

AUSTRALIA / JUDGMENT

Westpac Banking Corporation v Lee [2013] NSWCA 375

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Court of Appeal

Supreme Court

New South Wales

Medium Neutral Citation: Westpac Banking Corporation v Lee [2013] NSWCA 375

Hearing dates: 12 June 2013

Decision date: 11 November 2013

Before: Barrett JA at [1];

Emmett JA at [4];

Gleeson JA at [44]

Decision: 1. The appeal be dismissed.

2. The appellants to pay the respondents' costs.

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Catchwords: MISLEADING OR DECEPTIVE CONDUCT - financial services - s 12DA Australian Securities and Investment Commission Act 2001 (Cth) - where respondents had not read the documents provided by the appellants in relation to a complex financial product - where strong reservations on credit had been expressed - whether respondents were led into error by the appellants in relation to the capital protection feature - whether the appellants caused the respondents' loss - where post-facto evidence relied upon

Legislation Cited: Australian Securities and Investments Commission Act 2001 (Cth) ss 12BAA, 12BAB, 12DA, 12DB

Corporations Act 2001 (Cth) ss 708, 761G(4), 761G(7), 944A, 946A

Corporations Regulation r 6D 2.03

Uniform Civil Procedure Rules 2005 51.36(2)

Cases Cited: Browne v Dunn (1893) 6 R 67

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60; 218 CLR 592

Campbell v Backoffice Investments Pty Ltd [2009] HCA 25; 238 CLR 304

Campomar Sociedad, Limitada v Nike

International Ltd [2000] HCA 12; 202 CLR 45

Commonwealth Bank of Australia v Mehta (1991) 23 NSWLR 84

Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31

Fox v Percy [2003] HCA 22; 214 CLR 118

Henville v Walker [2001] HCA 52; 206 CLR 459

I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd [2002] HCA 41; 210 CLR 109

Johnson Tiles Pty Ltd v Esso Australia Ltd [2000] FCA 1572; 104 FCA 564

Jones v Dunkel [1959] HCA 8; 101 CLR 298

Manly Council v Byrne [2004] NSWCA 123

Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd [2010] HCA 31; 241 CLR 357

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd [1982] HCA 44; 149 CLR 191

Payne v Parker [1976] 1 NSWLR 191

Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18; 200 CLR 121

Watson v Foxman (1995) 49 NSWLR 315

Texts Cited: Oxford English Dictionary, 3rd ed (2000)

Category: Principal judgment

Parties: Westpac Banking Corporation (First Appellant)

BT Funds Management Corporation Limited (Second Appellant)

BT Funds Management No 2 Limited (Third Appellant)

Michael Lee and Majed Hawatt (First Respondents)

Sandstone Constructions Pty Limited (Second Respondent)

Representation: Counsel:

K C Morgan (Appellants)

D A McLure (Respondents)

Solicitors:

King and Wood Mallesons (Appellants)

Kennedys (Respondents)

File Number(s): CA 2012/298009

Decision under appeal Citation: [2012] NSWSC 899

Date of Decision: 2012-08-09 00:00:00

Before: Harrison AsJ

File Number(s): 2009/297860

Judgment

1BARRETT JA: I have had the advantage of reading in draft the thorough and comprehensive judgment to be delivered by Gleeson JA. For the reasons his Honour gives, this appeal should be dismissed with costs.

2I wish to emphasise one matter relevant to Ground 1 (c). The existence of circumstances which, by virtue of s 708 of the Corporations Act 2001 (Cth), displace the need for the disclosure that would otherwise be required by Part 6D.2 is irrelevant to questions of misleading or deceptive conduct under s 12DA of the Australian Securities and Investments Commission Act 2001 (Cth). Promoters who arrange investment solicitation in a way that attracts one of the s 708 exceptions do not thereby avoid the need to ensure that the terms in which the solicitation is made are, in the whole of the circumstances and context, fully informative, honest, frank and balanced.

3That leads me to a second matter. When expressions such as "capital protection", "capital preservation" and "capital guarantee" are employed in the solicitation of investment, there will be a danger of contravention of s 12DA unless the precise source and nature of the relevant assurance or support are explained.

4EMMETT JA: This appeal is concerned with whether the appellants, Westpac Banking Corporation (Westpac), BT Funds Management Limited (BT) and BT Funds Management No. 2 Limited (BT No 2) engaged in misleading and deceptive conduct in connection with the provision of financial services to the respondents, Mr Michael Lee, Mr Majed Hawatt and Sandstone Constructions Pty Limited (Sandstone). The conduct in question concerned the entry into agreements between Westpac, BT and BT No 2, on the one hand, and Messrs Lee, Hawatt and Sandstone on the other.

5Messrs Lee, Hawatt and Sandstone claimed that the conduct in question contravened s 12DA of the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act). A judge of the Court accepted that claim and declared that the agreements in question were void and unenforceable. Her Honour also gave judgment for Messrs Lee and Hawatt against Westpac, BT and BT No 2 in the sum of \$188,141 plus pre-judgment interest of \$67,145, and gave judgment for Sandstone against Westpac, BT and BT No 2 in the sum of \$191,945.48 plus pre-judgment interest in the sum of \$58,128. Westpac, BT and BT No 2 have now appealed from those orders.

Background

6The agreements in question concerned Westpac's guaranteed portfolio service (the GPS). The GPS allows a person to borrow a principal amount from Westpac to fund the acquisition of units in funds managed by BT and BT No 2 (the Funds). The investor may borrow the interest payable on the principal amount annually in advance. The GPS has a fixed term of 5 years (the Term). At the end of the Term, the repayment to the investor of the initial capital investment (the Investment), which it was allowed to borrow from Westpac, is guaranteed.

7Initially, the entire Investment is invested into the Funds but, depending upon movements in the Funds' value, part of it may be transferred into zero coupon bonds issued by Westpac. Zero coupon bonds do not generate any income and, on maturity at the expiration of the Term, would be worth no more than their face value. By switching between the Funds and zero coupon bonds, Westpac can expose the Investment to favourable investment conditions but, in the event of adverse movement in the Funds' value, can protect the Investment by transfer into zero coupon bonds that are not exposed to market risks. The transfers occur when pre-agreed levels, described as buy triggers and sell triggers, are reached in the Funds. The buy triggers and sell triggers are defined so as to ensure that the value of the Investment does not fall below the present value of the capital protected amounts.

8If, as a result of the operation of the sell triggers, 100 per cent of the Investment is allocated to zero coupon bonds, the whole Investment will remain frozen in zero coupon bonds until the end of the Term. That is to say, the capital is not reallocated to active funds for the balance of the Term.

9The GPS consists of several contracts, being an asset allocation advisory agreement (advisory agreement), a loan and security agreement and an interest loan agreement.

10On 26 June 2007, Messrs Lee and Hawatt entered into a loan and security agreement with Westpac and an advisory agreement with Westpac, BT and BT No 2. Under the loan and security agreement, Messrs Lee and Hawatt borrowed \$2 million at an annual interest rate of 8.55 per cent to fund the acquisition of units in investments managed by the Funds under the advisory agreement. Messrs Lee and Hawatt also borrowed money from Westpac to pay interest under the \$2 million loan.

11On the same day, Sandstone entered into a loan and security agreement with Westpac and an advisory agreement with Westpac, BT and BT No 2. Under that loan agreement, Sandstone borrowed \$1 million at an annual rate of 8.55 per cent to fund the acquisition of units in the Funds in accordance with the advisory agreement. Sandstone also borrowed money from Westpac to pay interest in advance on the \$1 million loan.

12Finally, on 25 June 2007, Messrs Lee and Hawatt also executed a guarantee in favour of Westpac in respect of Sandstone's obligations under its loan and security agreement with Westpac. The amount borrowed by Messrs Lee and Hawatt for interest on 25 June 2008 was the sum of \$171,000. The amount borrowed by Sandstone on 25 June 2008 for interest was \$85,500.

13On various dates between 18 March 2008 and 28 January 2009, 100 per cent of the investments of Messrs Lee and Hawatt and of Sandstone were transferred to zero coupon bonds and were thus frozen until the end of the Term. On the maturity date of 25 June 2012, Messrs Lee and Hawatt had zero coupon bonds worth \$1,728,977.10 and Sandstone had zero coupon bonds worth \$864,949.39. However, in the meantime, both Messrs Lee and Hawatt and Sandstone continued to be liable to Westpac for interest on the loans from Westpac.

14The conduct complained of by Messrs Lee, Hawatt and Sandstone consisted of an email sent by Mr Nazvanov on behalf of Westpac, BT and BT No 2 to Mr Lee on 8 June 2007 (the Email) and a conversation between Mr Nazvanov and Mr Lee on 22 June 2007 (the Conversation). The conduct alleged to be misleading and deceptive related to comparisons between the GPS and an earlier investment made by Messrs Lee and Hawatt through Westpac.

15In April or May 2004, Mr Lee met Mr Nazvanov at a seminar about stock market investment conducted at a Bankstown sports club. During the seminar, Mr Nazvanov spoke about stock market-related financial products offered by Westpac. One of the products was described as a protected equity loan (PEL). Mr Nazvanov stated that the PEL had no downside risk because it was supported by put and call options. As a result of the seminar, Mr Lee had a general understanding that the PEL provided a guarantee against capital loss. If the value of shares invested in dropped below the initial investment amount, Westpac would make up the difference.

16In May 2004, Mr Nazvanov met Mr Lee at Mr Lee's office in Kingsgrove. Mr Nazvanov told Mr Lee that the PEL was capital guaranteed and funded 100 per cent by Westpac. He said that Mr Lee did not need to put any capital in, as he could borrow the initial capital investment from Westpac, and that loan was 100 per cent capital guaranteed, so he could not lose any money. The term of the PEL could be one, two or three years.

17Mr Nazvanov said that he was uncertain about how the put and call options, which supported the PEL, worked. He then made a telephone call to Mr Moghseen Jadaat of Westpac, who explained how they worked. He told Mr Lee that Westpac would create a put option that would guarantee the value of the stock at the purchase price, so that from the beginning of the investment Mr Lee would be protected from any falls in the value of the stock below the purchase price. Mr Nazvanov recommended that Mr Lee take out a PEL with a 3-year term for several million dollars. Mr Nazvanov also provided Mr Lee with a copy of a product disclosure statement

that Westpac issued about the PEL.

18On 4 June 2004, Messrs Lee and Hawatt attended a meeting with Mr Nazvanov in their Kingsgrove office. Mr Nazvanov said that Messrs Lee and Hawatt would need to invest a large amount of money for an investment in a PEL to work for them. He suggested about \$4 million. He said that the investment term of the PEL was three years but that they could pull out early. In response to an enquiry from Mr Hawatt as to what would happen if the stock market fell, Mr Nazvanov said that the PEL was a secure investment, with the only downside being loss of interest. He said that the upside was that they could make good money on the investment if the stock market rose.

19Mr Nazvanov spoke to Messrs Lee and Hawatt about shares in News Corporation and a sugar making company. Mr Nazvanov said that there should be a mix of stocks that had potential for capital gain and good dividend income. He provided Mr Lee with recommendations as to whether to buy certain shares and in what quantity. Mr Nazvanov and Mr Lee together chose particular stocks for the proposed investment in the PEL. Messrs Lee and Hawatt then signed various forms, which involved investment of capital in the sum of \$3.8 million for a period of 3 years. They accepted and relied upon Mr Nazvanov's advice in relation to the amount to invest and the period of the investment.

20Over the 6 months from June 2004, the investment made by Messrs Lee and Hawatt performed well and the value of most of the stocks rose. In January or February 2005, they decided to close out their position on stocks that had made a good profit. On 9 March 2005, Mr Lee sent an email to Mr Nazvanov expressing pleasure at the fact that their portfolio had already generated more than \$1 million of profit.

21By November 2005, stocks in a company related to News Corporation had fallen in value. On 4 November 2005, Mr Lee received a letter from Westpac confirming an indicative loss of approximately \$11,500 on closing out their position in News Corporation. On 9 November 2005, Mr Nazvanov told Mr Lee by email that their holdings in News Corporation had been terminated. However, on 14 November 2005, Mr Lee received a copy of an email with a revised loss estimate of \$39,739.29. On 15 November 2005, Mr Lee sent an email asking for an explanation as to why the option was not covering 100 per cent of the loss. Mr Lee said that he was confused with the explanations that he received but eventually came to understand that, even though they had received the benefit of the option, which did reduce their loss on News Corporation, additional bank fees, charges and interest (break costs) had been incurred because they had closed out their holding before the end of the 3-year term and that they owed those break costs to Westpac.

22On 23 November 2005, Mr Lee gave final instructions for their position in News Corporation to be closed out. On 23 June 2006, Messrs Lee and Hawatt signed an application for a second investment in a PEL for \$1.5 million. Between June 2006 and February 2007, some of the stocks that were the subject of the second PEL increased in value, while Messrs Lee and Hawatt closed out their positions early in others. From mid 2000 onwards, other stocks in the second PEL decreased in value.

23 Having regard to his experience with the first PEL, Mr Lee realised that, while he could close out those holdings early and get the benefit of the put option, that benefit would be depleted by Westpac's break costs. Mr Lee therefore decided to retain those stocks for the term of the PEL, in the hope that their market value would recover in the meantime. Overall, Messrs Lee and Hawatt made a profit on their investments in both the first and second PEL.

24 It is against that background that the investments in the GPS took place. On 8 June 2007, Mr Nazvanov sent Mr Lee the Email, which had several attachments. The attachments were promotional brochures relating to various investment products, including the GPS and Macquarie Bank's "MQ Gateway" product. The Email said as follows:

"If you have a Sophisticated Investor certificate we can offer you another PEL-like gem this year. Please note that we shall need applications by Thu to process in time.

Please, see how the macq gateway can double the exposure to the market whilst keeping protection:

Let me know what amount you will be doing: \$1m, \$1.5m, \$2m?

The loan interest can be prepaid as per usual - in case of PEL at 7.75%, in case of Mac GT at 7.95%"

25 Messrs Lee, Hawatt and Sandstone allege in their statement of claim that, by the Email, Westpac, BT and BT No 2 represented to Mr Lee that the GPS had the same, or substantially the same, characteristics as the PEL.

26 On 18 June 2007, Mr Nazvanov sent another email to Mr Lee about investing with Westpac before the end of the financial year. On 21 June 2007, Mr Lee received a telephone call from Mr Nazvanov. Mr Nazvanov asked Mr Lee what he thought about the GPS. Mr Lee said that he had not had time to read any of the material so he did not know what the GPS was. Mr Nazvanov said that it was a great product run by Westpac's best fund manager. He said that Mr Lee did not even need to pick the stocks himself, as he had to do with the PEL, since the fund manager would choose what the best performing stocks were. Mr Nazvanov said that if Mr Lee wanted to get into the GPS, he must have a relevant certificate signed by his accountant. He said that he would send that document to Mr Lee by facsimile. Later that day, Mr Lee received a further email from Mr Nazvanov in relation to the GPS. Mr Lee did not read the attachment to that email.

27 On 22 June 2007, Mr Lee met Mr Nazvanov at the Kingsgrove office of Mr Lee and Mr Hawatt. The meeting lasted about 40 minutes. After spending about 15 minutes talking about markets in general, particular stocks and general economic conditions, the Conversation took place as follows:

"Nazvanov: Global equities are good and will keep growing in my view. Another sector, which is going to be a good performer, is the Asian sector because both the Chinese and the Indian economies are booming. The GPS product is one in which you can invest in these sectors. It is an investment run by the best fund manager. It provides the same protection as the PEL. However

for the GPS you don't need to pick the stocks as professional traders will pick the stock for you. The interest you pay on the money you borrow is only 8.5% and there is scope for a much greater return on the investment.

Lee: It sounds good but I don't want to stay in the investment for more than one year.

Nazvanov: That's ok. You will have to pay a penalty if you exit the investment before one year. But if you get out after one year and one day, you can exit without paying any penalty.

Lee: What would the penalty be if you got out within 12 months?

Nazvanov: It's about 1% - which means about \$10,000 if you invested \$1 million."

(emphasis added)

28The statement of claim alleges that by those statements Mr Nazvanov represented on behalf of Westpac, BT and BT No. 2 to Mr Lee that:

- * The GPS had the same, or substantially the same, characteristics as the PEL;
- * An investor could withdraw money from the GPS any time after the first anniversary of the initial investment.

29The statement of claim also asserts that, at no time prior to entry into the relevant agreements by Messrs Lee, Hawatt and Sandstone, did Mr Nazvanov advise them that:

- * the Term was 5 years;
- * the guarantee amount would only be paid at the completion of the Term;
- * during the Term of the agreements, BT or BT No 2 would be permitted to sell portions of their portfolio and invest the proceeds in zero coupon bonds;
- * in the event that the portfolio value was reduced to zero, 100 per cent of the investment would remain allocated to zero coupon bonds until the maturity date of 25 June 2012;
- * zero coupon bonds would not generate income, would not become worth more than their face value and were not capable of increasing in value if the value of the portfolio changed during the Term, unlike the put options in PEL that provided capital protection;
- * in the event that 100 per cent of the investment were allocated to zero coupon bonds, there was no realistic possibility that they would recover any more than the initial amounts of their investments on the maturity date;
- * a significant risk and disadvantage of the GPS was that if 100 per cent of the investment were allocated to zero coupon bonds early in the Term, to get the benefit of the guarantee they would have to keep paying interest on the loans for the whole of the Term (the Interest), while having no prospect of recovering any more than the initial amounts of their investments on the maturity date;

* a significant risk and disadvantage of the GPS was that if 100 percent of the investment were allocated to zero coupon bonds early in the Term, the Interest could exceed the difference between the break costs and the guaranteed amount payable on the maturity date;

* there were other protected equity loans offered by Westpac where the guarantee was payable after one or two years, which did not have the characteristics of the GPS described above; and

* Mr Nazvanov was not advising them about the important features and risks of the GPS.

30The statement of claim alleges that Mr Nazvanov's conduct, in sending the Email, in saying what he said during the Conversation and in not advising about the matters described above, misrepresented the characteristics of the GPS and the effect of the various agreements signed by Messrs Lee, Hawatt and Sandstone. That was alleged to be because the GPS did not have the same, or substantially the same, characteristics as the PEL and because even if they could have withdrawn their money from the GPS from the first anniversary of the initial investment, by doing so they would have forfeited the benefit of the guarantee amount, as it was not payable until the maturity date. They say that that conduct contravened s 12DA and s 12DB of the ASIC Act.

31Section 12DA(1) provides that a person must not engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive. Section 12DB(1) provides that a person must not, in connection with the supply, or possible supply of financial services, make a false or misleading representation that the services have performance characteristics. Under s 12BAB, a person provides a financial service if the person provides financial product advice or deals in a financial product. Under s 12BAB(5), financial product advice means a recommendation or a statement of opinion or a report of either of those things that is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products or could reasonably be regarded as being intended to have such an influence. Under s 12BAB(7), issuing a financial product constitutes dealing in a financial product. Financial products are defined in s 12BAA(7). It is common ground that the conduct on the part of Westpac, BT and BT No 2, about which complaint is made, falls within s 12DA or s 12DB.

32The primary judge found that representations as pleaded were made by Mr Nazvanov on behalf of Westpac, that those representations were misleading or deceptive and that Mr Lee and Mr Hawatt relied on the those representations in deciding to invest in the GPS. Her Honour therefore concluded that the loss was suffered by conduct that was misleading and deceptive in contravention of the ASIC Act.

33The issues raised by the appeal were as follows:

* whether the primary judge erred in finding that Westpac's conduct was misleading and deceptive;

* whether the primary judge erred in finding that the respondents suffered loss or damage by that conduct; and

* whether the primary judge erred in accepting Mr Lee's account of the Conversation.

34I have had the advantage of reading in draft form the proposed reasons of Gleeson JA. I agree with his Honour's conclusion that the appeal should be dismissed. I agree with his Honour's reasons for that conclusion.

35The appellants contended that the reference in the Email to "another PEL-like gem" and the statement in the course of the Conversation that the GPS "provides the same protection as the PEL" did not convey the representation that the GPS had the same, or substantially the same, characteristics as the PEL. Rather, they say, they were simply statements that the GPS and the PEL had some similarities and that statement was not misleading or deceptive.

36The appellants also contended that the statement that the GPS provided "the same protection as the PEL" was no more than a representation that the GPS provided protection in the form of a guarantee, which was the same kind of protection provided by the PEL. The appellants say that the Email and Conversation did not convey the pleaded representations. I agree with Gleeson JA that the primary judge did not err in concluding that the pleaded representations were conveyed by the Email and the Conversation.

37The appellants also contended that there was no representation that the mechanics of the PEL and the GPS were the same or that there was a put option with the GPS. They contended that there was no representation to the effect that the guarantee and the GPS commenced after one year. I agree with Gleeson JA that such a characterisation of the statement made by Mr Nazvanov in the course of the Conversation should be rejected.

38The appellants contended that the GPS and the PEL were similar in many respects. However, there were critical differences between the two products in the way in which the guarantee operated. Further, those differences had practical consequences for the respondents who entered into the GPS on the understanding that they could exit from the contract after one year and obtain the benefit of the guarantee. I agree with the conclusion reached by Gleeson JA that there was no error on the part of the primary judge in finding that Mr Nazvanov's statements were wrong, insofar as the GPS did not afford the same protection as the PEL, but instead operated in a different fashion. The respondents were not entitled to exit without penalty after one year.

39The appellants failed to disclose three significant features of the GPS as follows:

* the guarantee was only payable on maturity of the investment at the end of the Term;

* BT Funds had authority to move the invested funds between active assets and the passive zero coupon bonds; and

* funds invested in the zero coupon bonds were quarantined once the totality of the funds had been transferred into such passive assets.

40The appellants contended that the primary judge erred in finding that circumstances existed under which disclosure of those matters could reasonably be expected by the respondents. Thus, Mr Nazvanov was not a financial adviser to the respondents, he had provided the relevant information relating to the GPS by attaching the relevant brochure to the Email and there was no suggestion that Mr Nazvanov told Mr Lee and Mr Hawatt that his explanation was a complete explanation of the GPS product. As Gleeson JA says, the respondents' case below was not that the earlier dealings in relation to the PEL gave rise to an expectation that Mr Nazvanov would provide a complete explanation of the GPS product. Rather, their case was that the earlier dealings gave rise to a reasonable expectation that Mr Nazvanov would advise them about the differences between the PEL and the GPS. There was no error on the part of the primary judge in finding that the failure by Mr Nazvanov to disclose the three matters mentioned above was misleading in the circumstances.

41The appellants also contended that the primary judge should not have accepted Mr Lee's evidence that, if he had been told about the differences between the PEL and the GPS, he would not have entered into the transactions. The assessment of evidence of what would have been done if more information had been known will often be a difficult assessment to make (see *Campbell v Back Office Investments Pty Limited* [2009] HCA 25; (2009) 238 CLR 304 at [146]). I agree with Gleeson JA that the primary judge did not fall into error in giving credence to Mr Lee's evidence of what he would have done if he had known the true position concerning the difference between the PEL and the GPS. I agree with Gleeson JA for the reasons given by his Honour that even if the failure on the part of the respondents to read the documents was a cause of their loss, that was not sufficient to lead to the conclusion that there was no causative connection between the misleading conduct and the loss. There was no challenge to the finding by the primary judge that Mr Lee attributed importance to the contents of the Email and the Conversation. I agree with Gleeson JA that there was no error on the part of the primary judge in accepting Mr Lee's evidence that he would not have entered into the GPS arrangement and would have advised Mr Hawatt against doing so, had all of the features of the GPS been explained to him.

42The third issue concerns the challenge by the appellants to the primary judge's acceptance of Mr Lee's evidence of the Conversation. They contended that it was open to her Honour, in the light of the adverse credit findings made against Mr Lee, to conclude that Mr Lee had not accurately recorded the terms of the Conversation in his affidavit. I agree with Gleeson JA that that is not sufficient to demonstrate error in the fact finding of the primary judge. The appellants must establish that her Honour's conclusion was erroneous by reason of incontrovertible facts or uncontested testimony or that the decision is glaringly improbable or contrary to compelling inferences. The appellants have failed to do so.

43Some reliance was placed on the principles expounded in *Jones v Dunkel* in relation to the failure on the part of the appellants to call Mr Nazvanov to give evidence. However, there is no real question concerning the drawing of an inference. There was direct evidence, in the form of Mr Lee's affidavit, as to a version of the Conversation. It was not necessary for the primary judge

to draw an inference in order to determine what was said, as there was direct evidence on that point. The only question was whether her Honour ought to have rejected that evidence by reason of the existence of incontrovertible facts or uncontested testimony to the contrary. For the reasons given by Gleeson JA, her Honour made no error in that regard.

44GLEESON JA: This appeal concerns whether the appellants' conduct misled the respondents in relation to an investment product, which the respondents entered into with the appellants in June 2007. The product was a structured equity investment known as the Guaranteed Portfolio Service (GPS).

45The GPS was promoted by the first appellant as an investment product containing "a range of special features including 100 per cent finance and 100 per cent capital protection at maturity". At the core of the dispute is whether the respondents were led into error by the appellants in relation to the nature of the capital protection provided under the GPS.

46The primary judge (Harrison AsJ) accepted the respondents' complaint that the appellants had engaged in misleading or deceptive conduct in contravention of s 12DA of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) in connection with the provision of the GPS, and that the respondents had suffered loss by that conduct.

47The primary judge declared that certain agreements between the respondents and the appellants relating to the GPS executed on 26 June 2007, are void and unenforceable. Her Honour ordered the appellants to pay the respondents' damages in the sum of \$380,086.48. The first appellant's cross-claim seeking recovery of moneys lent to the respondents for the purpose of investing in the GPS was dismissed, and the appellants were ordered to pay the respondents' costs: see [2012] NSWSC 899.

48The appellants contend that the primary judge erred in her approach to determining whether their conduct in promoting the GPS to the respondents was misleading or deceptive. They also contend that, in any event, her Honour should not have found that the respondents relied upon any impugned conduct of the appellants in deciding to enter into the GPS investment. For the reasons given below, the appellants' submissions should be rejected and the appeal should be dismissed with costs.

The parties

49The first appellant is Westpac Banking Corporation (Westpac). The second appellant is BT Funds Management Limited (BT Funds) and the third appellant is BT Funds Management No 2 Limited (BT No 2) (together, BT). The first respondents are Michael Lee (Mr Lee) and Majed Hawatt (Mr Hawatt). The second respondent is Sandstone Constructions Pty Ltd (Sandstone), a company of which Mr Lee is the sole director.

The GPS

50The primary judge described the operation of the GPS by reference to a promotional brochure published by Westpac: at [3]-[12]. It is unnecessary to repeat that material here as it runs to over four pages. It is sufficient to briefly describe the GPS to aid comprehension of these reasons.

51The terms of the GPS are embodied in written agreements described respectively as a loan and security agreement and an asset allocation advisory agreement. The GPS was available to investors with considerable sums to invest (the minimum being \$500,000 or \$250,000 in more than one fund). The GPS was said by the promotional brochure to provide "capital protection", by Westpac guaranteeing "that your initial investment amount will be 100 per cent protected at maturity" (emphasis added). Westpac was also prepared to lend 100 per cent of the amount of the investment to the investor, as well as an "interest loan" to pre-pay the interest.

52The investor was invited to place funds in one or more of six wholesale managed funds managed by BT. Five of the six were share funds (local and international) and one was based on property.

53Westpac was to manage the investments by what was termed "Dynamic Portfolio Management". This was described in the brochure as a "capital preservation technique which involves the act of allocation between 'active' and 'passive' assets". Two paragraphs of the brochure explained this technique as follows:

"When you enter into the GPS, 100% of the investment capital will be placed into the Fund, thus offering the greatest potential for capital growth. However, should the value of the Fund drop to a point where a Sell Trigger is reached, the exposure to the Fund will be reduced and the exposure to the Westpac Bond will be increased. Conversely when the value of the Fund recovers and a Buy Trigger is reached, the exposure to the Fund will be increased and the exposure to the Westpac Bond will be decreased.

These triggers are defined as the percentage fall in the value of the Fund that will result in the value of the Dynamic Portfolio falling to a value equal to the Bond Floor. The Dynamic Portfolio is an investment portfolio comprising the investment in the Fund and the Westpac Bond. The Bond Floor is the present value of the capital protected amount. The table below shows the Buy, Sell and Profit Triggers for each of the Funds."

54Thus, under the GPS, the "active" assets comprised the Fund, being one of six wholesale managed funds from BT. The "passive" asset comprised the "Westpac Bond" which was a zero coupon bond issued by Westpac.

55The brochure also described what would occur at maturity (in this case, 25 June 2012) as follows:

"On the Maturity Date, you can either:

1 Continue to hold your units in the Fund without capital protection. Westpac may offer a capital protected investment with similar terms at that time.

2 Sell your units in the Fund.

In either case, if the value of the Dynamic Portfolio on the Maturity Date is less than your original investment amount (adjusted for any early redemptions), Westpac will make a guarantee payment to you for the difference.

If the Dynamic Portfolio contains any Westpac Bonds on the Maturity Date, the Westpac Bonds will be redeemed and the proceeds will be paid to you."

56The asset allocation advisory agreement was entered into between Westpac (as the asset allocation adviser), BT Funds No 2 and BT Funds (as fund manager) and the investor. The relevant terms of the advisory agreement included:

(1)that the appointment of Westpac as the asset allocation advisor will terminate on the Maturity Date (cl 12.1);

(2)the Maturity Date is defined in cl 17.1 to mean "25 June 2012";

(3)the investor authorised Westpac to sell portions of the active asset portfolio and invest the proceeds in the fixed income portfolio so that the allocations of the investments were consistent with the respective target allocations specified in the Asset Allocation Advice (cl 2.3);

(4)the payment of the "Guaranteed Payment Amount" by Westpac to the investor on or as soon as practicable after the "Guarantee Payment Date" (cl 3.1); and

(5)the Guaranteed Payment Date was defined as the first date on or after the Maturity Date on which the unit price for Units in the relevant managed fund as at the Maturity Date, is published by the fund manager.

Factual background

PEL investments

57Prior to investing in the GPS in June 2007, Mr Lee and Mr Hawatt had invested in another financial product provided by Westpac, referred to as a "Protected Equity Loan" (PEL). The PEL provided a guarantee against capital loss at maturity. This was an attractive feature of the PEL, because it reduced the risk of the investment. The mechanism by which the capital protection was provided by the PEL involved a put option that gave the borrower the right to require Westpac to purchase any parcel of securities, held by the investor under the PEL at the Maturity Date, for an amount equal to the loan advanced in respect of that parcel of securities.

58As explained below, although the put option was only exercisable by the investor at the Maturity Date, the capital protection in a PEL was capable of yielding a benefit to the investor in the event of early termination, through the sale of the underlying put options. There was no such mechanism in the GPS.

59In June 2004, Mr Lee and Mr Hawatt invested the sum of \$3,800,000 in the first PEL for a period of three years. This investment performed well, as it occurred at a time when the value of most of the stocks which were the subject of the investment increased.

60In June 2006, Mr Lee and Mr Hawatt entered into a second PEL. The amount invested on this occasion was \$1,500,000. The value of some of the stocks the subject of this investment increased and the respondents closed out some of their positions early between June 2006 and February 2007. However, by mid 2007, some of the stocks which were the subject of the second PEL had decreased in value. Mr Lee decided to retain those stocks for the term of the second PEL investment in the hope that their price might recover in the meantime.

61Up until mid 2007, Mr Lee and Mr Hawatt made an overall profit on both PEL investments.

GPS investments

62In May 2007, Mr Nazvanov of Westpac contacted Mr Lee in relation to making a further investment before the end of the 2007 financial year. One of the financial products suggested by Mr Nazvanov was the GPS. This was a new investment product offered by Westpac. It was described in Westpac's promotional brochure as "a unique investment opportunity". The critical communications between Mr Nazvanov and Mr Lee in June 2007 in relation to the GPS product are referred to at [77]-[79] below.

63Ultimately, on 26 June 2007, Mr Lee and Mr Hawatt invested \$2,000,000 in the GPS, allocating \$1,000,000 to each of BT Wholesale Focus Australian Share Fund and BT Wholesale Asian Share Fund. They funded this investment by applying for and obtaining an investment loan from Westpac of \$2,000,000 and selected a fixed interest rate of 8.55 per cent for the first year. They also obtained an "interest" loan for \$171,000 to pre-pay the interest for the 2007/2008 year.

64Sandstone also invested \$1,000,000 in the GPS on 26 June 2007, allocating \$500,000 to each of BT Wholesale Focus Australian Share Fund and BT Wholesale Asian Share Fund. Sandstone applied for and obtained an investment loan from Westpac to finance its \$1,000,000 investment and selected a fixed interest rate of 8.55 per cent for the first year. They also obtained an "interest" loan for \$85,500 to pre-pay the interest for the 2007/2008 year.

Events after the GPS investments

65In May 2008, Mr Lee decided to exit the GPS investment shortly after the first anniversary date of 26 June 2008. He inquired of a representative of Westpac as to whether the respondents could do so without penalty. He was informed that he could not because the term of the GPS investment was five years and the capital protection was only available at the end of that five years, not beforehand.

66The respondents' case at trial was that this was the first time that Mr Lee became aware that the capital protection for the GPS was only available at the expiration of five years. Mr Lee gave evidence, which was accepted, that up until this time, based upon advice he had received from Mr Nazvanov of Westpac, he believed that he could exit the GPS after one year and one day without penalty and with the protection of the capital guarantee.

67After discussing the inability to exit early without penalty with Mr Hawatt, Mr Lee decided to continue with the GPS loans for a further 12 months, until 25 June 2009. This involved Mr Lee and Mr Hawatt borrowing a further \$171,000 to pay the interest accruing on the \$2,000,000 loan to 24 June 2009, and Sandstone borrowing a further \$85,500 to pay the interest accruing on the \$1,000,000 loan to 24 June 2009.

68The wholesale managed funds selected by the respondents for the GPS investments were affected by turbulence on world financial markets during 2008. In late August 2008, Westpac commenced the redemption of various units held by the respondents in these funds.

69By 27 November 2008, all of the respondents' units in the BT Wholesale Focus Australian Share Fund and most of their units in the BT Wholesale Asian Share Fund had been redeemed by Westpac and the proceeds used to acquire Westpac zero coupon bonds.

70Westpac sent letters dated 27 November 2008 to the respondents, described as "Cleanup Calls", in relation to both GPS investments. These letters advised the respondents that Westpac had fully liquidated the investments in the active asset portfolio, by redeeming the remaining units in the underlying managed fund, and used the proceeds to invest in the fixed income portfolio. As a consequence, the amount invested in the Westpac zero coupon bonds was less than the respondents' initial investments.

71The respondents' case at trial was that upon reading these letters of 27 November 2008, Mr Lee became aware for the first time that under the GPS, Westpac could transfer the entire amount of the investments into zero coupon bonds and that there would be no further reallocation to other active assets for the five year life of the GPS investment. Thus it became apparent to Mr Lee that the respondents could never effectively make any profit on the investment, but would have to continue to pay interest on the GPS loans at a rate in excess of the interest rate which the zero coupon bonds would attract.

72On 7 October 2009, the respondents gave written notice purporting to rescind the GPS advisory agreements and GPS loan agreements.

73On 15 October 2009, Westpac sold the respondents' holdings of Westpac zero coupon bonds, purportedly in exercise of its powers of sale under the GPS investments.

74The parties agreed below that the respondents had paid Westpac \$380,086.48 pursuant to the GPS loan agreements and the GPS interest loan agreement. This is the amount which the primary judge assessed as the respondents' damages: at [184].

The respondents' claims

75The respondents claimed against the appellants on various bases including negligence. At the trial, it was accepted by the parties that determination of the respondents' claim pursuant to s 12DA of the ASIC Act would be decisive of the remainder of their claims.

76The respondents alleged that the appellants engaged in misleading conduct in two respects. First, by misrepresenting two matters concerning the GPS, and secondly by failing to disclose certain features of the GPS to the respondents.

77As to the first category of conduct, the respondents' pleaded claim asserted that two express representations were made by Mr Nazvanov of Westpac to Mr Lee:

(1)That the GPS products had the same, or substantially the same, characteristics as the protected equity loans that Mr Lee and Mr Hawatt had previously obtained from Westpac.

(2)That the respondents could withdraw their money from the GPS products any time after the first anniversary of the initial investment.

78The first representation was said to be contained in an email dated 8 June 2007 from Mr Nazvanov to Mr Lee, the terms of which the primary judge set out at [82], and repeated during a meeting on 22 June 2007 between Mr Nazvanov and Mr Lee. The second representation was said to have been conveyed during the meeting on 22 June 2007, the relevant terms of which were set out by the primary judge: at [87]. It will be necessary to return to the content of the 8 June 2007 email and the 22 June 2007 conversation when considering Grounds 1 and 3 of the amended notice of appeal.

79As to the second category of conduct, the respondents pleaded that the appellants failed to disclose various matters relating to the GPS, in circumstances where disclosure was reasonably expected by the respondents, including that:

(1)The term of the investment was five years and that the capital guarantee only related to the investment term, that is, the amount payable on maturity.

(2)The invested funds would move between BT Funds and the zero coupon bonds.

(3)Once 100 per cent of the funds was transferred to zero coupon bonds no further transfers back into other investments would occur, and there was no possibility that the respondents would recover more than the initial investment.

The judgment below

Credit findings

80The primary judge made various findings about Mr Lee's credit: at [34]-[43]. Those findings involved a combination of assessments of Mr Lee's demeanour and concessions that he made false statements to Westpac in the course of applying to borrow money for investments under the PELs and the GPS. Her Honour concluded that Mr Lee's evidence should be treated with caution and considered in light of contemporaneous documentation: at [46].

81Despite the adverse credit findings, the primary judge accepted Mr Lee's evidence of the meeting on 22 June 2007: at [47]. In making that finding, the primary judge took into account that Mr Lee's evidence was not contradicted by Mr Nazvanov, who did not give evidence although an affidavit had been filed from him: at [45]; that Mr Lee's account of the meeting was not challenged in cross-examination: at [48]; and that Mr Lee's evidence of the meeting was consistent with what he repeated to Mr Hawatt on 24 June 2007, before Mr Hawatt signed the GPS documents: at [48]. Her Honour (at [47]) also had regard to the necessity that the words spoken be proved with a degree of precision sufficient to enable the Court to be reasonably satisfied that they were in fact misleading in the proved circumstances: *Watson v Foxman* (1995) 49 NSWLR 315 at 318-319 per McLelland CJ in Eq.

Misleading conduct

82The primary judge commenced her analysis of the misleading or deceptive conduct claim by noting two matters: at [118]. First, there was no dispute that Mr Nazvanov's dealings with the respondents were in trade or commerce and were in relation to financial services. Secondly, Westpac admitted that Mr Nazvanov was authorised by Westpac to represent the appellants for the purpose of marketing the GPS.

83The primary judge referred (at [121]) to the well-known statement of principle by McHugh J in *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; 218 CLR 592 at [109] that:

"The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself."

84The primary judge recorded that she would adopt the same approach as the plurality in *Butcher* at [40] (Gleeson CJ, Hayne and Heydon JJ). This approach was that in assessing whether conduct was misleading, regard would be had to the nature of the parties, the character of the transaction contemplated and the contents of the document containing the impugned representation. The primary judge observed that in the present case, this last factor was to be equated to the conduct of Mr Nazvanov and the 8 June 2007 email: at [124].

85The primary judge examined what she described, in shorthand, as the two "positive representations" separately from what was described as the "representation by silence". Her Honour found that the appellants made the two positive representations as pleaded; the first being contained in the 8 June 2007 email and the second conveyed during the 22 June 2007 meeting between Mr Nazvanov and Mr Lee: at [132].

86It is in respect of this finding that the appellants complain that the primary judge failed to examine whether the pleaded representations were established by the evidence at trial.

87The primary judge then identified the relevant question as being whether Mr Nazvanov's conduct (constituted by the statement in the 8 June email and what he said at the 22 June 2007 meeting) was misleading and deceptive having regard to the course of conduct as a whole, in light of the surrounding facts and circumstances: at [132].

88The primary judge noted the appellants' submission that Mr Nazvanov's conduct was not misleading or deceptive because there were similarities between the PEL and the GPS products, and that this was correct: at [134].

89The primary judge accepted that the GPS and the PEL were similar in many respects. This included that: both involved the lending of money for investment purposes and offered a guarantee at the end of the term of the agreement, that the lender would pay the investor no less than the amount of capital invested; both products also offered investors the possibility of paying interest on the capital loan in advance on an annual basis; both products allowed for the capital investment to be borrowed in its entirety by way of interest only loan and interest on the capital loan could also be borrowed; and the tax effectiveness of each transaction was a similar feature of both: at [135].

90Nonetheless, the primary judge found that the critical difference between the two products was the way in which the capital guarantee operated: at [136], and that these differences had practical consequences for the respondents: at [137].

91Her Honour's finding as to the critical difference in the way in which the capital guarantee operated is important for an appreciation of the competing contentions as to whether the evidence established that the pleaded representations had been made by Westpac. Her Honour found that:

"[136] However, the critical difference between the two products is the way the capital guarantee operated:

- Under a PEL, a sum of money could be borrowed to purchase securities from a list approved by Westpac for a term of 1, 3 or 5 years. The loan was 100% capital protected at maturity and that protection was achieved by a put option that gave the borrower the right to require Westpac to purchase any parcel of securities, held by the investor under the PEL agreement at the maturity date, for an amount equal to the loan advanced in respect of that parcel of securities. Westpac hedged its potential liability under the put option by placing on the ASX tradable put options in relation to the securities purchased by the investor.

- The put option was only exercisable at the maturity date. However when an investor terminated a PEL before the maturity date, Westpac would calculate the 'Break Costs' by taking into account the value of the underlying tradeable options at the date of termination. So in the case of a security that had fallen in value, causing its corresponding option to rise in value, Westpac would sell the option for a profit and credit that amount to the investor (see what happened when the plaintiffs sold their holding in NWSLV, referred to above).
- Therefore, in a PEL, the capital protection was capable of yielding a benefit to the investor in the event of early termination, through the sale of the underlying put options. There was no such mechanism in the GPS.
- In a PEL, the investor's money stayed invested in the security and therefore retained the capacity to recover value in a rising market. In the GPS, the capacity of the investment to recover losses may be inhibited and eventually destroyed by reallocations to zero coupon bonds. The zero coupon bonds were not tradeable and were not redeemable any time before maturity. At maturity they would not be worth more than face value."

92After considering the similarities and differences between the PEL and the GPS products, her Honour found that the two "positive representations" were misleading and deceptive, because they misled the respondents into thinking (contrary to the true position under the GPS) that the GPS had substantially the same characteristics as the PEL and that they could withdraw their investment in the GPS after one year without losing all of the capital protection: at [145].

93In relation to the "representation by silence", the primary judge found that Mr Lee and Mr Hawatt had a reasonable expectation that Mr Nazvanov would advise them about the differences between the PEL and the GPS. The circumstances giving rise to that expectation were their lack of real sophistication or understanding of complex financial products (of which Mr Nazvanov was aware from his earlier explanation as to specific features of the PEL investments), coupled with the positive misrepresentations found to have been made by Mr Nazvanov: at [150].

94The primary judge found that the appellants' conduct constituted by the "representation by silence" was misleading, except to the extent that the respondents alleged that Mr Nazvanov should have told them that there were other protected equity loans offered by Westpac. This was unnecessary as the respondents were well aware of the existence of the PEL product, having entered into two such investments previously: at [152].

95The primary judge then turned to consider the effect of the written material provided by the appellants to the respondents in relation to the GPS product, and whether this negated any misleading and deceptive conduct. Her Honour referred to the appellants having relied on this written material "By way of defence to the representation by silence ..." at [153]. Whilst this sentence expressed the significance of the GPS documentation too narrowly (a matter which the respondents properly conceded), at [157]-[161] her Honour did take into account the GPS documentation when evaluating the whole of the appellants' conduct, in particular the positive representations which she found had been made.

96The primary judge accepted that the GPS brochure contained certain information relating to how the GPS worked: at [155] and that the respondents had made various declarations (to Westpac) about the risks involved in the GPS and that they had not relied on any representation or advice from Westpac: at [156]. The primary judge found that these standard form clauses were not brought to the attention of the first respondents, in the context where Mr Nazvanov was being asked specific questions about the intricacies of the GPS: at [157].

97The primary judge also found the disclosures in the GPS brochure and the generic declarations and clauses in the application form (for the GPS investment) did not have the effect of communicating to the respondents any relevant qualification in respect of Mr Nazvanov's advice: at [158]-[160]. The primary judge found that the misleading or deceptive conduct of Mr Nazvanov was undisturbed by the conduct of Mr Lee and Mr Hawatt in failing to read any of the GPS documents: at [165].

98On the issue of reliance and causation, the primary judge found that Mr Lee would not have entered into the transaction if the features of the GPS had been properly explained to him, and that the conduct of Mr Nazvanov (on behalf of the appellants) caused Mr Lee's losses: at [173].

99As to the claim by Mr Hawatt, the primary judge found that his damage was caused by conduct of Westpac, because Mr Hawatt would not have agreed to invest in the scheme had he known the key features of the GPS, and Mr Nazvanov knew that his advice (to Mr Lee) would be relayed to Mr Hawatt by Mr Lee: at [179].

Issues on appeal

100The issues raised by the notice of appeal are as follows:

(1)Whether the primary judge erred in finding that Westpac's conduct was misleading and deceptive, in particular, by failing to assess Westpac's conduct as a whole, including the summary and contractual documents provided by Westpac to the respondents, and by failing to take into account certain aspects of the respondents' conduct (Grounds 1 and 3).

(2)Whether the primary judge erred in finding that the respondents suffered loss or damage by Westpac's conduct:

(a)in relying on Mr Lee's ex post facto evidence of what he would have done;

(b)in finding that Mr Lee was an agent on behalf of Mr Hawatt; and

(c)in not taking into account the decision by Mr Lee and Mr Hawatt to not read any of the documents provided by Westpac, which the primary judge found contained the correct information in relation to the transactions the respondents were entering into (Ground 2).

(3)Whether the primary judge erred in finding Mr Lee's account of a meeting with a representative of Westpac on 22 June 2007 had to be accepted, because Mr Lee was "not discredited" in relation to that particular meeting, in circumstances where the primary judge had expressed strong reservations about Mr Lee's credit (Ground 4).

Submissions

101The appellants contended that the primary judge's reasons disclosed three errors.

102The first contention is that the primary judge's approach to the determination of whether Westpac's conduct was misleading or deceptive revealed an overarching conceptual error. This error was said to involve three aspects:

(1)that the primary judge failed to examine whether the pleaded representations were made out on the evidence at trial;

(2)that the primary judge failed to assess the relevant conduct of the appellants as a whole, but instead isolated parts of the impugned conduct from the remainder of the relevant facts and circumstances;

(3)that the primary judge failed to take into account certain matters relating to the status of the respondents and the declarations they had made that they had read and understood the documents and understood the risks.

103Next, on the issue of reliance and causation, the appellants contended that the primary judge should not have placed any weight on the evidence of Mr Lee and Mr Hawatt that, had they been told about the differences between the GPS and the PEL products, then they would not have entered into the GPS investments.

104Finally, the appellants contended that the primary judge should not have accepted Mr Lee's evidence of the conversation on 22 June 2007, in circumstances where her Honour had expressed strong reservations about Mr Lee's credit generally, and Mr Lee's evidence of this meeting was said to be inconsistent with Westpac's documentary material and inherently incredible. The appellants also submitted that the absence of any challenge to Mr Lee's evidence concerning the conversation was not a matter where the rules in *Browne v Dunn* (1893) 6 R 67 or *Jones v Dunkel* [1959] HCA 8; 101 CLR 298 applied.

Grounds 1 and 3 - Misleading conduct

105Two questions arise in the context of the claim based on s 12DA of the ASIC Act. First, did the appellants engage in the conduct complained of, and secondly, if so, was such conduct misleading or deceptive or likely to mislead or deceive?

106Insofar as the impugned conduct is constituted by the two representations as set out at [77] above, the first question is relevantly stated as, was each representation conveyed to the respondents?

107The appellants' primary submission was that the two pleaded representations were not in fact contained in or conveyed by the 8 June email and the 22 June meeting.

Representations conveyed?

8 June 2007 email

108The context of this email is that Mr Nazvanov initiated contact with Mr Lee by telephone in around May 2007, asking if Mr Lee was interested in making a further investment before the end of the 2007 financial year. Following this telephone call, Mr Nazvanov sent certain investment materials and emails to Mr Lee. These included the 8 June 2007 email. The "Subject" of this email is described in the header as "PEL's or GPS at 8.50% or macq gateway at 8.5%". The email included eight attachments. One of the attachments was described in the email as "WestpacGPS-MarketingFINAL.pdf". This was Westpac's promotional brochure in relation to the GPS product. In the email, Mr Nazvanov stated:

"Michael,

If you have a Sophisticated investor certificate we can offer you another PEL-like gem this year. Please, note that we shall need application by Thu next week to process in time.

...

Let me know what amount you will be doing: \$1m, \$1.5m, \$2m?

The loan interest can be prepaid as per usual- in case of PEL at 7.75%, in case of Mac GT at 7.95%." (emphasis in original)

109Mr Lee gave evidence that he had a quick look at the email, but did not open nor read any of the attachments. The appellants did not really challenge this evidence in cross-examination. Mr Lee said that he understood from the email that Mr Nazvanov was inviting him to enter into another PEL with Westpac, or something similar. Her Honour accepted this evidence: at [83]. There is no challenge to this finding.

22 June 2007 meeting

110The context of the meeting on 22 June 2007 is recorded by the primary judge at [84]-[86] as follows: Mr Nazvanov had telephoned Mr Lee on 21 June 2007 and asked whether Mr Lee had received Mr Nazvanov's emails and what he thought about the GPS product. This was a reference to, amongst others, the 8 June email. Mr Lee replied that he had not had time to read any of the material, so he did not know what the product was. Mr Lee suggested a meeting the following day to discuss the matter.

111The primary judge recorded what happened at that meeting as follows:

"[87] On 22 June 2007 at about 5.00pm, Mr Lee met Mr Nazvanov at the Kingsgrove office. Mr Hawatt was not present at the meeting as he was overseas at the time. The meeting lasted about 40 minutes. Mr Nazvanov and Mr Lee spent 15 minutes talking about markets in general, particular stocks and general economic conditions. They then had a conversation to the following effect:

'Nazvanov: Global equities are good and will keep growing in my view. Another sector which is going to be a good performer is the Asian sector because both the Chinese and the Indian economies are booming. The GPS product is one in which you can invest in these sectors. It is an investment run by the best fund manager. It provides the same protection as the PEL. However for the GPS you don't need to pick the stocks as professional traders will pick the stock for you. The interest you pay on the money you borrow is only 8.5% and there is scope for a much greater return on the investment.

Lee: It sounds good but I don't want to stay in the investment for more than one year.

Nazvanov: That's ok. You will have to pay a penalty if you exit the investment before one year. But if you get out after one year and one day, you can exit without paying any penalty.

Lee: What would the penalty be if you got out within 12 months?

Nazvanov: It's about 1% - which means about \$10,000 if you invested \$1 million."

(emphasis in original)

112The primary judge's findings in relation to the subsequent communications between Mr Lee and Mr Hawatt concerning the proposed GPS investment, included:

"92 Early in the evening on 24 June 2007, Mr Hawatt went over to Mr Lee's house and a conversation took place in words to the following effect:

Hawatt: So tell me about this investment and why we are doing it.

Lee This one is just like the PEL investment. It's 100% capital protected. It's run by Westpac's best fund managers, they choose the shares and when to buy and sell. We only have to stay in the product for one year and one day and our interest payments are only 8.5%. I think the investment should make some money and we only have to remain in the investment for just over one year.

Hawatt: Ok, that sounds good.'

93 As previously stated, I accept Mr Lee's account of the conversation between Mr Nazvanov and himself at the meeting on 22 June 2007. His version of the conversation is corroborated by what he told Mr Hawatt occurred at that meeting."

113The appellants' primary submission is that Mr Lee's evidence, as accepted by the primary judge, did not establish the pleaded representations concerning the GPS. The appellants' alternative submission is that Mr Lee's evidence of the 22 June 2007 should not have been accepted. This is dealt with below under Ground 4.

114The finding of the primary judge (at [132]), that the "two positive representations" occurred, is based on the terms of the 8 June email and her Honour's acceptance of Mr Lee's evidence of the 22 June meeting. The appellants correctly complain that her Honour does not explain why she reached this conclusion. It is possible that her Honour considered the conclusion to be obvious from the evidence she had accepted and therefore it did not require further reasons. However, in view of the appellants' complaint, it is necessary to consider the matter afresh.

Same characteristics representation

115The appellants submitted that the statement in Mr Nazvanov's 8 June email to "another PEL-like gem" and his statement at the 22 June 2007 meeting that it (the GPS) "provides the same protection as the PEL", did not convey the "same, or substantially the same characteristics" representation as pleaded.

116As to the "PEL-like gem" statement, the appellants contended that this was merely a statement that the products had some similarities, and that such a statement was accurate.

117As to the "same protection as the PEL" statement, the appellants contended that, at best, this was a representation that the GPS provides the same protection, in the form of a capital guarantee, as the PEL, but did not convey the pleaded representation. The appellants argued that certain evidence given by Mr Lee in cross-examination supported this contention.

118In my view, these submissions should be rejected.

119First, the meaning to be given to the words used by Mr Nazvanov in his email and at the 22 June meeting, is to be derived from the circumstances and context in which those words were used.

120Relevantly, that context included that Mr Lee had two existing PEL investments; that the capital protection provided by the PEL was an attractive feature to Mr Lee, and this was known to Mr Nazvanov, because it reduced the risk of the investment: at [54]-[55], and that the put option operated to provide a benefit on early termination of particular investments the subject of the PEL, subject to the extra fees, charges and interest arising on early termination: at [67].

121The context also included that Mr Lee had previously exercised early termination rights in respect of some of those PEL investments and he had learned from his experience with the first PEL, as Mr Nazvanov was aware that he could terminate those holdings early and get the benefit of the put option, although some of that benefit would be overtaken with Westpac's break costs: at [78].

122Secondly, the message conveyed by the "another PEL-like gem" statement in association with the "same protection as the PEL" statement was more than simply that the PEL and GPS products had "some similarities" or that the GPS provided protection "in the form of a capital guarantee" as did the PEL. Both statements concerned the likeness or sameness of the two investment products. Both statements were unqualified. Both statements emphasised that the GPS had the same capital protection as the PEL, which made the GPS attractive like the PEL.

123Thirdly, whilst the word "like" has a range of meanings including "having the same characteristics or qualities as some other person or thing; of approximately identical ... character, etc, with something else; similar; resembling; analogous": Oxford English Dictionary, 3rd ed (2000), when used by Mr Nazvanov in conjunction with the word "gem", which suggests something greatly prized, the natural meaning conveyed by the "another PEL-like gem" statement is that the GPS product had the same characteristics or qualities as the PEL product, being characteristics or qualities which made the PEL attractive.

124Furthermore, the ordinary meaning of the word "same" is "identical": Oxford English Dictionary, 3rd ed (2000). This was also the natural meaning of the word "same" when used by Mr Nazvanov in the "same protection as the PEL" statement, in the context of referring to the capital protection feature of both products. It was used by Mr Nazvanov without any qualifications being attached to the description of the capital protection feature of both products.

125Taken together, the statements by Mr Nazvanov conveyed to Mr Lee that the GPS had the same or substantially the same characteristics as the PEL.

126Fourthly, contrary to the appellants' written submissions, which only referred to part of the cross-examination of Mr Lee extracted by the primary judge at [143], Mr Lee's evidence confirmed that he understood Mr Nazvanov's "same protection as the PEL" statement to mean that the GPS provided "also the same product and guarantee with the put option in it". That is, Mr Lee understood that the capital protection under the GPS was identical to that under the PEL. The relevant passage of the cross-examination is as follows:

"Q: Another major reason you chose the GPS was because it provided you a capital guarantee like the PEL, is that correct?

A: That is correct.

Q: And when you say in your statement at paragraph 46, have you got paragraph 46 there? Page 9 of your statement?

A: Which?

Q: Page 9. If you go six lines down with the part that you have got what Mr Nazvanov was telling you, he said, 'It provides the same protection as the PEL'?

A: That is right.

Q: And you understood that to mean it provided the same capital guarantee as the PEL, is that right?

A: Also the same product and guarantee with the put option in it.

Q: You said a moment ago that the reason you chose the GPS is that it provided a capital guarantee like the PEL, is that right?

A: That's right.

Q: And where you say Mr Nazvanov says, 'It provides the same protection as the PEL', you understood that to be it meant it provided a capital guarantee to your investment amount?

A: Yes."

127Counsel for the appellants submitted that the affirmative answer by Mr Lee to the last proposition set out above (that he understood Mr Nazvanov to be saying that the GPS provided a capital guarantee of the investment amount), overcame his earlier answer that he understood the "same capital guarantee as the PEL" to include the "guarantee with the put option in it". In my view, this submission should not be accepted for the following reasons.

128The stated context of the last question extracted above was the earlier answer by Mr Lee to the question why he chose the GPS: because it provided a capital guarantee like the PEL. This was different to the context of the immediately preceding question, which concerned what Mr Lee understood the "same protection as the PEL" statement to mean. Mr Lee's answer, which was not subsequently challenged by the cross-examiner, reflected his understanding that it was the same capital "guarantee with the put option in it". This was a reference to the put option in the PEL.

129This evidence of Mr Lee given in cross-examination, which the primary judge accepted (at [87]), supported the respondents' case that the pleaded representation was conveyed by Mr Nazvanov's email and statements at the 22 June meeting. It was not contrary to the respondents' case as submitted by the appellants.

Early exit representation

130It will be recalled that the second representation asserted by the respondents was that Mr Nazvanov said at the 22 June meeting they "could withdraw their money from the GPS products any time after the first anniversary of the initial investment". This was alleged to be misleading because the respondents could not withdraw their money from the GPS with the benefit of the capital guarantee, which was not payable until the Maturity Date (being 5 years after the date of the initial investment).

131The appellants submitted that Mr Nazvanov's statement concerning exit without paying any penalty, did not make out the pleaded representation. They contended that there was no representation that the mechanics of the PEL and GPS were the same, or that there was a put option with the GPS. They also contended that there was no representation to the effect that the capital guarantee in the GPS commenced after one year.

132In my view, this characterisation of Mr Nazvanov's statement is overly narrow and should be rejected.

133First, the appellants' approach to the meaning conveyed by Mr Nazvanov's "early exit" statement seeks to isolate a component of Mr Nazvanov's statement to Mr Lee on 22 June 2007 from the remainder of Mr Nazvanov's statements at the meeting. This approach is contrary to authority, which requires that impugned words not be viewed in isolation from other words or their context: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44; 149 CLR 191 at 199. The whole of Mr Nazvanov's statements are to be considered to determine the meaning conveyed by the "early exit" statement.

134Secondly, the context of Mr Nazvanov's "early exit" statement was that it was immediately preceded by his "same protection as the PEL" statement, when describing the capital protection feature of the GPS. Mr Lee responded that that "sounded good", but told Mr Nazvanov that he did not want to stay in the GPS investment for more than one year. Thus, the context of Mr Nazvanov's "early exit" statement was whether the respondents could withdraw their money from the GPS after one year, having just been assured Mr Lee that the GPS product provided the "same protection" as the PEL product.

135Thirdly, viewed in context, the "early exit" statement conveyed the message, as found by the primary judge (at [144]), that the capital guarantee would still operate on early exit after one year, because Mr Nazvanov had assured Mr Lee that the GPS provided the "same protection" as the PEL, in which the put option helped to cover any charges associated with early exit.

136In my view, the primary submission of the appellants, that the pleaded representations were not conveyed by the email and the statements made at the 22 June meeting, fails.

Was the appellants' conduct misleading or deceptive?

137The arguments on appeal next focussed on whether, accepting that Mr Nazvanov said, in effect, that the PEL and GPS products had the same or substantially the same characteristics, including the same capital protection, and gave an assurance about early exit without paying any penalty, were those statements misleading or deceptive. The appellants submitted that such statements were not misleading because the statements were correct.

138A related issue is whether Mr Nazvanov's failure to disclose the differences between the GPS and PEL products was misleading or deceptive.

Conceptual error in the primary judge's approach?

139The appellants contended that the primary judge failed to assess the relevant conduct of the appellants as a whole, which included the GPS documentation provided to the respondents which explained how the GPS operated.

140In my view, this is not a fair reading of her Honour's judgment. As explained at [95] above, although the first sentence of her Honour's judgment at [153] expressed the significance of the GPS documentation too narrowly as being by way of defence to the so-called "representation by silence" claim, at [157]-[161], her Honour did take that documentation into account when evaluating the whole of the appellants' conduct, in particular the positive representations which she found had been made by Mr Nazvanov. In my view, there is no substance in this complaint.

141As to whether the appellants' conduct was misleading or deceptive, there is no issue on appeal as to the applicable principles. The dispute relates to their application by the primary judge.

142Conduct will be misleading or deceptive if it induces or is capable of inducing error: *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA 1572; 104 FCA 564 at [63]; approved in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; 241 CLR 357 at 368 [15] per French CJ and Kiefel J. This is a question of fact to be determined in the context of the impugned conduct and the relevant surrounding facts and circumstances.

143In the present case, the focus of attention is on the impact of the impugned conduct on the respondents: *Campomar Sociedad, Limitada v Nike International Ltd* [2000] HCA 12; 202 CLR 45 at [63].

Same or similar products?

144The appellants' submissions emphasised, as the primary judge acknowledged, that the GPS and the PEL products were similar in many respects: at [135]. Nonetheless, the primary judge was correct to observe two matters. First, that there were critical differences between the two products in the way in which the capital guarantee operated: at [136]. Secondly, that these differences had practical consequences for the respondents, who the primary judge found had entered into the GPS on the understanding that they could exit and obtain the benefit of the capital guarantee (or at least a partial benefit, as derived from the put options under the PEL) after one year: at [137].

145As already noted at [127]-[128] above, the appellants' submission that Mr Lee understood the "same protection as the PEL" statement as simply that the GPS product provided a form of capital protection, should not be accepted. This submission also ignored Mr Lee's evidence, which was accepted by the primary judge, that what persuaded him to invest in the GPS was the capital guarantee and his understanding that it was possible to pull out of the GPS investment without penalty after one year: at [138].

146In my view, there was no error in the primary judge's finding that Mr Nazvanov's statements were wrong, because the GPS did not afford the same protection as the PEL (in fact it worked quite differently) and the respondents could not exit without penalty after one year: at [139].

Early exit?

147The appellants also complained that the primary judge erred in accepting Mr Lee's understanding of what Mr Nazvanov meant when he told him "after one year and one day, you can exit without paying any penalty". The primary judge found that Mr Lee understood that statement to mean that although interest was payable, "break fees" were not payable: at [141].

148At [143] the primary judge recorded the cross-examination of Mr Lee on this topic. The cross-examiner sought to undermine Mr Lee's evidence by suggesting to him that it was implausible that he understood Mr Nazvanov to have said that there was a one per cent penalty for early exit within 12 months of the GPS product, but that the respondents could exit without penalty, that is, without any break costs, after that date.

149The primary judge viewed Mr Lee's evidence somewhat differently. Her Honour did not accept that Mr Lee understood that there would be no break costs associated with an early exit of the GPS. This was because Mr Lee had previously paid break costs under the PEL when terminating investments in November 2005. Those break costs related to bank charges, fees and interest. Nonetheless, her Honour found that Mr Nazvanov's assurance that there would be no penalty after one year misled Mr Lee to believe that the capital guarantee would still operate on early exit, even if there were break fees to be paid: at [144]. The appellants challenged this finding. They submitted that the finding is irrational because it accepts Mr Lee understood the investment was for five years but despite that, he could be in the same position in relation to the capital guarantee after one year as after five years.

150However, her Honour's finding at [144] as to what Mr Lee understood Mr Nazvanov to mean was not irrational. Her Honour's finding was that Mr Lee interpreted Mr Nazvanov to mean that the capital guarantee would still operate on early exit, even if there were break fees to be paid. It was open to her Honour, who had the benefit of appraising Mr Lee's evidence, to accept that this was a credible interpretation, in light of Mr Lee having been told by Mr Nazvanov that the GPS provided the same protection as the PEL, in which the put option helped to cover any charges associated with early exit.

Failure to disclose

151The circumstances in which silence or non-disclosure of information can be misleading or deceptive are various: *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* at [16].

152The primary judge at [147] correctly stated the relevant principles with reference to *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*, where French CJ and Kiefel J referred with approval to statements of Black CJ and Gummow J in the Full Court of the Federal Court in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31. French CJ and Kiefel J said:

"[18] ... Silence, as Black CJ said in his concurring judgment, was to be assessed as a circumstance like any other:

the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive.

Gummow J referred to the limitation that 'unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist.'" (Citations omitted)

153The significant features of the GPS which the respondents claimed that the appellants failed to disclose are set out at [79] above. They related to the capital guarantee only being payable on maturity of the investment, which was five years; the authority of BT Funds to move the invested funds between active assets and the passive zero coupon bonds; and the quarantining of invested funds in the zero coupon bonds once 100 per cent of the funds were transferred into such passive assets.

154The appellants contend that the primary judge erred in finding that circumstances existed where disclosure of those matters was reasonably expected by the respondents: at [150]. The appellants' submissions highlighted that Mr Nazvanov was not the respondents' financial adviser, that he had provided the relevant information concerning the GPS by attaching the GPS product brochure to his 8 June 2007 email, and that there was no allegation by the respondents that Mr Nazvanov told them that his explanation purported to be a complete explanation of the GPS product. It was contended that nothing further, by way of disclosure, was required of Mr Nazvanov.

155In the present case, which involves dealings between individuals or individual entities, as opposed to conduct which is directed to members of the public, the characterisation of conduct consisting of, or including, non-disclosure of information is to be undertaken by reference to its circumstances and context: *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* at 369 [19]-[20]. Thus, the knowledge of the person (in this case Mr Lee and Mr Hawatt) to whom the conduct is directed may be relevant, as may be the existence of common assumptions and practices established between the parties, such as their dealings in relation to the PEL investments.

156Whether non-disclosure is to be characterised as misleading or deceptive, having regard to a reasonable expectation of disclosure, is to be assessed objectively. In this regard, antecedent erroneous assumptions or beliefs or high moral expectations held by one person of another, which exceed the requirements of the general law and the prohibition imposed by the statute, are to be disregarded: *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* at [20]-[21] per French CJ and Kiefel J.

157These submissions should be rejected for the following reasons.

158First, although not formally appointed as the respondents' financial adviser, the relationship between Mr Nazvanov and the respondents was clearly one of a promoter of financial products to potential investors, including the respondents.

159Secondly, the GPS, like its predecessor the PEL, was undoubtedly a complex financial product. Mr Nazvanov was aware from his telephone conversation with Mr Lee on 21 June 2007, that Mr Lee had not read any of the material attached to the 8 June 2007 email and that Mr Lee had stated that he did not know what the GPS product was. It was Mr Nazvanov who suggested to Mr Lee that they meet the following day to discuss the matter, being the potential investment by the respondents in the GPS. Mr Lee decided to wait for Mr Nazvanov to explain the GPS product at the 22 June meeting: at [86]. These findings were not challenged.

160Thirdly, the primary judge found that Mr Nazvanov knew or ought to have known that Mr Lee was unlikely to have appreciated certain characteristics of the GPS, and would not appreciate them without an explanation: at [151]. The appellants challenged this finding, but, in my view, no error has been shown in light of the critical differences between the PEL and GPS products, which her Honour found had practical consequences for the respondents: at [137], and the fact that Mr Nazvanov knew that Mr Lee had not read the GPS brochure, and it was Mr Nazvanov who suggested the meeting with Mr Lee to explain the GPS product.

161Fourthly, the primary judge found that the evidence in relation to the earlier PEL investments demonstrates Mr Lee's and Mr Hawatt's reliance on Mr Nazvanov for an explanation as to specific features of financial products: at [150]. The appellants also challenge this finding but, again, in my view, no error has been shown. The appellants emphasised that they affected the PEL and GPS investments for the respondents on an execution only basis, that is, there was no statement of advice. However, the absence of a statement of advice, which was not required under the Corporations Act 2001 (Cth) in relation to wholesale investors: see s 761G(4) and s 761G(7), Corporations Act, does not detract from the relationship between Mr Nazvanov and the respondents, being that of a promoter of structured equity investments to investors in the share market (in the case of the PEL), and in wholesale managed funds (in the case of the GPS).

162The appellants' contentions also ignore the findings of the primary judge in relation to the dealings between Mr Nazvanov and Mr Lee and Mr Hawatt in relation to the initial PEL investment in May 2004: at [50]-[62]. These findings are inconsistent with the appellants' "execution only" characterisation of those dealings.

163In particular, on the specific issue of how the put and call options for the PEL worked, at a meeting with Mr Lee in May 2004, Mr Nazvanov had telephoned another employee of Westpac, Mr Jadwat, using a speaker phone, to answer Mr Lee's questions: at [54]. Later, at a meeting with Mr Lee and Mr Hawatt on 4 June 2004, Mr Nazvanov gave an explanation that the only downside risk with the PEL was loss of interest: at [59], and provided Mr Lee with recommendations as to whether or not to buy certain shares, and in what quantity: at [61]. When Mr Lee terminated some of the PEL investments early in November 2005, he found the whole thing very difficult to understand, even with the explanations provided by Mr Poon of Westpac: at [67]. Mr Nazvanov was copied in on these email communications: see Blue 587-602.

164Fifthly, the appellants' reliance upon *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84 is, in my view, misplaced. The question whether an inadequate explanation will be misleading or deceptive will always depend upon the context and circumstances in which the explanation is given.

165Mehta deals with factual circumstances quite different from the present. It concerned whether the failure by the bank to give complete and accurate advice about all aspects of the transaction, which the investor was minded to enter, was misleading or deceptive. This Court held that it was not because in the circumstances of that case, the investor did not expect a complete explanation of the transaction: Mehta at 89A per Samuels JA, at 92 see per Meagher JA and at 104-105 per Waddell AJA. On the other hand, Mehta emphasises that the provider of the financial product will be liable if the advice which it tenders is misleading or deceptive.

166In the present case, the primary judge found that Mr Nazvanov knew of Mr Lee's limited capacity to understand complex financial products: at [127]. The appellants challenge this finding, but it is well supported by her Honour's findings concerning the dealings between Mr Nazvanov and Mr Lee and Mr Hawatt in relation to the initial PEL investment in May 2004, and the findings in relation to Mr Lee's difficulty in understanding the explanation provided by Westpac in relation to termination of some of the PEL investments in November 2005.

167Further, contrary to the premise underlying the appellants' submissions, the respondents' case below was not that those earlier dealings in relation to the PEL investments gave rise to their reasonable expectation that Mr Nazvanov would provide a complete explanation of the GPS product. Rather, the case as propounded and as accepted by her Honour was that those circumstances gave rise to the respondents' reasonable expectation that Mr Nazvanov would advise them about the differences between the PEL and the GPS products.

168The primary judge found that those differences included the three matters which the respondents complained that Mr Nazvanov had failed to disclose: see [79] above.

169These were strikingly different features of the GPS product compared to the PEL product. In my view, there was no error in the primary judge's finding that the failure by Mr Nazvanov to disclose these matters was misleading: at [152].

Failure to take into account aspects of the respondents' conduct

170The appellants contended in Ground 1(c) that the primary judge failed to take into account four aspects of the respondents' conduct as part of the surrounding circumstances, when assessing whether the appellants' conduct was misleading or deceptive.

171The first matter concerns the alleged failure to take into account the respondents' status as wholesale or sophisticated investors and their provision of an accountant's certificate within s 708(8) of the Corporations Act and Corporations Regulation 2001 (Cth) 6D.2.03. This contention is incorrect. The primary judge took this matter into account at [126]. Her Honour noted, amongst other things, that the respondents' qualifications for "wholesale client" status was based on the value of their assets and income.

172Satisfaction of such criteria in the case of the respondents did not establish that they had expertise in understanding and using financial products like the GPS. The accountant's certificate given pursuant to s 708(8)(c) of the Corporations Act simply relieved the appellants from the obligations imposed on financial services licensees to give disclosure in relation to certain financial services provided to "retail clients". This included, where personal advice is given, that a statement of advice must be provided: s 944A and s 946A, Corporations Act.

173The fact that the respondents were not "retail clients" of the appellants for the purposes of Part 7.7 of the Corporations Act, did not mean that the conduct of Mr Nazvanov in making representations about the characteristics of the GPS was not capable of being misleading or deceptive.

174The second and third matters concern the alleged failure to take into account the respondents' declaration to the appellants that they had read and understood the GPS documents, and understood the risks.

175Again, this contention is incorrect. The primary judge took these matters into account at [85], [86], [140] and [154]-[165]. Her Honour accepted that Mr Lee told Mr Nazvanov that he had not read the GPS document and that he waited for Mr Nazvanov to explain the GPS product at the 22 June meeting: at [85]-[86].

176The appellants complain that the primary judge described the declarations and clauses in the application form signed by the respondents as "standard form clauses": at [157]. However, there is no challenge to her Honour's finding at [157], that there was no evidence that the appellants specifically brought these clauses to the attention of the respondents, in the context where Mr Nazvanov was being asked specific questions by Mr Lee about intricacies of the GPS.

177The declarations and clauses by the respondents could only erase the misleading conduct of Mr Nazvanov by actually modifying such conduct: *Butcher v Lachlan Elder Realty Pty Ltd* at [152] (McHugh J); *Havyn Pty Ltd v Webster* [2005] NSWCA 182 at [86]-[96] (Santow, Tobias JJA and Brownie AJA); *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; 238 CLR 304 at [130].

178There was no error in her Honour's finding, at [159], that the declarations and clauses in the application form (which had not been specifically drawn to Mr Lee's attention), did not have the effect of communicating to the respondents any relevant qualifications to Mr Nazvanov's advice.

179The fourth matter concerns the alleged failure to take into account the respondents' rejection of the offer of specific financial advice. This matter may be put aside, as it was not the subject of evidence at the trial, and no submissions were made in support of this complaint on appeal.

180In my view, Grounds 1 and 3 of the amended notice of appeal are not made out.

Ground 2 - Reliance and causation

181The appellants contended that the respondents were the authors of their own loss because they failed to read any of the relevant documents in relation to the GPS product.

182The relevant principles are to be found in *Henville v Walker* [2001] HCA 52; 206 CLR 459 at 468 [13] where Gleeson CJ said:

"It will commonly be the case that a person who is induced by a misleading or deceptive representation to undertake a course of action will have acted carelessly, or will have been otherwise at fault, in responding to the inducement. The purpose of the legislation is not restricted to the protection of the careful or the astute. Negligence on the part of the victim of a contravention is not a bar to an action under s 82 unless the conduct of the victim is such as to destroy the causal connection between contravention and loss or damage."

Ground 2(a) - Mr Lee's evidence

183The appellants contended by Ground 2(a) that the primary judge should not have accepted Mr Lee's evidence that had he been told about the differences between the PEL and GPS products he would not have entered into the transaction. The appellants pointed to the statement by the plurality in *Campbell v Backoffice Investments Pty Ltd* at 353 [146] (per Gummow, Hayne, Heydon and Kiefel JJ), that the assessment of evidence of what would have been done if more information had been known may not be easy. So much may be accepted.

184Nonetheless, in the present case, there was no error, in my view, in the primary judge giving credence to Mr Lee's evidence of what he would have done if he had known the true position.

185First, the primary judge accepted Mr Lee's evidence that initially he did not want to pursue another investment because he and Mr Hawatt were already exposed with the second PEL and Mr Lee did not want to be exposed to the share market much beyond the middle of 2008, as he believed that sometime after that there would probably be some kind of downward correction: at [89]. The appellants did not directly challenge this finding in their Uniform Civil Procedure Rules 2005 51.36(2) statement. However, they did challenge this finding in passing when challenging her Honour's findings on causation in relation to Mr Lee, at [173], and in relation to Mr Hawatt, at [179].

186This challenge to her Honour's factual finding is to be considered in the light of two matters. The first is that there was no challenge in cross-examination of Mr Lee in respect of the relevant paragraph of his affidavit where this evidence was given by him: Blue 17C-E. The second is that the appellants have not established on appeal, that the primary judge's conclusion was erroneous

by reason of incontrovertible facts or uncontested testimony or that the decision is glaringly improbable or contrary to compelling inferences: *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [28], [29]. For these reasons, the appellants' indirect challenge to the finding at [89] must be rejected.

187Secondly, the primary judge accepted Mr Lee's evidence that the major factor that changed his mind was that, like the PEL, the GPS provided a capital guarantee and the GPS seemed to be an improvement on the PEL. This was because, based on what Mr Nazvanov had told him, he could pull out any time after 12 months without penalty. Mr Lee thought this would avoid the problem he experienced in November 2005 with the first PEL: at [89]. There is no challenge to this finding.

188Ground 2(a) of the amended notice of appeal is not made out.

Ground 2(b) - Mr Lee was Mr Hawatt's agent

189The appellants contended by Ground 2(b) that the primary judge erred in finding that Mr Lee was an agent of Mr Hawatt for the purposes of receiving information from Mr Nazvanov: at [181]-[183].

190The appellants made no submission, either written or oral, in support of Ground 2(b). It may be taken that this ground was not pressed.

Ground 2(c) - Failure to read documents

191The appellants contended by Ground 2(c) that the primary judge did not take into account Mr Lee's and Mr Hawatt's decision not to read the GPS documentation.

192The respondents submitted that this contention is incorrect. The respondents' submission should be accepted. As explained below, the primary judge did consider the respondents' failure to read the GPS documents both in the context of characterisation of the impugned conduct, and on the causation issue.

193It is not surprising that her Honour addressed the significance of the respondents' own conduct in the way in which she did. This is because although characterisation of the impugned conduct and determination of causation of the claimed loss said to result from it are logically distinct questions, there may be practical overlaps in the resolution of these questions: *Campbell v Backoffice Investments Pty Ltd* at [24] per French CJ.

194Thus, when addressing the characterisation of the appellants' conduct at [162]-[165], the primary judge considered the appellants' submission that, by not reading the GPS documentation, the respondents had carelessly disregarded their own interests in order to make a profit on the share market.

195The primary judge was not satisfied that Mr Nazvanov's misleading or deceptive conduct was disturbed by the respondents' failure to read the GPS documentation, so that the respondents carried responsibility for their own losses: at [165]. There is no error in this finding. Mr Lee made clear to Mr Nazvanov that he had not read the documents attached to the 8 June email, that he

did not know what the GPS product was and that Mr Lee decided to wait for Mr Nazvanov to explain the product at the 22 June meeting. The primary judge found that what was said by Mr Nazvanov at that meeting was reasonably understood by Mr Lee to be an explanation of what the GPS documents contained: at [160]. There is no challenge to this finding.

196The primary judge returned to the significance of the respondents' failure to read the GPS documentation when considering the issue of causation. At [171], her Honour correctly stated the relevant principle on causation. It is unnecessary for conduct to be the sole cause of loss; it is enough that it be a cause of the loss or damage sustained: *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* [2002] HCA 41; 210 CLR 109 at 128 [57], 130 [62] and furthermore, the conduct must have materially contributed to the loss: *Henville v Walker*.

197In applying this principle, the primary judge correctly observed that even if the respondents' failure to read the documents was a cause of their loss, this did not necessarily deprive Mr Nazvanov's misleading conduct of its causative effect, provided that conduct materially contributed to the respondents' loss: at [171].

198The primary judge went on to find that Mr Lee attributed importance to what Mr Nazvanov told him both in the 8 June email and at the 22 June meeting: at [172]. There is no challenge to this finding.

199At [173], her Honour accepted Mr Lee's evidence that he would not have entered into the GPS investments and would have advised Mr Hawatt against doing so, had the features of the GPS been properly explained to him. The appellants challenged this factual finding on two bases.

200First, it was contended that the primary judge should have found that the respondents had participated in highly risky share market investments for significant profit up to and including June 2007 and their decision to continue to participate in such investments, namely, the GPS investments, was because they had done so with significant success up to that time. In short, the contention is that the respondents were prepared to take a risk as to how the GPS operated, in not reading the documentation, because their earlier investments had been largely profitable.

201This contention ignores the findings of the primary judge, which are not challenged, concerning Mr Lee's initial reluctance to pursue another investment in June 2007, and that the major factor which changed his mind was that the GPS investment provided a capital guarantee and the GPS seemed to be an improvement on the PEL: see [187] above. The respondents' decision to participate in the GPS was predicated upon the existence of a guarantee against capital loss, which the respondents believed was available by reason of the benefit of a put option like under the PEL, if they withdrew from the investment after one year.

202Secondly, it was contended that the primary judge did not take into account that the GPS investments only failed for the respondents (in 2008) because of the global financial crisis.

203This contention is not to the point. Although Mr Lee gave unchallenged evidence that he believed that there would probably be some kind of downward correction in the share market sometime after the middle of 2008: at [89], this was not evidence that he was prepared to invest in

the GPS in complete disregard to whatever risks attached to that investment. Nor was it ever put to Mr Lee or Mr Hawatt, and there was no other evidence that either of them anticipated in June 2007, what was later to become known as the "global financial crisis", but they nevertheless chose to invest in the GPS despite anticipating such a risk.

204In my view, there was no error in her Honour's finding that the conduct of Mr Nazvanov caused Mr Lee's loss: at [173] and Mr Hawatt's loss: at [179] and [183].

205Ground 2(c) of the amended notice of appeal is not made out.

Ground 4 - Acceptance of Mr Lee's evidence

206The appellants challenged the primary judge's acceptance of Mr Lee's evidence of the conversation with Mr Nazvanov on 22 June 2007: at [47].

207In oral argument, the appellants submitted that it was "open" to the primary judge to find, having regard to the adverse credit findings against Mr Lee (at [34]-[43]), that Mr Lee had not accurately recorded in his affidavit the conversation with Mr Nazvanov on 22 June 2007.

208However, this is not sufficient to demonstrate error in the primary judge's fact finding.

209In order to succeed on appeal, the appellants must establish that the primary judge's conclusion was erroneous by reason of incontrovertible facts or uncontested testimony or that the decision is glaringly improbable or contrary to compelling inferences: *Fox v Percy* at [28], [29].

210The credibility findings of the primary judge included Mr Lee's evidence as to what Mr Nazvanov said at the 22 June 2007 meeting: at [44]. It must be accepted in this regard that her Honour had the very considerable advantage of seeing both Mr Lee and Mr Hawatt give their oral evidence, and thus was able to bring to bear aspects of judgment and appraisal that are simply unavailable to this Court: *Fox v Percy* at [23].

211The primary judge approached Mr Lee's evidence of the 22 June meeting with caution: at [46]. Her Honour properly took into account the need for the respondents to prove the alleged oral representations with a sufficient degree of precision: at [47]. Her Honour's acceptance of Mr Lee's evidence was not inconsistent with any incontrovertible facts or uncontested testimony.

212Nor was Mr Lee's evidence glaringly improbable or contrary to compelling inferences. Mr Nazvanov's 8 June email described the GPS as "another PEL-like gem". It was Mr Nazvanov, as the promoter of the GPS product, who suggested the meeting with Mr Lee to discuss the GPS document, in the context of Mr Lee telling him that he had not read the attachments to the email and did not know what the product was. The GPS brochure described the capital protection feature of the GPS as one of its "special features".

213 It is not glaringly improbable that Mr Nazvanov made the "same protection as the PEL" statement to Mr Lee when explaining the GPS product. The GPS brochure described the capital protection feature of the GPS as one of its "special features".

214 Mr Nazvanov knew that Mr Lee had closed out some of the investments under the PEL early. Again, it is not glaringly improbable that Mr Lee raised the issue of "early exit" under the GPS with Mr Nazvanov, or that Mr Lee made the "early exit" statement.

215 The appellants' written submissions also complained about the matters which the primary judge took into account in accepting Mr Lee's evidence of the 22 June 2007 meeting. Those matters were:

(1) Mr Lee's evidence was not contradicted by Mr Nazvanov, the only other person who was present at the meeting: at [45].

(2) Mr Lee was cross-examined about his account of what Mr Nazvanov said at the meeting, however, his account was not challenged: at [48(3)].

(3) Mr Lee's evidence of the meeting was consistent with his report of it to Mr Hawatt on 24 June 2007: at [48].

216 As to the first matter, the appellants submitted that there were no contemporaneous documents which supported Mr Lee's description of what occurred at the meeting. However, the absence of a corroborating note of the conversation is not, in and of itself, fatal to accepting Mr Lee's evidence.

217 Furthermore, the appellants' submission ignores the terms of the 8 June 2007 email which described the GPS as "another PEL-like gem". Mr Lee's account of what Mr Nazvanov said at the 22 June 2007 meeting, in particular that the GPS "provides the same protection as the PEL", is not inconsistent with the language used in the 8 June email, nor inherently incredible, as submitted by the appellants.

218 As to the second matter, the appellants submitted that the primary judge erred in concluding that as Mr Lee's version of the conversation was not challenged in cross-examination, it was "necessary" for her Honour to find that the conversation occurred.

219 The respondents correctly submit that this is not an accurate statement of her Honour's reasons.

220 The primary judge did not say that such a finding was "necessary" as a consequence of Mr Lee's evidence being left unchallenged in cross-examination. Rather, the primary judge accepted Mr Lee's evidence of the meeting, taking into account that it was not challenged in cross-examination, it was consistent with the evidence of what Mr Lee repeated to Mr Hawatt two days later, and was not contradicted by evidence from Mr Nazvanov: at [48] and [93].

221As to the third matter, the appellants submitted that the primary judge was in error in taking into account that Mr Lee's evidence of the 22 June meeting was consistent with what he told Mr Hawatt had occurred at the meeting, because Mr Hawatt's evidence of what Mr Lee told him was said to be in different terms. The appellants point to the slight difference between Mr Lee's evidence of his reporting to Mr Hawatt: "This one is just like the PEL investment ..." and Mr Hawatt's evidence of what Mr Lee told him: "It is exactly like the other PEL investments ...".

222In my view, the respective accounts of Mr Lee and Mr Hawatt of their 24 June 2007 conversation are relatively indistinguishable. The slight difference in language given in the account by Mr Hawatt does not diminish the primary judge's conclusion that Mr Lee's account of the 22 June 2007 meeting was consistent with what he repeated to Mr Hawatt on 24 June 2007: at [48].

223The appellants' related submission that the primary judge should not have found that Mr Nazvanov made the "early exit" statement, because this necessarily included an implied finding by her Honour that Mr Nazvanov lied when discussing the effect of the GPS with Mr Lee, should not be accepted. The appellants did not identify any part of the judgment to support this submission. Furthermore, Mr Nazvanov's state of mind, as to which no evidence of was given by him, was not in issue.

224Ultimately, counsel for the appellants properly accepted in oral argument that the primary judge could have accepted that Mr Nazvanov made a mistake when explaining the GPS to Mr Lee. Such an inference was reasonably open, given there was no evidence that Mr Nazvanov had either read some or all of the GPS documents, or that he understood the complexities of how the GPS product operated.

225The appellants' submission that the absence of any challenge to Mr Lee's evidence of the meeting on 22 June 2007 was not a breach of the rule in *Browne v Dunn*, may be ignored. In accepting Mr Lee's evidence of the 22 June meeting, the primary judge made no reference to, and did not proceed upon the basis that there had been a breach of the rule in *Browne v Dunn*.

226Finally, the appellants submitted that in drawing a *Jones v Dunkel* inference in relation to the failure to call Mr Nazvanov, the primary judge failed to identify the relevant inference that is available to the respondents. This submission is without foundation.

227At [45], the primary judge stated that the inference to be drawn from the absence of evidence from Mr Nazvanov, was that it would not have not assisted the appellants' case, in particular, as to the representations alleged to have occurred at the meeting on 22 June 2007.

228The conditions for the operation of the principle in *Jones v Dunkel* were clearly satisfied in the present case: *Manly Council v Byrne* [2004] NSWCA 123 at [53] per Campbell J (Beazley JA, as her Honour then was, and Pearlman AJA agreeing) citing *Payne v Parker* [1976] 1 NSWLR 191 at 201-202 per Glass JA. In particular:

(1)The absent witness, Mr Nazvanov, could be expected to be called by the appellants rather than the respondents.

(2)Mr Nazvanov's evidence would elucidate a particular matter, relevantly the alleged oral representations made by him to Mr Lee at the 22 June meeting.

(3)Mr Nazvanov's absence was unexplained. As to this, the appellants had filed an affidavit by Mr Nazvanov but made a tactical decision not to read that affidavit.

229As to the second condition referred to above, the rule in *Jones v Dunkel* only applies where a party is "required to explain or contradict" something. In this regard, as explained by Gleeson CJ and McHugh J in *Schellenberg v Tunnel Holdings Pty Ltd* [2000] HCA 18; 200 CLR 121 at [51]:

"What a party is required to explain or contradict depends on the issues in the case as thrown up in the pleadings and by the course of evidence in the case. No inference can be drawn unless evidence is given of facts 'requiring an answer'. (Footnotes omitted.)"

230In the present case, the pleadings, the affidavit evidence as filed and the openings of the parties gave rise to contestable facts as to what was said by Mr Nazvanov to Mr Lee at the 22 June meeting.

231Having found, at [44], that Mr Lee's evidence of the meeting of 22 June 2007 was not discredited in any way, the primary judge stated the relevant *Jones v Dunkel* inference in conventional terms. This was that it might be inferred that the evidence of the absent witness, if called, would not have assisted the party who failed to call that witness.

232This inference was available to the primary judge and entitled her Honour to take that into account, in deciding whether to accept Mr Lee's evidence, which related to the disputed conversation on which Mr Nazvanov could have given evidence. In those circumstances, no complaint can be made in relation to the drawing of a *Jones v Dunkel* inference.

233In my view, Ground 4 of the amended notice of appeal is not made out.

Orders

234None of the grounds of appeal are made out. The orders that I propose are:

(1)The appeal be dismissed.

(2)The appellants to pay the respondents' costs.

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