. In relation to those two valuations he was asked whether the contents had any impact on the views expressed in his initial retrospective report and valuation.

144 In his comments he noted that the Egan valuations were predicated on there being 28 presale contracts available at the time. As he said earlier, the reliance on presale contracts has always been a contentious issue where the weighting of this evidence is dependent on its comparability with the broader market sales evidence. He said that, usually, where the nominated sale price is below or above the analysis of sales evidence parameters, the weighting of presale contracts requires closer forensic examination of the circumstances surrounding the sale/negotiation. He considered this was particularly relevant in the case of a property which is somewhat unique or pioneer in nature and is sold off the plan, where there are no comparable properties or sales other than the subject one.

145 On the basis that there were 28 presale contracts in this case, equating to approximately 68% of the total development of 41 villas, he considered the presales evidence could not be ignored in 2008, as these contracts would have formed part of the basket of evidence for analysis by a valuer.

146 He noted that the 1 June 2008 Egan valuation commented that the prices stated in the price list were at the higher end of the evidence analysed, but Mr Martin added that "clearly their opinion of end selling prices was influenced by the pre-sale prices".

147 That comment was followed by a reference to [10.2] of the Egan valuation, which commented that the market activity in all sectors had slowed and, further, the market had contracted with only 39 unit sales in the previous 12 months. The sale of the five tourist holiday units at prices ranging from \$1.65 million to \$3.25 million in the last 12 months, he considered, "influenced their opinion of the value of the subject beachfront units".

148 Mr Martin noted that the Egan valuation had commented that the:

proposed Bay Beach houses, at a total cost of \$3 million to \$3,200,000 are at the upper end of market value range for tourist accommodation dwellings, however, the beachfront position and the small number of units available suggests that the price range is within market parameters. We also note four of the seven dwellings have pre-sold indicating a reasonable level of demand, albeit some coming from syndicate members.

The price range for Grove Beach houses inclusive of all costs is \$1,058,000 to \$1,708,500 with price variance depending on proximity to the beachfront. Given the accommodation provided, the twin key [quay] proposal and the Resort communal facilities, this price range is well supported by the market evidence.

149 Mr Martin further noted that, in the knowledge that 68% of the development was under executed contracts, this evidence could not be ignored and would have influenced the assessment of the "As If Complete" value of the individual units at the time. He observed that the presales provided evidence of Bay Beach Villas "Sold" at \$2,795,000 and the Grove Beach Villas ranging from \$1,048,000 to \$1,473,000. He said that the evidence of fully executed presale contracts at these price levels would have supported the adoption of higher levels of value than that evidence offered by the cross-section of broadly comparable sales relied upon in his earlier report. In Mr Martin's opinion, the "As If Complete" individual unit values would be revised upwards on the basis there were 28 arm's length enforceable contracts in place, although he would have been unlikely to adopt the price list.

150 He then expressed the final view that, based on his reading of the valuation, the "As If Complete" individual unit values were influenced by the purported existence of the presale contracts for 28 or thereabouts units at the list prices.

151 Mr Martin importantly concluded his view by saying that the most significant point of difference between the opinions he had expressed and those expressed in the Egan valuations, was the reliance by Egan Valuers on the large number of presale contracts.

152 In cross-examination, first by senior counsel for the valuers, Mr Martin accepted the proposition that where a valuer was told there were presale contracts and asked to see them, but, having been given reasonable explanation did not receive them, it would be appropriate for them to note that in their valuation report. Mr Martin was pressed about the extent to which the formation of a valuation opinion involved subjectivities.

153 Mr Martin rejected the proposition that what was happening in the world economy or in the Australian economy did not necessarily reflect what was happening in the Western Australian economy.

154 He agreed that undertaking a retrospective valuation was a difficult task. He accepted, for example, that some market information available now was not available until some months later at the time, but that certain figures produced by REIWA would have been available later. For example, at the time of the 30 October 2008 Egan valuation, results of the September quarter would not have been available.

155 Mr Martin was taken to the Regency Beach Club 2008 sale of \$2.45 million. He agreed that its subsequent sale would not have been part of the basket of evidence of settled sales at as June. He appeared to consider it would have been available, however, for the November valuation.

156 More generally, Mr Martin accepted, in relation to the conduct of a retrospective valuation, that one actually looks at a broader cross-section of the evidence and some will have a better weighting than others, and some of the information may not have been available at the time of the relevant date.

157 Mr Martin was taken to a number of transactions including Caves Ridge Yallingup, Smiths Beach, Injidup Retreat, as well as the Regency Beach Club. The latter he considered superior to the subject property. He confirmed that that was because he considered Dunsborough was a better location than the Aqua Resort.

158 He was challenged as to the extent of real differences, ocean views and the like with those comparative properties.

159 Mr Martin confirmed that he considered the sales at Halcyon Bay, Geographe Cove Resorts and Dunsborough Beach Cottages to be the best guide to pricing the Aqua villas with no ocean views.

160 He agreed that if there were comparable sales transacted in February and March 2008, he would not regard them to have been the subject of transactions in a materially different market.

161 He also explained what he considered to be a legitimate arm's length transaction; one not involving the related parties.

162 Senior counsel for the valuers continued to cross-examine Mr Martin about a number of the detailed attributes or otherwise of the resort with a view to distinguishing its superior valuation features.

163 He was specifically then asked, if he were told as a valuer that 23 members of the public had agreed to participate in the syndicate and pay a contracted price for a unit, whether that would fall into the basket of evidence. He said that they would be part of one's survey of available presale information or sale information, but it would be necessary to know if they were at arm's length. He added that the broader question was to ensure that they actually fitted within the other evidence that a valuer has analysed and whether they are within the parameters of the broader market evidence that one is looking at in terms of style of property.

164 Mr Martin was also cross-examined as to the assumptions he had made about what features the villas would have, including plunge pools and other fit out aspects.

165 When further challenged about the extent to which he was able to exclude hindsight from his mind in conducting the retrospective valuation, Mr Martin said that hopefully he was professional enough to be able to do so by focussing on the things that were happening and not taking into account things that happened later. He tried to place himself in the shoes of the valuer at the time and to make a judgement as to what was reasonably known at the valuation date. He added that it "becomes cloudy". He acknowledged that it was a difficult process. He also acknowledged that, in relation to the 30 October 2008 Egan valuation, what he had done was use the 1 June 2008 Egan valuation figures and discount them by a percentage.

166 He again confirmed that a very significant matter was the different assumptions he and Mr Smith made as to the existence of presales. He only considered three sale contracts as part of the total basket of evidence in doing his first report.

167 When asked whether he accepted that the nature of the valuation exercise is such that, had another valuer competently undertaken a valuation, even using his assumptions, another valuer could have arrived at a different result, Mr Martin answered that it is generally accepted that there is a probably 10% to 20% tolerance in difference of opinions between valuers.

168 He also confirmed his view that the uplift on the \$9.5 million paid for the caravan park site in 2006 was effectively negligible over the intervening period to 2008.

169 When cross-examined by senior counsel for Mr Paganin, Mr Martin confirmed a number of the same propositions put to him in earlier cross-examination, including that conducting a retrospective survey was a difficult task.

170 When the question of "price list" was raised with him and he was asked whether he would have regarded price lists as relevant evidence to go into the basket of evidence, Mr Martin answered: "No ... the pricelists would have given me was the expectations of the selling party". He said they would be relevant to the valuation exercise, but explained it was more the nature of "information" than "evidence". He explained that evidence constitutes properties that are transacted. Information is everything else.

171 He was also pressed on comparative features of the resort property and other properties in comparative categories. He did not consider the beachfront of the resort was unique, but accepted that what made it unique was low density, on the beach, and high quality. He was pressed into comparing the subject property with the Regency Beach Club in those respects. He was then taken to information about the state of the market and ultimately accepted that, at the very least, a valuer forming a view of the market at the relevant time without the benefit of hindsight, could well have taken a different view of the state of the market from the one which he now took.

172 He did not necessarily agree, however, that he was taking a hindsight view in relation to the impacts of the GFC on the Western Australian property market at material times.

173 In respect of the presales, Mr Martin confirmed that, having regard to the Egan report, he formed the view that the valuation was influenced by the presale prices. He agreed with senior counsel that whether that was a correct inference or not was for Mr Smith to say. This, of course, is only partly true, as ultimately it is for the Court to say.

174 He made it clear, however, that he did not assess the value on the basis that there were 28 presales. He confirmed he would be unlikely to adopt the list.

Applicants' submissions

175 The applicants contend that the valuers acknowledged the instructions from the Bank, including that the valuation was for mortgage security purposes and would be relied upon by the Bank and its mortgage insurer. About that there is no doubt.

176 They contend the valuation table indicated, in relation to the 23 syndicate members' Grove Villas, that they had been sold to them at the contract price as listed in the right hand column. The valuation table indicated, in relation to the two Ibex Capital Bay Beach Villas (lots 19 and 24), that they had been sold to Ibex Capital for the listed contract prices (GST included). They contend Mr Smith for Egan Valuers valued those villas at those contract prices. They contend the valuation table, read in the context of the whole of the 1 June 2008 Egan valuation, represented that there were "presale contracts" of those villas at the prices indicated, and this representation was made to the 23 syndicate members and to Ibex Capital.

177 They refer to evidence given by Mr Smith in which they submit he accepted that he did not request the presale contracts referred to and he was content that they existed. That too is true.

178 They also refer to Mr Smith's evidence in cross-examination by senior counsel for Mr Paganin that Mr Smith was comfortable that the transactions were market value transactions. That too should be accepted.

179 The applicants submit that Mr Smith's valuation depended, in part, on the existence of the 25 presale contracts in question, with the contract prices being those indicated in the valuation table, and the understanding that those transactions had occurred, even though there in fact were no such contracts and, instead, syndicate members possessed a bundle of rights under the syndicate agreements. Thus, they submit, there was no reasonable basis for Mr Smith taking the views that he did.

180 The applicants submit that Mr Smith did not merely assume the existence of the 25 presale contracts, he also accepted the existence of those contracts and their terms as part of the evidence for, or the basis of, his valuation of the 25 villas; and that he did this without causing the presale contracts to come into his possession.

181 The applicants also submit that, in relation to the "As If Complete" valuations of the resort where construction had not yet commenced, the existence of presale contracts was relevant to a market valuation, and as at 1 June 2008, there had only been three true presales (in respect of lots 27, 18 and 21). They submit that "presales" of 28 of 41 villas (24 of the 34 Grove Villas and four of the seven Bay Beach Villas), according to Mr Smith's understanding, was one thing, but presales of three villas of 18 available Sale Villas (one of the 11 Grove Villas and two of the five Bay Beach Villas), as was the fact, presents an entirely different market picture for valuation purposes.

182 Accordingly, they submit, it is unsurprising that the valuation of the resort made by Mr Martin on an "As If Complete" basis as at 1 June 2008 of only \$45.55 million (GST excluded) is substantially lower than Mr Smith's valuation of \$67,785,197 (GST excluded). Mr Martin did not rely, they submit, on the misleading Ibex Capital price list of 20 May 2008, as did Mr Smith. Rather, Mr Martin was briefed with only the three true presale contracts for his valuation purposes.

183 In relation to the competing valuations, the applicants also note that Egan Valuers and Mr Smith did not seek to support the 1 June 2008 Egan valuation by leading independent expert evidence, but rather relied on Mr Smith's own evidence in support of the valuations he made at material times. It is submitted by senior counsel that Mr Martin's valuations and evidence ought to be accepted.

184 In relation to the confirmatory 3 November 2008 Egan valuation letter to the Bank, the applicants also challenge the data upon which that opinion was expressed. They submit that Mr Smith said in evidence that he considered data on the state of the market at that time before confirming the June valuation, but notes Mr Smith did not refer to that consideration in the 30 October 2008 Egan valuation. Nor, they note, did Mr Smith give evidence at trial as to what steps he took and what the recent comparable sales and listings were in that regard.

185 Thus, the applicants submit that, apart from lots 18 and 21 of the resort, the sole property which Mr Smith described as "comparable" for valuations purposes was unit 14, 77 Gifford Road, Dunsborough, which was listed for sale as at May 2008 for \$2.8 million. Senior counsel referred to his cross-examination of Mr Smith and submits there was no reasonable basis for the 30 October 2008 Egan valuation, and that the two valuations were, in fact, misleading or deceptive.

Valuers' submissions

186 The valuers, by contrast, submit that the representations allegedly conveyed by the valuations, as pleaded in [40] of the statement of claim, either do not arise or have not been falsified.

187 First, they say that the representations pleaded in [40(a)]-[40(e)] were not made in the valuations, in that the pleading involves an attempt to convert "assumptions and conditions" in the valuation report into representations made.

188 Secondly, they say, as to the representation pleaded in [40(d)], that each of the units 18 and 21 had been sold under arm's length contracts for \$3,031,500, and that the price list and the proforma contract disclosed (as was the fact) that the purchasers of those units were obliged, in addition to the "list price", to pay GST on the building cost component of \$1.1 million (\$110,000) plus the furniture and fit-out costs, plus GST (for which M3Property and Mr Smith took a mid-point of the estimated costs - \$80,000 plus GST (\$8,000)), plus the pool tiling option plus GST (referring to Mr Smith's evidence at trial).

189 Thirdly, they say that the representation pleaded at [40(f)] is, in substance, an attempt to convert an assumption, as to a total As If Complete valuation for \$69,856,500, into a representation.

190 The valuers further submit that it was a condition of the valuations that the Bank should sight the presale contracts referred to and be satisfied that the presales were legitimate market transactions and, unless and until that happened, the valuations could not be regarded as being operative. It is submitted that had the Bank taken the steps that were recommended, and on which the valuations were conditioned, it would have become apparent that there were no presales at the prices set out in the "Gross realisation - As if complete" table. Egan Valuers, it is said, having made clear that the valuations were conditional on the Bank satisfying itself that the presales existed, cannot be regarded as having made the representation pleaded in [40(f)].

191 The valuers also contend that, even if and to the extent that such a representation was made as pleaded in [40(f)], it was a statement of opinion identifiable as such, conveying no more than that the opinion expressed was held on the basis of the assumptions and subject to the qualifications set out in the valuations, the most important of which was that there were presales as set out in the "Gross Realisation- As if complete" table.

192 Moreover, they submit, the Bank in fact knew that the assumption was wrong and that there were no presales at the prices set out in that table.

193 As to the substance of the misrepresentation pleaded in [42(a)] of the statement of claim, that the construction cost figures for the villa units were wrong, the valuers submit that the dollar cost to which the applicants refer is not the construction cost, but an amount that is the sum of the amount allocated to construction in the presale contracts, GST on those costs, the plunge pool costs, the mid-point of the estimates for the fit out costs and GST on those costs being estimated at \$80,000, plus GST, as mentioned above. It is contended that that submission disposes of the representations pleaded in [42(c)] and [43].

194 As to the reference to the "Contractual Limitations" pleaded in [42(b)] of the statement of claim, they submit:

- (1) the purpose of the valuations was for security purposes, that it is for the Bank to ascertain how much it could realise from the development as a whole if it had to take possession, and any limitations on the syndicate members' rights, vis a vis the Ibex companies, were not relevant to the valuation;

- (2) Egan Valuers was never provided with the documents that recorded the contractual arrangements between the Ibex companies and syndicate members or the facility offer, the latter of which post-dated the valuations in any event. The Bank, as a sophisticated user of valuation services, knew what the "Contractual Limitations" were in any event, and if they regarded them as important they would have briefed Egan Valuers on them and asked that they be taken into account, which did not occur; and
- (3) there was no evidence led that the "Contractual Limitations" pleaded had any bearing on the value of the property as security to the Bank.

195 As to the pleading in [42(d)], the valuers contend that there was no sales evidence in the period between June 2008 and October 2008 that showed any actual deterioration in the market, and to the extent there was any evidence, it indicated improvement in the market, namely a reduction in discount from asking price in relation to a comparative sale.

196 More generally, the valuers submit the valuations provided need to be read as a whole and subject to their assumptions, conditions and qualifications as was expressly made clear in the executive summary to the 1 June 2008 Egan valuation. Further, the Bank is a corporation that can be taken to be financially literate and commercially sophisticated in reading property valuations. It is submitted that for the purpose of the 1 June 2008 Egan valuation, Egan Valuers was provided by Ibex Capital with, amongst other things:

- (1) A document headed "Aqua-Villas Price List", which was described in the email that enclosed it as a "Villa Price List and Sales Schedule" recording that, of the 41 villa units, 28 had been sold at the prices in the Schedule.
- (2) A document headed "third party sales schedule" indicating that three of the villa units had been sold to third parties.

197 The valuers submit that the Bank knew that the presales information had been provided by the Ibex companies (noting the Ibex price list was first provided directly to the Bank and included as Appendix J to the June 2008 valuation).

198 Further, and for the purpose of the 30 October 2008 Egan valuation, they say Egan Valuers was provided by Ibex with updated presales information.

199 The valuers submit that the Bank knew that the updated presales information was provided by the Ibex companies in that Ms Gilbey at the Bank informed Mr Smith that Mr Paganin would provide that information, and the 30 October 2008 Egan valuation stated that the Ibex companies had provided an update presale schedule and attached Ibex's updated table to the report.

200 The valuers say that the Bank's instructions to Egan Valuers included an instruction to identify any conditions or disclaimers that the valuation was subject to, and Egan Valuers complied with that instruction.

201 Thus, the valuers submit that it was clearly apparent from the valuations, as was the fact, that Egan Valuers' valuations were based on and subject to a condition and an assumption that there had been presales as set out in the presale information provided to Egan Valuers by the Ibex companies.

202 In that regard, the valuers draw attention to the 1 June 2008 Egan valuation, which expressly stated that:

Liability for the valuation is extended to St George Bank Limited for lending purposes subject to the bank sighting the additional contracts and being satisfied that the 25 presales are legitimate market transactions with reasonable deposits or investment funds forwarded to and held by the developer.

203 They also note that the 30 October 2008 Egan valuation said, in substance, the same, but if anything in even clearer terms:

We recommend that St George Bank obtain copies of the presale contracts to confirm their authenticity as liability for our valuation is extended subject to these contracts being confirmed as acceptable to the bank .

(Emphasis in original.)

204 Thus, the valuers submit that, in those circumstances, and in the absence of any evidence that the Bank ever did so satisfy itself as recommended, the valuations cannot be said to have been misleading or deceptive. Unless and until the Bank satisfied itself of the condition, namely the presales assumption, the valuations could not be characterised as being operative.

205 In short, the valuers submit that the Court should not conclude that the applicants have discharged the burden of proving that the valuations were misleading or deceptive, having regard to:

the condition and assumptions stated in the valuations as to presales;

the express warnings to the Bank in the valuations that it should obtain copies of the presale contracts to confirm their authenticity;

the express statement that liability for the valuations was subject to the presale contracts being confirmed as acceptable to the Bank;

the commercial sophistication of the party to whom the valuations were directed, namely the Bank; and

the absence of any witness from the Bank to assert that or explain how the Bank was misled.

206 Finally, the valuers contend that this submission is sustained whatever the state of knowledge of the Bank was as to the presales questions.

207 They further submit, however, that the evidence shows the Bank in fact knew the presales did not exist.

208 In this regard the valuers say that the Bank received and was in possession of the Investment Memorandum and syndicate agreements that evidenced the contractual arrangements between the Ibex companies and the syndicate members, and therefore knew that the presales information was wrong:

Ibex Capital provided a copy of the syndicate agreements to the Bank on a CD-ROM;

in response to a subpoena, the Bank disclosed that it had received legal advice from Lavan Legal (though privilege was claimed over that advice), but an example of Lavan Legal considering the syndicate agreements is in evidence;

in response to a subpoena, the Bank produced copies of the Investment Memorandum and syndicate agreements, which are in evidence.

209 Among other things that the Bank and its advising lawyers are said to have known about the structure of the joint venture and obligations of syndicate members in relation to the villas they were obtaining, senior counsel for the valuers draws attention to the fact that, in April 2008, Ibex Capital provided the Bank with a finance memorandum that set out the structure of the project, and in particular, made it clear that:

the monies contributed by syndicate members had already been applied to the purchase of the land;

each syndicate member would receive title to a single storey villa;

the balance of the villas would be sold, with profits being applied to offset the cost of the members' villas;

the syndicate members would be obliged to contribute their share of the anticipated shortfall (then estimated at \$3.45 million) between total costs and total revenue from the non-member villas; and

the construction facility that was sought was intended to cover construction costs and the projected shortfall.

210 The valuers also point out that the summary feasibility at [6.1] of the finance memorandum provided for gross revenue from the sale of non-member villas in the sum of \$26.234 million, and no provision was made for revenue from the sale of villas to syndicate members.

211 The valuers accordingly submit that it must or ought to have been obvious to the Bank when it reviewed the valuations, that Egan Valuers was labouring under a misapprehension as to the nature of the presales to syndicate members and that this is apparent from the executive summary of the 1 June 2008 Egan valuation, the express assumptions that underpinned the valuation, and the reverse feasibility analysis, which was predicated on the sale of each of the resort villas at market price.

212 In the absence of any evidence to the contrary, the valuers submit that the proper inference to draw is that the finance memorandum and the contractual documents provided to the Bank were read and understood by a person or persons, whether an officer, employee or other agent of the Bank, acting within authority with a duty to communicate the knowledge obtained from the documents to the Bank.

213 Further, and in any event, the evidence is such that the Bank was legally advised on the documents by its solicitors, also an agent with a duty to communicate the knowledge obtained from the documents to the Bank.

214 For that reason, they submit, the Bank must be taken to have known that the presales information was wrong and cannot be said to have been misled or deceived by the valuations.

Directors' submissions

215 Mr Paganin submits that the first five representations pleaded in [40] are claimed to have been made in relation to presales of the syndicate members' villas and Sale Villas, and the sixth relates to the "As If Complete" value of the Grove Villas and the Bay Beach Villas as at 1 June 2008 and November 2008. He submits that, of those matters, only the sixth representation as to the value of the completed development in [40(f)] is material and the rest are not matters upon which the Bank needed or sought advice or information from Egan Valuers.

216 As have the valuers, so too Mr Paganin submits that the Bank was apprised separately as to the legal, financial, factual and other relevant details of the syndicate and the development, including the level and nature of presales, and that it had its own legal advice throughout the financing process.

217 Mr Paganin also submits that the valuation was conducted properly on a comparable sales basis by Mr Smith and that the price list was not material to the conduct of the valuation.

218 Mr Robertson, in effect, adopted Mr Paganin's submissions at trial.

Consideration

219 In light of Mr Smith's own evidence, it is difficult to accept the proposition, that the presales list, in respect of the 23 investor lots, was not a material factor in the two Egan valuations. From Mr Smith's own evidence, including his last evidence in re-examination that I highlighted earlier, it is clear he assumed, for the purposes of the 1 June 2008 Egan valuation, that there were in place arm's length contracts or that there would be contracts entered into by the investors directly or by

the powers of attorney they had signed in the form of a proforma contract of sale. He did not accept a proposition put to him by senior counsel for Mr Paganin that he treated them as different from the arm's length contracts for three of the Bay Beach Villas. He said he did not see a great difference between them.

220 While Mr Smith assented to the proposition in cross-examination, along the lines of that put by him in his primary evidence, that he only used the "price list" as a means of confirming an independent comparable sales analysis by reference to identified tourist type developments, the clear inference to be drawn from all the evidence is that the approach taken by Mr Smith, in the valuation, was that there were presale contracts that were, in his language, not greatly different from the three Bay Beach Villas for valuation purposes, and that he did not simply treat the price list as information as to properties that were on the market or would be put on the market at certain prices – as he did the Gifford Road property for the 1 June 2008 Egan valuation – but as evidence of arm's length sales.

221 In circumstances where there were relatively few other material comparable sales, and they were in the Dunsborough area and nearby, and the fact that Mr Smith considered the resort property to be a unique property where the investors had made decisions to "purchase" these lots on an arm's length basis, the inference should properly be drawn, as contended for by the applicants, that the values shown in the presales price list schedule constituted evidence material to the valuations made by Mr Smith. They were not used merely as a check on what other comparable sales suggested by way of value, but were very much part of the comparable sales data that influenced the setting of the end prices, as Mr Martin put it. Mr Smith's evidence that the presale contracts provided "reasonable evidence and a reasonable guide" confirms the point and justifies the inference, along with the proper construction of Mr Smith's evidence of the valuation process he undertook.

222 Mr Smith's updating of the 1 June 2008 Egan valuation as at 30 October 2008, in early November, in substance made the same assumptions.

223 The question remains, however, what effect, if any, Mr Smith's valuation methodology had on the proper valuation tasks he completed.

224 Having regard to the retrospective valuation completed by Mr Martin, and notwithstanding his clear recognition of the challenges in the task of completing a retrospective valuation some years after the event, it remains difficult to consider that a comparable sales valuation method could have produced a valuation in the order of that given by Mr Smith for Egan Valuers in June and October 2008 (10% to 20% tolerance, as Mr Martin suggested) without direct regard to the presales data. As I say, I am of the opinion that the inference should be drawn that the presales data materially influenced, and did not merely serve to confirm, a comparable sales analysis of the value of the investors' lots.

225 In my view, the retrospective analysis of Mr Martin provides a generally reliable estimate, in an uncertain market, both as at June 2008 and October 2008 of the value of the resort and the individual lots, than does the 1 June 2008 Egan valuation and the 30 October 2008 Egan valuation.

226 In that regard, I find that the Egan valuations, but for the statements of assumptions, qualifications and limitations included in them, to which Mr Smith has made regard and to which I will shortly turn, did not provide an accurate valuation of the resort for the Bank's security purposes and, in that regard, might have been considered misleading or deceptive if they stood alone. A question remains, however, as to what effect the assumptions, qualifications and limitations stated in the Egan valuations have, if any, on that finding.

227 There can be little doubt, in my view, that Mr Smith, for Egan Valuers, laboured under some misapprehension, to put it neutrally, concerning the legal nature of the syndicate and the interests held by the syndicate members, including the applicants, in the Grove Villa lots allocated to syndicate members. He plainly treated them as being the subject of concluded (or to be concluded) presale contracts. He seems to have accepted that as a fact, having regard to the information contained in the sales schedule provided to him in May 2007 by the Ibex companies and other communications referred to in his evidence, including the Bank's (Ms Gilbey's) reference to the presales in late October 2008. The fact of the matter was, and there is no dispute about it in this proceeding, no such presale contracts existed.

228 At the same time, there can be little doubt, in my opinion, that the Bank knew full well, or should be taken to have known, what the true position in relation to the resort development was, the fact that there was an investment syndicate, and that the syndicate members, including the applicants, were not in the position of third party, arm's length purchasers of villas in the project, but held their interests through the complex web of syndicate agreements.

229 I accept the submissions made on behalf of the valuers that the Bank was well aware, or should be taken to have been aware, of all of these things for the reasons advanced by the valuers and set out above. To put it another way, if the Bank were to have sued the valuers for having provided a valuation on the basis of a misapprehension as to the existence of the precontract sales, on the information before me (which I acknowledge does not include any evidence from the Bank directly), the Bank would be hard pressed to walk away from the qualifications, assumptions and limitations stated in the valuation reports provided in June and November 2008, that the Bank should obtain copies of the presale contracts to confirm their authenticity. It was obvious Mr Smith believed they existed and that his valuations had been given on this basis.

230 In those circumstances, a question arises whether that factor alone is sufficient to cause the applicants' claim against the valuers to be dismissed. That is to say, given what the Bank knew or should be taken to have known at material times, can it be said that the valuations misled or deceived the Bank, or that the Bank relied on misleading and deceptive valuations?

231 The syndicate documentation was reviewed by the Bank's solicitors, Lavan Legal. Lavan Legal had also advised the Bank in relation to a previous Smith's Beach House and Land Construction Package Deal on which the financing documentation was based. The Bank knew that 25 of the "presales" were not on an arm's length basis, as they were to syndicate members, and one was to the builder. In fact, by her email dated 4 November 2008, Ms Gilbey of the Bank explicitly mentioned those matters to Mr Smith and asked him to confirm his valuation on that basis.

232 It may be accepted at one level that there was some real confusion, perhaps between the valuers' understanding and that of the Bank as to the nature of the presales, but the applicants have not established that the Bank was relevantly misled or deceived by the valuations prepared by Mr Smith, or that the Bank relied on misleading or deceptive valuations.

233 While, as I say, it might be contended that there was a potential in the circumstances for the Bank to have been confused, or misled or deceived by those valuations, the applicants have not established that they were. No person from the Bank was called to give any evidence to the contrary.

234 As the valuers submit, the valuations were replete with advice that the Bank needed to satisfy itself as to the existence of the relevant presale contracts. In circumstances where the Bank has not been shown to have been ignorant of the true position involving the joint venture, the syndicate and the relevant contractual arrangements between the investors and the other parties under the syndicate agreements, the effective advice provided by the valuers as to their assumptions in giving the valuations should be given weight in the particular circumstances of this case. The Bank was specifically told at the time of the provision of the 30 October 2008 Egan valuation, to "obtain copies of the pre-sales contracts to confirm their authority as liability for our valuation is extended subject to these contract being confirmed as accepted to the Bank".

235 It is, in those circumstances, difficult to finally conclude that the Egan valuations were misleading or deceptive, or likely to mislead or deceive the Bank. Certainly, there is no evidence to prove the Bank was misled or deceived or relied on valuations that were misleading or deceptive.

236 The applicants additionally challenge the valuations given by Egan Valuers on the grounds pleaded in [42] and [43], as referred to above.

237 I accept the submissions set out above and made on behalf of the valuers in response to the alleged misrepresentation pleaded in [42(a)], which also has consequences for the pleading in [42(c)] and [43].

238 Similarly, I accept the submissions made on behalf of the valuers concerning the no reasonable basis argument and why it should be rejected, in relation to the failure to regard the "contractual limitations". The valuers were not provided with these documents. It is unnecessary for me to decide whether they should have been required by the valuers. The Bank should be taken to have been aware of the contractual circumstances and could have advised the valuers of them if the Bank had thought them relevant; indeed, in light of the valuers' statements in each

valuation concerning the need for the Bank to verify the existence of the presale contracts, if anything, the Bank may be considered the person who should have raised the issue of the nature of the syndicate agreements.

239 I also accept the submissions made on behalf of the valuers concerning the pleading in [42(d)], that there is insufficient evidence to make out the existence of "adverse changes" in market conditions between 1 June 2008 and 30 October 2008. Although Mr Martin considered the slowdown was quite evident by 30 October 2008, on balance, the evidence he relies on to support that view is not compelling.

240 It follows that Proposition 1 is not made out.

Were the presale schedules provided by the Ibex companies to Egan Valuers misleading or deceptive?

241 This question reflects the applicants' Proposition 2.

The pleadings

242 The applicants plead that the 20 May 2008 Aqua Villa price list was misleading or deceptive for the reasons pleaded in [41(b)] to [41(g)] of the statement of claim, set out above at [34].

243 They also plead that the 28 October 2008 Aqua Villa price list was misleading or deceptive for the same reasons pleaded in [41(b)] to [41(g)] of the statement of claim.

The evidence

244 As to the submission that the 28 October 2008 Aqua Villa price list provided by the Ibex companies was misleading or deceptive, the ultimate question on the pleaded case is whether Mr Paganin and Mr Robertson were knowingly involved in that conduct or otherwise themselves engaged in such conduct, which is the subject of a later proposition.

245 The directors correctly note that the essence of the applicants' case is that the use of the word "Sold" as opposed to "Available" in the last column of the May 2008 price list provided by the Ibex companies to Mr Smith at Egan Valuers on 5 June 2008 was false and misleading because there were no presale contracts with the relevant syndicate members at the prices indicated in the document, or any other prices.

246 Mr Robertson, in his evidence, which I accept, explained how the "List Prices" document had been generated. He did this in cross-examination by reference to a villa price list dated 14 April 2008. He explained that the prices were arrived at by a process of consultation with agents who were to market the development, which were then discussed by himself and Ibex staff, principally Mr Sheldrick. A recommendation was then put forward to the project's "compliance committee" as to what the appropriate prices should be and they were agreed at that point.

247 Mr Robertson said that the May 2008 price list was prepared "in the context of materials that were provided to the sales agents". He drew attention to the words "Agents/Information Package" on the document and said that it was prepared and provided to the sales agents principally to indicate to them what was available for them to sell so that there was no doubt as to what they were able to offer.

248 He said that in this context the word "Sold" on the list meant "Unavailable for sale".

Directors' submissions

249 On behalf of Mr Paganin – and effectively the same submission is made by Mr Robertson – it is submitted that Mr Smith was made aware by the Ibex companies or knew that the resort development was a syndicated project and about the structure of the project. An email from Mr Sheldrick to Mr Smith, dated 21 April 2008, is said to reflect this and contains Mr Smith's handwritten note of the meeting he had with Mr Sheldrick and Mr Robertson on 21 April 2008.

250 Further, it is noted, Mr Smith was informed by email from Mr Sheldrick dated 15 July 2008, that each syndicate member had contributed \$500,000 towards the syndicate.

251 In the circumstances, the directors contend that even if Mr Smith did not fully appreciate the structure of the syndicate, he was aware, or should have been, that there was a syndicate arrangement.

252 The directors also draw attention to the fact that the May 2008 price list comprised two attachments to Mr Sheldrick's email of 5 June 2008, which were respectively called the "villa price list and sales schedule" and "list of third party sales".

253 They draw attention to Mr Smith's evidence that he "understood" that the three units in the "list of third party sales" (lots 18, 21 and 27) were third party sales, and that he therefore "inferred" that all the other units in the "Villa Price List and Sales Schedule" were not third party sales.

254 The directors submit that Mr Smith's evidence, as a whole, is to the effect that he had regard to the May 2008 price list for the limited purpose referred to in his witness statement at [157], namely that it demonstrated an interest in the market for a development of that nature, and it was not relevant what price was being paid for a particular villa or when it was going to settle, but rather that there were people committed to the development in the terms of the commitment to a villa.

255 The directors also submit that the 1 June 2008 Egan valuation acknowledged that the "As If Complete" valuation assessments aligned with the "list prices", but restated that these valuation assessments had "primarily been based upon market sales evidence comparison". Mr Smith, they emphasise, gave evidence that, even if he had been provided with the developer's price list without any knowledge as to whether anything had been sold or not, he would have undertaken the same exercise of taking that price list and seeing how the comparable sales in the market aligned to it, and would have come to the same conclusion.

Consideration

256 In the result, I do not consider the applicants have made out, on the balance of probabilities, that the provision of the price list by the Ibex companies was misleading or deceptive in the circumstances in which Mr Smith received the price list.

257 While I have found above, in relation to Proposition 1, that Mr Smith was of the mistaken belief at material times that there were, or were to be, contracts of sale between the developers and the investors, and that this mistake materially contributed to the value he placed on the resort, Mr Smith and Egan Valuers must be taken to have understood that there was a syndicate of investors. This is not contested by Mr Smith, and nor could it be on the evidence referred to. Both for the June and the October valuations, the existence of a "syndicate" was brought to Mr Smith's attention. What Mr Smith says, however, is that he did not consider it necessary to call for any of the syndicate agreements or to understand in any more detail what the nature of the arrangements was between the syndicate members and the Ibex companies, because he was simply providing the Bank with a valuation which would indicate, for its security purposes, what the value of the development property was.

258 I consider that in circumstances where Mr Smith knew that investors were part of a "syndicate" the use of the word "Sold" on the price list was capable of bearing more than one meaning and did not necessarily convey the presale representation pleaded by the applicants or the understanding that Mr Smith took from it. In those factual circumstances, it is not reasonable to conclude that the identification of the relevant investor lots on the price list as "Sold" was misleading or deceptive. In that context, it was not.

259 Proposition 2 is not made out.

Did the Ibex companies engage in misleading or deceptive conduct between the receipt of the 1 June 2008 Egan valuation and the 30 October 2008 Egan valuation by failing to provide instructions to Egan Valuers to correct the 1 June 2008 Egan valuation?

260 This question reflects the applicants' Proposition 3.

The pleadings

261 The relevant pleading is at [53] of the statement of claim:

53. Further, Ibex Capital, Ibex Aqua and/or Aqua Resort engaged in conduct which was misleading or deceptive or likely to mislead or deceive by:
- (a) failing to provide to Egan Valuers during those material times instructions and/or information about the Contractual Limitations;
 - (b) Failing after receipt by it, and/or them, of the 1 June 2008 Egan Valuation in or about mid-July 2008, and before Egan Valuers provided the November Egan Valuation to Ibex Capital and St George, to provide instructions and/or information so as to correct the misleading or deceptive nature of the Egan representations.

Applicants' submissions

262 It is said that the Ibex companies did what is pleaded by the conduct of their directors, Mr Paganin and Mr Robertson.

Directors' submissions

263 Senior counsel for Mr Paganin and, by virtue of his submissions, Mr Robertson submit that so far as the alleged non-disclosure of material facts or misrepresentations by silence are concerned, the applicants have not identified or established, either with precision or at all, the circumstances in which the parties dealt with one another from which would arise the entitlement to expect or infer that the Ibex companies, Mr Paganin or Mr Robertson would disclose specific information to Egan Valuers.

264 The directors' submissions in substance are, in relation to the first limb of this non-disclosure case, that Mr Smith gave evidence that he held the view that, at the time he performed his valuation, any limitations on the syndicate members' rights to dispose or deal with their villa, and the nature of any rights that the Ibex companies may have had, were irrelevant. Similarly, Mr Smith did not consider the syndicate agreements that covered their relationship to be relevant to his market valuation assessment and so did not ask for them.

265 The directors, with respect to the second limb, submit that, absent the applicants' pleading and proving circumstances that would give rise to a reasonable expectation that the Ibex companies would provide Egan Valuers with information or instructions to "correct" the alleged representations made, the claim must fail.

Consideration

266 As to the first limb of the pleading, I accept that Mr Smith gave the evidence the directors point to, and I accept the burden of it. Plainly, he considered the contractual limitations question did not relevantly bear on the valuation exercise he had been commissioned by the Bank to conduct. Whether or not he should have is a moot question not directly raised in this proceeding. But his approach emphasises there were no relevant circumstances requiring the Ibex companies or the directors to engage in any discussion of contractual limitations.

267 I do not consider the Ibex companies were required to disclose the syndicate agreements in circumstances where the valuer relationship in question was between the Bank and its valuer. In any event, as noted above, Mr Smith was aware there was an investment syndicate involved in the resort project. No other circumstances arose, as I say, that required the Ibex companies to engage in a contractual limitations discussion.

268 As to the second limb of the pleading, I similarly consider there is no circumstance pleaded or established by the evidence to support a finding that the directors were, in effect, bound to correct some misunderstanding evinced by the valuers following the provision of the 1 June 2008 Egan valuation.

269 In short, I find there is no proper basis to conclude that either of the directors personally was under an obligation to disclose instructions or information to Egan Valuers about the contractual limitations, or to correct any representations contained in the valuations in the circumstances pleaded.

270 Proposition 3 is not made out.

Was the 3 October 2008 Ibex Capital letter to each applicant as a syndicate member misleading or deceptive?

271 This question reflects the applicants' Proposition 4.

The pleading

272 The reasons for Proposition 4 are pleaded in [57] and [58] of the statement of claim, namely:

57. By the 3 October letter, Ibex Capital, on behalf of itself, Ibex Aqua and Aqua Resort, in order to induce Syndicate Members, including the applicants, to execute the Guarantee and Indemnity in favour of St George so that the construction and completion of the Aqua Resort could be financed, represented to Syndicate Members, including the applicants, in trade or commerce (the 3 October 2008 Representations) that:
- (a) Ibex Capital had received a valuation of the Syndicate Resort villas on completion of the project, being the 1 June 2008 Valuation, an extract from which, being the Egan Valuation Table, was provided with the letter.
 - (b) The figures in the 'Value/Contract Price (GST incl)' column of the Egan Valuation Table for Syndicate Members' villas represented the value, in Egan Valuer's opinion, of each such villa.
 - (c) It was reasonable for Syndicate Members to rely upon the Valuation figures contained in the Egan Valuation Table.
 - (d) Based upon the figures for 'Value/Contract Price (GST incl)' column of the Egan Valuation Table for each Syndicate Member's villa, the projected return on Member's \$500,000 initial subscription, plus payment of an Outstanding Balance on completion, was 203.57% as set out in an appended schedule entitled 'Aqua Development - Proposed Outstanding Balance Contribution Schedule' (the 3 October 2008 Schedule).
 - (e) The projected returns for Syndicate Members set forth in the 3 October 2008 Schedule were based on reasonable grounds.
58. The 3 October 2008 Representations were misleading or deceptive, or likely to mislead or deceive as:
- (a) The Egan Valuation Table valued the syndicate resort villas on the basis of an assumed completion of the construction and development of the syndicate resort as at 1 June 2008, not when the syndicate resort would in fact be completed in 2010.

- (b) The figures in the 'Value/Contract Price (GST incl)' column of the Egan Valuation Table for Syndicate Members' villas did not represent the value , in Egan Valuer's opinion, of each such villa , but instead represented Egan Valuer's incorrect understanding of a Contract price which Members had agreed to pay, (but which they had not agreed to pay).
- (c) It was not reasonable for Syndicate Members to rely upon the Valuation figures contained in the Egan Table as they were misleading or deceptive , or likely to mislead or deceive for the reasons indicated above at paragraphs 41 and 42 hereof.
- (d) It was not reasonable for Syndicate Members to rely upon the Valuation figures contained in the Egan Table for the reasons set forth in (a), (b) and (c), and lacked reasonable grounds .
- (e) The projected returns for Syndicate Members set forth in the 3 October 2008 Schedule were not based on reasonable grounds, for the reasons set forth in (a), (b), (c) and (d) and are repeated.

Evidence

273 The 3 October 2008 letter relevantly stated:

As discussed above, we are now in receipt of sufficient cost information to provide you with an updated projection of your Outstanding Balance contribution. The attached calculations reflect the varied valuation of each of the Villas and ensure that each Investor receives an equivalent return. The attached table details the projected Outstanding Balance contribution for each lot. The current estimate will be subject to a final valuation and audit, and may be subject to further adjustment prior to settlement. We note that whilst the current average projections have increased in quantum from the original forecast included in the Investment Memorandum, the return on equity projections as a percentage have similarly increased as set out in the attached table.

Please note that:

- (a) the current projections are based on the current forecasts of cost and third-party sales revenue being contracted by project completion at List Price (which is less than the valuation);
- (b) Outstanding Balance contributions will increase if you opt to proceed with the plunge pool option; &
- (c) the values within the Egan Valuation are confidential and should not be distributed to third-parties.

We advise that there is potential for reduction in Outstanding Balance contribution if further sales are achieved prior to project completion as the current financial projections assume no further sales until completion. Any additional third-party sales would serve to reduce peak debt & therefore reduce interest payable, and increase total returns. Similarly, the Outstanding Balance may be reduced if further third-party sales are achieved at the levels listed in the valuation which exceed the current list prices.

Directors' submissions

274 Mr Paganin and, in substance, Mr Robertson note that the applicants opened their case in relation to the 3 October 2008 letter on the basis that the letter was misleading or deceptive because:

- (1) the letter included an extract from the 1 June 2008 Egan valuation, which they call the "Egan Valuers' Valuation Table", totalling the "As If Complete" valuation of the Aqua Development to be \$69,856,500, which the applicants submit was a "gross over-valuation"; and
- (2) those values were used in a separate calculation to make the outstanding balance figures for each syndicate member in the "Proposed Outstanding Balance Contribution Schedule" appear reasonable, when that would not have been the case had "realistic" figures been used for the value of each member's villa, as indicated by Mr Martin.

275 The directors submit that, in either case, the applicants' stated case on the 3 October 2008 letter depends on them being able to establish that the extract from the 1 June 2008 Egan valuation attached to that letter was misleading.

276 They submit, first, that the 1 June 2008 Egan valuation was not misleading because of Mr Smith's use of the May 2008 price list. I have dealt with that submission above, in relation to Proposition 1, and found the valuations not to have been misleading, but only because of the stated assumptions.

277 The directors secondly submit that, with respect to the applicants' submission that the differences between Egan Valuers' and Mr Martin's opinions of the "As If Complete" valuation of the Aqua Development at the relevant times is such as to make the Egan Valuers' valuations misleading or deceptive, this claim can only be made out if the applicants establish that Mr Martin's opinion as to value is correct. I have also dealt with this question above and found the claim in this respect has been made out by the applicants. I have accepted substantially Mr Martin's valuation as at 1 June 2008 applied at all material times.

278 The directors submit thirdly that, so far as their claim against the Ibex companies is concerned, the applicants plead in [57] of their statement of claim that the 3 October 2008 letter was sent by Ibex Capital, for and on behalf of the Ibex companies, in order to induce syndicate members (including the applicants) to execute the guarantee so that the construction and completion of the Aqua Development could be financed. They submit this allegation is not sustainable for the following reasons.

279 They point to the 3 October 2008 letter and say it needs to be read in the context of the qualifications, limitations and assumptions contained in the Investment Memorandum, including sections 4.4 and 5.2 concerning information about the "Outstanding Balance" contribution and the method of equity adjustment to syndicate members' outstanding balance contributions to ensure that each syndicate member received a pro rata share of the total value of the Aqua Development.

280 They say that, as expressly stated in the 3 October 2008 letter, the purpose of the proposed outstanding balance contribution schedule and extract from the 1 June 2008 Egan valuation, which were attached to the 3 October 2008 letter, was to provide an updated projection of the outstanding balance contribution for each lot, reflecting the differential valuations of the members' villas, in order to ensure that each investor received an equivalent return.

281 The directors also note that the 3 October 2008 letter did not call upon the applicants to make payment of the "updated projected" outstanding balance contributions referred to in the proposed outstanding balance contribution schedule. Nor did the letter enclose or call for execution of the guarantee at that time.

282 Fourthly, they say it was clear from the express terms of the 3 October 2008 letter (in addition to information about the outstanding balance contribution contained in the Investment Memorandum) that the outstanding balance contribution projections:

would be "subject to a final valuation and audit";

"may be subject to further adjustment prior to settlement"; and

were "based on the current forecasts of cost and third party sales revenue being contracted by project completion at list price (which is less than the valuation)".

283 Accordingly, the directors submit, the applicants cannot establish that the pleaded representations in the 3 October 2008 letter were material.

Consideration

284 So far as these submissions are concerned, as I have found above, the 1 June 2008 Egan valuation was not misleading or deceptive. That is because of the statements of assumptions, qualifications and limitations contained in the valuation. But for that, I would have found that it was misleading because I consider Mr Smith materially relied upon the "Sold" prices as evidencing arm's length or material contracts of sale in forming his valuation opinion.

285 I would also have found that the values ascribed were misleading or deceptive in the circumstances because the opinion as to values provided by Mr Martin should be accepted as reasonably indicative of the values at the time, not those given by Mr Smith.

286 However, I accept the submissions made on behalf of the directors that the pleading that the 3 October 2008 letter was sent by Ibex Capital in order to "induce" syndicate members to execute the guarantee is not made out. When one has regard to the text of the Investment Memorandum to which the directors refer, the purpose of the "outstanding balance" referred to is adequately explained and continued to apply at the time the 3 October 2008 letter was sent.

287 There is nothing in the 3 October 2008 letter that materially altered the understanding initially conveyed by the Investment Memorandum in that regard. As the directors reasonably submit, there was nothing in the letter that called for the execution of the guarantee at that time.

288 The terms of the letter also made it sufficiently clear that the final outstanding balance would be subject to final valuation and audit and may be subject to further adjustment prior to settlement, and was based on the current forecasts of costs and third party sales revenue being contracted by project completion at list price (which was less than the valuation).

289 While I accept that some investors, including the applicants might have harboured a subjective belief, hope or expectation that the outstanding balance indications might reflect final value, and ultimately were disappointed in that regard, in my judgement, in all the circumstances, the misleading or deceptive conduct pleaded in [58] of the statement of claim is not made out.

290 It follows that Proposition 4 is not made out.

Is Mr Smith liable for the 1 June 2008 Egan valuation and 30 October 2008 Egan valuation?

291 This question reflects the applicants' Proposition 5.

292 This is put on the basis that Mr Smith was the author of the two valuations, involved in their preparation and so has a separate liability in respect of their content.

293 Because I have found above that Proposition 1 has not been made out, it is unnecessary to consider Mr Smith's liability in respect of the provision of the two valuations. On the face of his conduct, however, he was so involved.

Are Mr Paganin and Mr Robertson liable for the presale schedules and the failure to correct the 1 June 2008 Egan valuation?

294 This question reflects the applicants' Proposition 6 and follows on from Proposition 2, which I have found is not made out. Thus, for that reason this proposition is not of moment. I should, however, deal with the allegations made.

Applicants' submissions

295 It is submitted that Mr Paganin and Mr Robertson did not plead any positive defences.

296 It is also submitted that although Mr Paganin sought to distance himself from the affairs of the Ibex companies concerning the Aqua Resort, the documentary evidence demonstrated that he was very much involved.

Directors' submissions

297 Mr Paganin submits that even if the applicants were able to establish that Egan Valuers, Mr Smith or the Ibex companies engaged in any misleading or deceptive conduct, the involvement and conduct case pleaded against him in relation to the May 2008 price list is without foundation.

298 He submits there is no evidence that he intentionally participated in any relevant conduct, nor is there any evidence that he had knowledge of the essential matters that go to make up that conduct, including, in particular, knowledge of the circumstances which were alleged to give that conduct a misleading or deceptive character.

299 Mr Paganin submits that the pleaded case against him boils down to the uncontested facts that:

he was, on a number of occasions, but not always, copied in to emails that Mr Robertson or Mr Sheldrick sent in relation to the Aqua development; and

he was a director of the Ibex companies until 26 November 2010 and a member of the compliance committee.

300 He contends that these particulars and the evidence adduced by the applicants are insufficient to establish that he was responsible for the provision of instructions and/or information by the Ibex companies to Egan Valuers because, amongst other things:

while he was a non-director of the Ibex companies, there is a relevant distinction between his involvement in the Aqua development in that capacity and the involvement of those who had day-to-day responsibility for the management and implementation of the development;

in that regard, he did not have responsibility for managing and did not, in fact, manage the process of instructing the valuer and procuring the valuation report;

the compliance committee did not assume the role of overseeing the management of the process of instructing the valuer and procuring the valuation report; and

the fact that he was, on a number of occasions, but not always, copied into emails that Mr Sheldrick or Mr Robertson sent in relation to a development is an insufficient basis to attribute to him the adoption of the contents of any particular emails as his own or that he otherwise authorised being sent.

Consideration

301 I accept the submissions made on behalf of Mr Paganin. I also accept the characterisation of his evidence on this question to the effect that he was not responsible for providing instructions or information to Egan Valuers.

302 While Mr Paganin plainly was a driving force in the business of the Ibex companies, in the circumstances in which the resort development was advanced, Mr Robertson and Mr Sheldrick at material times were relied upon to perform key functions in carrying the project forward. It is

difficult to conclude, and the applicants have not satisfied me on the balance of probabilities that I should, that Mr Paganin had that degree of knowledge or involvement in the activities those persons carried out that might have enabled me to characterise their conduct or the conduct of the Ibex companies more generally in effect as Mr Paganin's conduct.

303 While Mr Paganin plainly saw a range of emails, I accept his evidence that he, in effect, monitored or noted the contents, but usually at a more cursory level at which he scanned the materials.

304 Mr Paganin was closely cross-examined by senior counsel for the applicants concerning his control of company activities because they plainly considered him to be the prime actor in the development proposal and responsible for the failed development, and sought to sheet home liability to him for the losses they allege they had suffered. Senior counsel for the applicants pressed Mr Paganin closely about the extent to which he read emails copied to him and was involved in the day-to-day management of the business of the Ibex companies. For example, he was pressed about an email dated 5 June 2008 sent by Mr Sheldrick to Mr Smith that attached eight documents, including two that comprised the May 2008 price list. Mr Paganin's evidence was that he did not specifically recall reading that email and nor did he specifically recall opening or reading the attachments to it, but that he did not have any reason to believe that he departed from his usual practice, which was to scan the materials.

305 I do not have any doubt, and Mr Paganin did not suggest otherwise, that he saw materials such as these and scanned them. But it is difficult to conclude from this evidence, including in relation to what might be considered documents like price lists, that Mr Paganin involved himself in the process to the extent that suggests he was knowingly involved in those particular activities performed on behalf of the Ibex companies. I accept the evidence of Mr Paganin, for example, that he did not know how the information in the May 2008 price list was calculated or derived and that he did not know who had, in fact, prepared that document, as it was not the sort of work he normally undertook. Indeed, the evidence established that Mr Robertson was primarily responsible for generating those materials.

306 As senior counsel for Mr Paganin reasonably said, the high water mark of the applicants' case against Mr Paganin was that he sent an email on 28 October 2008 to Mr Robertson, prior to the 30 October 2008 Egan valuation, which stated: "You will need to manage this process with Blake [Mr Smith] to get it over the line – thanks". This email was sent shortly after Ms Gilbey forwarded to Mr Sheldrick a copy of her email of 28 October 2008 to Mr Smith, advising Mr Smith that the Bank had approved a facility to fund the proposed development and requesting Mr Smith to update and extend the date on the 1 June 2008 Egan valuation, so that the Bank could rely on the valuation for an additional three month period. Mr Sheldrick, in turn, forwarded a copy of Ms Gilbey's email and the email chain to Mr Robertson, and copied in Mr Paganin. Mr Paganin's email to Mr Robertson asking him to "manage this process" was sent relatively soon afterwards by way of reply to Mr Sheldrick's email.

307 Mr Paganin gave evidence, which I accept, about the reasons he sent that email, including that he saw the completion of the updated valuation as being "time critical" to the development proposal and wanted to communicate to Mr Robertson that he expected "he will take personal responsibility" for providing Mr Smith and Egan Valuers with all documents and information required so that the Bank could get the updated valuation, and not delegate that responsibility to somebody else.

308 Mr Paganin was cross-examined about this and explained that the project had been delayed because of a number of factors, including federal and State environmental approvals. He said he saw the timing of receiving the updated valuation as being material to ensure construction started before the end of the calendar year.

309 I accept the submission made on behalf of Mr Paganin that the suggestion put to him in cross-examination that "what you wanted to get over the line was to cause Mr Smith to come in with his fresh valuation at the same figure as the 1 June 2008 figures" was irrelevant to any pleaded issue and lacked any factual foundation.

310 I also accept the submission that the evidence discloses that Mr Paganin's email was, in fact, understood by Mr Robertson in the way that Mr Paganin intended. Mr Robertson gave evidence that he made of it "that he was effectively impressing upon me the urgency to get this sorted out".

311 So far as Mr Robertson is concerned, while he was plainly directly engaged in the implementation of the resort project, having found that the actions of the Ibex companies complained of in relation to the price lists were not misleading or deceptive, the case based on his involvement in that conduct, or other alleged misleading or deceptive conduct, necessarily fails.

312 Accordingly, Proposition 6 fails.

Are Mr Paganin and Mr Robertson liable for the 3 October 2008 letter to syndicate members, including the applicants?

313 This question reflects the applicants' Proposition 7, and flows on from Propositions 4 and 6. I have already found that the proposition that this letter was misleading and deceptive is not made out. I should, however, deal with those allegations.

Applicants' submissions

314 The applicants submit that Mr Paganin's evidence was that he read the letter before it went out and he settled it. It is submitted that as a director of Ibex Capital he could have prevented the letter from being sent but did not do so.

315 As to Mr Robertson's evidence that he approved the letter, it is submitted that he is liable for its misleading content.

Directors' submissions

316 The directors submit the applicants cannot establish that the pleaded representations were material.

317 Mr Paganin strongly resists the claim that he was knowingly involved in the conduct of Ibex Capital in sending out the letter; or that the sending of the letter was, in effect, his conduct.

318 Mr Paganin rejects any characterisation for his conduct as making him "responsible for" Ibex Capital's conduct so far as preparation of the 3 October 2008 letter is concerned, or that he was "aware of" its contents in a relevant sense, or that he "caused" the letter to be sent to syndicate members.

Consideration

319 To the extent that the applicants claim on the basis that the 3 October 2008 letter was misleading and deceptive because it included an extract from the 1 June 2008 Egan valuation showing an "As If Complete" valuation of \$69,856,500 (GST included), which was a "gross over valuation", I have already found that that particular allegation is not made out. So the claim against the directors on that basis must necessarily fail; and so this question of the directors' involvement in the alleged contraventions also necessarily fails.

320 I have also dealt with, above, and rejected the plea made by the applicants that the 3 October 2008 letter was sent by Ibex Capital, for and on behalf of the Ibex companies, in order to induce syndicate members, including the applicants, to execute the guarantees so that the construction and completion of the development could be financed, as set out in more detail in [57] of the statement of claim.

321 In any event, I accept the submission made on behalf of Mr Paganin that his status as a director of the Ibex companies and member of the compliance committee for the joint venture, on their own, is insufficient to make him responsible for, aware of, or otherwise to have caused the 3 October 2008 letter to have been sent.

322 The evidence is that the compliance committee included two investors, neither of whom is an applicant. There is no reason on the evidence to consider that, by the compliance committee giving consideration to materials to be sent to investors, Mr Paganin himself personally became responsible for the 3 October 2008 letter or aware of it in an actionable sense, or "caused" it to be sent.

323 As it transpires, and I accept his evidence, Mr Paganin did recall the draft of the 3 October 2008 letter being tabled for discussion at a compliance committee meeting. His recollection was that the letter was predominantly concerned with matters associated with syndicate members' elections regarding certain options associated with their respective villas. He understood those options would then assist in the equalisation and top up calculations that would ultimately be a factor in determining the quantum that each syndicate member would be required to pay at the conclusion of the development.

324 In cross-examination Mr Paganin resisted the proposition that p 32 of the 1 June 2008 Egan valuation – which later became an attachment to the 3 October 2008 letter – was the most important part of the document. He said from his perspective as a compliance committee member, it was not. He considered it to be an investment newsletter and said he "would have been" comfortable with the letter in its entirety being sent out.

325 On behalf of Mr Paganin, it is observed that the letter and enclosures were also reviewed and approved for distribution by Mr Robertson and by the other investor members of the compliance committee.

326 In all the circumstances, if it could have been established that the 3 October 2008 letter was misleading and deceptive, I would not find that Mr Paganin was knowingly involved in causing it to be sent out.

327 The ultimate point here really is that while Mr Paganin and Mr Robertson were aware, more generally speaking, that the letter was to be sent out and included the impugned attachment, the applicants have not proved to the requisite standard that the letter had the purpose pleaded in [57] of the statement of claim.

328 Proposition 7 therefore fails.

Did the applicants rely upon the 3 October 2008 letter, such that, had the valuation table of the Villas of the Resort provided with the letter disclosed substantially lower values, they would not have executed the guarantees and mortgages which the Bank required as securities for the loan facility to Ibex Aqua and Aqua Resort?

329 This question reflects the applicants' Proposition 8, and also proceeds from their having established Proposition 4, that the 3 October 2008 letter was misleading or deceptive, which proposition I have found is not made out. I should, however, deal with these allegations.

Applicants' submissions

330 The applicants refer to the evidence given on behalf of the applicants in that regard.

Directors' submissions

331 The directors submit that the applicants' pleaded case, in relation to the 3 October 2008 letter, has a number of difficulties.

Consideration

332 I accept the directors' submissions. The case pleaded in [59] of the statement of claim is that each of the applicants relied upon the representations in the 3 October 2008 letter in executing guarantees and authorising a mortgage over their villas in favour of the Bank to be signed under the power of attorney they had given as part of the syndicate agreements. The claim is that they suffered loss and damage as a result.

333 The first significant difficulty is that the objective evidence does not support the proposition that the applicants relied on the 3 October 2008 letter in the manner alleged.

334 When the applicants, with other investors, became syndicate members, they became obliged to execute and provide guarantees and mortgages in accordance with the syndicate agreements, failing which Ibex Aqua could act under the power of attorney on their behalf. The Investment Memorandum s 4.3(b), the Joint Venture Agreement cl 15.7, the Investor Agreement cll 3t, 5 and 6.8 and the power of attorney cll 2.18(b), 2.19 and 2.35 all bear this out.

335 The authority of Ibex Aqua to execute the mortgages under the power of attorney arose under the syndicate agreements and not from any decision or step taken by the applicants subsequently. This is confirmed by Investor Agreement cll 3(t), 5.1 and power of attorney cll 2.18(b), 2.19 and 2.35.

336 It is relevant to note that:

The mortgage in each case was limited to a registered mortgage over each applicant's interest in the "Property".

The guarantee was a limited guarantee and was subject to express "Limits – Special Conditions" as set out in Annexure A which relevantly dealt with a limit to the enforcement of the security in these terms:

Notwithstanding any other provision of this Guarantee and indemnity or any arrangement with us, the maximum amount we can recover from each Guarantor under this guarantee and indemnity is the amount we obtain from, and our right of recourse is limited to, realising that Guarantor's interest in the Property ... in accordance with the Mortgage.

The expression "arrangement with us" was defined to include the "facility offer" in each "security interest".

It follows that execution of the mortgage and guarantee did not expose the applicants to any greater liability to the Bank beyond their interest in the "Property". This is despite some of the applicants having historically believed and having maintained a different belief in the course of giving their evidence.

337 Secondly, the guarantee and mortgage were not enclosed with the 3 October 2008 letter and the guarantee was sent subsequently by Ibex Capital to the applicants by letters dated either 11 November 2008 or 17 November 2008. Those letters did not contain any reference to what the applicants had pleaded as the 3 October 2008 letter representations. By those dates the Bank had already approved and made the facility offer dated 10 November 2008.

338 Thirdly, the guarantees were not executed by the applicants until weeks after the 3 October 2008 letter was sent. The applicants' own evidence is that they executed the guarantee on about 23 November 2008 through to about 4 December 2008.

339 Fourthly, at a more subjective level, the evidence of individual applicants or persons associated with them, which generally involved assertions that, but for this letter and the attachment they would allowed the development to proceed, leaves me with some real doubt as to the extent to which they, in fact, relied on those letters in relation to the guarantees. Mr Meneghello, for example, for the first applicant, as the directors observe, understood he was obliged to sign the guarantee in any event in accordance with the syndicate agreements, and understood that the guarantee was to be of a limited recourse nature and that by signing it he assumed no greater risk with respect to the investment than he already had.

340 For Mr Patterson, that the guarantee would be strictly limited was important to him. While he maintained a belief that his liability would be limited to his villa, he conceded in cross-examination that the reason why he signed the guarantee was because it was limited recourse; he did not want to relinquish the \$500,000 subscription he had made; and because everyone else had signed the guarantee to his knowledge.

341 Mr Jujnovich, for the third applicant, felt that he was locked in at that point and also said that he "felt comfortable" proceeding with the Bank finance documents because the compliance committee included an accountant and a developer, as well as Mr Paganin and Mr Robertson.

342 Mrs Jane Boyatzis, on the advice of her husband, Mr Paul Boyatzis, for the fourth applicant signed the guarantee on the understanding that it provided for limited recourse and liability.

343 Mr Del Borello, for the fifth applicant, said that he understood he was obliged to sign the guarantee and that he did not have an option to review his investment at that stage. He considered that whatever the value of his unit was at that point was not significant to him because he was planning to use it, not sell it.

344 For the sixth applicant, Mr Middlemass conceded that he executed the guarantee because the development manager told him to.

345 In each case, reliance on the "valuation table" is not clearly demonstrated as a material reason for signing.

346 In the result, I am not satisfied, on the balance of probabilities, that the applicants would not have executed the guarantees and mortgages which the Bank required as securities for the facility to Ibex Aqua and Aqua Resort but for the 3 October 2008 letter.

347 Accordingly, Proposition 8 fails.

Did the Bank rely upon the Egan valuations in agreeing to provide the facility, such that, if the "As If Complete" valuations of the Resort had been substantially lower than \$69,856,500 (GST included) (\$67,785,197 GST excluded) and the applicants had not provided the guarantees and mortgages, the Bank would not have provided the facility and the resort would not have been built?

348 This question reflects the applicants' Proposition 9 and the applicants refer to the Bank's facility offer, dated 10 November 2008, and the preconditions to it. The question of the Bank's reliance on the Egan valuations has already been considered in relation to Proposition 1. It is appropriate nonetheless to deal with this claim of reliance and loss.

349 As to the fact that no witnesses from the Bank were called by them to sustain this proposition, the applicants say nothing turns on this. They say that what happened in 2008 concerning the Bank's reliance on the Egan valuations is what happened and is evidenced by internal Bank documents, upon which they rely.

350 The reality is that the Bank did use the Egan valuations, supporting an "As If Complete" valuation of the resort at \$69,856,500 (GST included) (\$67,785,197 GST excluded), but they did so or must be taken to have done so on the basis of the assumptions, limitations and advice provided by Egan Valuers to the Bank, which included the need for the Bank to verify such matters as the presales documentation. The Bank was fully aware, as I have found earlier, or at least must be taken to have been fully aware of the nature of the interests that all of the investors, including the applicants, had in the "Property" through the syndicate agreements.

351 In circumstances where the Bank had the Egan valuations and its own information concerning the nature of the syndicate and the proposed development, it cannot be said that the Bank was misled by anything in the Egan valuations or that it relied on valuations that were misleading or deceptive.

352 In the circumstances, it cannot be concluded that the Bank would not have provided the loan facility but for the Egan valuations and that the resort would not have been built, as alleged by the applicants.

353 Accordingly, Proposition 9 fails.

Are the claims of the applicants against the valuers sustainable in any event?

354 In my judgement, the claims made by the applicants fail on the basis that the nine propositions put forward on behalf of the applicants, and the pleadings underlying them, are not sustained. But there is also a larger question raised by the valuers as to whether such a claim could ever be sustained against parties in their position in a case such as this.

355 Put simply, the valuers at material times have not been shown to have made any representations to any of the investors including the applicants. Any representations they made were made to the Bank. The applicants say that those representations were misleading and deceptive and, if they had not been made, the Bank would not have made the facility offer and the development would not have occurred; and so they, the applicants, would not have suffered the losses that they say they have suffered.

356 The valuers note that the issues that arise, where an applicant claims they have suffered loss and damage as a consequence of an innocent third party being misled or deceived by the conduct of a respondent, have been considered by various authorities. They contend that, where an

applicant seeks to recover damage against a person who has engaged in misleading or deceptive conduct, and where conduct by the applicant – whether an act or omission – forms a link in the chain of causation, the applicant must plead and prove that the applicant was in fact induced by the misleading or deceptive conduct of the respondent to proceed with the transaction. They cite in support of this proposition: *Digi-tech (Australia) Pty Ltd v Brand* (2004) 62 IPR 184 at [148]-[149] and [155]-[159]; [2004] NSWCA 58; and *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653 at [10]-[22]; [2008] NSWCA 206 and approved in *De Bortoli Wines Pty Ltd v HIH Insurance Ltd* [2012] FCAFC 28 at [63].

357 They say that this is such a case where the conduct of the applicants forms a link in the chain of causation, because:

There was each applicant's act of investing in the proposed development and executing the necessary documents.

There was each applicant's act of executing the documents required by the Bank for the provision of finance for the development.

There was each applicant's act of paying for the fit out and/or the plunge pool packages.

There was the act of paying the cash calls.

There was the act of commencing the 497 proceeding against the Bank and the Ibex companies.

There were the acts of settling that earlier proceeding.

In relation to Chowder Bay's additional claim, there were the acts of entering into the agreement to purchase the Bay Beach Villa, paying the deposit and the further deposits, executing the documents required by the Bank for the provision of finance for the development, paying for the fit out, and commencing and settling the 277 proceeding.

358 The valuers submit there is no allegation pleaded in this proceeding that the applicants were induced to take any of those steps by reason of misleading or deceptive conduct of Egan Valuers and, on the facts, no such inducement could be pleaded.

359 So far as the provision of the 3 October 2008 letter and its attachment is concerned, they contend it is also not alleged to be conduct by Egan Valuers, and the valuers are not sued in relation to that conduct. They say the inducement that is required to be pleaded and proved is the inducement by the misleading or deceptive conduct of Egan Valuers, and there is no such plea. Further, they contend, it would not have been open to the applicants to make that any part of their case, for two reasons:

the provision of the impugned one page of the valuation report was not their conduct; and

each of the applicants knew that valuations did not comprise a single page and that valuations were subject to assumptions, conditions and limitations that were set out in a valuation report.

360 Thus, the valuers submit, for that reason alone, the applicants' case against them must be dismissed.

361 They submit that this result would be consistent with the purpose and policy of the relevant consumer statutes, which purpose and policy informs the question of causation in an action for damages for breach of s 82 Trade Practices Act 1974 (Cth) and also the Fair Trading Act 2012 (WA), and refer to *I&L Securities Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [26]; [2002] HCA 41.

362 In the circumstances of this case, which these respondents submit involved valuations given to the Bank (a very sophisticated user of such services) on express conditions and assumptions, and which were never seen or relied on by the applicants, it could not be said that a finding of liability against the valuers would promote competition, fair trading or consumer protection, and does not meet any of the objectives of such legislation. Further, they contend, the purpose of the legal norm that the valuers is alleged to have breached – that is, not in trade or commerce to engage in misleading or deceptive conduct – should not be regarded as including the purpose of preventing people such as the applicants from suffering the detriment alleged in the circumstances of this case.

363 They further argue that, even in a case where an applicant is a "passive sufferer of loss":

The loss or damage must directly result from or be caused by the respondent's conduct. The respondent's conduct must be the real or direct or effective cause of the applicant's loss. See *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at 530, which has been referred to with approval in *Marks v GIO Australia Holding Ltd* (1998) 196 CLR 494; [1998] HCA 69 at [101] (Gummow J).

There must be a sufficient and direct link between the loss or damage alleged to have been suffered and the misleading or deceptive conduct. See *McCarthy v McIntyre* [1999] FCA 784 at [48].

There must be a sufficient and direct link or a requisite element of proximity between the loss and the conduct. See *Finishing Services Pty Ltd v Lactos Fresh Pty Ltd* (2007) ANZ ConvR 93; [2006] FCAFC 177 at [31].

364 On that basis, the valuers submit the applicants have failed to demonstrate any real nexus between the conduct of Egan Valuers and any losses that the applicants may have suffered. They again emphasise that Egan Valuers made no representations to the applicants, and the applicants did not have a copy of either valuation.

365 Thus, the valuers reject that a "but for" approach to causation is at the root of the claim made by the applicants. That is the proposition that, but for Egan Valuers' valuations, the Bank would not have granted the development funding and so the investors would not have lost out. They submit causation cannot be established by mere proof that a third party's reliance on the contravention merely played some part in a series of events that led to the victim suffering loss. They say that conduct which merely provides the opportunity for an applicant to enter into a

transaction will not suffice in establishing causation, referring to Ingot at [19].

366 They submit that in the present case, even had the applicants been passive sufferers of loss (which they were not), their losses could not be said to directly result from, or be caused by, the conduct of Egan Valuers and Mr Smith, and the conduct of Egan Valuers and Mr Smith was not the real, direct or effective cause of the loss claimed.

367 Rather, they say the real or effective cause of the loss was the acts of the applicants in executing the agreements to invest in the development project on the basis of representations made to them about the project and various other steps taken by the applicants subsequently.

368 Notwithstanding these submissions, I consider that there is no obvious reason why, if A makes a representation to B, which is misleading and deceptive, and which causes B to engage in conduct that results in B acting to the ultimate detriment of C, C, under a provision such as s 82 of the Trade Practices Act, should be precluded from claiming that it was by the conduct of A that C suffered loss.

369 The provision of a valuation to support the funding by a bank of a land development proposal is plainly a critical step in the realisation of the proposal. If a bank, relying on a misleading or deceptive valuation from a valuer, lends money to its client to carry out the development proposal, and the development eventually fails because the valuation supporting the funding model for the development was provided in contravention of the conduct requirements of consumer legislation, it would be a question of fact in every case whether the bank's client ever sustained loss "by" that conduct of the valuer.

370 Section 82 of the Trade Practices Act gives a cause of action for damages to "a person who suffers loss or damage by the conduct of another person" where the conduct was in contravention of s 52. Section 82 does not stipulate any particular manner in which the loss or damage must be suffered. See *Hampic Pty Ltd v Adams* [1999] NSWCA 455 at [35].

371 I accept the applicants' submission that it is now well established that one does not construe the operation of these remedial provisions of the consumer laws by attempting to draw some analogy with any particular form of claim under the general law.

372 The relationship between conduct of a person that is in contravention of the statute and loss or damage suffered is expressed by the word "by" in s 82.

373 In deciding whether loss or damage is "by" misleading or deceptive conduct and assessing the amount of the loss that is to be so characterised, it is in the purpose of the statute, as related to the circumstances of a particular case, that the answer to the question of causation is to be found. See *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at [30] (Gleeson CJ) and [49] (Gummow and Hayne JJ); [2005] HCA 69.

374 I also accept the submission made by the applicants that s 82 asks a question as to causation that is not answered solely by proving a factual connection between the alleged loss and the contravening conduct by such a causal chain. The answer to the question involves the attribution of a legal cause for the purpose of the operation of the section in its context in the statute. See in this regard QNI Resources Pty Ltd v Sino Iron Pty Ltd [2016] QSC 62 at [91]-[92] (Jackson J).

375 Section 82 contains no stated limitations of the kinds of loss or damage that may be recovered and there are no express indications that some kinds of loss or damage are to be regarded as too remote to be recovered.

376 Thus, I generally accept the proposition put by the applicants that the issue of causation should be approached by asking whether a respondent's conduct can properly be said to be a cause of the loss and not by asking what caused the loss. See *Townsend v Roussety and Co (WA) Pty Ltd* (2007) 33 WAR 321 at [101]; [2007] WASCA 40.

377 So long as the contravening conduct materially contributes to the loss, a causal connection may be thought ordinarily to exist, even though the breach, without more, would not have brought about the loss. See *Bennett v Elysium Noosa Pty Ltd (in liquidation)* (2012) 202 FCR 72 at [240]; [2012] FCA 2011.

378 I also accept the proposition that there is no requirement that damages can be recovered only where the applicant relies directly upon the conduct of the party constituting contravention of the relevant consumer provision. See *Hampic* at [35]-[37] (Mason P and Davies AJA, with whom Giles JA agreed).

379 It follows that third party reliance may cause an applicant's loss for the purposes of s 82, provided there is a "sufficient and direct link" or a "requisite element of proximity" in order for the section to be satisfied. See *Finishing Services* at [31].

380 While *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1; [2014] FCAFC 65 suggests there may be limits to how the "reliance" link in the causal chain may be found to have occurred to support a claim for damages for loss "brought about by virtue of" misleading conduct based on s 82, in my view that becomes a factual inquiry to which there is no easy conceptual answer. Thus, a claim cannot be rejected out of hand where an applicant claims that some other person relied on misleading conduct and that person's reliance led to them suffering loss. See *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94 at [62] (Gilmour and Foster JJ).

381 Where misleading conduct takes the form of a representation, it is established that it is enough that the representation was a link in the chain of causation. See *ABN AMRO* above.

382 In a third party situation it may also be relevant to ask whether the respondent intended that the "third party" should pass on the representation to the applicant. See *McBride v Christie's Australia Pty Ltd* [2014] NSWSC 1729 at [255]-[267] (Bergin CJ in Equity).

383 In the result, in my opinion, it cannot be said that the elements of the claim that the applicants make against the valuers, are not open to be pleaded in support of the claimed statutory cause of action under the relevant consumer legislation. The question is whether the material facts relied on to support the alleged contravention of the relevant consumer legislation have been made out, and whether, so far as the loss claimed is concerned, there is such a chain of causation that it can, or cannot be said that the loss arises by the proved contravention.

384 In the result, in this case I consider the applicants have not proved that any losses suffered by them were relevantly by any misleading or deceptive conduct alleged against the valuers; or for that matter, the directors.

Damages claims

385 While I have determined liability issues against the applicants, I should also briefly deal with the damages claims as argued.

Sale of development land scenario

Applicants' submissions

386 The applicants contend that they are entitled to be paid damages for the alleged misleading or deceptive conduct of the respondents on the basis that, but for that conduct, the Bank would never have financed the resort development and so the land, pursuant to the syndicate agreements, would have been sold. It is submitted that, in the circumstances, they lost the opportunity for that to happen and should be compensated for that lost chance. They also claim recovery of legal costs in prosecuting the 497 Proceeding, and, in the case of Chowder Bay, the legal costs incurred in the 277 Proceeding.

387 In relation to the sale of the land scenario, the applicants say that, having regard to cl 12.1(f) of the Joint Venture Agreement, the "evidential default position" is to conclude that the development land would have been sold if appropriate finance terms were not obtained. They contend that, on a "Sellars analysis" (*Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; [1994] HCA 4) the Court should find on the evidence that, but for the respondents' misleading conduct, appropriate finance terms would not have obtained and hence the applicants were deprived of the opportunity to have the development land sold.

388 The applicants say the evidence referred to by them is so compelling that the court should simply proceed on the basis that the development land would have been sold. Alternatively, the court should assess damages on that basis but make a small discount on account of the possibility that the development would have proceeded in any event.

389 The primary analysis relied on by the applicants is that, having regard to cl 12.1(f) of the Joint Venture Agreement, the Court should conclude that the development land would have been sold if appropriate finance terms were not obtained, and that if any of the respondents had wished to contend otherwise then they should have called syndicate members to give evidence as to how they would have voted.

390 Moreover, the applicants contend, the gist of the propositions put by senior counsel for Mr Paganin to various of the applicants' witnesses in cross-examination, was that there was a diversity of interest among the syndicate members and this meant, on Mr Paganin's implicit case theory, that a "non-sale 75% vote" was unlikely to have occurred.

391 The alternate analysis put by the applicants is that the respondents' conduct deprived the applicants of a valuable opportunity to have the development land sold if the finance terms were not obtained.

392 In relation to the lost opportunity approach – the Sellars approach – the applicants say they have adduced the relevant evidence to assess the lost chance, including the:

Investment Memorandum;

cl 12.1(f) of the Joint Venture Agreement;

Finance Memorandum sent by Mr Sheldrick to Mr Kenny of Westpac on 8 April 2008;

Finance Memorandum sent by Mr Sheldrick to Mr Arundell of NAB on 8 April 2008;

Finance Memorandum sent by Mr Sheldrick to Ms Gilbey of the Bank on 8 April 2008;

"indicative terms" offered by BankWest on 17 April 2008;

"indicative terms" offered by the Bank on 21 April 2008;

"indicative terms" offered by NAB on 15 May 2008;

"indicative terms" offered by Westpac on 28 May 2008;

terms ultimately offered by the Bank on 10 November 2008; and

expert evidence of Mr Martin, which referred to bank lending practices at relevant times.

393 The applicants draw attention to the cross-examination of senior counsel for Mr Paganin of various of the applicants' witnesses to the effect that, even if the Bank had known the true position regarding the "pre-sales", alternate finance terms may have been obtained from the Bank or some other financier. The applicants contend that, given the evidence listed in the preceding paragraph, there was at least a forensic onus on the respondents to adduce evidence, if it could be found, to the effect that the development would still have proceeded on different finance terms. They say this is especially so given the roles of the directors within the Ibex companies and the oral evidence of Mr Paganin as to his connections with the main financiers in Western Australia; and no such evidence was adduced on behalf of any of the respondents.

394 The applicants submit that on a Sellars analysis the Court should find on the evidence including, but not limited to that referred to above, and the absence of any evidence adduced by the respondents on the question that, but for the respondents' misleading conduct appropriate finance terms would not have been obtained and hence the applicants were deprived of the opportunity to have their development land sold.

395 Clause 12.1 of the Joint Venture Agreement deals with the situation where the development manager believes the development is unlikely to proceed in the manner contemplated by the syndicate agreements. A meeting of the syndicate members is to be called and proposals as to the future of the development put to the vote. In the absence of at least 75% in favour of some other outcome, para (f) provides that the "default position" is that the development land be sold.

Directors' submissions

396 Mr Paganin contends, and Mr Robertson's position would appear to be the same, that the applicants claim damages based on two alternative models:

- (1) Model 1 seeks damages on the basis that the property would have been sold "As Is" with a premium for the development approvals in place as of 1 June 2008 and/or 30 October 2008.
- (2) In the alternative, Model 2 seeks damages on the basis that the property would have been sold "As Is" without a premium for development approvals at those dates.

397 As to Model 1, the directors note that the heads of loss and damage claimed by the applicants, including Chowder Bay, are:

loss of proportionate share of the joint venture property – \$450,550 for each applicant;

furniture and fitout package – \$49,000 for each applicant;

syndicate member cash call contribution from December 2010 – \$25,000 for each of the first, second, third and fifth applicants;

settlement with Ibex Aqua and Aqua Resort in the 497 Proceeding – \$250,000 for each applicant, a total of \$1.5 million for these six applicants;

legal costs in the 497 Proceeding – \$180,500 for each applicant, for a total of \$1,085,100 for the six applicants alone; and

statutory interest.

398 In addition, Chowder Bay claims under Model 1 for:

deposit on the Bay Beach Villa – \$500,000;

settlement with Ibex Aqua and Aqua Resort in the 277 Proceeding – \$300,000; and

legal costs in the 277 Proceeding – \$241,935.32.

399 The directors note that the same heads of loss and damage are claimed under Model 2, and say that the amount claimed for loss of proportionate share of the joint venture property is reduced to \$372,193.40 for each applicant, without a premium for the development approvals in place.

400 Noting that Model 1 and Model 2, as advanced by the applicants, includes a table setting out the methodology for calculating loss of the proportionate share of the joint venture property under cl 12.2 of the new Joint Venture Agreement, the directors say that the applicants have not, through documents, their witness statements or their written or oral opening submissions made any meaningful attempt to identify or adduce evidence that might enable the Court to assess the applicants' claims of loss and damage under either model. For example, the applicants did not lead evidence to support the assumption in note 2 to the methodology table regarding joint venture expenses.

401 As to the applicants' case that the property would have been sold and the net sale proceeds would have been divided between the participant joint venturers according to their respective interests under cll 12.1 and 12.2 of the new Joint Venture Agreement, the directors referred to cl 12, which provides for termination by frustration and delay, noting that only various paragraphs of cl 12.1 apply:

In the event that the Development Manager [Aqua] reasonably believes that the development penalty is unlikely to proceed in the manner contemplated by the Syndicate Agreements or is likely to be substantially delayed in its implementation.

402 They say the applicants have not led any evidence to show that the development manager formed or would probably have formed a relevant opinion under cl 12.1. Accordingly, in the absence of such evidence, the other provisions of cl 12 relied on, including cll 12.1(f), 12.2 and 12.3 are irrelevant to the claims the applicants now make in the proceeding.

403 In any event, they contend, under cl 10.1(b) of the Unit Trust Deed, the Unit Trust could only be terminated by the "special resolution" of the unit holders, which is defined to mean a resolution passed as special business at a duly convened general meeting by the holders of not less than 75% of the issued ordinary units. They say the applicants have not led evidence, or sought to have any steps taken by them (or at least two of them) to requisition a general meeting, and nor have they led evidence that would enable the Court to be in a position to conclude that there would be a quorum at any such meeting, and that any resolution to terminate the trust would have been passed by the requisite 75% of unit holders.

404 The directors submit that the applicants do not make up a majority of syndicate members, and no evidence was led from other syndicate members as to what they might have done in the hypothetical scenario raised.

405 The directors note that, in cross-examination, the applicants' witnesses conceded that they could not exit the syndicate unilaterally and require the consent of the majority of the syndicate members; that they could not say what other syndicate members would have done if guidance

had not been "available"; that other syndicate members may have had different points of view; that there may be a million reasons that might have affected how other syndicate members would have reacted if finance had not been available, depending on their personal circumstances; that other syndicate members may have considered other possibilities, such as the developer looking for alternative financing proposals or renegotiating the construction contracts; and that, ultimately, the majority would rule.

406 The directors also refer to the fact that all investors including the applicants were subsequently provided with an updated outstanding balance contribution schedule under cover of a letter from Ibex Capital dated 3 December 2009. It referred to "unprecedented volatility and disruption to global financial markets" leading to "a severe down turn in global property markets" and "negative impacts" on the property market in Western Australia and the South West in particular, and confirmed statements in recent newsletters that marketing activity had been suspended for the remaining 12 Sale Villas until conditions improved sufficiently. Item 2 stated that the updated outstanding balance contribution schedule made provision for the fact that some of the Sale Villas may remain unsold at completion, which would impact on the final amount of the outstanding balance, and that there was "potential for the Outstanding Balance contribution to increase if there are further adverse movements in any of the above assumptions". The letter, the directors note, invited the investors to give consideration to those matters and to attend an investor meeting to be held on 16 December 2009 to discuss that item and other matters.

407 They submit, however, there is no evidence that the applicants or any other investors took any steps as a consequence of this news, and none of them proposed that the property be sold at that point in time. In fact, none of the applicants, the directors say, attended the annual general meeting of investors held on 16 December 2009, at which they were invited to discuss financial projections and other issues which may have affected the final return to investors.

408 Accordingly, the directors submit the assertions now made by the applicants, that they "would have" voted to sell the property in the hypothetical scenario they now contend for, is inconsistent with their actual conduct after they were provided with the updated outstanding balance contribution schedule in December 2009.

Valuers' submissions

409 The valuers make a similar range of submissions, noting that, properly characterised, the applicants' claim is a claim for loss of chance to wind up and terminate the joint venture. They say the claim is subject to a number of imponderables:

Uncertainty around what decisions would have been made if the future of the project had been put to the syndicate members for a vote. They say the syndicate members may have voted to seek alternative finance, scale down the project, reduce the building specification or costs, or subdivide and retain individual blocks.

Uncertainty as to how long the process of consideration options would have taken.

Uncertainty as to how long it would have taken to implement any action voted by the members of the syndicate.

If the syndicate voted to sell the land, uncertainty as to how long it may have taken to sell the land.

Uncertainty as to the price at which the vacant land may have been sold.

Uncertainty arising from the applicants' failure to lead evidence as to the liability of the joint venture they would need to be satisfied from the sale of the land as to whether, and if so, how those liabilities would have increased during whatever period it would have taken to sell the land.

410 The valuers submit that, although precise evidence of loss may not always be available, the Court should be reluctant to make an estimate where the applicants' evidence fails to provide any rational foundation for a proper estimate of damages, referring in this regard to *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 at 241; *Advanced Buildings Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd* (1995) ATPR (Digest) 46-144 at [53] and [138]; [1995] FCA 236.

411 They say the applicants have not put the Court into a position to value the lost chance for the following reasons:

Evidence is only led of the alleged value of the land as at June 2008 and October 2008, neither of which dates have been proved to be the date at which the land would have been sold.

June 2008 is an irrelevant date because the evidence does not support any suggestion that the land would have been sold any time proximate to that date. At the time, the amount of the finance being sought was in the amount of \$20,600,000, yet it could not be found on any basis that if a valuation had been provided that "was not misleading or deceptive", finance would have been refused or a decision would have been taken not to proceed with the project.

The evidence of Mr Martin recognises that time would be taken to secure a sale of the land, and assumes an unspecified period of time for orderly marketing.

Mr Martin's valuation as at October 2008 assumes that values remain constant throughout the marketing period, which is contrary to the other view that the market was in decline;

There was no evidence as to how long it would have taken to sell the land and there is no evidence as to the value of the land as at any date on which it would have been sold.

412 The valuers also submit that, contrary to the assumption of the applicants that no joint venture expenses had been properly incurred in excess of the equity contribution of \$11.5 million made by the syndicate members, the expenses exceeded that sum.

413 For all these reasons, they submit that the applicants have not put the Court in a position to assess damages.

Consideration

414 I generally accept the submissions made on behalf of the respondents.

415 There are many circumstances in which a court, having found that a party is liable to compensate another party by reason of their conduct, must deal as best it can to assess those damages given the nature of the matter, the detriments and losses identified and the like. In those cases the Court comes to the clear view that damages must be paid and then do all it can to assess them. In some cases, however, where the party claiming the damages should have led appropriate evidence of loss but has failed or neglected to do so, a court may be unable to make that assessment on the basis that to do so would, in effect, involve speculation.

416 This case must of course be assessed on its own facts and circumstances. The applicants have endeavoured to keep their claim for damages as simple as possible. As can be seen, they principally argue that, having regard to the syndicate agreements, in the particular circumstances that existed, the Court should readily conclude that, if there had not been misleading and deceptive conduct, the Bank would never have provided finance and that, inevitably, the syndicate property would have been sold. The simple proposition put is that it would have been one or the other of the values in June or November 2008. The Court can then make those simple assumptions, it is submitted, in order to provide a certain sum by way of compensation for loss.

417 In my view, however, for the reasons advanced on behalf of the respondents, the Court cannot easily infer that, if the alleged misleading and deceptive conduct had not occurred, the Bank would simply not have granted the finance. The possibilities of further valuation assessments by the Bank, negotiation over finance, including as to the scale of the development, would all have been in play and there is insufficient evidence, to my mind, for the Court to decide what then commercially would have happened. While it is one thing for the Court to be referred to the indicative terms proposed by the various banks, to which the applicants made reference, those proposals of finance were limited to the express propositions put to those banks for financing.

418 Further, I do not consider the evidence allows me to conclude, having regard to the reasonably complex terms of the joint venture agreements, that the requisite percentage of 75% or more of all the syndicate members would have voted to adopt the default position and thereby have caused the land to be sold. That was an option, but I do not consider it appropriate to say, on the Sellars approach, that that chance was realistically lost. There is insufficient evidence to indicate that there was a real chance that the default position would have been obtained, contrary to the submissions of the applicants in that regard. The point is that the default position was not at the election of the six applicants, but was at the election of at least 75% of the 23 syndicate members. To know whether that chance was lost, the Court would need to be apprised of much more evidence than it has received concerning the position that the syndicate members more generally might have adopted. The Court does not feel confident in coming to a view about that, including by making a generous inference. The position as to what might have happened

within the syndicate but for the allegedly deceptive conduct is quite uncertain on the evidence led by the applicants.

419 I reject any part of the applicants' submissions which suggests that it was for the respondents to lead evidence about what the position of more general syndicate membership was in this regard. It is for the applicants to prove their case, including on damages, and to have led appropriate evidence in this regard at trial.

420 The land development scenario is therefore rejected as a basis for assessing damages in the event that misleading conduct had been determined in this case.

Costs associated with the 497 Proceeding

Applicants' submissions

421 Proceeding 497 was a proceeding commenced by investors including the applicants against the Bank and the receivers appointed by it. The applicants here contend it was a defensive proceeding. They contend that it was reasonable for them to commence the proceeding and, objectively considered, the proceeding had reasonable prospects for success when commenced and the settlement ultimately achieved in that proceeding was reasonable.

422 In that regard the applicants rely on the following letters, notices, Court events and documents as sustaining these submissions:

letter dated 3 October 2011 from the receivers and managers;

notice of default dated 7 November 2011;

notice of demand dated 28 November 2011;

the 497 Proceeding commenced on 8 December 2011;

statement of claim dated 8 December 2011;

notice of default dated 16 December 2011;

notice under mortgage dated 28 December 2011;

further amended statement of claim dated 9 October 2012;

interlocutory application dated 29 October 2012 filed on behalf of Ibex Aqua (receivers and managers appointed), Aqua Resort (receivers and managers appointed) and Westpac;

Westpac's outline of submissions dated 16 January 2013;

outline of submissions dated 11 February 2013 filed on behalf of the applicants in the 497 Proceeding;

letter dated 12 February 2013 from solicitors for the two Ibex companies as referred to;

further re-amended statement of claim dated 18 June 2013;

defence of Ibex Aqua (receivers and managers appointed) and Aqua Resort (receivers and managers appointed) dated 5 July 2013; and

list of court events and documents filed in the 497 Proceeding.

423 The applicants, referring to their evidence or that of various individuals associated with them concerning: their motivation to invest in the Aqua Resort; parts of the Investment Memorandum; their understanding of their limited liability and the outstanding balance, their understanding of the syndicate agreements; their understanding of the 3 October letter; and their understanding of the Bank's notices of default, notices of demand and notices under the mortgage, contend that the best case the respondents can put is that the demands made by the Bank (by that time Westpac) and/or the receivers and managers were confusing as to whether or not the amounts claimed in those demands were limited to a syndicate member's interest in their villa, rather than some unlimited liability.

424 The applicants submit that the effect of the settlement in the 497 Proceeding with the Bank was that the applicants avoided any personal liability and limited their liability to the value of their villas.

425 They contend that, by the time of the settlement, in consequence of a mediation conducted in the Court, the position of the receivers and managers had changed such that they ran alternative arguments as to the outstanding balance claims.

426 They contend there were substantial arguments that could be advanced on behalf of the syndicate members, including the applicants, that under the syndicate agreements their liability was limited, contrary to the various ways the receivers and managers had put it.

427 The applicants contend the respondents cannot have it both ways – that is, to say that the 497 Proceeding had no prospect of success, and that the amounts paid to settle the proceeding are not recoverable. They submit on that approach, if X is sued by Y for \$1 million, and X settles with Y for \$200,000, then X acted unreasonably in not allowing judgment in favour of Y for \$1 million to go by default.

428 The applicants contend the legal costs associated with prosecution of the 497 Proceeding, and the amount paid to settle it are linked, in the sense that if the settlement was reasonable, then at least some legal costs must be recoverable as the price to litigate to that issue.

429 As set out earlier in respect of the sale of the land scenario, the applicants also, in respect of the 497 Proceeding, seek to recover some \$180,500 for each applicant – a total of \$1,085,100 for the six applicants.

Director's submissions

430 The directors submit that prior to the commencement of the 497 Proceeding, the applicants' solicitors provided an estimate of legal costs under the Legal Profession Act 2008 (WA) that suggested these might be anywhere between \$200,000 and \$1 million in relation to the matter "overall". A separate costs estimate was given for dealing with the identified GST or other taxation issue that might arise, for which the fees might, on face value, be about \$100,000 to \$300,000.

431 The directors note that Chowder Bay entered into a separate costs agreement with its solicitors in relation to matters that were litigated in the 277 Proceeding. They estimated legal costs from that point on, to be another \$300,000 to \$400,000, plus GST disbursements.

432 The directors observe that the total legal costs now alleged in this proceeding by the six applicants alone in relation to the 497 Proceeding exceeds the upper end of the range of the estimated legal costs for the matter overall, including the tax issue and any court action.

433 They also draw attention to the statement by junior counsel for the applicants in the course of the trial in this proceeding, that he was informed that the total costs of conducting the 497 Proceeding on behalf of some 20 applicants was in the order of \$2.4 million. But, as the directors note, no evidence was raised to support that oral observation. They say, in any event, the figure of \$2.4 million is more than double the upper end of the range of estimated legal costs for that matter overall as at 31 October 2011.

434 They say that if the figures referred to above are correct, then the six applicants in this proceeding would be paid almost half (45%) of the total legal costs incurred by the 20 applicants in the 497 Proceeding – that is, more than their share of the costs of the 497 Proceeding on a proportionate basis; but now they seek to recoup all of that from the respondents on a full indemnity basis.

435 The directors further note that the evidence adduced by the applicants in support of the legal costs claim includes legal expense timesheets, invoices and payment receipts concerning costs allegedly incurred. Many of them, they observe, are redacted, some more and some less than others, purportedly under the realms of professional legal privilege, without prejudice privilege and confidentiality. They submit the tender of redacted timesheets gives rise to particular difficulties:

it is impossible to assess the nature of the work which was invoiced and allegedly paid for, and to conclude whether or not it related to the 497 or 277 Proceeding;

in relation to the timesheet entries, if it is not redacted, the identity of the solicitors who performed the work and therefore their qualification, skills and experience is not apparent; and

in the case of the 277 Proceeding, general receipts issued by the applicants' solicitors appear to indicate that invoices were paid by a number of parties.

436 The directors submit, by way of example of overpayment, the general receipt at p 50 of exhibit 19 appears to be a receipt in respect of a payment by the second applicant, Badenport, of \$20,000 in part payment of invoice 5572. That invoice is for professional fees, office costs, disbursements and a previous balance outstanding less discount, in the total amount of \$114,296.46. The directors submit that, from the evidence before the Court, it appears Badenport has paid substantially more than a on-twentieth share. They submit the applicants have not made any attempt to plead or prove why the respondents should be liable, in effect, now to indemnify Badenport where the payment may have been paid on behalf of the applicants in the 497 Proceeding, including persons who are not parties to this proceeding. They further contend, on the other hand, that the applicants have not adduced evidence to show that Badenport was reimbursed by the other applicants, if that be the case.

437 They also submit that exhibit 19 includes trust statements consisting of entries relevantly described as "payment toward legal fees for instructing" their solicitor. The entries do not disclose that the payment of trust monies is made in respect of any particular invoice. They suggest it may be more likely that the payments of trust monies were payments towards anticipated costs and expenses, but they say no evidence about the nature of these payments has been led by the applicants. They say there is an evidentiary gap that is particularly significant where the subject matter of the solicitor's retainer agreement included matters other than court proceedings – for example, tax issues.

438 Accordingly, the directors submit the Court is not in a position to safely draw any conclusion as to whether the invoices before the Court actually or reasonably relate to the previous 497 or 277 Proceedings, nor can it be satisfied as to whether the present applicants have in fact paid the legal costs in relation to the previous proceedings, which they now claim by way of damages.

439 They also draw attention to the "retrospective" costs agreement of senior and junior counsel who acted for the applicants in the 497 Proceeding.

440 The directors submit that, in addition to "obvious difficulties" of reliance on retrospective costs agreements generally, Ms Valerie Higinbotham, called by the third and fourth respondents as an expert costs consultant, gave evidence about difficulties with the counsel's fee notes that were relied upon, including in some cases that they were quite generic and the inability to cross reference them appropriately to the solicitor's tax invoices or the work product.

441 The directors make the submission that the evidence presented by the applicants is inadequate to found a conclusion that the work done, which gave rise to those costs, was reasonable, or to quantify those costs by way of awarding damages.

Valuers' submissions

442 The valuers make similar submissions, but primarily submit that the applicants would not be able to recover their costs in the 497 Proceeding as there is no evidence to provide a basis for finding they acted reasonably in commencing and maintaining the proceeding; and such evidence as there is actually points the other way.

443 In this regard, they refer to correspondence prior to the commencement of the 497 Proceeding, including an email from Mr Robertson to syndicate members dated 30 December 2010, the letter from PPB Advisory dated 3 October 2011 explaining the liability of each of the applicants under some of the guarantees and a letter from the solicitors on behalf of Westpac dated 28 November 2011, making a demand under the guarantee and indemnity, that expressly noted the bank agreed that the maximum it could recover from each applicant was the amount that Westpac could realise from the sale of each applicant's villa.

444 The valuers say that when the 497 Proceeding was commenced, a genuine steps statement required by the Court did not put into evidence the full suite of correspondence referred to in the genuine steps statement and the second, third and fourth respondents disputed the statement.

445 They then note that following amendments to the initial statement of claim, in order to overcome the effect of the contractual arrangements between the applicants and the Bank, and the applicants and the Ibex companies, the applicants pleaded: pre-contractual representations by Ibex in the Investment Memorandum; representations made by Ibex after the applicants were already parties to the syndicate agreements; representations made by the Bank by its letter of 10 November 2008; representations made by Ibex in November 2008; representations made by Ibex in May 2010; breaches of the Development Management Agreement; and breaches of fiduciary duty.

446 The valuers submit no evidence at all has been led to explain the basis for bringing the 497 Proceeding or to establish that it was reasonable to commence that very expensive proceeding, especially given that proceedings that seek to set up pre-contract representations relied on to impugn entry into a contract are notoriously difficult.

447 It is further submitted by them that no explanation has been given as to why the applicants chose to initiate very expensive proceedings in circumstances where it was the respondents in the 497 Proceeding who had claims against the applicants.

448 They say a further matter that points against any finding that the commencement of the proceeding was reasonable, is the settlement of the action at an early date on terms that, in effect, gave the Bank and the receivers what they had claimed they were entitled to from the outset. The action was settled by the applicants on terms that each applicant pay \$250,000. They say no explanation is proffered as to why, if the claims made in the 497 Proceeding were viable claims, the action was settled at the stage it was settled, and on the terms on which it was settled. No explanation for the settlement ought to be allowed to be proffered from the bar table.

449 The valuers further submit that the fact the action was settled with the Bank on terms that each applicant hand over their villa title to the Bank underscores the submission that the applicants have not established that the commencement of the proceedings against the Bank was reasonable. The settlement gave the Bank, in effect, the total of what it was entitled to from each applicant, that is to say, there was no discount on the claim allowed by the Bank, and in effect the same as what the Bank had demanded prior to the proceedings being commenced.

Consideration

450 It must be said that there are no doubt cases where a party, rather than await the initiation of proceedings against it by another party, commences what can properly be called "defensive" proceedings, in which it seeks relief that would negate the prospective action of that other party. In effect, that is what the applicants say happened in this case when the investors commenced the 497 Proceeding.

451 The background of the 497 Proceeding, including the demands referred to above, involved at least some of the applicants believing that there was an open-ended liability demand being made against them, such that not only would the villa they would be entitled to under the joint venture and the balance of the outstanding balance due have to be paid, but also that the liability was open-ended and not limited to the security provided for by the security documents, mortgage and guarantees.

452 In my assessment, the investors cannot be said to have unreasonably commenced the 497 Proceeding in all of the circumstances. The demands made of them and the implicit threats of action against them cannot be said to have been open and shut cases of limited liability. Only in retrospect may that be said to be so.

453 It is another thing, however, whether or not the costs the applicants now seek to recover, in the event that the action of deceptive conduct had been made out, are shown to be reasonably incurred. In my view, many of the complaints made on behalf of the respondents about the quality of the evidence led in that regard, are reasonably made. The memorandum and fee notes of barristers and the lawyers' records adduced in evidence are, respectively, at a very generalised level and are highly redacted. I would have been disinclined in the circumstances to speculate about what work was done in relation to the redacted items provided in evidence.

454 There is also the difficult question of determining the relevant proportions the applicants contribution to costs incurred by a wider client group of investors, given that they were but a few of the investors overall.

455 Then there is the fair point made in respect of Badenport, that it appears to have paid beyond its investor share and yet no allowance has been made for that in the recovery process by the applicants.

456 Notwithstanding all those misgivings, and having regard to what I said above about a court doing the best it can in some cases to assess damages, I consider that, if a case of misleading deceptive conduct had been made out, some loss on account of the 497 Proceeding has been established by the applicants.

457 I would have approached the assessment of damages in respect of the 497 Proceeding by taking the amount claimed, but discounting it heavily by reason of the factors I have just mentioned, by an amount of 50%.

Costs associated with the 277 Proceeding

Chowder Bay's submissions

458 Chowder Bay contends that it had no choice but to either sue or be sued and so it commenced this proceeding as a defensive proceeding – the same proposition, in effect, as the applicants advanced in relation to the 497 Proceeding.

459 It contends that the evidence demonstrates the reasonableness of it doing so and objectively considered it had reasonable prospects of success when it commenced the proceeding, and that the settlement it achieved was reasonable.

460 It relies on the following letters, notices, court events and documents in making their submissions:

on 6 March 2008 Chowder Bay and Aqua Resort made a contract (the Chowder Bay beach house contract), whereby Chowder Bay agreed to purchase a villa known as Bay Beach House);

on or about 17 July 2009 Chowder Bay and Aqua Resort executed a deed (Chowder Bay variation deed), whereby the Chowder Bay beach house contract was varied;

on 7 April 2011 Westpac appointed receivers and managers to Aqua Resort;

on 11 July 2011 the applicants commenced the 277 Proceeding;

the 277 proceeding was commenced by an application supported by affidavits and one of the respondents was Westpac;

on 12 July 2011 the solicitors for Aqua Resort (receivers and managers appointed) purported to issue a notice of default under the Chowder Bay beach house contract and the Chowder Bay variation deed;

on 16 August 2011 the solicitors for Aqua Resort (receivers and managers appointed) purported to terminate the Chowder Bay beach house contract and the Chowder Bay variation deed;

on 29 August 2011 the applicants filed a statement of claim in the 277 Proceeding;

on 1 September 2011 an order was made in the proceeding that Westpac be removed as a party and the applicants pay Westpac indemnity costs;

on 1 September 2011 orders were made in the proceeding for Ibex Aqua (receivers and managers appointed) and Ibex Capital (receivers and managers appointed) to be joined as respondents;

on 1 September 2011 Chowder Bay and other applicants were given leave in the proceeding to amend the originating application;

on 3 October 2011 Aqua Resort (receivers and managers appointed) filed in the proceeding a notice of cross-claim against the applicants, which was supported by a statement of claim, and made claims amongst other things against Chowder Bay for liquidated damages of \$2,770,250 plus costs, expenses, fees, rates and taxes, and also forfeiture of the \$500,000 deposit

on 9 December 2011 Ibex Capital filed a defence;

on 22 December 2011 Chowder Bay and other applicants filed in the proceeding a defence to the cross-claims made by Aqua Resort (receivers and managers appointed);

on 22 December 2011 Chowder Bay and other applicants filed in the proceeding a reply to the defence of Aqua Resort (receivers and managers appointed);

on 22 December 2011 Chowder Bay and other applicants filed a reply to the defence of Ibex Capital;

on 5 July 2013 Chowder Bay and other applicants filed a re-amended statement of claim in the proceeding;

on 12 August 2013 Aqua Resort (receivers and managers appointed) and Ibex Aqua (receivers and managers appointed) filed a defence in the proceeding;

on 29 August 2013 Chowder Bay and other applicants filed a reply in the proceeding to the defence of Aqua Resort (receivers and managers appointed) and Ibex Aqua (receivers and managers appointed);

on 7 July 2014 a deed of settlement and release was executed amongst others by Chowder Bay, Aqua Resort and Ibex Aqua (receivers and managers appointed to those companies) in respect of the proceeding; and

a list of court events and documents were filed in the proceeding.

461 Chowder Bay contends that the settlement in the 277 Proceeding was a consequence of a mediation conducted in the Court, and resulted in Chowder Bay being in a better position as a result of pursuing the proceeding than had it not.

462 As above, in relation to the 497 Proceeding, Chowder Bay submits the respondents want it both ways – that is to say, that the 277 Proceeding had no prospects of success, and that the amounts paid to settle were not recoverable.

463 Again it is submitted that the legal costs incurred in prosecuting the 277 Proceeding, and the amount paid to settle it, are linked in the sense that if the settlement was reasonable, then at least some legal costs must be recoverable as the price to "litigate to that point" – that is, to the point of settlement.

Directors' submissions

464 In relation to the claim by Chowder Bay for reimbursement of the costs in the 277 Proceeding, Mr Paganin, and it may be said Mr Robertson, submit that not only do the applicants bear the onus of showing that the settlement terms were reasonable and the settlement negotiations were conducted with proper care and skill, but also that the settlement amount was paid. They say that, in the case of Chowder Bay, the receiver offered to settle for payment of the total amount of \$1,085,634, an amount significantly less than the total amount now claimed by Chowder Bay in this proceeding by way of damages.

465 I note that similar letters dated 3 October 2011 were sent by the receiver to the second, third and sixth applicants and contained without prejudice offers to settle for specified amounts.

466 The directors submit that, significantly, those offers contemplated that the applicants would keep their villas and that the Bank's mortgage would be discharged. It is submitted by them that, in assessing the reasonableness of the offers in comparison to the total amount of loss and damage now claimed, it would be necessary to have regard to the value of the unencumbered freehold title to the applicants' villas as at the date of the receiver's offer. However the applicants have not adduced any evidence of that value.

467 They also say that the applicants have not adduced any evidence as to whether the legal proceedings and settlement negotiations were conducted with proper care and skill.

468 In relation to the reasonableness of the legal costs in relation to the 277 Proceeding, the directors make submissions similar to those made in respect to the 497 Proceeding's costs, including that the applicants have failed to lead evidence which would allow the respondents and the Court to scrutinise their conduct in relation to the previous proceedings; or the basis, background or advice upon which they were commenced, prosecuted and then settled.

469 In relation to the 277 Proceeding they again draw attention to the redacted timesheets relied upon by the applicants and how they caused difficulty:

They say it is impossible to assess the nature of the work which was invoiced and allegedly paid for in the 277 Proceeding.

In relation to entries which were not redacted, the identity of who did what work and the qualification, skills and experience of any solicitors is not apparent.

In the case of the 277 Proceeding, general receipts issued appear to indicate that invoices were paid by a number of parties, including Chowder Bay, by Mr Meneghello personally and one or more other parties whose description is redacted.

470 The directors say more generally in respect of the 277 Proceeding that the applicants have not made any meaningful attempt to plead or prove the reasonableness of commencing the proceeding or of the timing in terms of settlement. It has not been alleged by Chowder Bay that it paid the deposit of \$500,000 in reliance on any of the relevant conduct of the respondents. Nor has it adduced any evidence to support such an allegation. To the contrary, its obligation to pay the deposit of \$500,000 arose under an unconditional contract which it entered into to purchase Bay Beach Villa, as varied by a deed. Under the deed of variation the deposit was increased from \$299,000 under the original contract to \$500,000 in circumstances where Chowder Bay was unable to complete its purchase under the original contract and required an extension of time.

471 I note that Mr Meneghello, through his witness statement, acknowledged that he had signed an unconditional contract of offer and acceptance and that he "had no option but to proceed with it".

472 Finally, the directors submit that insofar as Chowder Bay's claim relates to the "forfeit" of the deposit by Ibex Aqua, the deposit was forfeited upon the termination of the Bay Beach Villa sales contract. They say Chowder Bay has not pleaded or sought to prove how the consequences of its decision to enter into the original contract on 28 February 2008, and the deed of variation in July 2009, or its failure to complete its obligations and the terms of the settlement, should now entitle it to relief against the respondents in this proceeding.

Valuers' submissions

473 The valuers make a similar range of submissions. They say that Chowder Bay in the 277 Proceeding also sued the Bank when there cannot be any possible basis for doing this. Chowder Bay was obligated under its contract of sale to complete the contract to buy the Bay Beach Villa, having contracted to do so separately from its obligations arising under the syndicate agreements.

474 They note that in order to overcome the effect of that contract, Chowder Bay, in the 277 Proceeding, had pleaded pre-contractual representation by Ibex in the Investment Memorandum, made a contention that it relied on a forecast rate of return on the Grove Villa in forming a view that the return assisted in acquiring the Bay Beach Villa, contended it was not aware of the effect of the certain terms of the contract for sale for the Bay Beach Villa when it executed it, relied on representations it said were made by Ibex after the applicants were already parties to the syndicate agreements, as well as representations about financing arrangements, and claimed a breach of the Development Management Agreement. They note the action was ultimately settled on terms that Chowder Bay pay \$300,000 to the receivers.

475 The valuers contend there is no evidence to establish that this settlement sum represented any discount on the amount that Chowder Bay was liable for as a consequence of its failure to complete the sale contract.

Consideration

476 In the circumstances, as I have found in relation to the 497 Proceeding, I consider it was not unreasonable for Chowder Bay to commence the 277 Proceeding, although why it chose to sue the Bank is not clear.

477 While the valuers also raise submissions about the unreasonableness of the applicants not pursuing all respective respondents at the same time, and instead proceeding against the Bank and the Ibex companies at first, and then the directors and the valuers in this proceeding at a later time, I do not consider that forensic decision to be an unreasonable one.

478 Whilst, at least in principle, the costs of the 277 proceeding might, at least to some extent, together with the settlement sum, be considered recoverable in this proceeding, had the misleading and deceptive conduct action been established, as the directors submit there really has been little emphasis placed on the extent to which the 277 Proceeding could have succeeded. Little evidence has been led in respect of the purchase of the Bay Beach Villa under a separate contract not to do with the joint venture, and why that contract was liable to be upset.

479 If the misleading and deceptive conduct action had been made out, I would have declined to make any award of damages in respect of the 277 Proceeding because the evidence, in the event, is insufficient to satisfy me that the proceeding had a reasonable chance of success, as well as because of the general evidentiary difficulties in identifying the expenses actually incurred, which I have canvassed above in relation to the 497 Proceeding.

Conclusion and orders

480 For these reasons I would dismiss the applicants' originating application.

481 I will hear from the parties as to the orders that should now be made including as to the costs of the proceeding.

I certify that the preceding four hundred and eighty-one (481) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker.

Associate:

Dated: 3 April 2017

SCHEDULE OF PARTIES

WAD 461 of 2013

Applicants

Fourth Applicant: LESEUR PTY LTD ACN 052 291 639

Fifth Applicant: TEDDORO DEL BORELLO

Sixth Applicant: ARREDO PTY LTD ACN 009 256 606

Respondents

Fourth Respondent: BLAKE WILLIAM SMITH

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