IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGĀREI TERENGA PARĀOA ROHE

CIV-2016-488-35
[2017] NZHC 3047

BETWEEN	PETER ANTHONY SULLIVAN First Plaintiff
	PORT ALBERT INVESTMENTS LIMITED Second Plaintiff
AND	WELLSFORD PROPERTIES LIMITED First Defendant
	GARRY EDWARD HANNAM Second Defendant
	SUMPTER BAUGHEN CHARTERED ACCOUNTANTS LIMITED (Discontinued) Third Defendant

Hearing:	16 - 26 October 2017
Appearances:	P Dale and A Steel for the Plaintiffs J Golightly and D Reeves for the Defendants
Judgment:	8 December 2017

JUDGMENT OF GORDON J

This judgment was delivered by me
on 8 December 2017 at 4.30 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Stafford Klaassen, Epsom, Auckland

	Marsden Woods Inskip Smith, Whangarei
	McElroys, Auckland
Counsel	P J Dale, Auckland

Introduction

[1] On 23 June 2014 the first plaintiff, Peter Sullivan, entered into a conditional agreement for sale and purchase (SPA) to buy a commercial property at 95-97 Rodney Street, Wellsford comprising a service station, a food court and other retail premises (the property) from the first defendant, Wellsford Properties Limited (WPL). The SPA contained a due diligence clause.

[2] The purchaser in the SPA was expressed to be "Peter Sullivan or nominee". On 11 July 2014 the second plaintiff, Port Albert Investments Limited (PAIL), was incorporated. PAIL was formally nominated as the purchaser by deed on 25 August 2014 and took title to the property on settlement the following day.

[3] Prior to the signing of the SPA, the operator of the service station, Number 8 Caltex,[1] raised issues regarding operating expenses (OPEX) for its tenancy. The issues were raised in two emails dated 27 and 30 May 2014 sent by Peter Hardy, the Chief Financial Officer of Number 8 Caltex, to Kerry Foon, an employee of the third defendant, Sumpter Baughen Chartered Accountants Limited. Sumpter Baughen were WPL's accountants. The second of those emails was copied to the second defendant, Garry Hannam, the sole director and a shareholder of WPL.

[4] Mr Hardy's emails were not disclosed during the due diligence process. Instead, the emails came to light after settlement when Mr Hardy advised one of the shareholders of PAIL that there was an issue in relation to the OPEX allocated to Number 8 Caltex's tenancy.

[5] Mr Sullivan and PAIL say that the defendants should have disclosed Mr Hardy's emails. They further say that, had the emails been disclosed, PAIL would not have proceeded with the purchase at the agreed price.

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[1] In this judgment I refer to the operator of the service station at the property during 2014 as Number 8 Caltex. Various name changes are referred to at [22] to [23] below.

[6] PAIL and Number 8 Caltex ultimately reached a settlement as to the amount of OPEX to be paid annually by Number 8 Caltex to PAIL. That sum is less than the sum previously allocated to Number 8 Caltex by WPL. PAIL says that because of the reduced OPEX contribution by Number 8 Caltex there has been a reduction in the net income and thus a diminution in the value of the property as compared to the purchase price it paid for the property.

[7] Mr Sullivan and PAIL seek damages in the sum of $428,337.43 together with other costs including legal, valuers' and surveyors' costs plus interest. The sum of $428,377.43 represents the difference between the income which PAIL expected to receive over the term of the lease, based on a capitalisation rate of 7.48 per cent, and the (reduced) income that PAIL will in fact receive as a result of the reduced OPEX contribution.

[8] Prior to the hearing the plaintiffs settled their claim against Sumpter Baughen. The hearing accordingly proceeded in relation to the claims against WPL and Mr Hannam only.

[9] WPL and Mr Hannam deny that they were under an obligation to disclose the May 2014 emails to Mr Sullivan. They say there was nothing in the conduct of the parties or in the terms of the SPA that displaced the doctrine of *caveat emptor* or the principle that a contract for the sale and purchase of land is not a contract *umberrimae fidei* in which there is an absolute duty on each party to make full disclosure to the other of all material facts of which he has knowledge.[2]

[10] The defendants deny that they made any misrepresentation in relation to the sale of the property but say that, in any event, any representations were made to Mr Sullivan and not to PAIL. It follows, they say, that PAIL did not rely on the representations and Mr Sullivan did not suffer any loss. Alternatively, the defendants say that the plaintiffs did not suffer any loss, because the shortfall in OPEX received from Number 8 Caltex can be recovered from other tenants.

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2 Citing *Spooner v Eustace* [1963] NZLR 913 (SC) at 917.

[11] Finally, the defendants say if the plaintiffs have suffered loss as a result of the reduction in OPEX received from Number 8 Caltex, then the defendants' conduct was not causative of the loss.

[12] In relation to Mr Hannam, it is submitted he is not personally liable for any misrepresentations of WPL.

The claims

[13] The plaintiffs pursue four causes of action against the defendants: the first three against WPL only and the fourth against both WPL and Mr Hannam personally. The central issue underlying all causes of action is whether there was a legal obligation to disclose the emails of 27 and 30 May 2014.

[14] The first cause of action claims misrepresentation by silence alleging that the failure to disclose the contents of Mr Hardy's emails was a misrepresentation under s 35 of the (now) Contract and Commercial Law Act 2017 (CCLA).[3]

[15] The second cause of action alleges that the statement in a letter from WPL's solicitor to the plaintiffs' solicitor that "…there are no outstanding disputes with the tenants" was a misrepresentation under s 35 of the CCLA.

[16] In the third cause of action Mr Sullivan and PAIL allege that WPL breached two clauses in the SPA by failing to disclose Mr Hardy's emails. The first clause relates to vendor's warranties regarding notices by a tenant and the second relates to disclosure by the vendor as part of the due diligence process.

[17] The fourth cause of action alleges misleading and deceptive conduct under s 9 of the Fair Trading Act 1986 (FTA) against both WPL and Mr Hannam personally.[4]

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3 This Act is a revision Act. Section 35 of the Contract and Commercial Law Act 2017 (CCLA) replaces s 6 of the Contractual Remedies Act 1971.

4 The claim, now settled, against the third defendant was also brought under the Fair Trading Act 1986.

[18] WPL initially filed a counterclaim against PAIL alleging breach of contract. However, the issues in the counterclaim were resolved prior to the hearing and accordingly the counterclaim was discontinued.

Factual background

The service station lease and tenants of the service station

[19] The service station on the property has been in operation since at least 1994. Since that time, the property has changed hands on several occasions. The original owner was the Northland Cooperative Dairy Company Ltd, which was later subsumed into Fonterra following the restructuring of the New Zealand dairy industry in the early 21st century. The property was subsequently transferred, first, to NDS Fuel Ltd and later, to WPL.

[20] Since 1994, the part of the property comprising the service station has been leased to a number of different companies, each associated in some way with the Caltex brand.

[21] The initial headlease from the Northland Cooperative to Caltex Oil (N.Z.) Ltd was signed on 1 February 1994. At the same time, the parties entered a deed of sublease whereby Caltex Oil subleased the service station back to Northland Cooperative, which operated the business of the service station. The business of the service station was later transferred to NDS in 2002 and NDS accordingly took over as sublessee.

[22] This separation of the headlease and sublease continued until 2013. In February 2013, the newly incorporated Caltex Wellsford Ltd purchased the service station business from NDS and NDS accordingly transferred its interest as sublessee to Caltex Wellsford. On 5 April 2013 Chevron New Zealand (previously Caltex Oil) as lessee under the headlease assigned its interest in the lease to Caltex Wellsford Ltd, merging the headlease and sublease.

[23] On 31 March 2014 Caltex Wellsford and others amalgamated to become Star Metro Holdings No. 2 Ltd. Shortly thereafter, on 14 August 2014, Star Metro changed

its name to Number 8 Caltex Ltd. For convenience, I will refer to the tenant of the service station during 2014 as Number 8 Caltex.

[24] As noted above, the second defendant, Garry Hannam, is the sole director and a shareholder of WPL. Mr Hannam has been involved with the property for many years. He was previously employed as the General Manager of Northland Cooperative (Service Station Division) and for Chevron New Zealand as Regional Manager. He was also Managing Director and shareholder of NDS. At the time of the 2013 sale by NDS of its business to Number 8 Caltex, Mr Hannam was involved both as the landlord (WPL) and vendor of the service station business (NDS).

The service station lease – OPEX provisions

[25] Clause 2 of the headlease refers to the payment of rental, property expenses and utility charges. The "Property Expenses" are defined in cl 2.2(b) as follows:

> … all rates, charges, assessments, ground rental, duties, impositions and fees whether municipal, governmental or otherwise which are, or may be at any time during the term of the Lease, levied in respect of the Premises (but excluding any costs or charges incurred by the Lessor in complying with the requirements of the Building Act 1991 except where costs or charges arise as a result of the use to which the Lessee puts the Premises or the number or sex of the persons employed on or occupying the Premises).

[26] The headlease identifies the Premises in cl 1 of the Reference Schedule by the full legal descriptions of the land comprised and described in CTs 810/31 and 789/287:

> … together with the Lessor's buildings and other improvements situated on that land and the Lessor's fixtures and fittings in or about the said building or the land comprising the service station and garage as more particularly shown outlined red on the plan attached to this lease.

[27] Unfortunately there does not appear to be in existence a plan outlined in red. The plan annexed to the exhibit copy of the headlease is in black and white. One of the plaintiffs' witnesses, Noel Chandler, thought he had seen a copy of the plan with a red outline. But the rest of the evidence suggests there is only a black and white version currently in existence.

[28] In the time since the original headlease and plan were agreed, it is clear that the service station canopy area has been extended. There have also been internal

alterations; for example, part of the Number 8 Caltex shop is used by one of the other tenants, Jesters Pies. In short, the (black and white) plan attached to the copy of the headlease of 1 February 1994 no longer represents the premises as they are currently occupied. The premises have been substantially modified and/or used outside the terms of the Premises defined in the lease.

Other tenants

[29] The service station is the main tenant of the property. As at 1 August 2014, there were six tenants in total. The five other tenants were McDonalds Restaurant and McDonalds McCafe, McDonalds Storage, Jesters Pies, Long John Silver and Noodle Canteen.

[30] Midas Coin Arcade occupied the arcade. It was not a tenant but paid a rental to WPL in the form of income sharing under a hire agreement.

The tenants' obligation to pay OPEX – WPL methodology

[31] Each tenant, other than McDonalds Storage, was obliged to pay a proportion of the operating expenses (OPEX) for the property calculated in accordance with their respective lease agreements.

[32] As noted above, Sumpter Baughen are WPL's accountants. It was the practice for Sumpter Baughen to issue invoices to the tenants of the property including annual OPEX wash-up invoices on behalf of WPL. Sumpter Baughen also monitored payment of rent and OPEX by the tenants. They communicated with the tenants on behalf of WPL in relation to these matters.

[33] Ms Foon was the Sumpter Baughen employee who, at the material times, performed these duties on a day to day basis. Ms Foon's principal contact at WPL was its director, Mr Hannam.

[34] Ms Foon said that WPL's methodology was to split OPEX between food court and building expenses. Foodcourt expenses simply consisted of the costs of cleaning the foodcourt. The building expenses incorporated a number of different items

including cleaning, insurance, lights and power, rates, repairs and maintenance, and security.

[35] Ms Foon said that WPL's solicitors, Marsden, Woods, Inskip & Smith (MWIS) confirmed to Sumpter Baughen the percentages allocated to each tenant on 1 June 2012. The arrangement was that each tenant would pay a set amount for their allocated share of OPEX each month. At the end of each financial year an OPEX wash-up would be completed which compared each tenant's allocated share of OPEX against the amount that tenant had in fact paid over the course of the year. If the actual costs exceeded the total amount paid, then the tenant would be invoiced for the shortfall. Conversely, a refund would be paid to the tenant, if it had paid more than its share of the OPEX for that year.

[36] Historically there was a shortfall between the total expenditure on OPEX and the recovery from the tenants.

The 27 and 30 May 2014 emails

[37] On 27 May 2014 Ms Foon sent an email to Mr Hardy of Number 8 Caltex, attaching a breakdown of the actual annual OPEX costs for the property and the wash-up invoice (invoice #123) for Number 8 Caltex for the period from 1 April 2013 to 31 March 2014.

[38] The total annual expenditure for OPEX for the financial year ending 31 March 2014 was $259,544. Number 8 Caltex's share was $91,614.73, which comprised 10 per cent of the food court costs ($13,247.90 plus GST) and 52.27 per cent of the building costs ($66,417.08 plus GST).

[39] Number 8 Caltex had paid $77,588.61 during the course of the year ($5500 plus GST each month) and $1,688.61 for an earlier wash-up invoice. This left an outstanding balance of $14,026.12 to pay.

[40] Mr Hardy sent a reply by email on the same day. This was the first of the two emails which the plaintiffs say should have been disclosed. The email reads as follows:

> Thanks Kerry
>
> Just a couple of quick things initially.
>
> 1. Can you please send me a copy of the budget and the detail of what has over-run so we can analyse why such a significant washup.
> 2. Can you please identify why we are being allocated 52% of power as we have own [sic] meter and are receiving separate accounts for our usage.
> 3. Can you provide the breakdown to detail on Hireage/leases and R&M – so that we can identify if tenant specific or general – they are pretty chunky numbers!
>
> Will have our ops manager run an eye over it as well.
>
> Thanks
> Pete

[41] Ms Foon forwarded Mr Hardy's email to Mr Hannam on the same day. In her covering email to Mr Hannam, Ms Foon suggested that she send Mr Hardy a spreadsheet which recorded for each cost category the invoices making up the final amount. Mr Hannam responded, also on 27 May 2014, agreeing with the proposal to send a spreadsheet. He added, "This is [Number 8 Caltex]'s first wash up invoice and knowing Pete Hardy he wants to understand the numbers."

[42] On 29 May 2014 Ms Foon sent Mr Hardy an email responding to his queries and attaching a spreadsheet which set out the breakdown for each costs category. She answered Mr Hardy's three questions as follows:

> 1. … We don't do an annual budget. I have attached a spreadsheet which shows a breakdown of each cost category.
>
> 2. … Per Garry Hannam–"Star Metro need to pay a % of the foodcourt power so their customers can find their way to the toilet"
>
> 3. … See my spreadsheet–I have tried to narrate as best I can.

[43] Mr Hardy responded on 30 May 2014 by email which he copied to Mr Hannam. This email was the second of the two emails which the plaintiffs allege should have been disclosed. The email reads as follows:

> Thanks Kerry
>
> I will reply to both you and Garry however there are a number of costs on here that are inequitably allocated – some which are quite clear – (for example the suggestion that we pay 52% of the total common area power costs just for customer toilet access.)

> Sending this as a heads up as I believe a re-allocation needs to be done and do not want to prejudice your opportunity to recover from the other tenancies. I will provide a comprehensive reply to follow up with reference to the Lease. I suggest that given the quantum you do not finalise the invoices for other tenancies until we have had a substantive discussion, and preferably resolution.
>
> Rgds
> Peter

[44] Ms Foon replied by email on the same day copying in Mr Hannam stating, "Garry is away on leave at the moment and won't be back until Monday 9th June".

[45] Mr Hardy responded shortly thereafter, copying in Mr Hannam as follows:

> That's OK – will give me a chance to get a proper reply to you. Main purpose for replying quickly was so that you had opportunity to hold the invoices to other tenants if they had not gone out.
> Pete

[46] The conversation concluded a few minutes later with Ms Foon's reply:

> Thanks for that consideration but they have already gone out.
>
> Obviously we'll be back in touch the week beginning the 9th June!
>
> Thanks
> Kerry

[47] On 10 June 2014, Ms Foon sent an email to Mr Hannam regarding OPEX matters for other tenants and asking Mr Hannam whether he had heard from Mr Hardy. Mr Hannam responded that he had not but asked Ms Foon to "please give him a nudge".

[48] On 10 June 2014, Ms Foon emailed Mr Hardy as follows:

> Hi Peter
>
> Garry is back now at work, so if you have any further queries re your OPEX wash-up we should try and get them sorted sooner rather than later.
>
> Thanks
> Kerry

[49] Mr Hardy did not respond to Ms Foon's 10 June 2014 email. She emailed him again on 23 June 2014 as follows:

> Hi Peter
>
> Please find attached the Perpetual Invoice for the new monthly lease for Wellsford.
>
> Also, what is the status of our annual OPEX wash-up I sent you at the end of May?
>
> Many thanks
> Kerry

[50] Mr Hardy did not respond to that email.

[51] Number 8 Caltex continued to pay monthly OPEX payments for the 2014/2015 year in accordance with the perpetual invoice sent by Sumpter Baughen, those payments having been set up by automatic payment.

Events leading up to the signing of the SPA

[52] In the meantime, the property was being marketed for sale by way of expressions of interest through the vendor's agent, Jones Lang LaSalle Ltd (JLL).

[53] At the time when the decision to sell the property was made, it was agreed between the shareholders of WPL that John Lea, one of the shareholders, would negotiate the sale on behalf of the company through JLL, for two reasons. The first was because Mr Lea's experience in senior commercial roles made him best qualified to do the job. His previous roles included Chief Operating Officer and CEO of Tegal Foods Ltd, CEO of RD1, and General Manager of Fonterra Enterprises Ltd. The second reason was because Mr Hannam was unwell and for part of the relevant period was in fact hospitalised.

[54] The property was listed for sale on behalf of WPL through JLL in November 2013.

[55] In preparation for the marketing of the property, Lawrence Lowe, another of the shareholders, assembled the key data for the property to send to JLL. In an email of 3 November 2013, which Mr Lowe sent to Mr Lea copying in Mr Hannam, he attached what he described as the first draft of the key data for the sale of the property. In the email, Mr Lowe commented on various financial aspects of the property

including OPEX costs and the apportionment for financial years 2014 and 2015. His email included the following comment:

> The overall issue of OPEX apportionment (who pays for what % of what and when) is incredibly complicated. I have been doing multi-tenant OPEX accounts for many years and have never seen anything as complicated as this.

[56] The property caught the eye of Blair Chandler, whose brother Stewart then requested and received a copy of the JLL information memorandum from one of the JLL agents on 10 June 2014. In his email forwarding Stewart Chandler the information memorandum, the agent stated as follows:

> Given some recent developments at the site, OPEX proportioning is currently being reviewed. Furthermore, the Caltex rent review is being dealt with and is expected to increase income by c.5000 p.a. As we get confirmation on these points we will pass this on to you.

[57] Stewart Chandler then contacted his father, Noel, and sister, Felicity, who were keen on being involved in the possible acquisition together with Blair.

[58] After some further correspondence with the first JLL agent, another JLL agent, Nick Hargreaves, wrote to Stewart Chandler on 16 June 2014 regarding writing up a contract and inquiring about his funding strategy if the property were to be locked up for a period of due diligence. Thereafter Mr Hargreaves continued as the JLL agent involved in the transaction.

[59] In his reply to Mr Hargreaves, Stewart Chandler included a reference to his group having been involved with property development and property investment over 35 years and named some of their notable projects. Stewart Chandler's evidence was that the reference to "our group" was because it had always been their intention to incorporate a company to complete the acquisition if they decided to proceed. The group was a reference to the family members referred to above as well as Mr Sullivan, a close friend and business associate of Noel Chandler (together, the purchasing group).

[60] Stewart Chandler said the purchasing group was looking for an investment property with established tenants that had an attractive yield. Noel Chandler's

evidence was also that the original offer and the final price agreed on were all based on yield.

[61] The first offer prepared by JLL was sent by Mr Hargreaves on 18 June 2014 to Mr Lea. The offer recorded the purchaser as "Peter Sullivan and/or nominee". The purchase price was expressed to be $5,250,000. Further terms of sale included a due diligence clause (cl 18.0), a confidentiality clause (cl 19.0), and an OPEX schedule (cl 20.0). The schedule included an allocation of 43.30 per cent of building expenses and 7.68 per cent of food court expenses to Number 8 Caltex. The OPEX schedule had been prepared for WPL by valuer, Nigel Kenny, of TelferYoung (Northland) Ltd. The agreement also contained a tenancy schedule as at 18 June 2014 (cl 21.0).

[62] Mr Sullivan signed the offer in the form as described above but with the finance condition deleted and with the addition of two subparagraphs to the due diligence clause. The added sub-paragraphs read:

> h) The purchaser is under no obligation to supply any reasons for the purchaser's dissatisfaction with any aspect of the due diligence investigation.
>
> i) The vendor undertakes and agrees to allow the purchaser together with consultants employed by the purchaser full access to the property for the purposes of the due diligence investigation and to provide the purchaser with any information held relating to the property relevant to the due diligence investigation.

[63] Subclause (i) is one of the clauses alleged to have been breached and will be discussed further below.

[64] On 20 June 2014, WPL made a counter-offer, seeking a higher price of $5,350,000 and making various amendments to the agreement. Those amendments included the deletion of the OPEX schedules in cls 20.0 and 21.0. These were replaced with a schedule of tenancies including information on OPEX allocation for each tenant with the percentages stated as "estimated". For Number 8 Caltex, the OPEX allocation was expressed to be 43.30 per cent in respect of the building and 7.68 per cent in respect of the food court.

[65] The conditional SPA was signed on 23 June 2014 at $5,350,000. Mr Sullivan was the member of the group named as purchaser, as he was the most accessible party for signatory purposes. However, once the SPA was signed Noel Chandler took over the negotiations on behalf of the purchasing group.

Period of due diligence

[66] In the JLL information memorandum, the total income for the property was recorded as $438,114.00. The OPEX shortfall (for the 2013 financial year) was recorded as $32,563.00 resulting in a net income of $405,551.00.

[67] The information memorandum contained a disclaimer as follows:

> The material herein is intended as a guide only, no liability for negligence or otherwise is assumed for the material contained herein either by Jones Lang LaSalle Limited, its principal or its servants or its agents. No material contained herein shall form the basis of or be part of any agreement and no warranty is given or implied as to the accuracy of the whole or any part of the material. Prospective purchasers should not rely on the material but should make their own enquiries and satisfy themselves as to the accuracy of all aspects of the material. Any liability by Jones Lang LaSalle Limited, its principal, its servants, or its agents in any way connected with the brochures, whether or not such liability results from or involves negligence, will not exceed $1,000. Licensed Under REAA 2008. Please note: Boundary lines on all images in this document are indicative only.

[68] The plaintiffs do not place any reliance on the rent and OPEX details in the information memorandum.

[69] For the due diligence process, the purchasing group engaged Mr Kenny, to value the property for mortgage lending purposes. Mr Kenny was familiar with the property having previously provided valuations for WPL.[5]

[70] On 25 June 2014 Mr Kenny sent an email to Mr Hargreaves at JLL which included the following:

> I have valued the property a number of times before but would be interested in anything else that Garry [Hannam] may think relevant. I will, as a courtesy, be sending him a release letter shortly.

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5 See [61] above.

[71] Mr Hargreaves forwarded this email on to John Lea.

[72] Noel Chandler's evidence was that he was aware from his own experience with property of the importance of issues as to OPEX. He said the purchasing group was particularly concerned about OPEX and therefore instructed their solicitors, Stafford Klaassen, to make further inquiries from the vendor.

[73] By letter dated 1 July 2014, Stafford Klaassen wrote to MWIS. I set out that letter in full below:

> **Wellsford Properties Limited to Sullivan – 95-97 Rodney Street, Wellsford**
>
> Pursuant to clause 18.0 of the agreement we note:
>
> 1. What is the latest information regarding the Noodle Canteen? Are their building works complete? What is the commencement date of their lease? Has a deposit been paid under the agreement to lease?
>
> 2. Is there a formal agreement in place with the coin arcade? If so, please provide us with it.
>
> 3. Has the deed of rent review and deed of amalgamation for the Caltex tenancy been signed yet? If so, please provide a copy.
>
> 4. Please provide any financial information that you hold regarding Caltex Wellsford Limited, Forbidden City New Zealand Limited and Noodle Canteen Limited and the guarantors of those tenancies.
>
> 5. Please provide financial accounts for Wellsford Properties Limited for the last three years.
>
> 6. Has there been any difficulty with the payment of rent by any of the tenants?
>
> 7. Where the tenants are recent e.g. Caltex Wellsford Limited and Forbidden City New Zealand Limited – are there any disputes with the previous tenants?
>
> 8. Have there been any breaches of any of the leases?
>
> 9. We note that there has been a shortfall of operating expenses in the year to March 2013 and that there looks to be an effort to improve this. Please advise the reason for the shortfall and what steps have been taken to improve this position.
>
> 10. Is there any asbestos in the building including the roof?
>
> 11. The LIM report records five building consents that have been granted between October 1993 and August 2000 that do not have code

compliance certificates (copy attached). What efforts have been made to finalise these consents?

12. The LIM report records that there are two trade waste consents that expired in October 2010 and February 2011 (see attached). Is the vendor able to shed any light on what these are and why they have not been renewed?

13. Please provide details of any insurance the vendor currently holds in relation to the premises.

Yours faithfully
STAFFORD KLAASSEN

[signed]

Geoff Stafford

[74] MWIS replied by letter dated 7 July 2014 and that letter is set out in full below:

Re: Wellsford Properties Limited to Sullivan – 95-97 Rodney Street, Wellsford

We refer to your letter of 1 July 2014 and address each of your points in turn:

1. Our client has completed the Landlord works. A deposit was not payable under the Agreement to Lease. The commencement date of the lease is 1 August 2014. Copy **attached**. We expect to receive a signed copy of the lease from the tenant's solicitor shortly.

2. Our client has sent us the agreement with Midas Coin. Copy **attached**. This has been added to the Tenancy Schedule.

3. The Deed of Rent Review and Amalgamation has not yet been returned to us. We are chasing this.

4. Our client advises it does not hold any financial information for Caltex Wellsford Limited (now Star Metro), Forbidden City NZ Limited and Noodle Canteen Limited, or the guarantors. Nicholas Paterson of Star Metro is well known to our client and highly regarded.

5. The financial accounts for Wellsford Properties Limited are confidential and our client does not wish to disclose these, however it can confirm that all rental payments are up to date.

6. As advised above, all rental payments are up to date and there has been no difficulty with payment. All tenants are on a direct debit arrangement.

7. Our client advises there are no outstanding disputes with the tenants.

8. Our client advises as at the date of the agreement there are no known breaches of any leases.

9. The leases historically did not line up in terms of OPEX as methods of calculating OPEX differed in some cases. Our client has attempted to clarify and crystallise OPEX with each tenant and in recent lease documentation.

10. Our client advises its building project manager reports that to the best of his knowledge no asbestos has been signed in the building or roof.

11. Our client advises that all building consents were obtained by Northland Cooperative Dairy Limited, McDonalds NZ Limited and Chevron New Zealand. We can request those parties to provide evidence of CCC or an explanation as to why the consents were not signed off. This may be difficult however in the case of Chevron who are no longer the tenant, and Northland Cooperative Dairy Limited who have now merged with Fonterra. Please advise if you wish us to follow this up.

12. Our client understands the trade waste consents relate to upgrade work that was carried out by Chevron New Zealand on the revamped forecourt.

13. **Attached** is a copy of the insurance held by our client in respect of the property.

In addition to the above, we advise that our client uses Sumpter Baughen, Chartered Accountants to manage the rental.

Yours faithfully
MARSDEN WOODS INSKIP & SMITH

Per: [signed]

NICOLE WARNER

[75] Noel Chandler said following that exchange, he investigated some of the OPEX issues further. He said, for example, the cleaning costs were quite high. He wanted to ensure that there would be no surprises and that the purchasing group was aware of the obligations that went with the property, the net income and any potential problems.

[76] On 10 July 2014, in Ms Foon's absence, Brenda Smith of Sumpter Baughen sent an email to Mr Hannam regarding OPEX details. That email read in part as follows:

> Nigel [Kenny] has advised the OPEX information he currently has is the % only, and that the percentages look incorrect (two tenants have percentages over 50%). He has requested the total OPEX paid by Wellsford Properties.
>
> I have prepared a schedule showing the percentages only for 2014 (No $ amount of opex included).

Can you please confirm this is okay to send to Nigel.

[77] Later the same day, Ms Smith emailed a schedule to Mr Kenny setting out rents and net OPEX for each tenant, which included forecasts for the years to 31 March 2014 and 31 March 2015 respectively. The schedule showed a forecast shortfall of $52,563 in OPEX recovery for the year to 31 March 2014.

[78] On 11 July 2014 Mr Kenny responded to Sumpter Baughen copying in Noel Chandler:

> Hi Brenda
>
> Sorry this is not what I was after
>
> I need to see what the actual service charge costs are.
>
> The service charge percentages under the leases are incorrect and will need to be adjusted at renewal in some cases.
>
> In order to arrive at a realistic projection of the shortfall I need to see the actual costs incurred. Given variables in percentage recovery between rates, building expenses and food court operation this requires at least a breakdown by category
>
> I appreciate your assistance in Kerry's absence but really need this as soon as possible as I can't take my draft report any further till I can arrive at a valuation which is highly dependent on these figures.
>
> Cheers
>
> [Nigel Kenny]

[79] In response, on 11 July 2014, Sumpter Baughen emailed Mr Kenny the OPEX totals for the period ending 31 March 2014. The total sum of $259,544 was broken down into three components, namely food court, building and rates. Noel Chandler was copied into the email and later that day, forwarded the attachment to the rest of the purchasing group along with their solicitor, Geoffrey Stafford of Stafford Klaassen.

[80] Also on 11 July 2014, Stafford Klaassen wrote to MWIS. Part of that letter stated:

> 2. You advised that your client does not wish to disclose the financial accounts for Wellsford Properties Limited as they are confidential. We note that the agreement contains a confidentiality clause (cl. 19.0)

> and advise that our client is prepared to sign a further confidentiality waiver if required.
>
> If your client still does not wish to provide financial accounts, would it be prepared to provide details of the last three years actual rents and operating expenses (certified by its accountant as being true and correct) which have been provided in draft for the year ending March 2013?
>
> Our client may find it difficult to complete his due diligence without the provision of further information from your client.

[81] MWIS responded by letter on 14 July 2014. That letter included the following:

> 2. Our client does not wish to provide financial accounts for Wellsford Properties Limited as this entity is involved in other businesses. However, our client is prepared to provide details of the last three years rents and operating expenses for the property certified by its accountant. This will be sent to you as soon as we have it in hand.

[82] The letter also recorded that WPL agreed to extend the date for satisfaction of the due diligence condition to 25 July 2014, provided the settlement date remained 25 August 2014.[6]

[83] On the same day, Mr Hannam sent an email to Ms Foon asking her to collate and certify the rental/OPEX only for the past three years and forward it to MWIS.

[84] On 17 July 2014, Ms Foon sent an email to Mr Hannam attaching a schedule of rent and OPEX information stating that if he was "okay with this" could he please forward it to MWIS.

[85] The schedule was on the letterhead of Sumpter Baughen Chartered Accountants, setting out the rent and OPEX in relation to each tenant by month for the financial years ending 31 March 2012, 31 March 2013 and 31 March 2014 for each tenant. The footnote to the schedule stated:

> 1 Figures based on Invoices issued.
> 2 March figures for OPEX include annual OPEX wash-up Invoices.
> 3 OPEX has varied over the years mainly due to fluctuating cleaning costs and repairs & maintenance.
> 4 McDonalds OPEX wash-up calculated after 31 May each year using June DPI-FY2014 wash-up not yet done.

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6 In fact, settlement did not take place until 26 August 2014.

[86] On 18 July 2014 MWIS sent the Sumpter Baughen schedule referred to above to Stafford Klaassen.

[87] Mr Stafford then forwarded the email to the purchasing group. Noel Chandler responded to Mr Stafford on 18 July 2014 saying:

> I would still like to see the calculations that drive these opex numbers and also the opex costs that aren't passed onto the tenants (i.e. the ones we have to pay).

[88] Also on 18 July 2014, Ms Warner, of MWIS, sent an email to Ms Foon copying in Mr Hannam saying:

> Hi Kerry
>
> Garry has sent us the figures you prepared and we have forwarded them on to the purchaser's solicitor. They have come back asking for a breakdown of rent and opex as the figures for each month seem to include both. Can you separate out the rental and opex for each tenancy and in turn break down the opex itself? (i.e. rates, utilities etc).
>
> They would also like to know if there is a property management or building management fee included in the opex.

[89] On Monday 21 July 2014, Ms Foon sent a detailed email to Ms Warner in response. The email commenced as follows:

> Hi Nicole
>
> For Caltex, Jesters and LJS they pay a monthly OPEX amount. At the end of the financial year an OPEX wash-up is done whereby the actual OPEX costs are split into Foodcourt and Building costs, tenants each have a % they pay of the annual Foodcourt and Building costs. The monthly amount they pay is then deducted from the total – giving the annual wash-up.
>
> …

[90] On the same day, Ms Warner forwarded Ms Foon's email to Mr Stafford saying:

> Hi Geoff,
>
> We have received the below email from Sumpter Baughen in relation to your questions regarding the OPEX breakdown.
>
> I trust this explains things but if you require further clarification please give me a call and we will likely put you in touch with Kerry directly.

Kind regards,

Nicole Warner

[91] Mr Stafford responded on Monday 21 July 2014 by email to MWIS stating:

> What we are actually after is the actual OPEX costs for the last three years.
>
> We have been provided with a draft set for the year ended March 2013 and forecasts to March 2015. We would like to see the actual operating costs (ideally for) 2014, 2013 and 2012.
>
> Geoff.

[92] Ms Warner responded promptly by email on the same day saying:

> Hi Geoff
>
> The financial information we sent you earlier contains tables of OPEX invoiced to each tenant from April 2011 to March 2014.
>
> Kind regards,
>
> Nicole Warner

[93] Again on the same day, Ms Warner sent an email to Ms Foon saying:

> Hi Kerry
>
> Can you please email me the actual OPEX our client is incurring for the property (as opposed to what it is recovering from the tenants)?
>
> If you could break it down into the categories you have listed below that would be great.[7]

[94] Ms Foon responded by email on the same day sending Ms Warner a schedule of actual OPEX costs for the three periods.

[95] Ms Warner forwarded that email to Mr Stafford again on the same day.

[96] There were further emails between Mr Stafford and MWIS regarding OPEX on 21 July 2014. In one of those emails Mr Stafford said:

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[7] Those categories included cleaning, hireage/leases, insurance, licences, light, power and heating, management and administration expenses, rates, repairs and maintenance, security.

> Please provide details of the internal costs you mention below related to the management and payment of the employees. My client wishes to understand what additional costs there are that are not captured in the operating expenses.

[97] By that date and on the basis of the information provided by Sumpter Baughen on 18 July 2014, Noel Chandler concluded that the deficit in OPEX recovery was substantially greater than $32,563 recorded in the JLL information memorandum.

[98] On 21 July 2014, Noel Chandler forwarded the information that had been received in relation to OPEX costs to ANZ Bank. He followed up with an email the following day in which he set out his calculations as to the OPEX recovery and concluded that the OPEX shortfall was in fact $50,457.

[99] The valuation prepared by Mr Kenny dated 21 July 2014 for the purchasing group (for their bank) also addressed the issue of OPEX. Mr Kenny commenced that section of his report with the following:

> We have made a number of requests for further and better particulars of the service charge expenses and service charge recovery, however, information provided appears conflicted.

[100] Mr Kenny recorded the total OPEX as $259,544.

[101] The report went on to note that the service charge recovery for the year ended 31 March 2014 as recorded in the Sumpter Baughen schedules was $189,044. That gave a shortfall of $70,500. However, those figures made no allowance for the service charge for the Noodle Canteen which, at that stage, had signed an agreement to lease. Its service charge for the first year was capped at $20,000. That then reduced the service charge deficit to $50,500 per annum. However, Mr Kenny also went on to note the following:

> … there is also potential for those lessees subject to more onerous liabilities to request a reassessment of their liabilities in which case, given that the under contributing portions cannot be increased, the non-recoverable OPEX could increase. It is estimated that under this scenario the shortfall could increase by a further $15,000 to $20,000.

[102] For the purposes of his report, Mr Kenny adopted a recurring shortfall of $60,000 per annum.

[103] Noel Chandler said he thought that the investigations they had undertaken with the vendor had reduced the risk of any lessee requesting a reassessment of their OPEX liabilities. He said although Mr Kenny had worked on an OPEX shortfall of as much as $60,000, his own figure was $50,457 (a deficit of $70,457 less the Noodle Canteen amount of $20,000). He said he was working on this being the actual income rather than an estimate, as was the case with Mr Kenny's value.

[104] Noel Chandler said he therefore entered into negotiations with the vendor based on actual rather than the estimated rental and OPEX income.

[105] Noel Chandler said that he did not think there was any real risk of any issues arising in the foreseeable future in relation to OPEX and he certainly thought that if there were any potential issues known to the vendor or Sumpter Baughen, he would have been alerted to them.

[106] On 23 July 2014, Noel Chandler sent an email to Mr Hargreaves at JLL explaining why he thought the net income had fallen. That email reads as follows:

> Hello Nick
>
> Those figures which we left with you this afternoon are from Sumpter Baughen who I understood to be the vendor's accountants. These show an unrecovered OPEX of $70,457 for last financial year. (The difference between $259,501 and $189.044)
>
> The income is shown as $405,982. If we add the Noodle Bar of $27,000 we get a projected income of $432,982. The reason it is not $438,000 is due to the fact that the Coin Arcade's income was only $12,826 and not $18,000
>
> The net income is then $432,982-70,457=$362,525
>
> Please note that none of these figures come from the valuer – they are all from the vendor's accountants.
>
> Regards
>
> Noel Chandler

[107] Noel Chandler then spoke to Mr Sullivan. They decided to approach Mr Hargreaves on the basis that they would not proceed with the purchase unless the price reflected the yield that they had decided was appropriate for the building and which was the basis of their original offer. Because they had concluded there was a

further shortfall in the recovered OPEX, on 21 July 2014 they elected not to declare the SPA unconditional.

[108] Mr Hargreaves sent Mr Noel Chandler a text telling him that the vendor was going back to its accountant to "sort out the numbers".

[109] There were then discussions and an exchange of texts over the weekend of 25-27 July 2014 between Noel Chandler and Mr Hargreaves. The texts included references to the yield in connection with the purchase price. The exchanges culminated in an SPA on a reduced price of $5.050 million. The amendment to the purchase price was confirmed by Stafford Klaassen by letter dated 28 July 2014 to MWIS. The parties then agreed to complete settlement within 30 working days.

Further communications with Number 8 Caltex regarding OPEX

[110] On 18 August 2014, Ms Foon sent an email to Mr Hannam setting out information prior to settlement. In her email, Ms Foon noted that the 2014 OPEX wash-up invoice #123 for Number 8 Caltex was still unpaid.

[111] On 20 August 2014, MWIS sent a letter to Mr Hardy of Number 8 Caltex on behalf of WPL. The letter advised that WPL had sold the property with settlement scheduled for 25 August 2014. The letter advised that the new owner was PAIL. The letter concluded with the following:

> We note you have paid rental to our client up to and including 31 August 2014. Our client has calculated a wash-up of OPEX due to 25/8/14. We enclose our client's tax invoice for OPEX due to 25/8/14. Please arrange payment to our client as soon as possible. Port Albert Investments Limited will be in touch with you directly concerning rental payments from 31/8/14 and OPEX payment from 25/8/14.

[112] The enclosed tax invoice #135 was dated 19 August 2014. As part of the narrative in the invoice there was the following:

> Plus Wellsford Properties Limited invoice #00000123 $14,026.12.
> OPEX wash-up 1/4/13-31/3/14

[113] On 22 August 2014, MWIS sent a letter to Stafford Klaassen for the attention of Mr Stafford regarding the settlement. Enclosed with the letter was a settlement

statement as at 25 August 2014. Also enclosed and referred to in the settlement statement was a copy of invoice #135.

[114] On 14 October 2014, Ms Foon sent an email to Mr Hardy regarding OPEX. The email reads as follows:

> Hi Peter
>
> I attach two invoices for Operating Expenditure (OPEX) which have not been paid and are now overdue.
>
> Invoice 123 is for the OPEX wash-up for the period 1/4/13 to 31/3/14.
>
> Wellsford Properties sold the foodcourt on 25 August 2014, therefore Invoice 135 is the OPEX wash-up for the period 1/4/14 to sale date of 25/8/14. Invoice 135 also incorporates the OPEX due from invoice 123. The total due to us $13,026.54 (including GST). Please arrange payment as soon as possible.
>
> You have previously queried invoice 123. I believe I have answered all of your queries to date. Please advise as soon as possible if you have any further questions, otherwise I look forward to receiving payment.
>
> Regards
> Kerry

[115] Mr Hardy responded by email on 21 October 2014 attaching a letter of the same date. The email reads:

> Hi Kerry
>
> Please see the attached letter & accompanying schedule.
>
> Sorry it has taken this time to get to you however we have spent quite some time monitoring usage at the premises as well as reviewing the lease. In our view the historical OPEX charge has been significantly overstated and accordingly a credit is due rather than further costs being owing.
>
> I'm happy to review with you as needed. There is a mix of strict lease interpretation as well as "fair usage" issues involved.
>
> Kind regards
> Peter

[116] In his letter, Mr Hardy expressed the view that the OPEX charges went far beyond those which were prescribed in the lease. He referred to the definition of property expenses in the lease. He also stated that it did not appear that any changes to the lease had been made over the years to respond to the inclusion of a food court and relocation of various services. He stated that he believed that the charges levied

to the Caltex/FIX shop included items that were not strictly included in the definition of property expenses as well as items that were not incurred in respect of the Caltex premises. He said, further, that in his view the lease only provided for such charges as were normally levied by municipal or council type organisations. He said that did not include expenses such as insurance, common area, electricity, cleaners' wages etc. Finally, he said property expenses could only be levied in respect of the premises which was the defined area that Number 8 Caltex leased; in other words, the lease did not contemplate charges in respect of a larger common area.

[117] Mr Hardy said, in relation to the financial year ended 2014, on a "fair allocation" basis he believed that rather than having additional costs owing, Number 8 Caltex was in fact owed a refund of $41,940.17 inclusive of GST. He said that if they were to interpret the lease strictly, that would result in a refund owed of $59,801.52 GST inclusive.

[118] Mr Hardy concluded his letter by saying that on a without prejudice basis he was prepared to leave things as they lay and not pursue the overcharge that he believed had been inappropriately applied. That offer, he said, was conditional upon WPL withdrawing invoices #123 and #135.

The emails of 27 and 30 May 2014 come to light

[119] On 15 August 2014, shortly before settlement, Felicity Chandler, who was responsible for liaising with the tenants, sent an email to all the tenants introducing herself as a shareholder in the new owner company. Mr Hardy responded on the same day by email which included the following:

> We will need to have a discussion regarding OPEX at the property. We recently received the first "wash-up" statement under our ownership (we purchased the business in April 2013) and it is clear that there were a number of assumptions regarding usage of the food court and general expenses that are not appropriate. My view is that all of the costs should be recoverable by the Landlord but that an alternative allocation methodology should be used. I will set this out for you prior to 1 Sep. It seems that a change of owner is an ideal time to address this and get it right for the future.

[120] Ms Chandler responded on the same day by email which included the following:

> … I agree we need to review the OPEX, allocations as well as amounts – currently not all the OPEX is recovered (there is a reasonable shortfall).

[121] On 9 September 2014 Mr Hardy sent an email to Felicity Chandler which included the following:

> As discussed the OPEX will also be paid on a without prejudice basis – I will have an analysis of this to you during the month.

[122] On 24 September 2014, Mr Hardy emailed Ms Chandler. That email included the following:

> Hi Felicity
>
> We paid normal monthly OPEX to the previous Landlord for the full month of August. While they say in the first line of the last paragraph that we paid rent for that month we did in fact pay rent and OPEX. I am attaching below the extract from our bank statement to evidence this.
>
> …
>
> The reference they make to OPEX was in respect of the prior year wash-up which they have calculated up to 25 Aug and which is in dispute because we do not accept the allocation of cost that has been apportioned to our tenancy.

[123] On 30 September 2014, Stafford Klaassen wrote to MWIS. That letter included the following:

> **Caltex**
>
> 6. We have been advised by the tenant's representative that there was a dispute with your clients [sic] calculation of the operating expenses wash-up. This dispute was never disclosed to our client prior to settlement.
>
> 7. We are unsure at this stage of the effect of the dispute on our client but we know that the amount of $1,219.15 for the period 25-31 August 2014 remains outstanding.
>
> 8. Further our clients[sic] understanding was that the total operating expenses to be paid by Caltex for the year ended March 2014 was $74,165.00. It appears that this may not be the case given the dispute.

[124] On 29 October 2014, Felicity Chandler emailed Mr Hardy asking him to send through any correspondence he had had with the vendor regarding the dispute.

[125] Mr Hardy responded in a detailed email on 30 October 2014:

Morning Felicity

…

Tracking back through the various discussions:

I communicated initial views about the opex on acquisition to the then Finance Manager for NDS (circa Mar/April 2013), James Nair. He has since left. At that time I was more focused on the very high quantum and issues of fairness but agreed to wait until the full year was-up to review formally.

We received the wash-up statement in May 2014 from Kerry Foon at Sumpter Baughen. At that stage I was still focused on understanding the quantum hence asked some questions of Kerry which you will see in the attached trail. She provided the spreadsheet that I think you also have a copy of.

Subsequently, in July and Aug we undertook a more physical 'observation' review both on-site and via CCTV – with intent of establishing as far as we could what the genuine usage of toilets was. Then in Sept, we undertook a full Lease review to understand the basis for the opex charge and from there we reviewed the Council file and the various physical changes/consents over the years.

I then wrote to Kerry again on 21 Oct per attached setting out the basis of our views on opex – as outlined to you yesterday.

To summarise the issues we have going forward:

1. Opex as currently being charged includes items that do not fall within the definition of Property Expenses
2. Opex as currently being charged includes items that do not relate to the Premises
3. Our Premises as defined in the Lease includes an area that has subsequently been let to Jesters pies (with no amendment to our Premises).
4. Notwithstanding the fact that there is no legal basis for on-charging many of the individual costs, the former 52.27% allocation does not appear to represent a reasonable or fair allocation of those costs.

[126] Mr Hardy attached to his email his 21 October 2014 letter sent to Ms Foon.

[127] On 16 November 2014 Ms Chandler emailed Mr Hardy. That email included the following:

> Regarding the OPEX issues – we are trying to ascertain the exact dispute between Garry [Hannam] and yourselves prior to us buying the premises. I know you've sent me some email correspondence, but do you have any other records of correspondence – e.g. meeting dates, phone calls etc? (or any other written correspondence).

[128] Mr Hardy responded the following day in an email as follows:

Hi Felicity

…

In terms of the who knew what and when – that is a more tricky issue and I think you have to make a distinction between our dealings with Garry [Hannam] in his capacity as Vendor of the business and as Landlord.

When we bought the business, as mentioned it was in the context of buying 9 separate sites (businesses) and buying the land & buildings at 4 of those sites from Chevron – a very big transaction. While I flagged the issue of surprisingly high opex with James (Nair) at the time I'm pretty sure it was by phone and I don't have a separate file note.

There were any number of issues that could have held the deal up had we worked them all through – I took the approach that if there was a problem with opex then I would take up with the Landlord after we owned the business, but that because of the overall deal structure, there was no chance of any price adjustment (which would have been to goodwill) at that time.

We had agreed to wait until the and [sic] of the March year which is then what happened and when I initiated the stronger query with Wellsford Properties. From that point on we are well documented.

I know that's probably not hugely helpful to you but equally I think that any issue between you and Garry comes down to whether your right to collect opex under the lease (strict interpretation) is actually different from what was represented (by way of the 53%/10% allocation.) It seems to me that there has always been a fundamental divergence between what the Lease allows and what Garry had been doing in practice when he owned both sides of the equation. As to whether that gives you the right to recover I'm not qualified to say but I will guess they will argue you could have seen that discrepancy during due diligence?

Our position is still that given we are prepared to settle on a figure above the strict entitlement in the lease that at least that represents mitigation of your shortfall wherever that ends up.

Many thanks
Peter

[129] The dispute between PAIL and Number 8 Caltex regarding OPEX was ultimately resolved to the apparent satisfaction of both parties.

Third cause of action – breach of contract

[130] In his closing submissions Mr Dale said that the third cause of action was at "the front, left and centre" of the plaintiffs' case. He placed the most emphasis on the claim for breach of contract. His position was that if the plaintiffs' claim was made

out under this head, then the only other cause of action requiring consideration was the FTA claim.

[131] The plaintiffs rely on two clauses in the SPA, namely clauses 6.0 and 18.0. The SPA was for the most part in the form of the standard ADLS Agreement for Sale and Purchase of Real Estate, Ninth Edition 2012(2). Clause 6.0 is a standard clause in that agreement regarding vendor warranties, while cl 18.0 was a further term added to the SPA regarding due diligence.

[132] Although the plaintiffs pleaded a breach of both cls 6.0 and 18.0, the plaintiffs' main focus was on cl 18. The plaintiffs allege a breach of cl 18(i) specifically. However, it is necessary to consider that subclause in context. The whole of clause 18 is therefore set out below:

> **FURTHER TERMS OF SALE**
>
> 18.0 This Agreement is conditional upon the Purchaser being satisfied that the property is suitable for the Purchaser's intended use of the property at the agreed purchase price following the Purchaser undertaking a due diligence investigation of the property, including but not limited, an investigation of:
>
> a) the soundness, quality and value of the property and any building on it.
> b) town planning and other zoning or permitted use aspects of the property as they relate to the Purchaser's use or intended use of the property.
> c) the street file (property oag) held by the local authority.
> d) the location of any buildings in relation to the boundaries of the land and any other survey matters.
> e) all legal and title issues relating to the property and any encumbrances or memorials recorded on the title.
> f) engineering aspects relating to the property and its potential developments.
> g) such other matters which the Purchaser … deems pertinent regarding the commercial viability of the Purchaser's proposed development or use of the property.
>
> The deadline for the satisfaction of this condition is 4.00 pm on the day which is 15 working days after the date of the ….[8]
> This clause is inserted for the sole benefit of the Purchaser.
>
> h) The purchaser is under no obligation to supply any reasons for the purchaser's dissatisfaction with any aspect of the due diligence investigation.

---

8 These words are illegible.

> i) *The vendor undertakes and agrees* to allow the purchaser together with consultants employed by the purchaser full access to the property for the purposes of the due diligence investigation and *to provide the purchaser with any information held relating to the property relevant to the due diligence investigation.*
>
> (emphasis added)

[133] The plaintiffs allege that WPL was in breach of cl 18.0(i) by failing to disclose, as part of the due diligence process, the emails from Mr Hardy to Sumpter Baughen dated 27 and 30 May 2014.

[134] The statement of claim further pleads that had WPL disclosed the two emails, neither Mr Sullivan nor PAIL would have declared the SPA unconditional and would not have proceeded with the transaction. It is further alleged that, as a consequence of the breach of cl 18.0(i), Mr Sullivan and PAIL have suffered loss of $428,377.43, being the difference between the income which PAIL expected to receive over the term of the lease, based on a capitalisation rate of 7.48 per cent, and the (reduced) income that PAIL will in fact receive as a result of the reduced OPEX contribution.

[135] There are three issues which must be determined under this cause of action:

(a) Was the failure to disclose the 27 and 30 May 2014 emails a breach of the due diligence clause and/or the vendor warranty clause in the SPA?

(b) If either of those clauses required disclosure of the emails of 27 and 30 May 2014, was the failure to disclose an operative cause of loss?

(c) In any event, does PAIL have a cause of action in circumstances where the representations made to Mr Sullivan as purchaser and not to PAIL as nominee under the SPA?

[136] The issues are sequential: if the answer to any of the questions above is "no", it will be unnecessary to consider the remaining issues.

Submissions for the plaintiffs (cl 18.0)

[137] Mr Dale submitted that this cause of action raised a straightforward question of contractual interpretation of clause 18(i). He said there was nothing difficult or ambiguous about the clause. Under cl 18(i) the vendor undertook to provide "any information held relating to the property relevant to the due diligence investigation", not just information that the vendor or its agents considered might be relevant. Accordingly, the test is whether the emails from Mr Hardy were information relating to the property and which was "relevant to the due diligence investigation".

[138] Mr Dale submitted that the information which was "relevant to the due diligence investigation" was not confined to the matters listed in 18(a)-(f). In the event, Mr Dale said, the due diligence investigation was almost entirely focussed on issues in relation to OPEX.

[139] Mr Dale submitted it was obvious that both parties to the transaction were well aware of the purchasers' concerns regarding the recovery of OPEX. Both parties were also aware that the purchase was an investment transaction driven by yield and that any information which affected yield was relevant to the due diligence investigation.

[140] Mr Dale was inclined to submit that the obligation under cl 18(i) to provide the purchaser with relevant information existed, whether there was a request for the information or not. But he said in any event, there were numerous requests relating to OPEX. He said that from the outset, the purchasers asked questions about OPEX but received answers that were incomplete and/or inaccurate.

[141] Mr Steel, who developed the submissions on this issue on behalf of the plaintiffs, accepted that there needed to be some sort of inquiry by the purchaser in relation to OPEX to trigger the vendor's obligations under cl 18(i). He submitted, however, that the inquiry did not need to be a specific, detailed or precise question. He said that in this case the purchasers made inquiries in relation to operating expenditure, asking for actual OPEX figures. That then created a scope or an area of due diligence investigation. He submitted that in those circumstances the obligation then fell on the vendor to provide the purchasers with any information held relating to the property relevant to the subject matter of the due diligence investigation.

Submissions for the defendants (cl 18.0)

[142] Mrs Golightly first emphasised the importance of the doctrine of *caveat emptor* and the principle that a contract for the sale and purchase of land is not a contract *umberrimae fidei* in which there is an absolute duty on each party to make full disclosure to the other of all material facts of which it has knowledge. She submitted that given the pre-eminence of the basic *caveat emptor* rule, a very strongly worded express term imposing a duty of utmost good faith upon the vendor would have been required if the parties intended to place a burden of general disclosure on the vendor. Mrs Golightly submitted that cl 18(i) did not meet that threshold.

[143] Mrs Golightly further submitted that the interpretation advanced by the plaintiffs required the Court to adopt a construction that divorced subcl (i) not only from cl 18.0 as a whole, but also from the rest of the SPA, from the legal and business context in which due diligence clauses operate, and from the subsequent conduct of both parties.

[144] In particular, she submitted that the process contemplated by the plaintiffs, whereby the purchaser could make a general unspecific inquiry and then shift the obligation onto the vendor to assess whether it held any relevant information, did not accord with business common sense.

[145] As to the parties' subsequent conduct, Mrs Golightly said that wholly supported the interpretation of cl 18 as being an ordinary due diligence clause. She said the purchaser was entitled to seek detailed and particularised information from the vendor by making a specific request, either to JLL or MWIS. She submitted that the purchasers' inquiries in the present case were not sufficiently particular.

[146] Mrs Golightly submitted that the meaning of cl 18(i) should be ascertained in light of the commencing expression of the condition:

> This Agreement is conditional upon the Purchaser being satisfied that the property is suitable for the Purchaser's intended use of the property at the agreed purchase price following the Purchaser undertaking a due diligence investigation of the property…

[147] Mrs Golightly said this was the independent part of cl 18.0 and that the following subclauses, including subcl (i), were dependent upon it for meaning.

[148] Mrs Golightly then turned to consider the surrounding circumstances to determine whether some modified meaning of cl 18.0 was intended. She submitted that relevant matters might include the relative experience of the parties. In this case, she said, the plaintiffs were experienced business people, including in the area of commercial property, who were familiar with due diligence clauses in sale and purchase agreements and were legally represented.

[149] Mrs Golightly further submitted that the plaintiffs had incentive to continue to negotiate because of the large sum of money they had invested in due diligence which would have been wasted if the deal fell over. She said that the "intense pre-contractual haggling" over net income, capitalisation rate and price that took place from 23 to 26 July 2014 did not support a conclusion that disclosure would have prevented agreement.

[150] Mrs Golightly had initially submitted that the SPA dated 23 June 2014 had lapsed because the final SPA between the parties was not reached until after the expiry date for the period of due diligence as expressed in the SPA of 23 June 2014. That argument was abandoned during closing submissions.

Was the failure to disclose the 27 and 30 May emails a breach of the due diligence clause in the SPA (cl 18.0)?

[151] The first matter which must be considered in order to determine this issue is the meaning of cl 18.0 and, in particular, subcl (i). I follow the approach to contractual interpretation as set out in the Supreme Court judgment in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*:[9]

> [60] Given the issues in the case, it is not necessary that we discuss the approach to contractual interpretation in any detail. It is sufficient to say that the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This

[9] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 (footnotes omitted).

> objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

[152] In construing cl 18.0 the Court should start with the plain and ordinary meaning of the words,[10] having regard to the relevant factual background in which the agreement was reached. Regard may be had to the commercial purpose of the contract and the structure of the parties' bargain.[11]

[153] The function of cl 18.0 is to make the SPA conditional on the purchaser's satisfaction following the completion of due diligence. Subclauses (a) to (f) list specific matters that may be relevant to the investigation. Subclause (g) then extends the subject matters of the investigation to "such other matters which the Purchaser … deems pertinent regarding the commercial viability of the Purchaser's proposed development or use of the property."

[154] It is apparent from earlier drafts of the SPA that subcls (h) and (i) were later additions. Subclauses (a) to (g) are followed by an unnumbered paragraph setting out the specified time for satisfaction of the due diligence condition and the party for whose benefit it is inserted. Subclauses (h) and (i) are then inserted below.

[155] I accept the plaintiffs' submission that subcls (h) and (i) of cl 18.0 can only logically be read as separate and apart from subcls (a) to (g). Neither subclause is directed to any aspect or quality of the property to be the subject of due diligence, but rather at the manner in which the due diligence investigation is to be conducted and regulated.

[156] When cl 18.0 is read in that way, it imposes upon the vendor an express contractual obligation to provide any information it holds (i.e. any knowledge or facts) that may be relevant to the due diligence investigation being undertaken by the purchaser on any particular issue.

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10 At [88].
11 At [79].

[157] The issue remains, however, as to whether the obligation exists independently of any inquiry by the purchaser. In other words, who bears the burden of determining what information is "relevant to the due diligence investigation"?

[158] I do not accept Mr Dale's submission that the obligation to determine whether information is "relevant to the due diligence investigation" rests with the vendor. That interpretation is inconsistent with subcl (g), which provides that the purchaser may extend its due diligence investigation to additional matters which are "pertinent to the commercial viability of the Property". The obligation clearly rests with the purchaser to determine whether an additional matter is "pertinent". Unless raised by the purchaser, the vendor cannot know whether the additional matter forms part of the purchaser's due diligence investigation and cannot be expected to disclose the relevant information.

[159] What, then, is the nature of the inquiry required by the purchaser? Mrs Golightly adopted a strict interpretation of cl 18(i), submitting the purchaser was required to make a detailed and particularised enquiry of the vendor to compel disclosure. Mr Steel on the other hand submitted that the purchaser need only identify to the vendor the general scope or area of the due diligence investigation to give rise to a duty of disclosure.

[160] The plain language of the contract appears to favour the interpretation suggested by Mr Steel. However, as noted by the Supreme Court, the factual background and/or commercial context is also relevant to the exercise of contractual interpretation. Where, as in the present case, the contractual provision forms part of a contract for the sale of land, the doctrine of caveat emptor is relevant. The doctrine of caveat emptor means that, in general, a purchaser bears the onus of making any relevant inquiries regarding the property.[12] The vendor, however, is not obliged to disclose any information about the property.[13]

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12 D W McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) at [2.01].

13 The vendor may not, however, make any misrepresentations (whether positive or by silence) regarding the property.

[161] The factual background in the present case supports a narrower reading of cl 18(i) than the plain language of the provision might otherwise suggest. In my view, cl 18(i) places a limited obligation upon the vendor to provide information relevant to the due diligence investigation, as requested by the purchaser. The narrow interpretation of cl 18(i) modifies the doctrine of caveat emptor. The purchaser bears the burden of making inquiries; the vendor, however, is contractually obligated to provide the requested information.

[162] Clause 18(i) does not, however, require the vendor to evaluate the queries put forward by the purchaser and to then consider whether there is further information, over and above that requested by the purchaser, which might be relevant to the due diligence investigation. An obligation of that nature would be entirely inconsistent with the doctrine of caveat emptor. In the absence of clear contractual language demonstrating that the parties intended that outcome, I consider a narrower interpretation of cl 18(i) must be preferred.

[163] The question which then arises is whether the purchaser in the present case made inquiries regarding OPEX that were sufficiently specific or sufficiently general to require disclosure of the two emails dated 27 and 30 May 2014.

[164] I accept the submission for the plaintiffs that the questions put forward by members of the purchasing group and their representatives clearly demonstrated an interest in OPEX costs and recovery in relation to the property. At no stage, however, was that interest expressed by way of a general inquiry. Instead, the purchasers relied upon a series of specific questions, each of which was answered promptly and in apparently good faith by the vendor.

[165] The difficulty, from the perspective of the plaintiffs, is that none of the specific questions put to the vendors sought information regarding any disputes regarding OPEX with the existing tenants:

(a) By letter dated 1 July 2014, Mr Stafford asked: “Where the tenants are recent e.g. Caltex Wellsford Limited and Forbidden City New Zealand

Limited – are there any disputes with the previous tenants?" This question was clearly limited to disputes with past tenants.

(b) In the same letter, Mr Stafford wrote: "We note that there has been a shortfall of operating expenses in the year to March 2013 and that there looks to be an effort to improve this. Please advise the reason for the shortfall and what steps have been taken to improve this position." This question asked about shortfall in the previous financial year. The emails of 27 and 30 May 2014 did not affect either the shortfall for the year ending 31 March 2013, or the efforts subsequently taken to improve that shortfall. I accept that the emails may have been tangentially relevant to this issue; however, in my view, the connection was not sufficiently strong to require disclosure as a matter of contractual obligation.

(c) By email dated 11 July 2014, Mr Kenny requested "to see what the actual service charge costs are… this requires at least a breakdown by category." This inquiry was clearly limited to the costs incurred by the landlord, rather than the recovery of OPEX from tenants.

(d) By letter dated 11 July 2014, Mr Stafford asked: "If your client still does not wish to provide financial accounts, would it be prepared to provide details of the last three years actual rents and operating expenses (certified by its accountant as being true and correct)". This request was in my view limited to a request for formal accounting records (as demonstrated by the request for certification by the vendor's accountant), which were duly provided.

(e) By email dated 21 July 2014, Mr Stafford wrote: "What we are actually after is the actual OPEX costs for the last three years." Again, this request was clearly targeted towards OPEX costs, rather than recovery.

[166] It would have been a simple matter for the plaintiffs to make either a general request for all relevant information regarding OPEX, including matters relating to the

recovery of OPEX from the tenants; or alternatively to ask, more specifically, whether there were any disputes with the current tenants. Either inquiry would, in my view, have given rise to an obligation on the part of the vendor to disclose the emails of 27 and 30 May 2014. However, the purchasers elected not to put questions of that nature to the vendor.

[167] Evidence given by Mr Stafford in the course of the hearing suggests that this omission was deliberate. When asked whether the question in his letter of 1 July 2014 regarding disputes with previous tenants should have been worded to include any disputes with current tenants, Mr Stafford denied that was the case:

> Q: And question 7 you asked about disputes with previous tenants, didn't you?
>
> A: Correct.
>
> Q: You did not ask about disputes with current tenants, did you?
>
> A: Again, the reason for that was that any information if there was any disputes with current tenants your client was required to provide the information under the warranties [in] the agreement.
>
> Q: Which warranties are those?
>
> A: I believe they're contained in clause 6. Do you want to go back there?
>
> …
>
> Q: Question was, you just wanted to ask whether there were any disputes with the previous tenants, didn't you?
>
> A: Yes, yes.
>
> Q: You don't think there was any aspect of that that was a mistake on your part?
>
> A: No.

[168] Mr Stafford did not consider it was necessary to inquire about disputes with current tenants, because he considered the vendor would be obligated to disclose the existence of any dispute under cl 6.0 of the SPA.

[169] I do not overlook the answer given by Mr Lea under cross examination that had he been aware of the emails, he would have disclosed the 27 May email to the purchasers as part of the due diligence investigation (but not the 30 May email); nor

the evidence of the valuer Mr Dean, also under cross-examination, that he thought the email of 30 May 2014 would have been disclosed to an incoming buyer during due diligence. But in the end, the issue is one of contractual interpretation.

[170] I do not consider that the inquiries put to WPL were sufficiently specific (or alternatively, sufficiently general) to give rise to an obligation to disclose the emails of 27 and 30 May 2014 to the purchasing group. There was no breach of cl 8(i) of the SPA.

Was the failure to disclose the 27 and 30 May emails a breach of the vendor warranty clause in the SPA (cl 6.0)?

[171] The plaintiffs allege that the failure to disclose the emails of 27 and 30 May 2014 was a breach of cl 6.0 of the SPA, which relevantly provides:

> 6.1 The vendor warrants and undertakes that at the date of this agreement the vendor has not:
>
> (1) received any notice or demand and has no knowledge of any requisition or outstanding requirement:
>
> …
>
> (c) from any tenant of the property; or
>
> …
>
> Which directly or indirectly affects the property and which has not been disclosed in writing to the purchaser.
>
> 6.2 The vendor warrants and undertakes that at settlement:
>
> …
>
> (8) Any notice or demand received by the vendor, which directly or indirectly affects the property, after the date of this agreement:
>
> …
>
> (c) from any tenant of the property; or
>
> has been delivered forthwith by the vendor to either the purchaser or the purchaser's lawyer, unless the vendor has paid or complied with such notice or demand. If the vendor fails to so deliver or pay the notice or demand, the vendor shall be liable for any penalty incurred.

[172] Mr Dale candidly acknowledged that the plaintiffs' case under cl 6.0 was not strong and the authorities did not support his case. He accepted that the relevant case law suggested that a "notice" under cl 6 must be directive and must require some action to be taken or avoided. He did not however abandon reliance on cl 6.0 altogether. He submitted that although Mr Hardy's emails were not calling for a direct response, the emails were nonetheless intended to provoke action on the part of the landlord, namely a re-allocation of OPEX across the tenancies.

[173] The effect of cl 6.0 was considered by Associate Judge Bell in *Kaitaia Timber Co Ltd v Alternative Enterprises Ltd*.[14] The proceedings concerned the sale and purchase of a sawmill. The Northland Regional Council had granted a discharge permit to the vendor, and there was correspondence from the Council reporting on environmental monitoring of the site, including an expression of concern at high boron readings. Associate Judge Bell held that the correspondence was not "a demand", "requisition", or "requirement":[15]

> Demands, requisitions and requirements are directive – some action must be taken or avoided. An obligation to comply with a duty imposed in a general way by statute, regulation or by-law does not count.

[174] The Judge then considered the meaning of the term "notice":[16]

> [55] That deals with demands, requisitions and requirements, but it still leaves notices. Potentially, "notices" could have a much wider scope. They might not be limited to directive communications. The defendants relied on the information set out in correspondence from the council as matters that Kaitaia Timber Company Ltd ought to have passed on under condition 6.1. They can only get home on that if "notice" is held to cover communications that convey information, even if they are not directive.
>
> [56] However, there are factors that count against "notice" in 6.1 referring to communications that only convey information:
>
> (a) In general, under an agreement for sale and purchase a vendor is not required to disclose all information known to him that may be relevant to the purchaser's decision whether to buy, for how much and on what terms. It is not a contract requiring utmost good faith. That idea is normally referred to as caveat emptor. The risk the purchaser assumes is that the property may be subject to some defect and it is up to him to find out about it. The vendor is entitled not to say anything about the

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14 *Kaitaia Timber Co Ltd v Alternative Enterprises Ltd* [2012] NZHC 2497.
15 At [53].
16 Footnotes omitted.

property. 6.1 is an exception to that general principle, but it is to be considered against the background that otherwise the purchaser assumes a risk.

(b) In New Zealand it has been standard practice for some time now for the vendor to give a warranty as to government or local authority requisitions and requirements. For example, in *Niven v Robertson Industries Ltd* the warranty was:

> The Vendor warrants he has not received nor has he any notice of any requisition or outstanding requirement imposed by any local or government authority in respect of the property which he has not disclosed to the purchaser.

On these terms, the warranty is confined to directive communications received by the vendor. Since then, the warranty has been extended to apply also to directives under the Resource Management Act, from tenants and from other parties. But that does not mean that the nature of the communications to be disclosed has changed. The traditional purpose of the warranty has been to ensure that the vendor discloses to the purchaser directives which are still outstanding. It would be a marked change to expand the matters to be disclosed to information, as well as directives.

(c) Both the vendor and third parties may hold information about a property. But only third parties may impose legal requirements to take some action in relation to a property. The warranty serves a useful purpose in requiring disclosure of directives from third parties. On the other hand, it would be anomalous to hold that the warranty requires the vendor to disclose information about the property he has received from third parties, when there is no obligation on the vendor to disclose information he has obtained for himself.

(d) The context supports "notice" being directive. The accompanying words, "demand", "requisition" and "outstanding requirement" are also directive. The context does not suggest that notice should be more than directive.

(e) The warranty 6.3 also helps. That warranty applies at settlement. There "notice" is directive, as the warranty provides that it can be paid or complied with:

> 6.3 The vendor warrants and undertakes that at settlement:
>
> ...
>
> (2) Any notice or demand received by the vendor, which directly or indirectly affects the property,

(a) from any local or government authority or other statutory body; or

(b) under the Resource Management Act 1991; or

(c) from any tenant of the property; or

(d) from any other party –

has been delivered forthwith by the vendor to either the purchaser or the purchaser's solicitor, *unless the vendor has paid or complied with such notice or demand*. If the vendor fails to so deliver or pay the notice or demand, the vendor shall be liable for any penalty incurred.

(emphasis in original)

[175] In his decision, Associate Judge Bell relied upon the decision of Moller J in *Robertson v Niven Industries Ltd*.[17] That case concerned the sale and purchase of land and a building. The vendor had received letters from the city council advising that the building did not comply with the fire protection by-laws, attaching schedules of deficiencies and requesting "prompt action … as Council cannot permit substandard fire precautions to continue".[18] The Court concluded that the Council's letters drew the vendor's "… attention to certain deficiencies but do no more than require them to be 'considered' by the company at some future time."[19]

[176] *Kaitaia Timber Co Ltd v Alternative Enterprises Ltd* was considered by the Court of Appeal in *Western Park Village Ltd v Baho*.[20] The Court of Appeal stated:[21]

> [39] The Judge found there was no breach of warranty under cl 6.1(1)(d) of the ASP. He referred to a judgment of Associate Judge Bell in *Kaitaia Timber Co Ltd v Alternative Enterprises Ltd* and other authorities mentioned in a case note by Professor DW McMorland. We agree with the conclusion reached by the Judge that the Glaister Ennor letter of 6 October 2006 did not amount to a notice or demand or to a requisition or outstanding requirement in terms of cl 6.1(1)(d) of the ASP. As the Judge observed, the warranty clauses in the ASP need to be considered together. There is an obvious contrast between the more formal terminology used in cl 6.1(1)(d) and the much more widely drawn cl 7.1(6)(b). The former

17 *Robertson v Niven Industries Ltd* (1984) 2 NZCPR 212 (HC).
18 At 214.
19 At 219.
20 *Western Park Village Ltd v Baho* [2014] NZCA 630, (2014) 16 NZCPR 139.
21 Footnotes omitted.

> contemplates a formal requirement or demand that specified action be taken. The language used may be more apt to refer to some form of official requirement from a local body or other government agency although we would not rule out the possibility of, for example, a formal demand made by a non-government party.

[177] I accept Mrs Golightly's submission that in this case neither of the two emails sent on 27 and 30 May 2014 imposed any legal requirement on the vendor to do, or avoid doing, anything. They raised matters of contract under the lease, and did not purport to impose any legal requirement on the lessor.

[178] Accordingly, neither email constitutes a notice, demand, requisition or requirement for the purposes of cls 6.1(1)(c) or 6.2(8)(c).

[179] For completeness, I add that the emails did not comply in terms of form with the relevant provision in the Deed of Assignment of Lease dated 5 April 2013. Clause 18.1 of that document requires any notice, demand to communication concerning the Deed to be made by letter or by facsimile transmission to the lessor at 1st Floor, Vinery Lane, Whangarei (the physical address of Sumpter Baughen). Emails are not contemplated.

[180] For the foregoing reasons, there was no breach of cl 6.0 of the SPA.

Second cause of action - misrepresentation

[181] It is convenient to deal first with the second cause of action which pleads an alleged positive misrepresentation before returning to the allegation of misrepresentation by silence in the first cause of action.

[182] The statement of claim pleads a misrepresentation in terms of s 6 of the Contractual Remedies Act 1986. The relevant provision is now s 35 of the CCLA. That section provides:

> **35 Damages for misrepresentation**
>
> (1) If a party to a contract (**A**) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (**B**),—

(a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached; and

(b) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of the misrepresentation.

(2) Subsection (1) applies to contracts for the sale of goods—

(a) despite sections 197 and 201(2); but

(b) subject to section 34.

[183] The plaintiffs rely on the statement in para 7 of the MWIS letter of 7 July 2014 that:

7. Our client advises there are no outstanding disputes with the tenants.

[184] The plaintiffs submit that the words "the tenants" include existing tenants, that the emails of 27 and 30 May 2014 are evidence of a dispute with Number 8 Caltex and accordingly, that there is a misrepresentation of fact in the letter.

[185] There are four issues which must be considered under this cause of action:

(a) Was there a statement of past or present fact?

(b) Was the statement false?

(c) Did the statement induce Mr Sullivan, as an agent for the purchasing group, to declare the SPA unconditional?[22]

(d) In any event, does PAIL have a cause of action in circumstances where the representations were made to Mr Sullivan as purchaser and not to PAIL as nominee under the SPA?

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22 See *Mt Pleasant Estate Co Ltd v Withell* [1996] 3 NZLR 324 (HC) at 329 per Tipping J: "I can see no difference in principle between a misrepresentation inducing a party to sign a conditional contract and a misrepresentation inducing a party to take a step toward making that contract unconditional. Indeed the latter situation is in a sense closer to the point at which the party becomes irrevocably bound than is a misrepresentation inducing entry into a conditional contract."

[186] Again, these issues are sequential: if the answer to any of the questions above is "no", it will be unnecessary to consider the remaining issues.

[187] For the defendants Mrs Golightly submitted that the letter of 7 July 2014 including the words "the tenants" needed to be read together with the question in the 1 July 2014 letter from Stafford Klaassen which generated the response from MWIS. Mrs Golightly submitted that when the two letters were read together in this way, the words "the tenants" was a reference to previous tenants only. Mrs Golightly also submitted that, in any event, the two emails were not evidence of a dispute.

Was there a statement of past or present fact?

[188] The defendants accept that the statement, "[t]here are no disputes with the tenants" is a statement of present fact.

Was the statement false?

[189] The answer to this issue turns upon the meaning of "the tenants" in para 7 of the letter. The surrounding context is crucial. The letter of 1 July 2014 from Stafford Klaassen (the Stafford Klaassen letter) asks in para 7:

> 7. Where the tenants are recent e.g. Caltex Wellsford Ltd and Forbidden City New Zealand Ltd – are there any disputes with the previous tenants?

[190] MWIS replied on 7 July 2014 (the MWIS letter). The opening words of the MWIS letter are:

> We refer to your letter of 1 July 2014 and address each of your points in turn…

[191] The MWIS letter then adopts the same numbering as in the Stafford Klaassen letter. The MWIS letter states at para 7:

> 7. Our client advises there are no outstanding disputes with the tenants.

[192] In my view, the answer given in para 7 of the MWIS letter needs to be read in the context of the question asked. That question makes it very clear that the focus is

on previous tenants. It goes so far as to give two specific examples where the tenant has recently changed.

[193] I acknowledge the evidence of both Mr Stafford and Noel Chandler that, in their view, the answer given in para 7 of the MWIS letter went beyond what was asked. In other words, MWIS voluntarily broadened its answer to encompass not only past tenants, but also present tenants. However, I do not accept the plaintiffs' submission that to construe the words "the tenants" as a reference to past tenants only would be to adopt an improperly narrow and literal meaning. This sentence in the MWIS letter is not well written and perhaps would have been clearer, had the writer referred to "the *previous* tenants". Nevertheless, when the two letters are read together, the meaning of para 7 is clear.

[194] Accordingly, I do not accept the plaintiffs' submission that "the tenants" included current tenants. It follows that the statement of fact in para 7 of the MWIS letter was not a false statement.

[195] The second cause of action therefore fails this point.

Further alleged misrepresentation

[196] Mr Dale in his closing submissions sought to extend the second cause of action to incorporate the statement in para 8 of the MWIS letter that "as at the date of the agreement there are no known breaches of any leases." However, as Mr Dale properly acknowledged, para 8 was not pleaded in the amended statement of claim as a misrepresentation. For that reason, I decline to consider those submissions.

First cause of action – misrepresentation by silence

[197] In this cause of action, as pleaded, the plaintiffs allege a misrepresentation pursuant to s 6 of the Contractual Remedies Act 1979. As with the second cause of action, the relevant provision is now s 35 of the CCLA.

[198] Again, there are four issues which must be considered under this cause of action:

(a) Was there a statement of past or present fact?

(b) Was the statement false?

(c) Did the statement induce Mr Sullivan, as an agent for the purchasing group, to declare the SPA unconditional?

(d) In any event, does PAIL have a cause of action in circumstances where the representations were made to Mr Sullivan as purchaser and not to PAIL as nominee under the SPA?

[199] Mr Dale submitted that an action for misrepresentation by silence could arise in two situations: first, where a party to a contract bears a positive obligation to disclose particular information, but fails to do so; second, where silence distorts an otherwise truthful statement, making the statement false (a half-truth).

[200] The amended statement of claim pleads misrepresentation by silence on the basis that WPL had a duty to disclose the emails of 27 and 30 May 2014. As pleaded, this duty is said to arise because WPL was aware:

(a) that the payment of OPEX and the tenants' liability for OPEX was a key component of the purchase price offered by the purchasing group;

(b) of the plaintiffs' particular concerns in respect of OPEX by reason of the exchange of correspondence between the solicitors for the parties;

(c) that Mr Hardy was unlikely to willingly give way on the question of OPEX and the disputed amount;

(d) that there were potential complications in the calculation of OPEX for the part of the property occupied by Number 8 Caltex; and

(e) that WPL was aware that Mr Hardy and Number 8 Caltex had not abandoned the position on the disputed amount of OPEX payable by Number 8 Caltex.

[201] It is alleged that in those circumstances WPL ought to have notified the plaintiffs that there was at least a potential issue in relation to the payment of OPEX.

[202] In his submissions, however, Mr Dale relied upon the "half-truth" line of cases. The particular 'half-truths' relied upon were not directly pleaded in the amended statement of claim. However, Mr Dale submitted that the pleading was sufficiently broad to include paras 7 and 9 of the MWIS letter, namely the statements that:

> 7. Our client advises there are no outstanding disputes with the tenants.
>
> …
>
> 9. The leases historically did not line up in terms of OPEX as methods of calculating OPEX differed in some cases. Our client has attempted to clarify and crystalise OPEX with each tenant and in recent lease documentation.

[203] I permitted submissions to proceed on that basis.

Was there a misrepresentation by silence?

[204] Burrows, Finn and Todd *Law of Contract in New Zealand* includes the following helpful summary of the law relating to misrepresentation by silence:[23]

> The general rule is that mere silence is not misrepresentation. "The failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract", even though it is obvious that the contractor has a wrong impression that would be removed by disclosure. Tacit acquiescence in the self-deception of another creates no legal liability, unless it is due to active misrepresentation or to misleading conduct. Thus, to take one important example, there is no general duty to disclose defects of quality in the case of a contract of sale, whether of goods or of land.
>
> …
>
> However, if silence distorts a positive representation this may amount to misrepresentation for the purposes of s 6. A party to a contract may be legally justified in remaining silent about some material fact, but if he or she ventures to make a representation upon the matter it must be a full and frank statement, and not such a partial and fragmentary account that what is withheld makes that which is said false. A half-truth may in fact create a misleading impression because of what it leaves unsaid. Thus, as in one English case, if a vendor of a farm states that the farm is let, he or she must not omit the further fact that the tenants have given notice to quit

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[23] John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis NZ Ltd, Wellington, 2016) at 357-358 (footnotes omitted).

[205] Mr Dale submitted that the failure to disclose the 27 and 30 May 2014 emails converted the positive statements in paras 7 and 9 of the MWIS letter into misrepresentations. He relied on a number of decisions of this Court in support of that proposition.

[206] A useful starting point, in Mr Dale's submission, is the decision *Wakelin v R H & E A Jackson Ltd*.[24] In that case, a purchaser of a lunch bar inquired about possible competition in the area and was told by the vendor's agent that first, "the closest competition was a takeaway bar half a mile away"; and second, that "the council would not grant permission for any further takeaway bars as the area was well serviced."[25] The Court found that, at the time of making the representations, the agent was aware that another lunch-bar had been granted consent to operate nearby, and had in fact taken possession of the premises for that purpose. Henry J held that:[26]

> … the unequivocal statement as to the situation concerning opposition and the specific reference to Neilson Street, coupled with the advice that the local council would not permit further lunch-bars, was at the time it was made both in substance and in effect untrue, and painted an erroneous picture to the plaintiffs.

[207] He went on:

> In my opinion this is a typical case where an answer given to a specific question, although theoretically true, constitutes a misrepresentation for the reason that it does not indicate the true position.

[208] Mr Dale cited two other relevant decisions. The first of those cases, *Hieber v Barfoot & Thompson*, concerned the sale of an expensive property on the Auckland waterfront.[27] The defendant in that case was the real estate agent who had sold the property, advertising its "magnificent sea and city views". The agent however failed to disclose that the Kohimarama Yacht Club intended to move its clubhouse to a position directly in front of the property, which would significantly detract from the advertised views. The Judge held:[28]

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24 *Wakelin v R H & E A Jackson Ltd* (1985) 2 NZCPR 195 (HC).
25 At 196.
26 At 197.
27 *Hieber v Barfoot & Thompson* (1996) 7 TCLR 301 (HC).
28 At 306.

> … it seems to me that to say the property had a magnificent view was literally true, but by failing to say the view could change because of the KYC proposals to resite the clubhouse makes the literal truth false. Because nothing further was said, and there was silence, that silence affirmatively conveys as true, in the sense of supporting what was said concerning the magnificent views, whereas in fact it was false, because the additional information concerning KYC was not supplied.

[209] Mr Dale also referred to the judgment in *Sipka Holdings Ltd v Merj Holdings Ltd*.[29] That case, like the present, involved the purchase of a commercial property subject to due diligence. The subject matter of the due diligence investigation included "the soundness and quality of the building, and any engineering aspects relating to the property and its potential development."[30] On 20 June 2013, as part of the due diligence investigation, the purchaser requested the vendor to provide any documents held on file, including any structural reports. The vendor disclosed one report dated 12 August 2009, in which a structural engineer concluded that the building had achieved a score of 43 per cent of the new building standard and, on that basis, was not earthquake prone. However, the vendor failed to disclose a second report dated April 2012, in which the same structural engineer concluded that the building was in fact earthquake prone, and required strengthening. Wylie J held:[31]

> [45] In the present case, Mr Sipka asked Mr Burns whether the Council had required any reports in relation to the building. Mr Burns told Mr Sipka that there was a report recording that the building had achieved 43 per cent of the new building standard, and that that report had been filed with the Council.
>
> [46] This statement was true insofar as it went, but it was only a half truth. Mr Burns knew that the second report had been obtained, that it was a more detailed and comprehensive report, that it advised that the building had been re-assessed at less than 33 per cent of the new building standard and that it concluded that the building needed strengthening. The existence of the second report was a matter of existing fact. Mr Burns, by his half truth, misrepresented the position. Silence as to the full truth rendered what was said untrue. A half truth is an untruth, and what was said by Mr Burns was at best a half truth.

[210] I do not consider that the representations made in paras 7 and 9 of the MWIS letter are comparable to the representations made in these three cases above. In *Wakelin* and *Hieber*, the agents acting for the vendors made positive representations regarding an attribute of the property, leaving out crucial information which rendered

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29 *Sipka Holdings Ltd v Merj Holdings Ltd* [2015] NZHC 1980.
30 At [14].
31 Footnotes omitted.

those representations untrue. There was going to be competition in the vicinity of the lunchbar; the "magnificent views" were going to be significantly eroded by a new clubhouse.

[211] The same cannot be said in the present case. The statements in paras 7 and 9 of the MWIS letter were made in response to specific questions put by the plaintiffs to WPL. The representation in para 7, as I have found, was limited to past tenants only and so, by any measure, was entirely truthful. The representation in para 9 arguably comes closer to a misrepresentation by silence, given the reference to "clarify[ing] and crystallis[ing] OPEX with each tenant". However, it is important to consider para 9 as a whole, in the context of the question that was asked:

> [Q] We note that there has been a shortfall of operating expenses in the year to March 2013 and that there looks to be an effort to improve this. Please advise the reason for the shortfall and what steps have been taken to improve this.
>
> [A] The leases historically did not line up in terms of OPEX as methods of calculating OPEX differed in some cases. Our client has attempted to clarify and crystallise OPEX with each tenant and in recent lease documentation.

[212] Two points emerge. The first is that the question in the Stafford Klaassen letter was primarily directed to a historical shortfall in OPEX recovery. The protest by Number 8 Caltex had arisen only recently and did not affect the shortfall for the financial year ending 31 March 2013. The second is that the statement "[o]ur client has *attempted* to clarify and crystallise OPEX with each tenant" (emphasis added) was – unlike the representations made in *Wakelin* and *Hieber* – vague and non-committal. It was, in my view, an effectively meaningless statement.

[213] Nor do I consider that the situation in the present case is analogous that which arose in *Sipka Holdings Ltd*. The purchaser in that case made a general request for the vendor to disclose any documents held on file regarding the building, including structural reports. The vendor indicated that he had done so, but in fact had deliberately concealed a recent, unfavourable structural report. There is nothing of that nature in the present case. The purchasing group simply did not ask the right questions.

[214] For those reasons, the first cause of action fails.

Fourth cause of action - misleading or deceptive conduct

[215] The fourth cause of action pleads a breach of s 9 of the FTA by WPL and by Mr Hannam personally.

[216] In respect of WPL, the plaintiffs say that para 7 the MWIS letter was misleading and deceptive, in that the statement there were no outstanding disputes with the tenants was untrue.

[217] In respect of Mr Hannam personally, the plaintiffs say that his conduct was misleading and deceptive, and in particular, that Mr Hannam caused WPL to provide the purchasing group with inaccurate information in respect of the OPEX payable by Number 8 Caltex. In support of this point Mr Dale relied upon paras 6 to 9 of the MWIS letter, as well as the schedules of rent and OPEX provided by Sumpter Baughen on 18 July 2014. The plaintiffs further say that Mr Hannam personally failed to provide the information regarding OPEX and the dispute with Number 8 Caltex to the purchasing group. A claim that Mr Hannam was vicariously liable for the acts of WPL and Sumpter Baughen was abandoned at the hearing.

[218] Section 9 of the FTA provides:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[219] The leading authority on the FTA is the decision of the Supreme Court in *Red Eagle Corporation Ltd v Ellis*.[32] In that case an experienced businessman had been misled by false information given by a Ms Black in support of a loan application. The information provided by Ms Black had effectively been endorsed by Mr Ellis. The Supreme Court held:

> [28] It is, to begin with, necessary to decide whether the claimant has proved a breach of s 9. That section is directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or

[32] *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.

> misleading in the particular circumstances. Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected. … The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would like have been misled or deceived.

[220] I do not consider that threshold has been met in the present case.

[221] As I have found above, the statement in para 7 of the MWIS letter was limited to past tenants only and was therefore entirely truthful. There was nothing misleading or deceptive in the conduct of WPL.

[222] Nor do I consider that Mr Hannam personally engaged in conduct that was misleading or deceptive. To the extent that the plaintiffs seek to hold Mr Hannam personally liable for statements made in the MWIS letter and/or the schedules provided by Sumpter Baughen, the obvious answer is that those documents were communications by WPL and its agents, not by Mr Hannam. He did not prepare the information and his name does not appear anywhere on the documents.[33] To hold Mr Hannam personally liable for statements made by WPL and its agents in those circumstances would in my view undermine the fundamental principle of separate corporate personality.

[223] The fourth cause of action therefore fails against both WPL and Mr Hannam.

Result

[224] The plaintiffs' claims fail and are therefore dismissed. Judgment is entered in favour of the first and second defendants.

[225] My present view is that the defendants as the successful parties are entitled to costs and that costs should be on a category 2B basis. However, a final determination of costs is reserved in the event the parties are not able to agree. In that case, counsel for the defendants may file a memorandum within 15 working days of delivery of this

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[33] See discussion in *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 at [79]-[86] and the cases cited therein.

judgment. Counsel for the plaintiffs may file a memorandum in reply within a further 10 working days thereafter. Memoranda should not exceed 5 pages.

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Gordon J