

16/10; [2010] VSC 129

SUPREME COURT OF VICTORIA

**STRUCTURED PROPERTY PTY LTD v TIRLI-BENNETT & ANOR**

Williams J

23 February, 16 April 2010

**CIVIL PROCEEDINGS – TRADE PRACTICES – ALLEGED BREACH OF S9 FAIR TRADING ACT 1985 AND THE TRADE PRACTICES ACT 1974 (CTH) – CLAIM FOR DAMAGES IN THE MAGISTRATES' COURT – PURCHASE OF RENT ROLL – REPRESENTATIONS AS TO LIKELY LOSSES OF LANDLORDS – WHETHER CONDUCT MISLEADING OR DECEPTIVE – WHETHER REPRESENTATIONS IN TRADE OR COMMERCE – LOSS OF A COMMERCIAL OPPORTUNITY – ASSESSMENT OF LOSS – FINDING BY MAGISTRATE THAT CLAIM NOT MADE OUT AND THAT DEFENDANT WAS NOT ENGAGED IN TRADE OR COMMERCE WHEN THE REPRESENTATIONS WERE MADE – 'IN TRADE OR COMMERCE' – CLAIM DISMISSED – WHETHER MAGISTRATE IN ERROR: FAIR TRADING ACT 1985, SS9, 159; TRADE PRACTICES ACT 1974 (CTH) SS4(2), 6(3), 52, 82.**

S. brought a claim under s6(3) of the *Trade Practices Act 1974* (Cth) ("TPA") because certain misleading or deceptive conduct was said to have occurred in the course of a telephone conversation between Ms Bennett (B.) and Mr Stefan Deffert, a director of S. S. alleged that B. had engaged in the impugned conduct by making a misrepresentation about likely losses from a 'rent roll' which it had purchased in March 2008 from I. (in liquidation). S. claimed to have suffered loss and damage as a result of having purchased the rent roll acting in reliance upon B.'s alleged misrepresentations about the losses and it sought compensation for loss of 'management income' and the alleged resale value of the rent roll. The magistrate – in dismissing the claim for damages – concluded that the claim should fail because the conduct of B. was not 'in trade or commerce' as she was not engaged in any business activity when the representations were made. Also, that B. only inadvertently failed to mention certain phone calls to landlords. Upon appeal—

**HELD: Appeal dismissed.**

1. The Magistrate's conclusion that B. inadvertently failed to mention 30-35 phone calls was clearly open on the evidence. Although B. may have appreciated the value of the rent roll and its vulnerability in terms of loss of landlords, she said that she did not believe that it was her responsibility to tell Mr Deffert about the negotiations. She also claimed that Mr Deffert did not ask her about other negotiations and that she did not consider the 30 to 35 landlords she had contacted to be 'losses', explaining that 'those clients were going to go wherever the rent roll was going to go'. The Magistrate took into account the informal nature of the conversations between Mr Deffert and B. when deciding the probability of her deliberately remaining silent about the calls she had made.

2. In relation to the contention that B.'s conduct was 'in trade or commerce', it was open to the Magistrate to conclude that B. was not engaged in any business dealing, or existing trade or commerce, with S. when she made the impugned statement. B. was not employed by anyone at the time of the conversations and that she would not have charged for answering enquiries about the rent roll, if she had not been given work afterwards. Further, B.'s subsequent charges related to the four hours' work she did later and she did not charge for the telephone calls separately. In those circumstances, the Magistrate's conclusion was open. It was also open on the evidence for the Magistrate to conclude that B. was not acting in the trade or commerce between the liquidator and S., given his findings that she was not employed by I. or S. and that she was not to be paid to answer calls relating to the rent roll. Sometimes there may be a fine line between conduct which is in trade or commerce and that which is not.

3. Damages under s159 of the *Fair Trading Act* and s82 of the TPA are to compensate for the loss sustained by reason of contraventions of the respective acts. There must be a causal link between the conduct and the loss claimed. S. claimed the loss of income which it alleged it would have received had the 28 properties lost to S. been transferred to it. It also claimed some loss of the resale value of the rent roll. Even had there been evidence establishing such loss, it could not be causally linked to the representation made by B. S. did not forego the opportunity to enter into a contract with I. which would have delivered the claimed amounts to it. In other words, it cannot be said that it could have entered into such a contract and did not do so because of the effect of the misleading information as to the landlord losses.

**WILLIAMS J:**

1. This is an appeal from a decision of the Magistrates' Court at Melbourne on 8 May 2009 dismissing a claim by the appellant ('Structured') for damages under s159 of the *Fair Trading Act* 1985 ('the FTA') and s82 of the *Trade Practices Act* 1974 (Cth) ('the TPA') against the first respondent ('Ms Bennett'). Structured sought damages from Ms Bennett for her alleged misleading or deceptive conduct in breach of s9 of the FTA and s52 of the TPA, respectively.

2. The TPA claim was brought under s6(3) of the TPA because the alleged misleading or deceptive conduct was said to have occurred in the course of a telephone conversation between Ms Bennett and Mr Stefan Deffert, a director of Structured.

3. Structured alleged that Ms Bennett had engaged in the impugned conduct by making a misrepresentation about likely losses from a 'rent roll' which it had purchased on about 6 March 2008 from Insight Investment Corporation Pty Ltd (in liquidation) ('Insight'). Structured claimed to have suffered loss and damage as a result of having purchased the rent roll acting in reliance upon Ms Bennett's alleged misrepresentations about the losses. It sought compensation for loss of 'management income' and the alleged resale value of the rent roll.

**The Magistrate's findings**

4. The learned Magistrate received oral evidence from Ms Bennett and Mr Deffert. He concluded that, 'by and large' each 'presented as a credible and candid witness'.

5. His Honour made findings of fact, including the following, that:

- Ms Bennett had been Insight's property manager and had created its rent roll business in the 18 months before her employment was terminated on Friday 22 February 2008 as a result of Insight's liquidation;
- the rent roll was a list of properties of which Insight was the managing agent;
- Insight's liquidator, Mr Ian Currie, was assisted by an individual, Mr Trent Richardson, whose role at Insight was unclear to the Magistrate;
- at the date of her dismissal on 22 February 2008, Ms Bennett had been unwell and had had no contact with Insight's rental department for at least two weeks;
- Mr Richardson, nevertheless, asked Ms Bennett to accept calls from potential purchasers of the rent roll and to suggest would-be purchasers, without reward;
- Ms Bennett agreed to 'ring around' and she rang three estate agents;
- Ms Bennett provided the telephone number of the liquidator, Mr Currie, to an officer in control of the agency, Sweeney Estate Agents at Caroline Springs ('Sweeneys');
- Ms Bennett was informed that the business had been sold to Sweeneys and enquired of Mr Richardson as to whether she could inform the landlords;
- Mr Richardson gave her permission to do so, but told her that she would not be paid;
- Ms Bennett then rang some 30 to 35 landlords, informing them that Insight's business was being sold to Sweeneys, and saying words to the effect that the management contracts would be referred to that agency, but that the landlords were free to go wherever they liked (his Honour expressly stated that he was not prepared to find that Ms Bennett urged the landlords to take their business to Sweeneys);
- Ms Bennett was not acting as a servant or agent for anyone when she made the calls;
- Mr Currie lost interest in selling to Sweeneys and, through Mr Richardson, found the prospective purchaser, Mr Deffert of Structured, whom he contacted and to whom the rent roll was offered;
- Mr Currie told Mr Deffert that he would buy the rent roll 'as it was' and that he, the liquidator, had no knowledge of such things, but that Ms Bennett was prepared to take Mr Deffert's call;
- on 4 March 2008, Mr Deffert spoke to Ms Bennett and discussed the rent roll with her, asking, in the course of the conversation, what 'losses' there had been and would be from the rent roll as a result of the liquidation;
- Ms Bennett knew that two properties had been lost and she expressed the view that between four and six properties would be lost;
- on the following day, 5 March 2008, Ms Bennett and Mr Deffert had another discussion about losses;
- at the time of her conversations with Mr Deffert on 4 and 5 March, Ms Bennett was not employed by him or by anyone else and his Honour was not satisfied that she charged Mr Deffert for the conversations;
- during the conversations on 4 or 5 March, Mr Deffert enquired as to whether Ms Bennett would be prepared to assist in the handover of the files and she indicated that she would;
- had Mr Deffert not purchased the rent roll, he would not have paid Ms Bennett anything, nor would she have expected payment or rendered an account to him;
- when Ms Bennett spoke to Mr Deffert, she did not turn her mind to the telephone calls she had

made to landlords and, in the context of her not being employed by the liquidator and having nothing to gain nor any reason to conceal anything, she inadvertently failed to tell Mr Deffert of her telephone calls to the landlords;

- Ms Bennett's conversation with Mr Deffert about potential losses was informal and not of a 'serious business nature';
- on 6 March 2008, the agreement for the sale of the rent roll was made;
- Mr Currie had been seeking \$200,000 for the rent roll;
- although Mr Deffert initially agreed to pay \$55,000 (including GST), when he saw the files in physical disarray before settlement, a price of \$49,500 (including GST) was negotiated;
- had Mr Deffert known about Ms Bennett's telephone conversations with the landlords, he would have factored that information into his decision to enter into the agreement and the price he ought to pay;
- Mr Deffert was simply buying the opportunity to approach the landlords first and did not want to buy a list of names and addresses which others already had;
- Mr Deffert would probably have sought to reduce the purchase price at least by some amount to recognise that 30 to 35 of the landlords had been approached, on the basis of dividing the number of files by the agreed purchase price;
- Ms Bennett did four hours of work for Structured on Friday 7 March 2008, as a consultant assisting with the handover of the files and she subsequently charged Structured for that work; and
- 28 files were lost to Sweeneys but his Honour was not satisfied that they were lost as a result of Ms Bennett's calls to the landlords, considering that some landlords may have approached or been approached by Sweeneys independently.

6. His Honour went on to find, in the alternative, that if he had determined that Ms Bennett had contravened the FTA or the TPA, he would have concluded that Structured had sustained a resulting loss of that part of the purchase price relating to 20 of those 28 lost files, at \$512 per file. The learned Magistrate decided on the figure of 20 files because Mr Deffert had been told that eight losses might reasonably be expected and his Honour stated that he would not have been satisfied as to the destination of those six or eight files to which Ms Bennett had referred.

### **The Magistrate's conclusions**

7. The learned Magistrate first concluded that, if Ms Bennett's silence with regard to the calls she had made had been the only alleged act of misleading or deceptive conduct, then that would have put an end to the TPA claim, because her silence on that score was inadvertent.<sup>[1]</sup> It would seem that this conclusion is a reference to s4(2)(c)(i) of the TPA which provides, in effect, that the refusal to do an act must not be inadvertent if it is to amount to engaging in conduct under the TPA. His Honour made no finding as to the effect of inadvertence on any claim under the FTA as he had not been addressed on the issue, although he had been assured by counsel that there were no material differences between the two acts.

8. The learned Magistrate did find that Ms Bennett's conduct was likely to mislead or deceive Mr Deffert, but concluded that the claims under the FTA and the TPA should fail because her conduct was not 'in trade or commerce' as she was not engaged in any business activity when she engaged in that conduct, notwithstanding that the conduct 'may well have had some bearing on other persons' business activities.'

### **The grounds of appeal**

9. In the Amended Notice of Appeal filed on 21 July 2009, Structured sets out a number of questions of law which are, in effect, mirrored in the Grounds of Appeal. I will address each of those grounds.

### **Grounds 1, 2 and 16**

10. In grounds 1 and 16, Structured makes a general challenge to the Magistrate's dismissal of its claim. It has abandoned ground 2.

### **Ground 3**

11. In ground 3, Structured contends that the learned Magistrate erred in law by failing to make a finding that Ms Bennett had established that she had reasonable grounds for making express and implied future representations as to losses from the rent roll, as she was required to do by s4(2) of the FTA and s51A(2) of the TPA.

12. Counsel for Ms Bennett responds that, in light of the Magistrate's finding that Ms Bennett was not engaged in trade or commerce, it was not necessary for him to address the issue. In any event, he submits, she gave evidence which established the reasonable grounds for her making

the statement. These included her testimony that she did not know where the rent roll was going and thought that the landlords would follow it.

13. I agree with counsel for Ms Bennett. I note that Ms Bennett's evidence was that she also generally considered that any negotiations for the sale were confidential and that it was not for her to mention them to a prospective purchaser. She knew of two 'lost' landlords and told Mr Deffert about them. It was in those circumstances that his Honour found that she did not specifically advert to the conversations.

14. In this case, nevertheless, the learned Magistrate considered that Ms Bennett's conduct was likely to mislead or deceive Structured and could amount to a contravention of the legislation. His Honour's decision was to turn on his conclusion that that conduct did not take place in trade or commerce. It seems implicit in his reasoning that he had reached this conclusion on the basis that Ms Bennett had not proved that she had the requisite reasonable grounds for her representation as to any future losses under s4 of the FTA and s51A of the TPA.

15. Ground 3 is not made out.

#### **Grounds 4, 5 and 6**

16. Structured argues that the learned Magistrate erred by concluding that its claim could not succeed as Ms Bennett had only inadvertently omitted to mention her calls to landlords. He erred by applying a test of 'deliberateness' or one related to intention, according to counsel.

17. Counsel relies upon *CCP Australian Airships Ltd v Primus Telecommunications Ltd*<sup>[2]</sup> in which it was held that it was not necessary for silence to be intentional for it to constitute misleading or deceptive conduct for the purposes of s52 of the TPA, notwithstanding the provisions of s4(2)(c)(i).<sup>[3]</sup>

18. Structured, on the other hand, relies upon s4(2)(c)(i) to justify his Honour's reliance upon his finding that Ms Bennett acted inadvertently. It cites *Williams & Ors v Commonwealth Bank of Australia*.<sup>[4]</sup>

19. The Court of Appeal's decision in CCP makes it clear that Ms Bennett's failure to refer to the calls made to landlords could constitute misleading or deceptive conduct, even if it were unintentional. The learned Magistrate indicated that he would only have dismissed Structured's claim on the grounds that Ms Bennett's failure to mention the calls was inadvertent if that inadvertent conduct had been the only alleged misleading or deceptive conduct.

20. Having implicitly found that Ms Bennett's impugned conduct consisted of more than her silence on that matter, his Honour went on to consider whether that conduct, which was likely to mislead or deceive Structured, would make her accountable under the FTA or the TPA.

21. Any possible error of law as to the relevance of deliberateness or intention to Ms Bennett's failure to mention the calls was, therefore, immaterial in terms of the Magistrate's decision and would not result in that determination being set aside.

22. Grounds 4 to 6 are not made out.

#### **Grounds 7, 8, 9 and 10**

23. In each of grounds 7 to 10, Structured argues that, in any event, the learned Magistrate erred in law by concluding that Ms Bennett did inadvertently fail to mention the 30 to 35 calls. In written submissions, counsel submits that there was incontrovertible, inconsistent evidence from Ms Bennett to the contrary (ground 7) or no evidence or insufficient evidence to support the conclusion (ground 8), that the inference was 'not a proper or valid inference' on the facts (ground 9) and that the Magistrate contradicted his own findings in reaching that conclusion and so failed to give adequate reasons for it (ground 10).

24. In oral submissions, counsel for Structured contended that it was not open on the evidence for the Magistrate to conclude that Ms Bennett only inadvertently failed to mention the phone calls to the landlords. Counsel argues that the issue would have been an obvious one to Ms Bennett,

given:

- her broad general understanding of the value of the rent roll, which had led to her own interest in purchasing it;
- her understanding as to how the value of the opportunity to speak to landlords could be damaged and the fact that clients could 'leak', given their freedom to change agents and the impetus to move resulting from Insight having ceased trading;
- her exertions in making the numerous calls;
- her telling landlords that they were going to be managed by Sweeneys;
- her concerns about the fate of the landlords; and
- her awareness of the confidentiality attaching to the liquidator's negotiations.

25. Ms Bennett responds that there was evidence upon which the conclusion of inadvertence was open. Counsel refers to her evidence that she did not know why she had not told Mr Deffert about the calls.

26. In my view, the learned Magistrate's conclusion was clearly open on the evidence. Although Ms Bennett may have appreciated the value of the rent roll and its vulnerability in terms of loss of landlords, she said that she did not believe that it was her responsibility to tell Mr Deffert about the negotiations.<sup>[5]</sup> She also claimed that Mr Deffert did not ask her about other negotiations and that she did not consider the 30 to 35 landlords she had contacted to be 'losses', explaining that 'those clients were going to go wherever the rent roll was going to go'.<sup>[6]</sup>

27. I add that I see no logical inconsistency or contradiction in the Magistrate's reasoning, as set out, which might indicate an error of law constituted by a failure to give proper reasons. I note that I am not persuaded by counsel's argument in this regard that his Honour 'erroneously conflated the question of inadvertence with whether the conversations were in trade or commerce'. In my view, the Magistrate rather took into account the informal nature of the conversations between Mr Deffert and Ms Bennett when deciding the probability of her deliberately remaining silent about the calls she had made.

28. Grounds 7 to 10 are not made out.

#### **Grounds 11, 12, 13 and 14**

29. Structured then contends, in grounds 11 to 14, that the learned Magistrate erred in law in concluding that Ms Bennett's conduct, which he considered likely to mislead or deceive Mr Deffert and, therefore, Structured, was not conduct 'in trade or commerce'.

30. Structured maintains that the finding that it would not have paid for the phone call advice was not open on the evidence and was based on 'surmise' relating to a hypothetical situation (ground 11).

31. Counsel for Structured emphasises the contents of the invoice rendered to the company by Ms Bennett's business, S & D Property Management. The invoice was relevantly in the following terms:

Item Date Amount per Unit Units Fee due

Consultancy 07/03/08 \$50.00 4 \$200.00

6pm To 10pm

This fee includes phone contact and email communication and assistance from 03/03/08 until 14/03/08 (one week before and after consultation date).

Service fee: \$200.00

GST: \$ 20.00

**Total due: \$220.00**

32. Counsel for Ms Bennett responds that it was open on the evidence for the Magistrate to conclude that the conversations were separate matters, distinct from the commercial activity in relation to the handover. He submits that the evidence established that Ms Bennett was not engaged in any commercial activity at the time when she gave the gratuitous advice before the sale, that she was then ignorant of the then current state of the rent roll (having been away ill) and also that she had played no part in the liquidator's negotiations and so had no knowledge of them.



33. The learned Magistrate reached his conclusion that no payment would have been expected for the telephone advice if the sale had not gone through, taking into account the chronology of events and notwithstanding the terms of the invoice. He accepted Ms Bennett's evidence that she was not going to charge Mr Deffert separately for the calls<sup>[7]</sup> and that her invoice related to her four hours' work between six and ten pm on 7 March 2008.<sup>[8]</sup>

34. In my opinion, it was open on the evidence for his Honour to conclude that Mr Deffert enquired during those calls as to whether Ms Bennett would be prepared to assist with the handover, that she had indicated her willingness to do so and, further, that if the sale had not taken place, she would not have charged for providing information about the rent roll.

35. Further, Mr Deffert's evidence did not preclude such a finding. Under examination in chief, he said that, on 4 March 2008, he phoned Ms Bennett and asked her whether she would mind assisting with his inquiries about the rent roll. He told her that he was happy to pay her a consultancy fee 'in order to assist, not only now but if we were successful in purchasing it, the [sic] hand the information across and get us up to speed with where essentially that portfolio had been when she last saw it and she agreed to that.'<sup>[9]</sup>

36. Counsel for Structured argues that the Magistrate erred by applying an 'employment test' in relation to the issue of whether Ms Bennett's conduct occurred in trade or commerce (ground 12).

37. I do not regard his Honour's references to employment in that light. In my view, they were made when he was differentiating between advice given in the context of a business arrangement for its provision, on the one hand, and in the course of an informal conversation, on the other. There may have been a transaction in trade or commerce for the sale of the rent roll, but the Magistrate's findings distance Ms Bennett from that activity.

38. By ground 13, Structured argues that the Magistrate erred by concluding that the conduct was not in trade or commerce by applying a 'serious business nature test.' I am not persuaded that the Magistrate erred in that way. His Honour concluded that Ms Bennett was not engaged in trade or commerce because she 'was not engaged in any business activity at all.' He used the impugned expression when contrasting such activity with an 'informal conversation' of the type he found had taken place. He did not distinguish between business activity, on the one hand, and serious business activity on the other.

39. Structured then submits that, even if it was open on the evidence for the learned Magistrate to conclude that the phone calls were not to be charged or paid for, his Honour erred in law in determining that Ms Bennett's conduct was not in trade or commerce (ground 14). In effect, counsel for Structured contends that his Honour was constrained to reach the contrary conclusion that she was acting in trade or commerce.<sup>[10]</sup>

40. Counsel for Structured argues that Ms Bennett's misleading conduct in making the representations was preliminary to her commercial activity in assisting with the handover and, therefore, was 'in trade or commerce' and that the Magistrate should have so found. The provision of information about the rent roll, according to his argument, was inextricably linked to the provision of Ms Bennett's services after the purchase, because it led Structured to purchase the rent roll<sup>[11]</sup> and was aimed at securing her participation in the later hand-over work.<sup>[12]</sup>

41. Counsel for Structured cites the decisions of the High Court in *Concrete Constructions (NSW) Pty Ltd v Neilson*<sup>[13]</sup> and the Full Court of the Federal Court in *Hearn v O'Rourke*<sup>[14]</sup> in support of his contention that the Magistrate was constrained to find that the conversations took place in trade and commerce. He submits that Ms Bennett's conduct was in the course of an activity of the type described as having a trading or commercial character in the following passage from the majority judgment in *Concrete Constructions*:

Such conduct includes ... promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public.<sup>[15]</sup>

42. Counsel for Ms Bennett does not dispute that the law is as it is stated in the cited authorities.

He nevertheless contends that, in the circumstances, it was open to the Magistrate to separate the conversations from the commercial transaction between the liquidator and Structured and from the subsequent commercial transaction between Structured and Ms Bennett.

43. Given the learned Magistrate's findings of fact and despite the evidence as to the terms of the invoice, I am not persuaded that it was not open to the Magistrate to conclude that Ms Bennett was not engaged in any business dealing, or existing trade or commerce, with Structured when she made the impugned statement. His Honour had found that Ms Bennett was not employed by anyone at the time of the conversations and that she would not have charged for answering enquiries about the rent roll, if she had not been given work afterwards. He had also found that her subsequent charges related to the four hours' work she did later and she did not charge for the telephone calls separately. In those circumstances, his conclusion was open.

44. It was also open on the evidence for the learned Magistrate to conclude that Ms Bennett was not acting in the trade or commerce between the liquidator and Structured, given his findings that she was not employed by Insight or Structured and that she was not to be paid to answer calls relating to the rent roll. Sometimes, there may be a fine line between conduct which is in trade or commerce and that which is not.<sup>[16]</sup>

45. Further, there was no evidence to support Structured's assertion that Ms Bennett provided information with the aim of securing the handover work. Mr Deffert did not and could not give any such evidence as to her intent and it was not put to Ms Bennett that she had done so.

46. The Magistrate was not constrained to make the alternative positive finding that the trading or commercial activity included the conduct which he found likely to mislead or deceive.

47. The fact that, at the time of the misleading statement, there may have been the potential for trade or commerce between Ms Bennett and Structured, in relation to her assisting with the handover, does not mandate a conclusion that the conduct occurred in trade or commerce.<sup>[17]</sup>

48. Further, to the extent that Mr Deffert testified that Ms Bennett agreed to accept a fee for her assistance during the telephone calls before the sale, his Honour's refusal to find that Ms Bennett's conduct was in trade or commerce may have been grounded on his rejection of part of that evidence. That would make it impossible to conclude that the Magistrate was compelled to make the positive finding for which Structured contends.<sup>[18]</sup>

49. Grounds 11 to 14 must fail.

### Ground 15

50. Structured finally submits that the Magistrate's conclusion, in the alternative, as to the quantum of loss was not open on the evidence and involved an error of law.

51. Counsel contends that, as a matter of logic, his Honour should have calculated loss on the basis that 28 landlords were lost to Sweeneys, as a result of the contravention, and that eight others, which Mr Deffert had expected to lose, had gone elsewhere. He should, therefore, have calculated loss on the basis of 28, rather than 20 landlords failing to remain with Structured.

52. His Honour considered that the evidence failed to disclose how many of the 28 landlords lost to Sweeneys had transferred their business as a result of receiving a phone call from Ms Bennett. He considered that there were a number of possible reasons for those losses. The Magistrate also noted the absence of evidence as to whether the eight landlords Mr Deffert had expected to lose had gone to Sweeneys or elsewhere.

53. The question as to the quantum of damages is one of fact and I am not persuaded that it was not open as a matter of logic or on the evidence to the Magistrate to calculate loss and damage as he did. His reasoning is also clear.

54. Damages under s159 of the FTA and s82 of the TPA are to compensate for the loss sustained by reason of contraventions of the respective acts. There must be a causal link between the conduct and the loss claimed.<sup>[19]</sup>

55. Structured claimed the loss of income which it alleges it would have received had the 28 properties lost to Sweeneys been transferred to it. It also claimed some loss of the resale value of the rent roll in its Magistrates' Court pleading. Even had there been evidence establishing such loss, it could not be causally linked to the representation made by Ms Bennett. Structured did not forego the opportunity to enter into a contract with Insight which would have delivered the claimed amounts to it. In other words, it cannot be said that it could have entered into such a contract and did not do so because of the effect of the misleading information as to the landlord losses.

56. As McHugh, Hayne and Callinan JJ said in *Marks v GIO Australia Holdings Ltd*:

The bare fact that a contract has been made which confers rights and imposes obligations that are different from what one party represented to be the case does not demonstrate that the party that was misled has suffered loss or damage. ... A party that is misled suffers no prejudice or disadvantage unless it is shown that the party could have acted in some other way (or refrained from acting in some way) which would have been of greater benefit and less detriment to it than the course in fact adopted. Thus the party that is misled will have suffered loss if a chose in action which was acquired was worth less than the amount paid for it. There may well be other ways in which it might suffer loss or damage. For example, consequential loss may be suffered. ... It is necessary, then, to determine whether the value of what was acquired is less than what was paid.<sup>[20]</sup>

57. Mr Deffert disclaimed any qualifications as an expert valuer of a real estate business and no expert evidence was called. Ms Anna Day was a director of the company running the Sweeneys business in question. Her evidence was that the officer in effective control of that business, her husband, and Mr Richardson of Insight had previously agreed upon a price which she thought was \$55,000 for the sale of the rent roll.<sup>[21]</sup> Mr Deffert did also give evidence of his view that Structured had paid what the rent roll was worth because there had been three parties bidding for it and Structured had paid more than anyone else.<sup>[22]</sup>

58. Evidence as to the value of what was received by Structured was also given by Mr Deffert under examination-in-chief in response to a question as to how much less he would have paid had he known that there were already 32 per cent fewer properties than the 88 on the list. Mr Deffert said that he would have paid about \$25,000 rather than \$45,000, given the reduced number and because such leakage by that stage would have raised a concern as to the value of the balance of the business.<sup>[23]</sup>

59. Ultimately, the Magistrate concluded that he could only be satisfied that Mr Deffert would have been likely to have negotiated a different purchase price. I am satisfied that this conclusion was open to him and note the absence of evidence from Mr Deffert that Structured would not have purchased the rent roll at all if he had known of Ms Bennett's calls.

60. The learned Magistrate then indicated that he would have calculated that loss by dividing \$45,000 by 88 and multiplying the result by 20 or 22 to reflect both the number of files transferred to Sweeneys and Mr Deffert's expectations in relation to possible losses. That method of calculating the actual loss, in the alternative, demonstrated no error and was open on the evidence.

61. Ground 15 is not made out.

## Conclusion

62. The appeal should be dismissed.

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[1] Transcript of Ruling, *Structured Property Pty Ltd and Semra Tirli-Bennett*, (Magistrates' Court of Victoria, Magistrate Braun, 8 May 2009), T 427, lines 8-18.

[2] [2004] VSCA 232; [2005] ATPR 42-042 ('CCP').

[3] [2004] VSCA 232, [34]; [2005] ATPR 42-042 (Nettle JA).

[4] *Williams & Ors v Commonwealth Bank of Australia & Ors* [1995], Federal Court of Australia, New South Wales District Registry General Division, (Unreported, Tamberlin J, 20 October 1995; (2000) 73 Australian Construction Law Newsletter 52).

[5] Transcript of Proceedings, *Structured Property Pty Ltd and Semra Tirli-Bennett*, (Magistrates' Court of Victoria, Magistrate Braun, 7 May 2009), T 212, line 31 - T 213, line 1.

[6] *Ibid*, T 214 line, 29 - T 215, line 2.

[7] *Ibid*, T 266, lines 1-3.



[8] Ibid, T 265, lines 25-6.

[9] Transcript of Proceedings, *Structured Property Pty Ltd and Semra Tirli-Bennett*, (Magistrates' Court of Victoria, Magistrate Braun, 5 May 2009), T 46 lines 7-12.

[10] See *Ericsson v Popovski* [2000] VSCA 52; (2000) 1 VR 260, 266, [14] (Brooking JA).

[11] Transcript, above n 9, T 46, lines 25-28.

[12] Ibid, T 47, lines 13-16.

[13] [1990] HCA 17; (1990) 169 CLR 594; (1990) 92 ALR 193; (1990) 64 ALJR 293; 17 IPR 39; [1990] Aust Torts Reports 81-020; [1990] ATPR 41-022; [1990] ASC 55-970.

[14] [2003] FCAFC 78, [13]; (2003) 129 FCR 64; [2003] ATPR 41-931 (Finn and Jacobson JJ).

[15] [1990] HCA 17; (1990) 169 CLR 594, 604; (1990) 92 ALR 193; (1990) 64 ALJR 293; 17 IPR 39; [1990] Aust Torts Reports 81-020; [1990] ATPR 41-022; [1990] ASC 55-970 (Mason CJ, Dean, Dawson, Gaudron JJ).

[16] *Advanced Hair Studio Pty Ltd v TVW Enterprise Ltd* (1987) 18 FCR 1; 77 ALR 615; 10 IPR 97; [1987] ATPR 40-816, 14 (French J).

[17] See *Robin Pty Ltd v Canberra International Airport Pty Ltd* [1999] FCA 1019, [49] (Gyles J).

[18] *Ericsson v Popovski* [2000] VSCA 52; (2000) 1 VR 260, [14] 265 (Brooking JA).

[19] *Marks v GIO Australia Holdings Ltd* [1998] HCA 69; (1998) 196 CLR 494, 513 [42]; (1998) 158 ALR 333; (1998) 73 ALJR 12; [1998] ATPR 41-665 (McHugh, Hayne and Callinan JJ).

[20] Ibid, 514 [47]-[49].

[21] Transcript, above n 9, T 33, lines 5-6.

[22] Transcript of Proceedings, *Structured Property Pty Ltd and Semra Tirli-Bennett*, (Magistrates' Court of Victoria, Magistrate Braun, 6 May 2009), T 107, lines 27-9.

[23] Ibid, T 95, lines 15-30.

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