**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. D496/2010

**DOMESTIC BUILDING LIST**

## CATCHWORDS

Contract – whether agreement reached; Sufficiency of evidence – most likely scenario; Section 4 of the *Fair Trading Act* 1999 – whether representation statement of fact or opinion, relevant principles to be applied, loss and damage – whether directly linked to representation.

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| **APPLICANT** | Philip Hocking Project Management Pty Ltd (ACN 006365 74) |
| **FIRST RESPONDENT** | Portdome Pty Ltd (ACN 088013325)<br>(receiver and manager appointed) |
| **SECOND RESPONDENT** | Grant Leslie Stephens |
| **THIRD RESPONDENT** | Craig Kelway Stephens |
| **BEFORE** | Senior Member E. Riegler |
| **HEARING TYPE** | Hearing |
| **DATE OF HEARING** | 25 and 26 July 2011 |
| **DATE OF ORDER** | 12 September 2011 |
| **CITATION** | Philip Hocking Project Management Pty Ltd (ACN 006365 74) v Portdome Pty Ltd (ACN 088013325) and Ors (Domestic Building) [2011] VCAT 1727 |

## ORDER

1. The applicant's claims against the Second Respondent and Third Respondent are dismissed.

2. Liberty to apply until 30 September for further orders consequent upon Order 1 of these orders.

**SENIOR MEMBER E. RIEGLER**

**APPEARANCES:**

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| For the Applicant | Mr P Lithgow of counsel |
| For the Respondent | Mr S Wilmoth of counsel |

## REASONS

1. The applicant is a builder (**'the Builder'**) who was engaged by the first respondent (**'the Owner'**) to undertake building works in relation to two residential developments located in Mornington, known as the *Tanti* project and the *Harba Restaurant* project respectively (**'the Development'**). The second and third respondents were, at the relevant time, directors of the Owner. The Development was constructed under four separate building contracts entered into between 2004 and 2008, each contract dealt with a distinct stage of the building works.

2. The director of the Builder, Philip Hocking had known and worked with the second and third respondents for many years before the Builder became involved with the Development. As is often the case, that led to some informality in relation to the financial arrangements between the parties. In particular, the Builder recorded its expenditure by reference to financial control sheets (**'FCS'**), which it provided to the Owner over the course of the building works. The purpose of those FCS was to advise the Owner of the ongoing costs of construction, and thereby allow for monthly progress payments to be made by the Owner's lender.

3. In 2009, the Builder sought to reconcile all outstanding accounts. To that end, a meeting was arranged on 15 July 2009 between Philip Hocking, Lorraine Jones, the internal accountant of the Builder; and Craig Stephens, the third respondent.

4. According to the Builder, an agreement was reached at the conclusion of that meeting to the effect that the Owner would pay the Builder $900,000 in full settlement of all outstanding claims as of that date. On 30 June 2009 the Builder prepared a tax invoice, which it forwarded to the Owner demanding payment of the $900,000.

5. The respondents deny that any agreement was made, either by the Owner or by its directors in their personal capacity.

6. On 21 June 2010, the Builder filed this proceeding, wherein it claims $900,000 as against the Owner on the ground that this amount was agreed to be paid by it in consideration of the work and expenditure incurred in undertaking the Development.[1] It further claims against the third respondent on the ground that he represented to the Builder that the Owner could and would pay that amount as and when individual apartments from the Development were sold. In addition, the Builder claims against the second respondent on the ground that he guaranteed the Owner's obligations to the Builder pursuant to a number of *Deeds of Guarantee and Indemnity*.

7. On 14 September 2010, the Owner filed a counterclaim against the Builder, wherein it claimed $676,987 made up as follows:

   (a) Additional bank fees of $290,000 as a result of the building works not being completed by the Builder.

   (b) Reimbursement of payments made to the Builder's subcontractors of $209,807.

   (c) Amounts still owing to the Builder's subcontractors of $177,180.

8. On 22 September 2010, receivers and managers of the Owner were appointed. Accordingly, orders were subsequently made staying the claim as against the Owner and the Owner's counterclaim. The proceeding continued as against the second and third respondents, Grant Stephens and Craig Stephens.

9. The proceeding raises the following issues for determination:

   (a) Did the Builder and the Owner enter into an agreement on 15 July 2009, under which the Owner was to pay the Builder $900,000 (**'the Claimed Amount'**)?

[1] The Builder clarified during the hearing that the alleged agreement made on 15 July 2009 was made only between the Builder and the Owner.

(b) Did the third respondent represent to the Builder that the Owner could and would reduce the outstanding balance of the Claimed Amount as individual residential apartments were sold and further that the Developments would realise a profit?

(c) If yes to question (b), what loss flows from such a representation?

(d) Did Grant Stephens guarantee and indemnify the Owner's obligations to the Builder?

## Was an agreement reached on 15 July 2009?

The Builder's evidence

10. Mr Lithgow, of counsel, appeared on behalf of the Builder. He called Philip Hocking, director of the Builder, to give evidence relating to the alleged agreement. Philip Hocking adopted what he set out in his witness statement dated 26 May 2011. He said that he and Lorraine Jones, the Builder's internal accountant, met with Craig Stephens at the Builder's office on 15 July 2009. According to Philip Hocking, the purpose of that meeting was to finalise the end of the 2008/2009 financial year figures regarding monies due to the Builder in relation to the Development. He said that a *Financial Summary* spreadsheet had been prepared on behalf of the Builder, which stated that the Owner's indebtedness to the Builder stood at $938,000 as at 15 July 2009. He also said that Craig Stephens did not take issue with the amounts stated on the *Financial Summary* spreadsheet. He stated further that:

> 23. Lorraine and I were prepared to discuss issues that we had been over many times before with Craig and we had collated invoices and prepared a financial spreadsheet for the project to reflect the current position.
>
> 24. At the meeting Craig advised us that he was very happy and relaxed with the figures we presented to him at this meeting. Craig said that our accounting system was far superior (to his accounts) and that he in fact had no figures or comprehensive accounting system on the project.

25. The indebtedness stood at approximately $938,000.

26. After a short period of time everyone was an agreement. At this stage it was agreed that Jack [an employee of the Builder] and I could leave for another meeting. I advised Craig that he and Lorraine could map the plan going forward.

27. On our return Craig had left. Lorraine was very happy. She explained how the meeting had ended up with an agreement that the project indebtedness to the Applicant as at 30 June 2009 was agreed at $900,000.00 with interest to be paid on this sum. Initially I was disappointed but quickly accepted that at least we had a figure and an agreement in place.

11. Further evidence was led from Lorraine Jones. She adopted what she had set out in her witness statement dated 26 May 2011. She confirmed that the meeting was held on 15 July 2009 and that she and Craig Stephens agreed that the Owner would pay the Builder $900,000 in settlement of all debts as of that date. She stated:

3. The sole purpose of the meeting was to agree to the amount owing to the applicant as at 30 June 2009, in respect of the Tanti Avenue Development and Harba Restaurant development.

6. We discussed the issue of finalizing the outstanding figures included on a spreadsheet previously prepared, discussed, analyzed and revised by Craig Stephens. We also discussed a few minor invoices that needed to be paid to sub contractors regarding the Tanti Project

8. At the end of the meeting we were all in agreeance of the $938,238.00. Phil Hocking and Jack Dyer left for another meeting and this left Craig and I to finalise the process going forward.

9. After Phil had left it was then that Craig said he was not sure how Phil came up with the interest charged. The interest has always been on the previous spreadsheets. It was then that I started negotiating with Craig. Both the external accountant and Phil had agreed that I was in a position, within reason, to do what I had to do to bring this matter to a close.

10. I then explained to Craig that this had gone on long enough and asked him what figure he would be happy with so we could bring this matter to a close.

11. We talked about it and without dragging the matter on I then said to Craig why don't we call it $900,000.00 to close as at 30/6/2009 and that would be final. Craig and I agreed to the figure of $900,000.00 which reduced the initial amount by a further $38,238.00.

18. On 16 July 2009 I sent a copy of the invoice in the sum of $900,000.00 to Craig by facsimile and called him after to make sure he had received it and not anyone else.

19. Craig acknowledged receipt of the invoice and at no stage did he query or dispute the amount of the invoice or suggest that it was anything other than accurate. A copy of the invoice and the facsimile sent confirmation is attached to the witness statement.

12. The *Financial Summary* prepared by Lorraine Jones prior to the meeting set out what the Builder contended was its total expenditure plus builder's margin on the Development against what the Builder had received by way of payments. It also recorded unpaid and unrelated loans by the Builder to the Owner and other unrelated matters. In essence, the document was a reconciliation of what the Builder said was owed to it both under the building contracts relating to the Development and also other matters which were not related to the Development. According to that document, the net amount said to be owing to the Builder was $938,238.

13. Lorraine Jones gave evidence during cross-examination that certain entries in the *Financial Summary* had been ticked by her in red, while other entries had been ticked by Craig Stephens. She said that the only query raised by Craig Stephens as to the content of the *Financial Summary* related to the entry of *interest on outstanding monies*. She said that he had told her that he was not sure about the amount of interest being claimed by the Builder. She recounted asking him *what do we need to put this to bed. Will 900 call it quits*. She said that he answered *yes*.

14. The *Financial Summary* was produced during the course of the hearing. That *Financial Summary* contained a handwritten note in red ink stating:

> *
> *900 000.00 Call it quits*
> *agree new interest as at*
> *1/7/09*

15. Lorraine Jones said that she added that note at the conclusion of the meeting with Craig Stephens.

16. Further evidence was led from Jack Dyer, an employee of the Builder. He adopted what he had stated in his witness statement dated 26 May

2011. He confirmed that he was in the Builder's office when the meeting took place on 15 July 2009. He recounted hearing Craig Stephens say that he was very happy and relaxed with the figures set out in the *Financial Summary* referred to above. However, he conceded during cross-examination that he was not a party to the actual discussion that took place and that his recollection was based on him overhearing some of the conversation while he was undertaking unrelated office work.

17. Both Philip Hocking and Jack Dyer left the meeting before it concluded, leaving Lorraine Jones and Craig Stephens alone. They both conceded during cross-examination that no concluded agreement was reached while they were at the meeting.

The respondents' evidence

18. Mr Wilmoth, of counsel, appeared on behalf on the second and third respondents. He called Craig Stephens who adopted what he had written in his witness statements as his evidence in the proceeding. Craig Stephens said that the Builder had little physical involvement with the Development because the project was, at least for a large part, managed by him, notwithstanding that the Builder was responsible to pay all subcontractors and suppliers.

19. He confirmed that he attended the meeting on 15 July 2009 but said that he was not under the impression that the meeting was any more extraordinary than other meetings he had attended with the Builder. He adamantly disputed that a concluded agreement was reached regarding any amount to be paid to the Builder. In particular, he said that he was concerned with the amount stated in the *Financial Summary* because he feared that it did not take into account unpaid creditors. He explained that the *Financial Summary* contained a column of entries with the heading *TOTAL EXPENSES*. He said that the Builder had represented that the amount under the column *TOTAL EXPENSES* reflected what it had spent on the Development as of 15 July 2009. He said that he did not

believe that this entry was accurate because he thought it comprised both paid and unpaid creditors. He said that this was of concern to him because the works had previously been disrupted because subcontractors had not been paid by the Builder. He said that this had become such a significant issue that the Owner's lender, Investec Bank (Australia) Limited, had intervened so that it could take over responsibility for paying all subcontractors and suppliers. Indeed, this arrangement was confirmed in a letter from the Builder to the relevant quantity surveyor dated 16 July 2009, which stated:

> Following discussions with Craig yesterday I wish to confirm my agreement with the below.
>
> 1) Subcontractors will be paid directly by Investec on a weekly or fortnightly basis.
>
> 2) The balance of the builders margin available in the cost to complete will be forgone and allocated across other cost centres and revised spreadsheet developed.

20. Craig Stephens further stated:

> 3. Throughout the five years the Applicant submitted invoices for work on an approximately monthly basis and every invoice submitted was paid by the bank directly through the Applicant once the Applicant had executed statutory declarations to the effect that the project subcontractors had been paid. No invoices in relation to the contracted works remain unpaid. The Applicant failed to complete the work and failed to pay all creditors leading the First Respondent to lodge a counterclaim.
>
> 4. The Applicant had minimum physical involvement in the supervision or organisation of the works and the subcontractors. This work was performed by the Third Respondent. The Applicants role was largely limited to the receipt of funds, payment due creditors and the reporting of same in a Financial Control Spreadsheet (FCS). The FCS was e-mailed to the Third Respondent on a regular basis and while it listed the receipts and invoices received it failed to show which creditors had actually been paid. The Applicant recorded all outstanding creditors for its business on a separate spreadsheet.
>
> 8. The Applicant claimed it reached agreement with the Respondents on the 15th of July 2009 which simply did not occur. Six weeks prior to that date there was still a difference between the FCS of the parties of $780,000 after several months of interchange on the topic. The Third Respondent verbally, by letter and by returning modified FCS to the Applicant disputed the numerous extra claims in the Applicants FCS before and after that date which clearly demonstrate a disagreement on the figures. The Third Respondent refused to sign the invoice for $900,000 and

demanded a list of the outstanding creditors which were thought to be over $500,000 at the time to further demonstrate a lack of agreement. Philip Hocking was not present for the last 90 min of the discussions at which the purported agreement was reached.[2]

21. In response to the evidence of Lorraine Jones, Craig Stephens stated in his reply witness statement dated 3 May 2011:

> 3. At the end of the meeting with only Lorraine and myself present I made several observations. I made it clear that there would be no agreement without the creditor problem being fixed. I was happy to assist Philip with end of year figures for his bank but I would not enter any agreement that would make Portdome the first target of any receiver that may be appointed to the Applicant subsequently. I pointed out that the make up of the invoice tendered was not related to the building contract and also included a large unnecessary GST component.
> 4. I did receive the invoice by fax as stated by Lorraine but did not return it signed because there was no agreement. I was not going to further discuss the matter with Lorraine as I did not feel it was her place to take the matters any further. Only a few weeks before this meeting I had sent Philip a position statement showing that the Applicant owed Portdome approximately $233,000 and I found it rather insulting that he would leave staff to deal with such a significant difference in position.

22. Craig Stephens also gave evidence that after receiving the invoice sent by Lorraine Jones, he was asked to sign that invoice but refused to do so. He said the invoice was nonsense because the *Financial Summary* was presented in a way that assumed that all creditors had been paid, when clearly that was not the case. In particular, he produced another *Financial Summary* spreadsheet, prepared by the Builder after the 15 July 2009 meeting. That *Financial Summary* was dated 28 August 2009 and recorded that the *TOTAL EXPENSES* were $66,760 less than what had been recorded on the *Financial Summary* dated 15 July 2009. Craig Stephens gave evidence that the *TOTAL EXPENSES* recorded by the Builder in the more recent *Financial Summary* reflected the fact that some of the unpaid creditors had been subsequently paid by the Owner's lender.

23. When asked during cross-examination why he did not dispute the invoice in writing, he answered that there was no need to because the payments

[2] ' Witness statement of Craig Stephens dated 5 May 2011.

to the Builder were still being negotiated well after the 15 July 2009 meeting. He said that this was evidenced by the Builder preparing the *Financial Summary* dated 28 August 2009, wherein the Builder was only claiming $871,478, rather than the $900,000 said to be the amount agreed.

24. Craig Stephens gave further evidence that he did not receive any further demand for payment after disputing the invoice for $900,000 until the first respondent received a solicitor's letter of demand in April 2010.

Finding

25. Central to determining whether an agreement was reached on 15 July 2009 is whose evidence I accept: Lorraine Jones or Craig Stephens. Each witness has a different account of what occurred. In particular, Craig Stephens was adamant that no agreement was reached because the issue of unpaid creditors had not been resolved. Both Lorraine Jones and Philip Hocking disputed that there was any discussion at all concerning unpaid creditors. This was confirmed by Jack Dyer, although I place little weight on his evidence given his admission made during cross examination that he was not part of the discussion that took place on that day. He merely overheard some of what was said but was unable to recount all of what was said. Moreover and critically, neither Philip Hocking nor Jack Dyer was present when the alleged agreement was made. They both had left the meeting before it concluded.

26. In support of the Builder’s position, it is submitted that regard may be had to the handwritten note made by Lorraine Jones on the *Financial Summary* and to the fact that she sent an invoice to Craig Stephens on the following day. It is said that these factors are consistent with there being a concluded agreement between the parties.

27. I accept that as a general principle of law, post-contractual conduct is admissible on the question of whether a contract was formed.[3] Accordingly, I can take into consideration the fact that Lorraine Jones made a hand written note of what she said was agreed and of the fact that she issued an invoice for the Claimed Amount. These factors both go the question as to whether there were concluded negotiations, as opposed to ongoing negotiations.

28. However, in my view, those two documents are of limited assistance. They assist only in terms of corroborating the evidence of Lorraine Jones that she believed an agreement had been reached. That is not, however, the critical question. The critical question is whether there was a meeting of minds. Did Craig Stephens, on behalf on the Owner, agree that the Owner would pay the Builder $900,000? I have no doubt that Lorraine Jones formed the view that such an agreement had been reached, however that still does not answer the question. I must be satisfied on the balance of probabilities that Craig Stephens agreed, on behalf of the Owner, to pay the Claimed Amount. The Builder bears the burden of proving that.

29. There is no doubt that the evidentiary burden is onerous where there are two witnesses who each have a different account of what occurred at the relevant time and who each present as credible witnesses. Here, the Builder contends that the balance of probabilities favours the evidence of Lorraine Jones because it is consistent with her hand written note on the *Financial Summary* and the raising of an invoice of the Claimed Amount.

30. Against that, however, is the evidence of Craig Stephens who disputes that any agreement was reached on 15 July 2009. He relies on the revised *Financial Summary* dated 28 August 2009 as being consistent with his

[3] *Howard Smith & Co v Varawa* (1907) 5 CLR 68 at 77; *B Seppelt & Sons Ltd v Commissioner for main Roads* (1975) 1 BPR 97011 at 9149 and 9155; *Abigroup Contractors Pty Ltd v ABB Service Pty Ltd* (2005) 21 BCL 12 at 24

evidence that the issue of unpaid creditors was unresolved and that no final agreement was reached as a consequence thereof.

31. In my view, the existence of the 28 August 2009 *Financial Summary* weighs against the Builder's position. I find that the document corroborates the evidence of Craig Stephens that there were unpaid liabilities comprised within the amount claimed as *TOTAL EXPENSES* in the 15 July 2009 *Financial Summary*. That leads me to conclude that it was unlikely that there was agreement that the *TOTAL EXPENSES* claimed in the 15 July 2009 *Financial Summary* only represented actual expenditure incurred by the Builder. Therefore, if the Owner (or its lender) was paying aged creditors, how can it then be said that the Claimed Amount represented the final figure to be paid by the Owner for work completed up until 15 July 2009? Clearly it didn't. It must have been less than that.

32. Therefore, it seems inconceivable that the issue of unpaid creditors would not have been raised at the meeting, given that this issue was central to any final reconciliation of the amount to be paid for the works comprising the Development up until 15 July 2009.

33. Further, the *Financial Summary* dated 28 August 2009 records the *TOTAL EXPENSES* being $66,760 less than what was recorded in the 15 July 2009 *Financial Summary*. In addition, it records the balance owing to the Builder as being $871,478, rather than the $900,000, which the Builder says was the compromised amount agreed on 15 July 2009. However, if I add $66,760 to the $871,478, the total amount owing to the Builder is $938,238. This is the amount that the Builder said was owed to it when it first started negotiating on 15 July 2009 and before $38,238 was compromised in order to obtain 'agreement'. That begs the question why this compromised amount is not recognised in the calculations set out in the 28 August 2009 *Financial Summary*. In my view, the failure to take into consideration the compromised amount of $38,238 in the

subsequent *Financial Summary* prepared by the Builder is another factor that weighs against a finding that a concluded agreement was reached on 15 July 2009.

34. Consequently, I accept the evidence of Craig Stephens over that of Philip Hocking and Lorraine Jones. I find that there was no concluded agreement reached on 15 July 2009. At best, what was agreed was a platform upon which to further negotiate, both in terms of the final amount ultimately to be paid and what, if any, interest was payable on that amount. How much was ultimately to be paid (if anything) depended on how much the Owner paid for unpaid creditors, either directly or through its lender.

35. Consequently, I dismiss this aspect of the Builders claim.

## Did Craig Stephens represent that the Development would realise a profit?

36. The claim made under the *Fair Trading Act* 1999 (**'FTA'**) proceeds on two grounds:

    (a) That Craig Stephens, on behalf of the Owner, represented to the Builder that the Claimed Amount would be paid by the Owner as and when apartments in the Development were sold; and

    (b) That Craig Stephens represented to the Builder that the Development would realise a profit in excess of $8 million in 2008 and $4 million in 2009 and 2010.

37. Given my finding that no agreement was reached on 15 July 2009, it is not necessary for me to determine whether Craig Stephens represented that the Claimed Amount was to be paid as and when apartments were sold. In other words, as I have found that Craig Stephens, on behalf of the Owner, did not agree to pay the Builder the Claimed Amount, it follows that Craig Stephens did not represent that the Owner would pay the Claimed Amount, absent of any agreement or otherwise.

38. The second basis upon which the Builder claims under the FTA relates to an allegation that Craig Stephens represented that the Development would be profitable. Mr Lithgow submitted that the representation was a representation as to a future matter within the meaning of s.4 of the FTA. Section 4 of the FTA states:

> (1) For the purposes of Part 2, if a person makes a representation about a future matter, including the doing of, or the refusing to do any act, and the person does not have reasonable grounds for making a representation, the representation is deemed to be misleading.
>
> (2) In any proceedings under this Act concerning a representation made by a person about a future matter, the person making the representation bears the burden of proving that he or she had reasonable grounds for making the representation.

39. Consequently, Craig Stephens bears the burden of proving that he had reasonable grounds for making the representation, if in fact it was made. Mr Lithgow submitted that the effect of s.4 of the FTA is that the non-fulfilment of the promise when the time for performance arrives will be deemed to be misleading unless the person making the promise brings evidence to establish that there were reasonable grounds for making the promise. He contends that there were no reasonable grounds upon which Craig Stephens represented that the Development was going to be profitable.

40. In the present case, Philip Hocking gave evidence as to the representations made by Craig Stephens, which included the following:

> 34. About a month after the 15 July meeting, Craig came to my office and produced a spreadsheet on which his handwritten notes indicated that the Tanti project would still make between $4,000,000.00 and $8,000,000.00 profit depending on the eventual sale prices of the various units. He was adamant that it was close to $4,000,000.00
>
> 37. It was on the basis of the ongoing assurances by Craig, and to a lesser extent by Grant, that I continued working on the project even though the project always owed the Builder money for work done.

41. During cross-examination, Philip Hocking was asked whether any guarantee was ever given to him that the Development would be profitable. He had said that no such guarantee was given. It was put to

him that it was not a case of Craig Stephens making a misrepresentation but rather, him making optimistic statements. He agreed with that proposition, a fact not disputed by Craig Stephens.

42. Mr Lithgow stated in his written closing submissions that:

> 10. Hocking relied upon the representations (as to profitability) in entering into the July Agreement.
>
> 11. The damages that flow from the reliance upon the representations as to profitability are:-
>
> a) $900,000 - the amount of the compromise agreement as this is not recoverable in the absence of the Tanti project being profitable;
>
> b) $38,000 - the amount compromise from the true amount owed versus the compromise amount.

43. There are a number of difficulties with the claim made under the FTA. First and foremost, a claim rests on the premise that the Development is not profitable. There is no evidence of that fact. The only evidence going to that issue, if at all, is that the lender has taken over control of the Development and that receivers and managers have been appointed of the Owner. However, Grant Stephens gave evidence during cross-examination that not all of the apartments and townhouses comprising the Development have been sold. Consequently, there is no evidence that the Development when finally realised will not yield a profit. In the absence of evidence that the Development is unprofitable, how can I make a finding that the representation is false?

44. Further, I do not consider that the representations made by Craig Stephens fall within what is alleged to be a representation as to a future matter, as distinct from a statement of opinion.

45. In my view, the characterisation of the representation as a statement of opinion rather than one of fact may affect its assessment in the breach inquiry. In particular, an assertion of fact will breach the FTA if it is false, while an opinion will, ordinarily, only mislead or deceive if it is not expressed honestly (or not reasonably capable of being expressed

honestly).[4] Naturally, different considerations apply in circumstances where an opinion is expressed by a person who holds him or herself out as an expert in the particular field of enquiry.[5] However, that is not the case here. It is not suggested that Craig Stephens made the representation as an expert in a particular field.

46. In my view, the representation made by Craig Stephens is more in the form of a statement of opinion rather than assertion of fact. It is a statement expressed to be one of judgement or belief, rather than an assertion of truth. That said, I find that there are a number of factors that led me to believe that the opinion was honestly held (and based on reasonable grounds).

47. First, secured funds were lent to the Owner in order to finance the Development. In my view, it is reasonable to infer that the financier made some assessment of the project before committing its funds into the Development. This may, in itself, provide reasonable grounds for making the representation.

48. Second, Craig Stephens gave evidence that that there were good early sales. He said one apartment sold for $1.4 million and another for $1.7 million, which he indicated where in line with projected forecasts.

49. Third, Craig Stephens said that quantity surveyor had assessed the Development as being profitable. No evidence was adduced from the quantity surveyor to verify this statement. Nevertheless, it is reasonable to infer that all information produced by the quantity surveyor was considered by the lender when it decided to finance the Development. That being case, it is also reasonable to infer that such information provided an optimistic financial forecast.

[4] *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 at 47; *National Australia Bank v Nobile* (1988) 100 ALR 227 at 235; cf *Nominal Defendant v Owens* (1978) 22 ALR 128.

[5] *RAIA Insurance Brokers Ltd v FAI General Insurance Co Ltd* (1993) 41 FCR 164

50. In my view, the combination of all factors referred to above go further than simply establishing that the opinion was honestly held. They indicate that there were reasonable grounds for making the representation.

51. Another difficulty with the Builder's claim concerns the question of loss. There seems to be a disconnect between the loss and damage claimed and the loss and damage that could be said to have been suffered as a result of the representation. In particular, Mr Lithgow submits that the damages that flow from the reliance upon the representations as to profitability are the $900,000 agreed to be paid or alternatively the amount compromised as part of that agreement ($38,000).

52. I do not believe that this is the correct categorisation of damages that flow from the representation. In my view, damages which are commensurate with the contract price usually flow from a representation that the contractual promise will be performed. In other words, the promise to pay the contract price constitutes the representation. However that is not what is alleged in the present case. Here, it is alleged that the representation was that the project would be profitable; and that led the Builder to continue to perform work under the various contracts.

53. Therefore, and given my finding that there was no concluded agreement made on 15 July 2009, the only loss and damage consequent upon the breach of the FTA could be those expenses or losses caused by the Builder continuing to work on the Development in circumstances where, but for the representation, it would have desisted. However, in the present case there is no evidence as to what expenditure was incurred in reliance upon the representation. Although Philip Hocking gave evidence that the Builder *continued working on the project even though the project always owed the Applicant money for work done*, no evidence was led what additional expenditure it incurred after the representations were made. Further, the only evidence given in relation to ongoing work was

that the Builder continued to be involved with the Development after 15 July 2009, albeit in a limited way. In particular, during cross-examination Philip Hocking said that in the latter part of the Development there was not much involvement on the part of the Builder, although it still had a leading hand on site. No details of what work, hours of work or cost of work were provided. In those circumstances, it is difficult to comprehend what loss was suffered by the Builder as a result of the representation.

54. Consequently, I dismiss the claim couched in terms of a breach of the FTA.

## Claim against the second respondent

55. No evidence has been led to support the claim that the second respondent, Grant Stephens, agreed to indemnify payments due under the relevant building contracts. No submission was made in support of that claim. Further, no evidence has been led as to what would have been payable under those building contracts, in any event.

56. By contrast, Grant Stephens gave evidence that he has not provided any guarantee and does not owe the Builder anything.[6]

57. In those circumstances, there is no basis to make any finding against Grant Stephens and I dismiss that claim without saying any more.

**SENIOR MEMBER E. RIEGLER**

[6] Paragraph 12 of the witness statement of Grant Stephens.