



Australasian Legal Information Institute

Supreme Court of Victoria

Plan B Properties Pty Ltd v Australian Secured & Managed Mortgages Pty Ltd & Ors [2026] VSC 306 (22 May 2026)

Last Updated: 22 May 2026

IN THE SUPREME COURT OF VICTORIA

Not Restricted

COMMERCIAL COURT

COMMERCIAL LIST

S ECI 2024 05588

PLAN B PROPERTIES PTY LTD (ACN 105
114 994)

Plaintiff

v

AUSTRALIAN SECURED & MANAGED
MORTGAGES PTY LTD (ACN 112 603 219)
& ORS (according to the attached Schedule)

Defendants

JUDGE: M Osborne J

WHERE HELD: Melbourne

DATES OF HEARING: 11 & 12 May 2026

DATE OF JUDGMENT: 22 May 2026

CASE MAY BE CITED AS: Plan B Properties Pty Ltd v Australian Secured & Managed Mortgages Pty Ltd & Ors

MEDIUM NEUTRAL [2026] VSC 306

CITATION:

MISLEADING AND DECEPTIVE CONDUCT – Where plaintiff was a private investor participating in a syndicated mortgage lending arrangement – Where mortgage broker arranged short-term property development loan secured by first registered mortgage over property – Where loan participants advanced funds totalling \$4.25 million, including \$1.5 million contributed by plaintiff in reliance on valuation – Where key investment material prepared by registered valuer represented land as worth \$10 million and characterised loan as ‘low-risk’ – Where borrower defaulted and property was sold following appointment of receivers – Where substantial shortfall suffered by plaintiff – Whether valuer prepared a defective valuation – Whether representations made by mortgage broker and its officer were misleading or deceptive under the Australian Consumer Law (ACL) and related provisions – Damages recoverable against valuer for negligent valuation – Claim against mortgage broker and second defendant dismissed.

HELD – The valuer was liable for loss arising from negligent valuation methodology, with judgment entered and damages assessed at \$1,104,578.71 plus interest – The mortgage broker and its officer did not contravene the misleading or deceptive conduct provisions, as they did not adopt or endorse the valuation but merely communicated as a third-party expert opinion – That claim was accordingly dismissed – *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592 – *Yorke v Lucas* (1985) 158 CLR 661 – *Campbell v Backoffice Investments Pty Ltd* 238 CLR 304 – *MGICA v Kenny & Good Pty Ltd* [1996] FCA 766; (1996) 140 ALR 313 – *Medical Device Technologies Pty Ltd v Health Administration Corporation* [2024] NSWCA 142 – *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41–249 – *The Saints Gallery Pty Ltd v Plummer* (1988) 80 ALR 525.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

P Noonan

Madgwicks

For the First and Third Defendants
No appearance

Not applicable

For the Second Defendant

G Jardine (pro bono)

Not applicable

HIS HONOUR:

Introduction

1 The plaintiff, ('Plan B'), is a company controlled by Nicholas Marasco ('Mr Marasco'). Mr Marasco is an experienced businessman and investor whose investment activities have, in part, been conducted through Plan B. Plan B was one of a number of private lenders who advanced a total of \$4.25 million to JB Property Investments (Aust) Pty Ltd ('JB Property'). The purpose of the loan was to enable JB Property to purchase and develop the land situated at Lot 1, Hydeaway Bay Drive, Cape Gloucester in Queensland ('the property'). The loan was a short-term facility of six months, secured by a first registered mortgage at an interest rate of 12.95% per annum. Interest was payable in advance and deducted from the funds made available to the borrower at settlement. The loan repayment date was 29 December 2022.

2 JB Property defaulted under the loan facility and subsequently the property was sold by receivers appointed by the lenders. The lenders suffered a substantial shortfall. Plan B's contribution to the \$4.25 million advance was \$1.5 million. After allowing for recovery of its part of the sale price, Plan B's net loss on the principal investment was \$1,104,578.71.

3 The loan was arranged by the first defendant, Australian Secured & Managed Mortgages Pty Ltd ('ASMM'), a mortgage broker now in liquidation. ASMM's sole director was Suzanna Asciak ('Ms Asciak'), although she played no role in these proceedings. All dealings on behalf of ASMM with Plan B were conducted by the second defendant, Angela Simonetta ('Mrs Simonetta'). Mrs Simonetta had prior experience as a law clerk working for law firms who were active in conveyancing and mortgage transactions. At the relevant time, Mrs Simonetta was engaged by ASMM on terms which, inter alia, involved the payment to her of a retainer of \$1,920 per week together with 0.33% on all private loans funded by ASMM's investors and a lesser amount (0.22%) on loans that she had worked on and which had been referred by other private lenders. Mrs Simonetta was required to take care of her own GST and superannuation.

4 The loan to JB Property was made after ASMM had obtained a valuation from the third defendant, Bruce Clisdell ('Mr Clisdell'), a qualified professional valuer ('the Clisdell valuation'). Based on information provided to him, Mr Clisdell had assessed the market value of the property as at 10 June 2022 at \$10 million exclusive of GST. The sale price of the property when sold by the receivers on 15 November 2023 was \$1,650,000 (GST inclusive). In the Clisdell valuation, Mr Clisdell stated that the property was suitable for a first mortgage loan of \$10 million and that the lending risk was low.

5 In these proceedings, Plan B seeks to recover its \$1,104,578.71 shortfall from Mrs Simonetta and Mr Clisdell. The claim against ASMM is stayed by reason of its liquidation.

6 Although Mr Clisdell initially defended the claim and retained solicitors, those solicitors filed a notice of ceasing to act some time ago. Following non-compliance with discovery orders, orders were made striking out Mr Clisdell's defence and interlocutory judgment was entered for Plan B against him for damages to be assessed, on 18 July 2025. Mr Clisdell's non-compliance with the orders was unsurprising. He had previously informed both the Court and the parties that he did not intend to participate in the proceeding.

7 Whilst Mrs Simonetta formerly had legal representation, her solicitors likewise filed a notice of ceasing to act earlier this year. Fortunately for both Mrs Simonetta and the Court, she had the assistance of Ms Jardine of counsel, who acted on a pro bono basis.

8 In the result, at trial, the only matters remaining for determination before the Court were the assessment of the quantum of damages against Mr Clisdell and Plan B's claim against Mrs Simonetta. A critical part of Plan B's case against Mrs Simonetta concerned her provision of the Clisdell valuation to Plan B.

9 Plan B's case is that, by providing the Clisdell valuation to Plan B, Mrs Simonetta and ASMM represented to Plan B that the value of the property which was to be mortgaged to secure the loan was \$10 million and that the lending risk was accordingly low. Plan B alleges that those representations were false and misleading in that the fair market value of the property was not \$10 million, but was materially less than \$10 million, and materially less than the loan amount, and accordingly the lending risk associated with the loan was not low.

10 Plan B further contends that it relied upon those representations in agreeing to advance its \$1.5 million to JB Property.

11 Its claim against Mr Clisdell which is the subject of the interlocutory judgment is to the same effect.

12 For reasons that follow, the damages recoverable by Plan B against Mr Clisdell are assessed in the amount of \$1,104,578.71. The claim against Mrs Simonetta fails and will be dismissed.

Witnesses

13 Mr Marasco gave evidence on behalf of Plan B. Mrs Simonetta gave evidence on her own behalf. In addition, her daughter Melinda Rae ('Ms Rae'), also gave evidence on behalf of Mrs Simonetta. Ms Rae was formerly a friend of Mr Marasco.

14 The parties also tendered a relatively confined suite of documents from the Court Book. No valuation evidence was called by Plan B. However, both Plan B and Mrs Simonetta tendered, without objection, two further valuations of the property. Plan B relied upon a valuation conducted by Acumentis Valuation on 25 July 2023 on the instructions of the receivers, pursuant to which Carlo Lando ('Mr Lando'), a registered valuer, assessed the market value of the property as at 25 July 2023 at \$1.55 million, excluding GST ('the Acumentis valuation').

15 Mrs Simonetta relied upon a subsequent valuation prepared by Mr Clisdell on 2 February 2023, in which Mr Clisdell assessed the value of the property as at that date at \$11.5 million, exclusive of GST.

The facts in more detail

16 The relevant sequence of events commences with a meeting between Mr Marasco, Mrs Simonetta and Ms Rae at Caffè e Cucina in Chapel Street, South Yarra. There was no satisfactory evidence as to when this meeting occurred, save that it most likely took place in around mid-June 2022. It was common ground that Mr Marasco initiated the meeting asking Ms Rae whether he could be introduced to her mother. Mr Marasco believed, as was the fact, that Mrs Simonetta worked in a mortgage broking business. He was apparently keen to diversify his existing investment activities and requested that Ms Rae arrange for him to meet her mother.

17 It is also not relevantly in dispute that, during the course of that meeting, Mr Marasco provided information about his business experience, which included his interest in investing by way of the making of private loans. He said he had never lent money at rates lower than 13.5%.

18 It is also common ground that there was discussion about a prospective loan which ASMM had been asked to procure by another broker, Justin Taylor from Private Loans Australia. Mr Taylor was seeking a loan of \$4.2 million for a period of six months. The loan was to be made on the security of a property in Gloucester Ave, Cape Gloucester (which was also referred to as Hydeaway Bay). The prospective borrower was seeking an advance of funds that would enable it to settle its purchase of the property, enabling it to obtain development finance so as to enable a development in the form of a 21-lot subdivision which was the subject of a recently obtained planning permit. Mr Taylor in fact had a shareholding in the proposed borrowing company. It is also common ground that Mrs Simonetta was aware that the property was the subject of a valuation which had been obtained of \$10 million and referred to this at the meeting.

19 Aside from those matters which are common ground, I found the evidence of Mr Marasco and Mrs Simonetta to be vague and of limited reliability as to the matters discussed at the meeting. I found Ms Rae's evidence somewhat more reliable, but only because she was more willing to concede that she could not recall the detail of what was said on that day. In making that observation, I do not intend to convey that Mr Marasco and Mrs Simonetta gave evidence that they knew was untrue, only that their recollections were imprecise given the passage of time and the absence of any contemporaneous documents which shed meaningful light on the discussions.

20 Notably, Mr Marasco's evidence concerning his reading of and reliance on the documents provided to him was also vague and imprecise. His evidence essentially went no further than saying that he read and relied upon 'the information' provided.

21 Contrastingly, both Mr Marasco and Mrs Simonetta appeared to have a much clearer recollection of a handful of isolated matters which, I suspect, each considered to be favourable to their case. For example, Mr Marasco, whose evidence was otherwise vague and imprecise as to 'the information' he received from Mrs Simonetta, was able to recall that she assured him that the loan was a 'safe and secure investment' and that she described herself as a partner in the ASMM business with Ms Acziak. I do not accept that evidence and very much doubt that either statement was made. Mrs Simonetta was not in fact a partner in ASMM with Ms Acziak. Further, having observed her in the witness box, I very much doubt that she would have used such precise language as 'safe and secure' to describe an investment of this nature, being a high-interest rate on a short-term, albeit with the comfort of the Clisdell valuation. Further, it was also tolerably clear that Mr Marasco was an experienced and sophisticated businessman with significant experience in private investments. In those circumstances, I find his evidence that Mrs Simonetta described the investment as 'safe and secure' as inherently unlikely and do not accept it.

22 Similarly, Mrs Simonetta's account of the oral discussions was that she did not make any positive statements about the proposed loan and that all she did was provide information to Mr Marasco and that she expressed no opinion or conveyed any assessment whatsoever. Given that her daughter and husband also formed part of the syndicate of private lenders who made the advance to Plan B I find it somewhat surprising that she did not express any view at all, although I am also satisfied that to the extent she did, it was not in terms suggested by Mr Marasco, nor in any sense relevant to anything that he then did.

23 In any event, what was or was not said at the meeting at Caffè e Cucina is of limited relevance to the issues which need to be considered in the resolution of the case.

24 Despite the deficiencies in the evidence, exacerbated by ASMM and Mrs Simonetta's practice of sending emails to its investors by way of a blind carbon copy which does not identify the recipient, I have no difficulty in accepting that, at some time between 17 June 2022, and 24 June 2022, Mr Marasco was provided with a covering email sent by Mrs Simonetta with her name appearing adjacent to the logo for ASMM and above the name of that company which read as follows:

Good evening

We have received the following proposal for your consideration.

Security property: Lot 1, Gloucester Ave, Cape Gloucester QLD 4800

Valuation: \$10,000,000 — valuation attached

Loan required: \$4,200,000

LVR: 42%

Interest rate: 12.95% pa

Term: 6 months

Prepaid: 6 months

Borrower: JB Property Investments Pty Ltd Purchased the property approx. 4 years ago for \$4m and now they are ready to settle. The borrower has completed full feasibility and obtained the relevant permits to commence a 21 lot subdivision of the land. All details are attached. Borrower has pre-sold two of the lots for \$1.5m each and have had plenty of enquiries for the rest of the lots. They have also applied for funding via a construction lender who are currently carrying out their due diligence and who have indicated they require 5 lots sold to complete and then will take out this loan within the term. Attached is full copy of approved Development Permit for the 21 Allotments.

Page 2 notes the extension in time given due to COVID restrictions which states a start by December 2022.

I have also attached a current development estimate to develop these allotments.

Currently have 2 allotments pre-sold (cannot contract it till after the settlement) both sold for \$1.5m incl GST.

Once they obtain 5 pre-sales which is expected by Late August we can then re-finance to construction lender

For a construction facility. The 5 pre-sales will cover the entire debt.

Link below to Permit information

Current DA Permit for 21 lots.pdf

This matter is expected to settle 30 June 2022.

25 In addition, and as indicted in the email, the investors, including Mr Marasco, were also provided with copies of, inter alia, a development cost estimate prepared by Sabai Consulting; a development management model headed 'Development Management Model Estate Master Licensed to: Private Loans Aust', prepared by Justin Taylor prepared for lending purposes with the name of the developer, JB Property; and the Clisdell valuation.

26 The Clisdell valuation is expressed to have been issued by Mr Clisdell, certified practising valuer and member of the Australian Valuers Institute. The valuation records that it was prepared pursuant to instructions from ASMM and records the receipt of instruction from

ASMM 'to determine the "as is" fair market value of the subject property for mortgage purposes'.

27 The valuation is otherwise in typical form for valuations of this nature. Included within the body of the valuation is a copy of the survey plan which has been approved for the 21-lot subdivision. Mr Clisdell provides a comprehensive definition of market value which reflects the test set out in *Spencer v Commonwealth* (1907) 5 CLR 418.

28 In the section headed 'Valuation Rationale & Methods of Valuation', Mr Clisdell explains the valuation approach in the following terms:

The valuer has adopted the Hypothetical Development approach as the primary method of valuation to arrive at the property's residual land value. This method has regard to the gross realisation as determined by the Comparable Sales method. We have allocated 'values' to the 'proposed plan' in accordance with land areas, aspect & exposure. There is then appropriate deductions made for development construction costs, profit and loss factors, interest charges, and other related fees that a developer would expect to outlay during the relevant construction period. The residual value is therefore the land's current value. Refer Hypothetical Analysis on page 21.

29 At pages 19 and 20, Mr Clisdell has incorporated the development cost analysis prepared by Sabai Consulting by reproducing that document within his valuation. At page 21, he has set out his hypothetical development analysis which, in broad terms, comprises his assessment of the realisable value of each lot, less the purchase price of the land, less a profit and risk factor of 20%, from which he then further deducts the development and interest costs, arriving at a residual land value of approximately \$9,981,750, which he rounds up to \$10 million.

30 In the section of the report headed 'Valuation "As Is"', Mr Clisdell states:

Subject to the information and disclaimers contained in this report, the current 'as is' fair market value of the subject property being Lot 1, Gloucester Ave, Cape Gloucester, 4800, as at 10th June 2022 is assessed at \$10 million (ten million dollars), exclusive of GST.

31 The valuation otherwise includes disclaimers in relatively standard form stipulating that the valuation is for the use of the parties to whom it is addressed, and for no other purpose, as set out in the syndicate product disclosure statement, and that no responsibility is accepted to any party who may use or rely on the whole or any part of the content of the valuation. It also includes in the disclaimers section that the subject property is considered suitable as security for first mortgage finance, subject to the comments within this report.

32 At about the same time, or shortly thereafter, Mr Marasco was provided with a copy of the original contract of sale, which showed that JB Property had acquired the property for \$3.7

million, with settlement originally due on 31 May 2022. Mrs Simonetta gave some evidence, albeit not entirely clearly, of discussions between herself and Mr Marasco about the significant difference between the valuation and the contract price. That disparity was said to be attributable to the subsequent obtaining of the permit for the subdivision.

33 Against that background, when Mrs Simonetta later informed Mr Marasco that the borrowers required additional moneys, Mr Marasco indicated that he would be prepared to advance \$1.5 million of the amount sought, rather than the \$1 million as had been originally discussed, but only on the basis that he would receive interest at 13.5% per annum, notwithstanding that the remaining lenders would only receive interest at 12.95% per annum.

34 In any event, on 28 June 2022, Mrs Simonetta emailed Mr Marasco thanking him for his time and willingness to increase his contribution from \$1 million to \$1.5 million, and attaching PDF copies of five documents, described as a client authorisation, lenders acceptance, loan summary, loan offer and application form. The email stated that the documents would also be forwarded via DocuSign to be signed and returned. The email requested that Mr Marasco pay \$1.5 million into the trust account of HWL Ebsworth Lawyers.

35 The loan offer was issued by ASMM and signed on its behalf by Ms Asciak, who was recorded as its director. The loan application form had been completed in hand by Mr Brian Seymour on behalf of the borrower, and the loan summary document, headed 'Loan Summary & Overview of the Mortgage Proposal', was issued under the letterhead of ASMM.

36 Relevantly, the Loan summary & Overview specified, among other things, the valuation of \$10 million by Mr Clisdell, the total loan amount required of \$4,250,000 and the LVR: 42.5%, the investment required from you '\$1,500,000', security: first registered mortgage, interest required: 12.95% per annum (concessional rate) on mortgage 13.5% per annum (concessional rate) agreed by borrower 17.95% per annum (standard rate) on mortgage 18.5% per annum (standard rate) agreed by borrower.

37 The identification of two concessional rates appeared to relate to the fact that the higher rate was that which Plan B was to receive in accordance with the discussions noted above, whilst the lower rate was to be received by the other lenders. The loan purpose was described as the purchase and development of land into a 21-lot subdivision as per existing permit granted, with the exit strategy identified as refinance with a construction lender to take out this loan during its term. The document required the signature of Mr Marasco on behalf of Plan B.

38 Immediately above the space for his signature was the following:

Acknowledgement

By signing this document you acknowledge and agree that:

1. You are satisfied as to the borrower's ability to service this loan and the borrower's overall creditworthiness;

2. There are significant commercial risks associated with this type of transaction and you are prepared to take those risks;
3. ASMM is appointed as your agent and, amongst other things, may proceed to instruct HWL Ebsworth Lawyers to prepare the loan security documents and settle this loan on your behalf. The loan security documents will include (unless you agree otherwise) a facility agreement, mortgage of land and guarantee and indemnity; and
4. The valuation report provided is acceptable and accurately details the current value of the property. The lender acceptance form and client authorisation forms otherwise provided for signature and return by Mr Marasco.

39 The lender acceptance form and client authorisation forms otherwise provided for signature and return by Mr Marasco.

40 On 29 June 2022, Mr Marasco returned the documents now signed by email. His email was sent in response to an email from Mrs Simonetta, copied to Ms Asciak, on 29 June 2022 at 10:20am, which forwarded an email which had been earlier sent to him in the early hours of Tuesday 28 June 2022. Reference to the early hours was accurate, as the email suggested that Mrs Simonetta had sent the email of 28 June 2022 at 3:05am. The email at 10:20am referred to certain difficulties apparently with the DocuSign process, which were said to be beyond anyone's control.

41 Settlement of the loan was effected on 30 June 2022. On 3 July 2022, Mr Marasco was provided with a copy of a letter sent by HWL Ebsworth to the borrowers confirming that settlement had occurred and advising of the disbursing of loan proceeds. The disbursement statement identified and confirmed that each of the private lenders comprising the syndicate of lenders had received their six months' interest in advance. Relevantly, in Plan B's case, it had received \$97,125. Other investors included Mrs Simonetta's husband, Adrian, and her daughter, Ms Rae, each of whom had loaned \$50,000 and received \$3,237.50.

42 The disbursement account also noted the receipt by ASMM of an establishment fee of \$155,000 and an administration and commitment fee of \$1,810. Following settlement, Mrs Simonetta forwarded her invoice to ASMM in the sum of \$12,750 plus GST of \$1,275, totalling \$14,025. The invoice described the charge as a 'procurement fee for JB Property Investments (Aust) Pty Ltd, loan amount: mortgage total of \$4,250,000 at 0.33%.'

43 As noted above, the loan fell due for repayment on 29 December 2022 but was not repaid.

44 There was some disagreement between the lenders as to the appropriate course then to be followed, with the borrowers requesting various extensions of time. Mr Marasco was active in the process of determining the course to be adopted and took a firmer position than some of the other investors. On 20 April 2023, solicitors engaged by him wrote to Ms Rae criticising a communication she had sent to the investors which apparently recommended a particular

course of action. In any event, nothing really of significance arises from the apparent disagreement between the various lenders, although it is noteworthy that it culminated in Mr Marasco procuring the commencement of legal proceedings of behalf of Plan B against the other investors by originating motion. That proceeding resolved shortly thereafter with consent orders being obtained on 16 June 2023 appointing receivers to the mortgage of land registered over the property and the general security interest created in favour of Plan B and the other lenders under the general security agreement between them and JB Property.

45 The orders further conferred upon the receivers the power to take all reasonable steps to enforce the rights under the mortgage and the GSA. As noted earlier, the property was subsequently advertised for sale by the receivers. The 'rare opportunity' sale advertisement issued by Knight Frank, Townsville and LJ Hooker advertised the property for sale as a receivers' sale on the Whitsunday Coast. The key features of the property were described in the advertisement as a 13.73 hectare redevelopment site with an existing approval for a 21-lot subdivision expiring on 7 December 2024. The advertisement also noted that alternative options may include a lifestyle property or a two to three lot prestigious subdivision.

46 The reference to the alternative option of a two to three lot prestigious subdivision appears likely to have been a reference to the use identified in the Acumentis valuation obtained by the receivers on 25 July 2023. In that valuation, the valuer, Mr Lando, had also undertaken a market value assessment. The valuer noted the development permit which provided for a 21-lot subdivision. Nevertheless, Mr Lando determined that the highest and best use of the land was not a 21-unit subdivision, but rather the development of a prestige residence or a subdivision into two or three lots, subject to council approval. The valuation noted that the original approval, being the 21-lot approval, required the developer to upgrade the adjoining gravel road, Gloucester Ave, to a higher bitumen sealed standard. This was said to involve a significant development cost, and Mr Lando expressed the opinion that the viability of the 21-lot development was highly uncertain. That conclusion led Mr Lando to assess the highest and best use of the property as a two-to-three-lot subdivision and to value the land accordingly at \$1.55 million, well short of the assessment in the Clisdell valuation.

47 In the result, the property was sold for \$1.65 million with settlement occurring on 12 January 2024.

Plan B's pleaded case

48 The critical paragraphs of the Plan B's statement of claim are as follows:

7. In about May 2022:

1. Simonetta and ASMM represented to Plan B that the value of the Property, which was to be mortgaged to secure the Loan was \$10,000,000 and that lending risk was accordingly low (Simonetta/ASMM Value Representation).

Particulars

The Simonetta/ASMM Value Representation was in writing in the Loan Documents that Simonetta of ASMM provided to Marasco of Plan B by email as described in paragraph 5 herein, namely:

1. The Loan Summary; and
2. The Valuation signed by Clisdell.

The Loan Summary provided by Simonetta of ASMM to Marasco of Plan B stated in writing that the security was a first registered mortgage and the valuation was \$10,000,000 million.

Plan B otherwise repeats the particulars to paragraphs 5 and 6 herein;

2. Clisdell represented to Plan B that the value of the Property, which was to be mortgaged to secure the Loan, was \$10,000,000 and that lending risk was accordingly low (Clisdell Value Representation).

Particulars

The Clisdell Value Representation was in writing in the Valuation signed by Clisdell.

Plan B otherwise repeats the particulars to paragraph 6 herein.

...

16. In reliance on the Simonetta/ASMM Value Representation, Plan B agreed to advance, and did advance, \$1,500,000 to JB.

17. But for the Simonetta/ASMM Value Representation, Plan B would have invested the \$1,500,000 in other income earning investments.

18. The Simonetta/ASMM Value Representation was false and misleading in that:

1. As at 10 June 2022, the fair market value of the Property, fee simple with vacant possession, exclusive of GST, was not \$10,000,000 but rather was materially less than \$10,000,000 and materially less than the Loan amount; and accordingly
2. The lending risk associated with the Loan was not 'low'.

Particulars

As at 10 June 2022, the fair market value of the Property fee simple with vacant possession, exclusive of GST, was approximately \$1,550,000. Plan B refers to the reasoning set out in the valuation report described in paragraph 13 herein.^[1]

19. To the extent that the Simonetta/ASMM Value Representation related to future matters, Simonetta and ASMM had no reasonable grounds for making the Simonetta/ASMM Value Representation within the meaning of section 4 of the Australian Consumer Law, section 12BB of the ASIC Act and/or section 769C of the Corporations Act.

49 Relevantly, paragraphs 23 to 26, under the subheading 'Clisdell's Misleading and Deceptive Conduct', are in materially identical terms.

50 The concluding paragraphs of the pleading that relate to the claim of misleading and deceptive conduct against Mrs Simonetta, ASMM, and Mr Clisdell are also relevantly identical. They allege that each engaged in conduct that was misleading or deceptive within the meaning of s 18 of the Australian Consumer Law, s 12DA of the *ASIC Act*, and/or s 1041H of the *Corporations Act*. It is further alleged that Mrs Simonetta was involved in the conduct referred to in sub-para (a), within the meaning of s 236 of the *Australian Consumer Law*, s 12GM of the *ASIC Act*, and/or s 1325 of the *Corporations Act*.

51 Separately, Plan B advanced a claim in negligence against Mr Clisdell, alleging that he failed to exercise all reasonable skill and care in carrying out the valuation. The relevant particulars of that claim referred back to Mr Lando's valuation.

52 Four matters should be noted: First, the alleged misleading and deceptive conduct is said to comprise representations. Secondly, the representations said to have been made by Mrs Simonetta and ASMM are precisely the same as the representations said to have been made by Mr Clisdell, with their misleading character arising in precisely the same circumstances. Thirdly, the alleged misleading nature of the representations is also said to arise in exactly the same manner in each case, namely because of the discrepancy between the value of the property as described in the Clisdell valuation and that in Mr Lando's valuation, which was comparable to the eventual sale price. Fourthly, the pleading advances, in each case, a plea seeking to invoke the reverse onus which applies in relation to a representation concerning future matters.

What representations were made?

53 Although Mr Clisdell did not defend the claim made against him, it is useful, in the first instance, to determine what representations were made by Mr Clisdell, given that they are the exact same representations alleged to have been made by ASMM and Mrs Simonetta.

54 Where a person expresses an opinion and sets out a basis for that opinion, the relevant information conveyed by the provision of the valuation is not properly characterised as a statement as to a future matter.^[2] Rather, what Mr Clisdell was doing was expressing his opinion or belief as to the current market value of the property. An opinion or a belief, unlike a fact, is not something which is false or untrue in itself.

55 The expression of an opinion or a belief is also likely to convey that the person holding that belief or opinion had an honest belief or, to put it another way, that the opinion expressed was genuine. If it can be shown that that the person expressing the opinion or belief did not in fact genuinely hold it, the proffering of that opinion or belief will be untrue and misleading. That will be because the proffering of the opinion or belief implicitly conveyed that it was genuinely held, when in fact it was not. It is not misleading because the opinion or belief itself was untrue *per se*.

56 Where the opinion is proffered by a person who professes to have expertise in forming and giving opinions of the kind in question, the provision of the opinion may well convey more than merely the fact that the opinion was held by the provider of the information. Rather, it may also convey that the opinion was based upon reasonable grounds and was the product of the exercise of due care and skill.^[3] That is the case with Mr Clisdell. He held himself out as a qualified valuer with the expertise to express an opinion on a subject matter which fell within his sphere of expertise.

57 Insofar as Mr Clisdell is concerned, I have no difficulty in accepting that the provision of the information to the investors, including Mr Marasco, relevantly conveyed that Mr Clisdell's opinion that the market value of the property was \$10 million was based upon reasonable grounds and was the product of due care and skill.

58 Further, and although not strictly necessary to resolve that which remains of Plan B's claim against Mr Clisdell, given that that interlocutory judgment in default of defence has been obtained against him, I also accept that Mr Clisdell did not have a reasonable basis for concluding that the market value was \$10 million and that his opinion to that effect was not one arrived at through the exercise of due care and skill.

59 Whilst Plan B did not adduce any expert evidence which pointed to a particular methodological error on Mr Clisdell's part, gross overvaluation is of itself an indicia of negligence. Relevantly, only 18 months after the provision of the Clisdell valuation, the property was sold, albeit by a receiver but following an advertising campaign carried out by two well-known estate agents, for a mere \$1,650,000. Further, Mr Lando's valuation, which assessed the market value at only \$1,550,000, only 12 months after the date on which Mr Clisdell had undertaken that assessment, concluded that the development which underlay Mr Clisdell's

analysis was not feasible because of the costs of development associated with the adjacent road. In the circumstances, it can comfortably be concluded that the reason why the sale price fell some \$9 million short of Mr Clisdell's assessment, was because of an error of methodology on the part of Mr Clisdell in concluding that the highest and best use of the land for a 21-lot subdivision, which in turn was based upon an assessment by him of the viability of the development plan.

60 It is instructive to consider Plan B's claim against Mrs Simonetta in the context of this characterisation of the claim by Plan B against Mr Clisdell, because Plan B seeks to impose upon ASMM and Mrs Simonetta liability for substantially the same conduct as those which it seeks to impose upon the valuer, Mr Clisdell.

The parties' submissions

61 Plan B and Mrs Simonetta both relied upon *Butcher v Lachlan Elder Realty Pty Ltd*.^[4]

62 In *Butcher*, the High Court, by majority, dismissed an appeal brought from a decision of the NSW Court of Appeal which had itself dismissed a claim by a purchaser against an estate agent for damages arising from the provision by the estate agent of a brochure which reproduced a survey diagram of waterfront land which showed a swimming pool as being entirely within the freehold land demarcated by the mean high water mark. In fact, the swimming pool was not wholly within the land above the mean high water mark. The purchasers brought proceedings against the estate agent for damages. Relevantly, the brochure provided by the estate agent stated that the information contained within the brochure had been obtained from sources which the agent believed to be reliable, but that its accuracy could not be guaranteed and that interested persons should rely on their own enquiries.

63 In their judgment, the majority^[5] rejected the contention that, by providing the brochure, the agent had represented (among other things) that the swimming pool constructed on the land was wholly constructed within the rear boundary of the land. Rather, the majority considered that the agent made no representation beyond stating that which the vendor had represented.

64 The majority quoted with approval the judgment of Mason ACJ, Wilson, Deane and Dawson JJ in *Yorke v Lucas*:

That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false. If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive.^[6]

65 The majority emphasised that it was important to view the alleged wrongdoer's conduct 'as a whole'^[7], and concluded that in the circumstances the agent did no more than communicate what the vendor was representing without adopting or endorsing it. The majority concluded that such a conclusion flowed from the nature of the parties, the character of the transaction contemplated, and the contents of the brochure itself.

66 Plan B emphasised aspects of the judgment of McHugh J, who dissented in the result, although his Honour's observations have been subsequently quoted with approval in later cases.^[8]

67 Relevantly, in his judgment, McHugh J stated:

[109] 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. It invites error to look at isolated parts of the corporation's conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct. Thus, where the alleged contravention of s 52 relates primarily to a document, the effect of the document must be examined in the context of the evidence as a whole. The court is not confined to examining the document in isolation. It must have regard to all the conduct of the corporation in relation to the document including the preparation and distribution of the document and any statement, action, silence or inaction in connection with the document.

...

[115] The decided cases also show that, by publishing erroneous information received from others, a corporation may engage in conduct that is or is likely to be misleading or deceptive. In determining whether a contravention of s 52 has occurred, two factors are important:

1. whether the corporation assumed responsibility for or adopted (or endorsed or used its name in association with) the information so that it would be reasonable for a recipient to rely on the information; and
2. whether the corporation disclaimed any belief in the truth or falsity of the information or disclaimed any personal responsibility for what it conveyed.

68 Plan B emphasised that, unlike *Butcher*, here, neither ASMM nor Mrs Simonetta disclaimed any belief in the accuracy of the Clisdell valuation. On the contrary, Plan B submits that, by a combination of incorporating the \$10 million figure and the associated LVR in its communications to Plan B, Mrs Simonetta adopted or endorsed that information. Further, Plan B contends that, by para 4 of the acknowledgement in the loan summary form, which required

an acknowledgment from Mr Marasco that ‘the valuation report provided is acceptable and accurately details the current value of the property’, Mrs Simonetta had positively adopted the Clisdell valuation.

69 Otherwise, Plan B sought to draw an analogy with the facts and circumstances considered by the Court of Appeal in NSW in *Medical Device Technologies Pty Ltd v Health Administration Corporation*.^[9] In *Medical Device Technologies*, the Court dismissed an appeal against the judgment of the trial judge, in which the trial judge had, among other things, rejected the assertion made by a vendor of ventilators that the provision by the vendor of a user manual to the ultimate purchaser in the course of negotiations which preceded the agreement conveyed nothing more than a representation by the vendor that the specifications were those of the manufacturer and that the vendor believed those specifications to be correct and did not know of any facts which gave reason to doubt their accuracy. The purchaser had argued successfully before the trial judge that the vendor had represented that the specifications of the ventilator were as set out in the user manual.

70 The Court of Appeal accepted the reasoning of the trial judge that the vendor did not pass on the user manual on a ‘for what it is worth’ basis and did not act as a mere conduit. The Court adopted the trial judge’s observation that a reasonable person in the respondent’s position would have understood that the appellant had ‘adopted or endorsed’ the accuracy of the user manual. An important aspect of the Court of Appeal’s reasoning was that the vendor was acting as a principal in its dealings with the respondent and was aiming to conclude a contractual relationship with the respondent, not as the agent for the manufacturer but on its own account. The Court considered that it would have been obvious to the vendor’s representatives that the purchaser would rely on the contents of the user manual as accurately and comprehensively explaining how the ventilator was to be used and its functionality.

Analysis

71 I do not accept Plan B’s submission. The necessary analysis must commence by identifying the conduct engaged in by Mrs Simonetta (and ASMM) that is said to be misleading.

72 Here, the conduct consisted of the provision by a mortgage broker of the Clisdell valuation by email, and the recitation of its essential conclusion (viz that the property was valued at \$10 million) in the covering email, and its deployment of that figure in the Loan Summary document in the basic arithmetic calculation by which the LVR was determined (ie, the value of the loan divided by the estimated value of the security).

73 Whilst the absence of an express disclaimer is part of the relevant context, that factor alone is less significant here than the role and circumstances of the person providing the information, ^[10] the nature of the information passed on, and the fact that it was clear to the recipient that the opinion was the product of disclosed and ostensibly expert analysis.

74 Plan B’s approach to identifying the representation conveyed by ASMM and Mrs Simonetta, and its characterisation of that representation in precisely the same terms as that made by the

expert valuer, does not sufficiently engage with the character of the information provided or the characteristics of the person providing the information.

75 It is one thing for the provision of information by A, containing A's opinion about a specialised subject matter falling within A's expertise, to convey to a recipient that A has a reasonable basis for that opinion. It is another thing for B to provide information containing the opinion of another (A) about a specialised subject matter which the recipient knows is not within B's expertise, to convey that B had a reasonable basis to believe that A's opinion was a reasonable one. But Plan B's argument goes further still. It says that the expert is liable for misleading conduct arising from the dissemination of an opinion about subject matter falling within the expertise of the expert disseminator because of matters that the expert ought to have known. In addition, it says that the known non-expert is also liable for the dissemination of the information affected by a defect in analysis by the expert which the non-expert did not know and lacked the expertise to know.

76 What Plan B seeks to establish is that, by providing a copy of the valuation to the investors, Mrs Simonetta herself conveyed that there was an objective reasonableness of Mr Clisdell's assessment. But an implication of reasonableness which attaches to an opinion only arises where the person who holds that opinion holds themselves out as having expertise or skill in the area constituting the subject matter of the opinion, and the person apprehends that anyone to whom the opinion has conveyed would understand and rely upon the opinion having been formulated on reasonable grounds.

77 Here, there was no evidence that Mr Marasco understood or apprehended that Mrs Simonetta possessed expertise in formulating an opinion as to the market value of the property. He certainly did not give evidence to that effect. The importance of the Clisdell valuation lay in the fact that the investors could take comfort from the fact that a person with expertise in its subject matter (namely, Mr Clisdell), had formulated an assessment. A person in Mr Marasco's position, and that of the other prospective investors would have appreciated that the person with the expertise to formulate the opinion on reasonable grounds was Mr Clisdell, not Mrs Simonetta, who was doing no more than passing on the expert opinion of Mr Clisdell.

78 It is reasonable to conclude that the non-expert ASMM and Mrs Simonetta genuinely believed that the Clisdell valuation had a reasonable basis. Clearly they did, and no case was made that they did not have that state of mind. Perhaps at its very highest, the dissemination of the Clisdell valuation and the calculation of the LVR may have conveyed that ASMM and Mrs Simonetta had a reasonable basis to believe that Mr Clisdell had the expertise to formulate the requisite opinion and had done so reasonably. But that is a different thing from non-experts conveying that the opinion itself was a reasonable one.

79 The critical difference between the circumstances of the cases relied upon by Plan B and the present lies in the character of the information conveyed and the reasonable expectations of the recipient party.

80 In *Medical Device Technologies*, the information passed on by the vendor to the prospective purchaser in the form of the user manual consisted of factual information concerning the characteristics of the product that the vendor was selling. A prospective purchaser who receives information as to the characteristics of the product to be sold would ordinarily expect that the vendor of the product would have the knowledge and expertise to provide accurate factual information as to its use and characteristics. Such a situation is far removed from the present case.

81 The estate agents' cases are closer but also somewhat removed from the present. In *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd*,^[11] the estate agent was held liable for incorrect information contained in a brochure concerning a property which it was marketing for sale. The brochure included a statement that the net lettable area of the building would be 180 square metres. In fact, the net lettable area was only 137.4 square metres. The agent had relied upon information provided by a consultant to the vendor. The brochure included a disclaimer to the effect that the information contained in the brochure had been prepared with care or had been supplied by apparently reliable sources and that the agent had no reason to doubt its completeness or accuracy. The gist of the agent's defence was that, in the disclaimer, it had made clear that it was disclaiming any belief in the truth or falsity of the information, merely passing it on for what it is worth. Critically, the subject matter of the misrepresentation, the net lettable area of the building was a matter of 'hard physical fact' which was passed on by an estate agent who held itself out as being a consultant to institutional investors and developers of major properties. The Court considered that a purchaser would ordinarily expect that, as part of ordinary business, the agent would present such information in a persuasive form, and not merely passing on information of another without endorsement or adoption. *John G Glass* is a very different case from the present. The information was of the very kind that an agent would be expected to know. That is not this case.

82 In *Butcher*, the line between information that the agent would be expected or not expected to know was much less clear, and the agent had disclosed the source of the information, albeit incorporating it into its own brochure. The absence of a bright line explains the varying approach of the judges in that case, despite their relevantly similar approaches.

83 *The Saints Gallery Pty Ltd v Plummer*^[12] provides a closer analogue. In that case, a purchaser acquired two paintings from a gallery, with the works said to be attributed to the late Ian Fairweather and Lloyd Rees. The paintings were forgeries. The purchaser sued the gallery owner for damages representing the difference between the price paid and the true value of the properties.

84 Relevantly, the gallery owner did not usually deal in the work of artists of any eminence and certainly not those of Fairweather and Rees. The purchaser, on the other hand, was a professional art valuer and dealer. It was common ground that the purchaser placed no reliance on the gallery owner's ability to judge the authenticity of the paintings the subject of the sale. In fact, the purchaser had more experience than the vendor in authenticating paintings in the category of those in issue. As was the case here, the purchaser relied upon the

reference in *Yorke v Lucas* to an express or implicit disclaimer of belief in the truth or falsity of the information, and emphasised that there was no evidence of any disclaimer on the part of the gallery owner.

85 The Court accepted that the gallery owner did not claim to have warned the purchaser of the possibility that the information that had been provided by a third party or suggested that the purchaser should have any doubts as to the accuracy of the paintings' authenticity. Relevantly, the Full Court of the Federal Court concluded that a disclaimer of personal knowledge of the paintings' authenticity was deducible from the parties' relationship and the whole of the circumstances.

86 So too here, where the subject matter of the alleged misleading representation concerned an area of expertise which Mr Clisdell had, but Mrs Simonetta did not. In such circumstances, a disclaimer of knowledge of the reasonableness or otherwise of the Clisdell valuation is deducible from the relevant circumstances.

87 Paragraph 4 of the acknowledgement as set out in the Loan Summary does not make any meaningful difference to this analysis. It is true that by providing the Loan Summary to Plan B requiring its signature and return, ASMM required an acknowledgement from Plan B that the Clisdell valuation 'is acceptable and accurately details the current value of the property'. By doing so, ASMM arguably conveyed, at the very least its belief that the current value of the property was as described in the Clisdell valuation. But a statement by ASMM that it held that belief is not misleading unless it can be said that ASMM lacked that belief. There is no suggestion that it did, and accordingly item 4 does not assist Plan B.

88 Otherwise, Mr Marasco's evidence did not refer directly to any consideration of paragraph 4 of the acknowledgement. Rather, his evidence, vague as it was, went really no further than that he had relied upon 'all the information provided to me by Mrs Simonetta'. There is no evidence that he attached any, or any particular, significance to paragraph 4 or, indeed, any satisfactory evidence that he ever read it, relied upon it, or understood it in the sense now sought to be relied upon.

Conclusion

89 Having regard to the above matters, Plan B's claim against Mrs Simonetta fails and will be dismissed.

90 In relation to the assessment of damages in respect of the interlocutory judgment for damages to be assessed against Mr Clisdell, there shall be judgment for Plan B against Mr Clisdell in the amount of \$1,104,578.71, together with interest pursuant to s 60 of the *Supreme Court Act 1958* (Vic) ('*Supreme Court Act*'), with such interest to be calculated at the rate fixed under the *Penalty Interest Rates Act 1983* (Vic) from the date of commencement of the proceeding to the date of judgment.

91 In opening the case, Plan B adverted to both a *Hungerfords* claim, in reliance upon an

alternative use of the invested funds or, in the alternative, a claim for interest pursuant to s 58(1) of the *Supreme Court Act 1986* (Vic). There is no proper basis to award interest on either of those bases as against Mr Clisdell. There is no evidence that Mr Clisdell was informed of Plan B's alternative use of the monies and, accordingly, a *Hungerfords*-style claim for damages is not open. Further, s 58(1), which entitles the Court to award interest where, in any proceeding, a debt or sum certain is recovered, permits interest to be awarded from the time when a demand for payment was made. There is no evidence as to the time at which any such demand was made.

92 Accordingly, Plan B shall be confined to interest pursuant to s 60 of the *Supreme Court Act* at the penalty rate, from the date of commencement of the proceeding to the date of judgment.

SCHEDULE OF PARTIES

S ECI 2024 05588

BETWEEN:

PLAN B PROPERTIES PTY LTD (ACN 105 114 994)

Plaintiff

- v -

AUSTRALIAN SECURED & MANAGED MORTGAGES PTY
LTD (ACN 112 603 219)

First Defendant

ANGELA SIMONETTA

Second Defendant

BRUCE CLISDELL

Third Defendant

[1] The reference to the valuation report in para 13 was a reference to the valuation of Carlo Lando dated 25 July 2023.

[2] *MIBA Pty Ltd v Nescor Industries Group Pty Ltd* [1996] FCA 834; (1996) 141 ALR 525, 533, 534.

[3] *MGICA v Kenny & Good Pty Ltd* [1996] FCA 766; (1996) 140 ALR 313, 356; *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* [1984] FCA 180; (1984) 2 FCR 82, 88.

[4] [2004] HCA 60; (2004) 218 CLR 592 (*Butcher*).

[5] Gleeson CJ, Hayne and Heydon JJ.

[6] (1985) 158 CLR 661, 666.

[7] *Butcher*, 605 [39].

[8] *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25, 341 [102].

[9] [2024] NSWCA 142 (*Medical Device Technologies*).

[10] *Butcher*, 605, [37], [39]–[40].

[11] (1993) ATPR 41–249 (Davies, Heerey and Whitlam JJ) (*John G Glass*).

[12] (1988) 80 ALR 525.