



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)**

Case No: 1072/2010

In the matter between:

DORMELL PROPERTIES 658 (PTY) LTD

PLAINTIFF

And

**ROWMOOR INVESTMENTTS 513 (PTY)
LTD**

FIRST DEFENDANT

AUCTION ALLIANCE (PTY) LTD

SECOND DEFENDANT

Coram: ROGERS J

**Heard: 6, 7, 11 - 14, 19 & 20 MARCH 2013; 5 – 8 & 12 – 14 AUGUST 2013;
2-3 SEPTEMBER 2013**

Delivered: 9 OCTOBER 2013

JUDGMENT

ROGERS J:

Introduction

[1] The plaintiff ('Dormell') sues the two defendants ('Rowmoor' and 'Auction Alliance' respectively) for damages of R25 million allegedly caused by misrepresentations and non-disclosure which induced Dormell to purchase Erf 257 Camps Bay situated at 35 Victoria Road Camps Bay ('the property') for a price of R44 million (inclusive of commission) whereas it would otherwise only have paid R19 million. Rowmoor was the owner and seller of the property. Auction Alliance was the auctioneer mandated by Rowmoor to sell the property. Dormell was represented by Mr AR Sholto-Douglas SC leading Ms L Kieck; Rowmoor by Mr PB Hodes SC leading Mr SC Goddard; and Auction Alliance by Mr Rose-Innes SC leading Mr D van Reenen.

[2] Dormell purchased the property on 6 March 2008. The property had been put up for auction that morning. Dormell bid at the auction but the property was knocked down to another bidder for R36 million. Rowmoor did not accept that price. Pursuant to negotiations which took place immediately after the auction, Dormell ended up buying the property for R40 million plus R4 million auctioneer's commission in accordance with the conditions of sale on which the auction had been conducted.

[3] Broadly stated, Dormell's complaint is that the defendants represented in the auction brochure and stated verbally at the auction that there were approved building plans for a three-storey building on the property as depicted in the brochure or that there were statements which, in the absence of further disclosure, conveyed that impression. It is common cause that various development rights for the proposed building had been obtained by the time of the auction but that the building plans had not yet been approved. It is also common cause that in the event the building plans were never approved though the circumstances giving rise to the absence of approval will require explanation. The content of the representations is not in dispute: they are contained in the brochure and in the transcript of what the auctioneer said (the auction was filmed).

[4] The issues which were argued at the end of the trial were in summary the following:

[a] whether the statements in the brochure and at the auction have the meaning alleged by Dormell (misrepresentation by commission);

[b] alternatively, whether there was a duty to disclose that building plans had not yet been approved (misrepresentation by omission);

[c] whether the defendants made the misrepresentations by commission negligently; or whether they made the misrepresentations by omission fraudulently or negligently;¹

[d] whether Dormell, represented by one of its directors Ms Suzette Main ('Main'), knew by the time of the purchase that building plans had not yet been approved;

[e] whether, assuming Main did not know, the knowledge of Mr Dudley Annenberg ('Annenberg'), whom she asked to investigate the property with a view to advising her on the proposed purchase and who undoubtedly knew at the time of the auction that building plans had not yet been approved, is attributable to Dormell;

[f] whether the fact that building plans had not been approved would have made any difference to the price paid by Dormell and if so what that difference would have been;

[g] related to issue [f], whether the evidence adduced by Dormell to the effect that the market value of the property at the auction date was R19 million (corresponding to the alleged lesser price Dormell would have paid but for the misrepresentations/non-disclosure) was cogent and should be accepted by the court;

[h] whether, assuming these various issues were decided in favour of Dormell, the defendants are shielded from liability by a disclaimer in the auction brochure or an

¹ The pleaded case of fraudulent misrepresentation by commission was jettisoned in argument.

exemption clause in the conditions of sale (it was accepted by the defendants, though, that these protections would not be available if fraud were proved).

Factual overview

[5] Dormell's two directors at all material times have been Main and Gary Tullis ('Tullis'). Main is an affluent woman in her own right and is married to Paul Main, a successful and wealthy businessman. Tullis was a director of various companies in which Suzette and Paul Main were interested. He is a chartered accountant and effectively functioned as a financial director. Paul Main was not involved in Dormell and played no part in the events with which this case is concerned. Main through Dormell was as at March 2008 the owner of an establishment in Plettenberg Bay known as the Grand Cafe & Rooms which operated as a restaurant and boutique hotel (she had acquired this in late 2007/early 2008).

[6] Rowmoor purchased the property in July 2004. Its sole director was Selwyn Fabian. Although the outside world would not have known this, Rowmoor was the general partner in an *en commandite* partnership in which the ownership and development of the property were effectively divided into three shares: a third held by a trust in which Selwyn and his brother Frank were interested; another third held by a trust in which Dennis Fabian and his brother Jeff were interested; and the final third held by various business associates of the Fabians. The fact that this partnership existed was not regarded by the litigants as a matter of significance.

[7] Dennis Fabian is a successful and well-known architect. He was at all material times the leading figure in a firm of architects called Dennis Fabian & Berman Architects ('DFBA'). All references in this judgment to Fabian are to Dennis Fabian unless otherwise indicated.

[8] The property is 476 m² in extent. As at July 2004 there existed on the property a two-storey building covering about one-third of the erf. There was a restaurant on the ground floor and a function facility on the upper floor. Rowmoor had in mind to develop the property in a way which would require various title deed restrictions to be removed or amended and various departures to be granted from

the zoning scheme. The restrictions had to do with building setbacks; the area of the erf which could be covered by buildings; and the activities which could be conducted on the property. In some instances these matters were dealt with in both the title deed and the zoning scheme though in different ways. There existed in Camps Bay an extremely active and vigilant ratepayers association ('the Association'). The changes which Rowmoor had in mind could be expected to attract the critical attention of the Association and of various neighbours.

[9] Shortly after purchasing the property Rowmoor engaged DFBA as architects to assist in the design of the proposed development. The main professionals at DFBA who dealt with the project were Dennis Fabian and Marius van Lonkhuyzen ('Van Lonkhuyzen'). Rowmoor engaged an experienced town planner, Tommy Brummer ('Brummer'), to guide Rowmoor through the difficult process of obtaining the necessary alterations to the title deed and zoning restrictions. Brummer had an associate, Arina de Villiers, who also had some involvement in the project.

[10] The removal and amendment of title deed restrictions were governed by the Removal of Restrictions Act 84 of 1967 ('the Removal Act'). The power to grant removal and amendment lay with the Department of Environmental Affairs and Development Planning in the Western Cape Provincial Government ('the Province'). The Act laid down a process of application, publication and objection. Such applications were made to the Province through the relevant local authority (in this case, the City of Cape Town – 'the City') which was required to make a recommendation to the Province. Ultimately the competent authority in the Province had to determine whether he or she was satisfied that it was desirable to remove or amend the relevant restrictions in the interests of the establishment or development of the township or area or in the public interest (see s 2(1)(a) of the Removal Act).

[11] Departures from the zoning scheme, by contrast, were a matter for the City. The departures had to be sought in terms of s 15 of the Land Use Planning Ordinance 15 of 1985 ('LUPO'). Again there is a prescribed process of application, publication and objection. In terms of s 36 of LUPO the test focuses on the desirability of the proposed departure, the safety and welfare of the members of the

community, the preservation of the natural and developed environment and the effect of the departures on existing rights.

[12] In December 2004 Brummer submitted to the City Rowmoor's application for the removal and amendment of certain title deed restrictions ('the removal application') and Rowmoor's application for departures from various terms of the zoning scheme ('the departures application'). The consolidated application was accompanied by a set of sketch plans collectively styled the Site Development Plan ('SDP') with floor plans for the various levels plus certain elevations and sections of the structure as a whole.

[13] As was perhaps to be expected, there were objections from the Association and from various neighbours ('the affected parties'). Rowmoor and Brummer engaged over a period of several years with the affected parties and with the City with a view to reaching a compromise. In this process the sketch plans constituting the SDP underwent various alterations.

[14] On 22 June 2006 there was a meeting of the City's Spatial Planning Environment and Land Use Management Department ('SPELUM'). By that stage some but not all of the objections of the affected parties had been accommodated. For convenience I shall refer to the SDP sketches as they existed at this stage as the June 2006 SDP. The SPELUM meeting was attended by, among others, representatives of the Association and affected neighbours and by Brummer. Despite the remaining objections, SPELUM resolved, in item 1 of its resolution passed on that date, to recommend to the Province the granting of the removal application. As to the departures application, items 2 and 3 of the resolution read thus:

'2. that, subject to the approval of 1 above [*ie the granting by the Province of the removal application*], the Departures as set out in Annexure "A" to the report, to enable the owners to construct a three story building, comprising retail (restaurant) and a parking garage in the basement and on the ground floor with flats on the first and second floor BE APPROVED in terms of Section 15 of the Land Use Planning Ordinance 15 of 1985, subject to the conditions as set out in the tabled Annexure "A", and

3. that the Development Plan, as per drawings SDP-1351-1000-1005 & 3000-3001 (Amended February, March and June 2006) BE APPROVED.'

[15] The departures thus approved involved the reduction (in most instances to zero) of various setbacks specified in the zoning scheme from Victoria Road (to the west) and Van Kamp Street (to the south). Among the conditions to which the departures were subject were [a] that not more than 11 dwelling units be developed on the property; and [b] that one on-site parking bay for each dwelling be provided on the property.

[16] The affected parties had a right to appeal to the Province against SPELUM's decision. This was naturally something Rowmoor wished to avoid. Moreover, the Province had not yet approved the removal application. Rowmoor thus continued to negotiate with the affected parties. Compromises were made on both sides which led to minor alterations in the SDP. The altered SDP sketches were dated November 2006, and I shall refer to this version as the November 2006 SDP. Eventually a written agreement was concluded between Rowmoor and the affected parties ('the APA'), the last signature being procured on 4 June 2007. In terms of the APA the affected parties withdrew their objections to the removal and departures applications and waived all rights of appeal. Clause 2 of the APA contained various terms for the benefit of the affected parties. In terms of clause 2.1 the development was to be in accordance with the November 2006 SDP sketch plans annexed to the APA 'and in particular, the external envelope as indicated on the Plans for the habitable areas of the development that shall define any future development in terms of set-backs from boundaries and heights above mean sea level'. Clause 2.2 contained various height restrictions in order to preserve a sea view for two objecting owners. Clause 3 stipulated that certain of these provisions were to be registered as a notarial deed of praedial servitude against the property's title deed in favour of certain specified neighbouring properties. (Such registration occurred on 23 March 2008, about two weeks after the auction.)

[17] Brummer immediately notified the Province of the conclusion of the APA. On 5 October 2007 the Province granted the removal application. The effect was to remove restrictions which specified a setback of 4,72 m from Victoria Road and

which limited building coverage to one-third of the area of the erf; and the amendment of a condition which prohibited the sale of spiritous liquors so as to make an exception for the sale of alcoholic beverages to parties visiting any restaurant conducted on the site. The removal of the one-third coverage restriction meant that the property could now benefit from the more generous provisions of the zoning scheme which permitted 100% coverage. (The removal and amendment of the title deed conditions were formally endorsed on the title deed on 31 October 2007.)

[18] The Province's granting of the removal application coupled with the waiver of appeal rights in the APA cleared the way for the City to give final notification to Rowmoor of the approval of the departures, which the City did by way of a letter dated 15 October 2007. Although the November 2006 SDP differed slightly from the June 2006 SDP approved by the City, there is an internal note by a City official dated 17 October 2007 to the effect that the later version was more favourable to affected parties than the earlier one, ie that the alterations did not stand in the way of final notification. This internal note is dated 17 October 2007 which is, I suspect, the date when the final notification letter dated 15 October 2007 was released by the City. Attached to the final notification letter was the SPELUM resolution of 22 June 2006 together with copies of the June 2006 SDP drawings, each bearing the City's signed stamp 'Departures Granted 12 Oct 2007'.

[19] There was a debate between the experts (David Saunders for Dormell and Brummer for Auction Alliance) as to the precise import of the decision in item 3 of the SPELUM resolution, namely the approval of the June 2006 SDP drawings. Saunders said that the approval of the departures was not formulated on the condition that the proposed structure had to be in accordance, or even substantially in accordance, with the SDP drawings – the SDP merely illustrated the extent of the departures. Brummer thought otherwise. If Saunders were right, it would mean that item 3 of the resolution was really of no effect since the approval of the SDP would have no other relevance. Whatever the correct legal position may be, I consider that *de facto* the City would, in the light of items 2 and 3 of the resolution read together, have declined to approve building plans which took advantage of the departures but

did not substantially correspond with the SDP drawings. This would have presented a practical difficulty for anyone wishing substantially to change the plans.

[20] Rowmoor was intending to do the development itself. In order to construct the building for which development rights had been obtained through the removal and departures application it was necessary to obtain approval from the City of building plans complying with the National Building Regulations and Building Standards Act 103 of 1997 ('the NBA'). The grant of such approval is governed by s 7(1) of the NBA. The local authority must first satisfy itself that the application for plan approval complies with the requirements of the NBA and any other applicable law (sub-para (a)). If so satisfied, the local authority must approve the building plans unless it is satisfied that the proposed building will probably disfigure the area or be unsightly or objectionable or derogate from the value of adjoining or neighbouring properties or be dangerous to life or property (sub-para (b)). The application must be approved or refused (in the case of a proposed building of the size here involved) within 60 days. In terms of s 7(6) the local authority may, prior to approval, grant provisional authorisation for the applicant to begin construction of the building to which the application relates.

[21] Because of the 60-day limit, a practice evolved by which the City would, prior to the formal submission of an application for approval, consider the proposed building plans for possible problems. This was known as pre-scrutiny. Once the plans passed the pre-scrutiny phase the applicant would pay the prescribed scrutiny fee, the date of such payment being treated as the formal submission of the application (thus triggering the 60-day limit).

[22] Rowmoor, through DFBA, lodged its building plans for pre-scrutiny in late August 2007. As is commonly done, DFBA engaged a third party, in this case a firm called Architectural Services, to attend to the more tedious aspects of 'walking' the plans through officialdom. The plans were cleared by various departments within the City over the ensuing few months. By 5 February 2008 the building plans had successfully passed the pre-scrutiny phase. Rowmoor immediately issued a cheque for the scrutiny fee (the cheque, oddly, is dated 4 February 2008). There was no documentary evidence as to when precisely the cheque was delivered. Fabian

believed that it would in the ordinary course have been delivered shortly after the cheque was issued. In any event, the cheque was only banked by the City on 19 March 2008 which was thus accepted by the litigants as being the formal date of the application for building plan approval. (The auction, it will be recalled, took place on 6 March 2008.)

[23] Towards the end of 2007, and while the building plans were wending their way through the pre-scrutiny phase, Rowmoor began to give thought to the possibility of selling the property rather than doing the development itself. Auctions of prime properties were achieving good prices and there was an air of optimism arising from the award of the 2010 FIFA World Cup to South Africa. The Rowmoor partners discussed this. Some were more bullish than others on price. Eventually and on 1 February 2008 Rowmoor gave Auction Alliance a written mandate to sell the property on auction or by private treaty at a price of R42 million net to Rowmoor (or such lesser price as Rowmoor might accept). Auction Alliance's commission was to be 10%. Fabian's evidence was that the proposed price was arrived at (very roughly) by calculating the costs already incurred by Rowmoor (inclusive of interest) at R20 million and by calculating the projected profit if Rowmoor were itself to undertake the development at a further R20 million. Fabian's evidence was that if Rowmoor did not achieve an acceptable price they would have gone ahead with the development without delay.

[24] The auction was scheduled for 6 March 2008. By mid-February at the latest Auction Alliance had issued a promotional brochure. Rowmoor accepted that the content of the brochure carried its approval. Contact details were given for Auction Alliance's Christian Stewart ('Stewart') and Kim Faclier ('Faclier'). The title page announced that the auction presented a 'Platinum Mile Redevelopment Opportunity'. Paragraph 3 of the brochure recorded the zoning of the property as being General Business B1² and proceeded:

² In terms of this zoning the property had a bulk factor of 1,2 and a habitable room factor of 34. The manner in which these factors applied in the context of the Fabian SDP was as follows: The property was 476 m² in extent. The bulk factor increased this to 571 m². The retail area of the Fabian design, calculated in accordance with the zoning scheme, was 195 m² (differing, because of the calculation rules, from the *de facto* retail area of 210 m² shown on the plans and mentioned in the brochure). This would leave 376 m² for habitable rooms in a residential development. The latter area, divided by the habitable room factor of 34, thus permitted 11 rooms. Although the calculation notionally allocates

‘All restrictions pertaining to the subject site are as per the Site Development Plan (SDP) attached. Approval has been granted for the removal and amendment of restrictive title conditions and departures to allow for such development. Attached, please [find] the Final Notification Letter granting such approval, as well as the signed agreement between Rowmoor Investments 513 (Pty) Ltd and The Affected Parties’.

(The SDP sketches were not in truth attached to the brochure nor were the final notification letter and APA.)

[25] In paragraph 5, under the heading ‘Description of Property’, the following was said against the sub-heading ‘Approved Development’:

‘A three story building comprising parking with the basement, parking and commercial space on the ground floor and flats on the first and second floor.

The accommodation breakdown is as follows:

4 Shops;
11 Apartments;
2 Levels of parking (17 bays);
11 Storerooms

The approved and detailed plans, depicting each level of accommodation are attached to this document.’

(As noted, those plans were not in fact attached.)

[26] Under the further sub-heading ‘Accommodation Areas’ the following was recorded:

‘Approved Plans indicate the following building areas:

Basement parking & stores	450m ²
Ground floor parking	250m ²

34 m² to each habitable room, the zoning scheme permitted a three-storey building, and the rules regarding height and mezzanine levels permitted the 11 rooms to cover a considerably larger floor area than 376 m² – in the Fabian design, the actual floor area of the 11 apartments, spread across two floors and two mezzanine levels, was 1 100 m². (The rules relating to hotels were different. The zoning scheme favoured hotels of 30 rooms or more, allowing common/circulation areas to be excluded from the bulked-up area of 571 m². For a hotel with fewer than 30 rooms (and the property in this case was not large enough for such a hotel), the common/circulation areas could not be excluded, which would impose a severe limitation on the number of rooms one could have.)

Retail	210m ²
Apartments (100m ² each)	<u>1 100m²</u>
Total	<u>2 010m²</u>

[27] Immediately beneath this text was a further sub-heading (capitalised and in bold print) 'DISCLAIMER' reading thus:

'Whilst all reasonable care has been taken to obtain the correct information, neither Auction Alliance (Pty) Ltd, nor any of its subsidiaries and related companies, nor the Sellers, guarantee the correctness of the information, and none of the aforementioned will be held liable for any direct or indirect damages or loss, of whatsoever nature, suffered by any person as a result of errors or omissions in the information supplied, whether due to the negligence or otherwise of Auction Alliance, its subsidiaries and related companies, the Sellers, or any other person.'

[28] The brochure contained an artist's impression (in the form of a photographic montage) of the west and south facade of the proposed building and of the interiors of two proposed apartments.

[29] Dormell alleges that the material in the brochure was intended to mean or would reasonably have conveyed to the public that the relevant authorities, including the City, had approved construction of the proposed building, ie that there were *inter alia* approved building plans.

[30] Main testified that she learnt of the auction on the evening of Friday 29 February 2008. She was immediately taken with the idea of buying the property and converting it into an establishment similar to the one she had in Plettenberg Bay – as she put it, she wanted to introduce her brand, the Grand Cafe & Rooms, to Cape Town. She sought advice and assistance from Tullis and Annenberg. She had already worked with the latter on a property development in Fish Hoek. Annenberg was an experienced property broker in Cape Town.

[31] It so happened that about two weeks previously, on 15 February 2008, the auction brochure as well as the SDP sketches, final notification letter and APA had been emailed by Faclier to Emmanuelle Marescia ('Marescia') who had an interest

in a company called Dayspring Property Holdings SA (Pty) Ltd ('Dayspring') of which Tullis was the CEO though Main described it as really being her husband's company. Dayspring had a modest commercial property portfolio. Marescia had wanted to see whether the property might be a suitable acquisition for Dayspring. She quickly dropped the idea but not before sending the brochure and other documents to Tullis for advice. The latter thus coincidentally had the brochure and the missing attachments when Main became interested in the property on 29 February 2008. Main said that she herself only ever saw the colour brochure, not the intended attachments.

[32] Main asked Annenberg to look into the property and give her his view as to whether she should buy it and if so at what price. Annenberg did so, and for that purpose made contact with Auction Alliance and Fabian prior to the auction. Annenberg prepared what he described as somewhat hurried feasibility calculations, and Tullis did the same (based on Annenberg's input on property-related matters).

[33] As background to the pre-auction communication which Annenberg had with Auction Alliance, one needs to know that on 28 February 2008 Stewart of Auction Alliance had emailed Fabian to say that the response to the promotion of the auction had been phenomenal. Stewart continued: 'Excuse my ignorance as I am not a developer! – A few questions from potential purchasers:' The second question was whether there was a QS report regarding current construction costs. The third question was:

'Exactly what else is needed in terms of the construction beginning the day the new owners take transfer. Does the Final Notification letter, dated 15 October 2007 – Application for removal of restrictions and departures – a copy of which we have and have been forwarding to clients – give the necessary permissions by all parties to begin construction? In other words are these the stamped and approved final plans?

[34] Fabian replied on the same day, providing estimated figures for construction costs, contingencies and escalation and responding as follows to the third question:

'The development plan has been fully approved (you have a copy) and building plans are awaiting final sign-off and is a mere formality – we would warrant permission for construction commencement prior to transfer if required.'

[35] Shortly after Main's request to him for advice, Annenberg obtained a copy of the brochure from Auction Alliance. As noted, the SDP sketch plans, notification letter and APA were not physically part of the brochure. Annenberg testified that he did not ask for and never saw the APA. He did, however, view the SDP sketches at DFBA's offices when he visited Fabian a couple of days before the auction to discuss the property. Both Fabian and Annenberg testified that Fabian told Annenberg that the building plans were in council for approval and would be approved within a matter of weeks.

[36] Presumably pursuant to discussions earlier in the day, Faclier on the evening of Monday 3 March 2008 sent an email to Annenberg containing (by way of cut-and-paste) Fabian's answers to the second and third questions Stewart had posed to Fabian on 28 February 2008. This included the statement that the building plans were awaiting final sign-off which was a mere formality. (Annenberg testified that he was aware that the substantive content of Faclier's email to him was a quotation of what Fabian had written to Auction Alliance – the content did not comprise Auction Alliance's own statements.)

[37] It is thus beyond doubt that Annenberg knew, prior to the auction, that building plans had not yet been approved – he knew this both from the Faclier email and from what Fabian said to him at their meeting. Whether Main also knew is a disputed question. Main testified that she believed at the time of the auction that building plans had been approved and was not told otherwise by Annenberg. The latter, who attended consultations with the legal representatives of all the litigants prior to the trial and was ultimately called by Rowmoor, could not independently recall whether or not he told Main what Fabian had said about the building plans. Because Fabian regarded building plan approval as a mere formality which would only take a few weeks – a view which Annenberg had no hesitation in accepting given its eminent source – he said it was possible he did not mention the status of the building plans to Main. My impression was that while he thought it likely he would have mentioned it to Main, he was reluctant in the absence of independent recollection positively to refute her denial.

[38] Annenberg's brief feasibility calculations were done on two scenarios: a boutique hotel development with 23 (later 20) rooms (in line with Main's desire); and a mixed residential development (ie along the lines of the DFBA design), though only the former survives in the form which Annenberg himself produced. The upshot was that he advised Main not to bid more than R24,5 million (ie R27 million inclusive of commission). Tullis also ran some numbers and was content to approve a bid of up to R35 million net of commission. I should record here that Main was the driving force behind the proposed acquisition. She was clearly enraptured by the whole idea and it was my distinct impression, having seen and heard both her and Tullis' evidence, that Tullis – while taking his duties as a co-director of Dormell seriously – was anxious if at all possible not to thwart her dreams.

[39] Main was nervous about doing the bidding herself. Thus it was that on 5 March 2008 (the day before the auction) she and Annenberg executed a bidding authority in terms whereof Main authorised Annenberg to bid up to R35 million or such higher amount as she might direct at the auction. (Although the authorisation recorded that the figure of R35 million was inclusive of commission, the common understanding seems to have been that it excluded commission.) The authorisation, which was drawn by Annenberg, stated that if Annenberg's bid was successful Main undertook to sign the conditions of sale and indemnified Annenberg against any claim that might arise as a result of his actions on her behalf.

[40] The auction proceeded as advertised on Thursday 6 March 2008. Annenberg registered and obtained a bidding card. The DVD recording of the proceedings was played in court and the transcript adduced. The auction was conducted by Auction Alliance's managing director, Rael Levitt, with Stewart and Faclier in attendance to monitor the bidding. In a pre-recorded introduction broadcast at the auction, bidders were told that it was essential to read the conditions of sale and buyers guide, and that if they had any questions the Auction Alliance team would be able to assist. Levitt then took over. He referred to the information pack which attendees should have been given (it is unclear on the evidence whether this was just the brochure or also the intended attachments) which, he said, gave information about the property, including 'the proposed plans and diagrams'. He repeated the importance of bidders' acquainting themselves with the conditions of sale and that there were qualified

professionals on hand to assist with any questions. He then went into promotional patter about the location and the property. This included the following passage (underlining added):

'In terms of the property itself we are obviously selling ladies and gentlemen the opportunity over here in terms of development plans which have been approved for the site, we've got 2 010 square metres approximately of mixed use residential. This property amazingly has taken four long hard years with a very strong professional team to get approval for the site to put up a block of flats upstairs as well as retail and underneath us in terms of the approvals is a basement parking.

In fact quite amazingly those plans were approved and the Camps Bay Ratepayers Association... have given the thumbs up to this development and anyone who has dealt with them they protect the rights of Camps Bay and its area with bulldog tenacity and the fact that they've given the rights to this development and our friends, our big property owners in the area will say yes it is true, the fact that they've given the hesche,³ the approval means ladies and gentlemen that you can go right ahead. The plans are in place, the rights are in place, this is easy ladies and gentlemen, you can start developing here as soon as possible so you are ready for 2010.

In terms of the development plans we've got four retail shops on the front here with not bad views, downstairs would be a basement parking, there would be some parking up here as well, there will be 17 parking bays. Probably those parking bays will be the most valuable parking bays in this country and on the African continent. There will also be 11 stores here ladies and gentlemen. The property will be great as an apartment block....'

[41] Dormell pleaded that the passages I have underlined were representations intended to mean or reasonably conveying to the public that the relevant authorities, including the City, had approved construction of the building.

[42] In the event, there were two serious bidders, Zunaid Moti (for his company Zimbrotti Investments 25 (Pty) Ltd) and Annenberg on behalf of Main. Levitt asked for an opening offer of R40 million but the first bid was R20 million. Annenberg testified that when the bidding got to R24,5 million he told Main they should stop but she asked him to carry on. (There was not in fact a bid of R24,5 million – the bidding went from R24 million to R25 million.) Annenberg testified that he again urged her to

³ This is a Yiddish term meaning 'seal of approval'.

withdraw when the bidding got to R30 million but she again said he should continue. He testified that at R35 million he was simply not prepared to participate in further bidding. (It seems, though, from the transcript that he must have made a bid of R35,5 million, because the final bid was R36 million, which was Moti's.) The property was knocked down to Moti at R36 million, subject to Rowmoor's confirmation.

[43] After the auction a disappointed Main, together with Annenberg and Main's assistant Jonitha McKenzie, retired to a nearby restaurant for coffee. Annenberg, in emailing Faclier to congratulate Auction Alliance on the excellent price obtained, fortuitously learnt that Rowmoor had not accepted the final bid of R36 million and that Moti had raised his offer but was digging in his heels at R39,5 million. Her hopes rekindled, Main phoned Tullis who did some quick calculations. Main said that Tullis' view was that although the viability would be 'tight' at a price of R40 million the project could still work. The way Tullis put it in evidence was that he told her it would be 'very tight' but that if she really wanted to buy the property she would be able financially to afford it and could go ahead. He acknowledged in evidence that Main was very passionate about the proposed acquisition and that he took her passion into account when considering whether to go along with a price of R40 million. Main told Annenberg (against his strong advice, he testified) that she would offer R40 million. Auction Alliance told them that there would be no more horse-trading – Moti would be given the opportunity to match R40 million, failing which Rowmoor would sell to Main at that price.

[44] Moti was not willing to increase his offer. Main then signed the conditions of sale at a price of R40 million plus commission of 10%. Dormell was the selected vehicle through which Main bought the property. Clause 13.1 was a standard voetstoots clause. In clause 13.3 Dormell acknowledged that it had fully acquainted itself with the property. In between these was clause 13.2, an exemption in the following terms:

'The PURCHASER hereby acknowledges that he has not been induced into entering into this agreement by any express or implied information, statement, advertisement or representation made by the AUCTIONEER or any other person, or by on behalf of the SELLER. The PURCHASER hereby waives any rights whatsoever which he may otherwise

have obtained the against the SELLER as a result of such information, statement, advertisement or representation made by all on behalf of the SELLER.’

In terms of clause 23.1 the signed conditions of sale constituted the whole agreement as to the subject matter of the sale ‘and no agreement, representation or warranty between the parties other than those set out herein are binding on the parties’.

[45] As mentioned previously, Dormell’s case was that it would only have paid R19 million if it knew that there were no approved building plans for the DFBA design.

[46] Transfer of the property into Dormell’s name was registered on 4 June 2008.

[47] Extensive oral and documentary evidence was presented in regard to the events which occurred after the auction until (and even after) the issue of summons on 21 January 2010. This evidence was directed variously at showing or refuting [a] that Main knew at the date of purchase that there were no approved building plans; [b] that even if she did not know, it would have made no or little difference to her decision to buy. One of the themes pursued in this regard was the extent to which Main was or was not wedded to the idea of developing the property into a restaurant and boutique hotel and whether she would seriously have contemplated the alternative of the residential development contemplated by the DFBA design. It would be tedious to relate all this evidence. I shall attempt to summarise some of its more important features.

[48] On the day following the auction Brummer, at Annenberg’s request, emailed Fabian to say that Annenberg would like to meet with Fabian on Monday 10 March 2008 – ‘it is with the client who wants to do the hotel’. This was a reference to Main, whom Fabian did not know prior to the auction and had met for the first time briefly after the conditions of sale were signed. The meeting duly took place on Monday 10 March 2008 at DFBA’s offices. Despite Main’s contrary recollection, it is clear from the other evidence that Fabian was not present except perhaps to say hello to her before excusing himself for another engagement. Van Lonkhuyzen represented DFBA. Brummer, Annenberg and Main were also in attendance. Brummer explained

that a hotel development would be difficult and time-consuming. It was not within the scope of the APA and various further planning approvals would probably be needed. The meeting ended (from Main's perspective) on a glum note. An arrangement was made that Van Lonkhuyzen would arrange for Annenberg to get a set of the building plans and the elemental bill of quantities prepared by Rowmoor's quantity surveyors. It appears that these were needed for the finance which Dormell intended to seek from Nedbank. At this stage it was an open question whether Main would use DFBA as Dormell's architects.

[49] On 12 March 2008 Annenberg emailed Fabian (not copied to Main) to say that they had met with Van Lonkhuyzen on 10 March 2008 and that the latter had promised to let Annenberg have 'a set of the plans that are in Council for approval' plus an updated bill of quantities, both of which Main needed urgently for the bank. Annenberg and Brummer could not positively say that at the meeting of 10 March 2008 the status of the building plans was discussed. On 13 or 14 March 2008 Annenberg collected the documents in question and delivered them to Nedbank. He did not look at the building plans.

[50] In the meanwhile and sometime after Annenberg had emailed Fabian on 12 March 2008 (which was at 08h31) Fabian, according to his evidence, had a telephonic discussion with Main. His evidence was that Rowmoor obviously had no further interest in the approval of the building plans and he had even, in the interests of Rowmoor, prepared a letter to the City in Rowmoor's name dated 11 March 2008 (signed by Bernard Osrin) requesting that the building plans be withdrawn and asking for the return of a guarantee of R50 000 which Rowmoor had provided in respect of landscaping. However, as the leading partner in DFBA he had a commercial and professional interest in his firm's continued involvement in the project. He knew that Main wanted to do a hotel development but he believed that there was no prospect of such a development receiving approval. He thus made contact with Main to persuade her that DFBA should continue with the process of getting approval of the building plans because she might decide to go ahead with the DFBA design. He said he made a contemporaneous note of this conversation on the design brief for the boutique hotel which Main's friend Gail Behr had prepared

and which Fabian's colleague, Van Lonkhuyzen, had been given at a meeting at Behr's home the previous evening. The note reads thus:

'12/03/08 SM wants us to resubmit the plans that I told her I have withdrawn as they may go ahead as we proposed with the building plan submission. '

[51] The defendants argued that Main's failure to remonstrate at this point showed that she knew the true position. In Fabian's cross-examination, however, Mr Sholto-Douglas put to him that the note was a later fabrication, a proposition which Fabian indignantly denied. Main in her evidence denied any such conversation with Fabian.

[52] As a fact, DFBA kept the building plans in council and pursued the process of approval, though Fabian said that once it became apparent that Main intended to engage another architect (this was in April 2008) DFBA's efforts were somewhat desultory – it was, as it were, on the backburner in case Main should eventually give up on the hotel idea and come back to Fabian.

[53] On 15 March 2008 Main sent an email to Tullis saying *into alia* that she now had 'the original plan as well as the approved plans done by Dennis Fabian for 35 Victoria Road'. She went on to refer to preliminary discussions with the proposed building contractor, GVK, to the effect that because of the water-table Dormell could not start building before the end of January 2009. She thus mooted the idea of transforming the current structure (as an interim measure) into a Grand Cafe (with no rooms) and a retail shop. The 'original plan' was the plan of the existing structure. The 'approved plans' seem most naturally to be a reference to the building plans which Annenberg had delivered to the bank a day or two previously. The email might thus be evidence that Main thought that building plans were approved though she may have meant that she had now received the building plans for the approved development. The latter but not the former would be consistent with Fabian's version of the telephonic discussion of 12 March 2008. (This email only came to light together with several other documents after Main had completed her testimony and while Tullis was giving evidence. It was one of several documents he found on his computer following a rule 35(3) notice. Main was thus not questioned about the document.)

[54] Although Main had in mind a boutique hotel development, she told Tullis in an email of 17 March 2008 that in Dormell's presentation to Nedbank for finance she would like to project 11 apartments with a Grand Cafe and shop on the ground floor: 'We fit perfectly into the footprint of what is designed @present. We will dress the building differently.'

[55] There were several meetings between Tullis, Main and Nedbank's Gill Leech. An internal bank memorandum of 28 March 2008 recorded that the previous owner (Rowmoor) had already had plans drawn up and approved for a mixed-use development but that Main was undecided whether she would use the existing plans. On 10 April 2008 a Nedbank valuer, Mr Neville Janari, prepared a valuation of the property. The valuation was of the property as vacant land but with the development rights granted pursuant to the removal and departures applications. The valuation correctly recorded that plans (ie building plans) had not yet been approved by the City. The valuation was R45 million. There was no evidence as to the source of the bank's information that building plans had not yet been approved – it could have been from a representative of Dormell or from independent enquiry to the City. On 27 April 2008 the bank granted Dormell various credit facilities for the development, the details of which are unimportant.

[56] In the meanwhile, Annenberg wrote to Main on 31 March 2008. He had undertaken various further investigations. He thought that the share block, fractional ownership and time-share options could only work if the building were redesigned as a traditional hotel but that there was inadequate parking for a hotel so that an additional basement would be needed (this flowed from the City's zoning scheme). He also thought that the projected room rates and occupancy rates were optimistic and that the common areas required for a hotel would leave very little space for the Grand Cafe. He was also against Main's idea of transforming the existing building into a Grand Café as an interim measure – it would give the impression that she had not succeeded. His opinion was that she should make the current retail space available to a third party operator and market the 11 apartments by way of a conventional sectional title scheme.

[57] Annenberg for practical purposes falls out of the picture at this stage. It is doubtful whether his advice was what Main wished to hear. There also seems to have been a souring of their relationship arising from something to do with the Fish Hoek project.

[58] In March or April 2008 Main approached a Johannesburg-based architect, Bernard Viljoen ('Viljoen'). On 23 April 2008 Viljoen obtained from Van Lonkhuyzen the CAD version of the DFBA building plans (not yet approved). Main also engaged a firm of quantity surveyors, SBDS, in the person of Mariki Terblanche ('Terblanche').

[59] In about May or June 2008 Main and Viljoen met with Brummer at the latter's Pinelands office. The primary purpose seems to have been for Viljoen to educate himself about the Cape Town zoning scheme so that he could determine what could and could not be done. Brummer repeated his negative view about the prospect of obtaining approval for a hotel development.

[60] There are subsequent documents indicating that what Viljoen and Terblanche had in mind was that Viljoen would prepare rider building plans reflecting Dormell's alterations to the DFBA building plans. A rider plan is an amendment to an approved plan (cf *Camps Bay Ratepayers' and Residents' Association & Another v Harrison & Another* 2010 (2) All SA 519 (SCA) paras 33-35). However, the fact that the preparation of rider plans was envisaged would not necessarily mean that Dormell's team thought that the DFBA building plans had already been approved – one might equally contemplate rider plans in respect of main plans which have progressed some distance but not yet themselves been approved. The evidence did not establish what limits, if any, there are to the alterations which can be effected by way of rider plans. The submission of rider plans would presumably save the developer the payment of a fresh scrutiny fee. However, the rider plans would still require approval, and the more extensive the changes the more protracted would be the approval process.

[61] As noted, Viljoen had already obtained the CAD version of the DFBA building plans on 23 April 2008. It appears that sometime later he asked Van Lonkhuyzen

also to send him the approved SDP plans. On 1 July 2008 Van Lonkhuyzen emailed him various plans. The attachments were described as ‘2007-06-11-Approved SDP Proposal.zip’. The attached sketches were not in fact the SDP sketches approved by SPELUM in June 2006 nor the SDP sketch plans attached to the APA. What Van Lonkhuyzen sent Viljoen were sketch plans corresponding to (though with less detail than) the building plans submitted by DFBA in August 2007 and which were still awaiting council approval. The building plans (and the structure depicted in the auction brochure) in fact differed somewhat from the June 2006 and November 2006 SDP sketch plans. The main change was in the roof detail of the Victoria Road elevation – the SDP plans of June and November 2006 showed that the second floor mezzanine areas would have a skylight window running across the length of the roof. The building plans, and the corresponding sketch plans sent by Van Lonkhuyzen to Viljoen on 1 July 2008, showed three dormer windows instead of the skylight window.⁴ This was presumably an attractive change for potential buyers as the dormer windows would command fine views over the ocean. Nobody appears to have noticed, until I raised the matter during Fabian’s evidence, that the building plans and the depiction in the brochure differed in this respect from the approved SDP and that what Van Lonkhuyzen sent to Viljoen on 1 July 2008 were not the approved SDP sketches but a later variation.

[62] The SBDS project minutes of 15 July 2008 recorded that SBDS was to formulate a brief to serve as an overall guide – the end product was to be ‘a well integrated design that combines luxury accommodation and exquisite dining experience based on, but not a replica of the Grand in Plettenberg Bay and which is aimed at a specific up-market clientele’. Apart from the reference to the Grand in Plettenberg Bay, the minutes are non-specific as to whether the development would be a boutique hotel or separate apartments plus retail space.

[63] On 22 July 2008 Viljoen sent to Terblanche his initial sketches on the basis that the brief was ‘An Urban interpretation of The Grand Cafe + Rooms – Plettenberg Bay, within the outlines of the approved Fabian Plans’. From what

⁴ In the sketch plans, the contrast is between the Victoria Road elevation in the November 2006 SDP (exhibit A18) and the later version at exhibit A331.8. A visual sense of this change can be seen by comparing the artist’s impression of the Victoria Road view of the structure as per the SDP (at exhibit B174) with the depiction in the brochure (at exhibit C4).

follows it is apparent that what this meant was that Dormell's new design would be 'within all the agreed set backs, height restrictions and view lines of the approved Fabian plans by Council and the [Association]'. After summarising what had already been approved (11 residential units, 16 parking bays and 196 m² of retail space – this accorded with the sketch plans which Van Lonkhuyzen had sent him on 1 July 2008)⁵, Viljoen set out the features of the new design – these would still include 11 residential units on the first and second floors but there would now be 20 parking bays and two additional basements. The Grand Cafe would be on the ground floor together with retail space and a lobby area for the apartments. In the first basement there would be a bar together with kitchen and storage. In the new second and third basements they would be restrooms for the cafe, a wine cellar/private dining/ spa, 20 parking bays and 10 storage rooms. He acknowledged in cross-examination that these plans were a radical departure from the approved SDP drawings and reflected commercial areas (504 m²) way in excess of the approved SDP drawings. (In the Fabian design substantially all the retail space was on the ground floor which is where any kitchen space for use by a restaurant would have had to be located. The Fabian plans did not expressly identify any portion of the retail space as being for utilisation as a restaurant. In Viljoen's drawings he located the kitchen and toilets in what were then his first and second basement levels.)

[64] Main and her professional team met at the Grand in Plettenberg Bay a couple of days later to determine which of its features could form the basis of the architectural brief for the Camps Bay project and which if any could be replicated 'to form the basis of a national branding strategy' (see the SBDS report of 1 August 2008). The SBDS report of the meeting noted that the Plettenberg Bay establishment lacked certain features normally associated with a hotel. The predominant view of the team was that only certain distinctive architectural and decor features could be borrowed and that certain of the absent features normally associated with a hotel should be introduced. The branding for Camps Bay 'would concentrate more on the Restaurant than on the hotel'.

⁵ The auction brochure referred to 17 parking bays. Since the SDP plans as well as the sketch plans sent by Van Lonkhuyzen to Viljoen on 1 July 2008 made provision for 16 parking bays, it is unclear where the figure in the brochure came from. No point was made of it. The retail area stated in the SDP and the plans sent on 1 July 2008 was actually 195 m².

[65] On 6 August 2008 Terblanche emailed De Villiers (of Brummer's office) asking various questions relating to the zoning scheme. It seems from this letter that Terblanche had not been shown the final notification letter, the approved SDP plans and the APA. In her reply of 8 August 2008 De Villiers made some general introductory observations. She noted that departures from the City's zoning scheme had been granted for the Fabian scheme. Viljoen's 'rider plans... to the approved Dennis Fabian plans' would be assessed for compliance with the zoning scheme, and any departures additional to those already granted would have to be sought, advertised for comment and so forth. She also reminded Terblanche that the Association and neighbours would be watchdogs to ensure compliance with the APA. She proceeded to answer Terblanche's specific questions. She noted that while Viljoen's rider plans (actually sketches at that stage) complied with the external envelope of the Fabian scheme, the alteration of the ground floor and basement differed significantly from the Fabian scheme, the biggest difference being an increase in the commercial floor area – a departure from the prescribed bulk factor of 1,2 would be needed which was likely to attract much resistance.⁶ Also, an additional setback departure would be needed for the revised first basement floor because it was no longer wholly below ground level – this would also need to be advertised. An endeavour to increase the commercial space could delay approval of the building plans for several months, even years.

[66] De Villiers was not called as a witness. The source of her belief that the Fabian building plans had already been approved is thus not known. Brummer testified for Auction Alliance. He did not have any independent recollection of knowing the status of the building plans but would have expected in the ordinary course that they would have been approved by August 2008.

[67] I have mentioned that DFBA had retained the building plans within the City's approval system. A technical query was raised by an official which Edwina of Architectural Services (the plan walkers) had communicated to Van Lonkhuyzen on 4 June 2008. Edwina reported that once the required amendment to the plans was done, the amended plans could go for approval to Neil Moir ('Moir'), the City's

⁶ See footnote 2 above.

Building Control Officer ('BCO') – Moir was effectively the final voice on building plan approval. Having not had a response, Edwina sent a chaser to Van Lonkhuyzen on 1 July 2008, to which he responded the next day to the effect that he would discuss the matter with Fabian – 'The new client is busy with a reapplication so I don't know whether we're still going ahead'. No further action seems to have been taken by DFBA until 21 August 2008 when the building plans, amended in accordance with the official's requirements, were returned to the City. (This is, I think, an example of the desultory manner in which DFBA was dealing with plan approval.)

[68] Of importance, arising from the foregoing, is that on 8 August 2008 Edwina forwarded to Viljoen her email to Van Lonkhuyzen of 4 June 2008. Viljoen had presumably wanted to know what the status of the DFBA plans was. By 8 August 2008 Viljoen thus knew that the DFBA building plans had not yet been approved. Although both Viljoen and Main testified that they only discovered this fact when they visited Greg September of the City's zoning department in early September 2008 in order to discuss the changes needed to the existing building to get a liquor license, at least Viljoen must have known the true position by 8 August 2008. The alternative is that the visit to the City occurred earlier than 8 August 2008. (Viljoen was unable to pin down the date of the visit with reference to contemporaneous documents.) Viljoen's evidence was that when he learnt that the DFBA building plans had not yet been approved, he was told by Architectural Services and by Van Lonkhuyzen that the issues raised by the City were minor and that the DFBA plans would be approved in time for Viljoen to submit his rider plans.

[69] At any rate, there is no evidence that Viljoen reacted to Edwina's email of 8 August 2008 by expressing surprise or by reporting the matter to Main.

[70] On 15 August 2008 Viljoen sent Terblanche amended sketch plans apparently intended to meet the comments in De Villiers' email of 8 August 2008. There were now to be 10 habitable rooms and a gym as a communal recreational area for all tenants. The reduction in habitable rooms, Viljoen evidently believed, would enable Dormell to increase the commercial space to 231 m². (The *de facto* commercial space in the June and November 2006 SDPs was only 210 m² and was only 195 m² when calculated in accordance with the zoning scheme.) His revised

plans now made provision for only two basement levels. (Again, the June and November 2006 SDPs made provision for a single basement.) Viljoen noted that the toilets in the second basement did not fit into the permissible bulk and a departure might be necessary.

[71] As noted, Main testified that she learnt that the building plans had not been approved during a visit to the City's Greg September ('September') in early September 2008. This was in the context of an enquiry about changes needed in order to obtain a liquor licence for the existing structure (in which Main wished to commence temporary operations as a Grand Cafe). September, she said, was quite negative and aggressive, saying that the building even as it stood was unapproved and that the DFBA plans were only at stage 3 of an 11-stage approval process. Terblanche, Main testified, was with her when this was said. If Main's evidence is correct, the visit to the City must have been on 1 or 2 September 2008, because the SBDS project minutes of a meeting held on 2 September 2008 (attended by Main, Terblanche, Viljoen and the engineer) recorded that the current DFBA drawings had been submitted and were in the approval process – 'approximately 2 weeks to go'. Viljoen said that this estimate would have come from Architectural Services or Van Lonkhuyzen. It thus appears that if, as Main testified, September had expressed a negative view in an earlier encounter, this was not taken too seriously. The minutes also recorded that Viljoen was to proceed with the preparation of rider plans for approval, with construction aimed to start in February 2009.

[72] On 15 September 2008 Viljoen sent to the Dormell team his preliminary CAD drawings in preparation for a meeting the next day. These were the same or similar to the sketches of 15 August 2008.

[73] At the SBDS project meeting on 16 September 2008 it was noted that the DFBA plans had been sent back (by the BCO, Moir) to September in respect of a 'small query'. Terblanche was to ascertain the reasons. Every effort was to be made to have full approvals and tender drawings by December 2008 (this would include Viljoen's rider plans).

[74] On 23 September 2008 Terblanche made a depressing report to Main that the engineering advice indicated that the second basement was going to be problematic because the soil was waterlogged and sandy. This would require 'major changes' – it would be necessary to reduce the number of apartments to seven though there could then be a larger restaurant.

[75] Following further discussion, Viljoen produced revised sketch plans which he sent to the team on 7 October 2008. His plans depicted only five (larger) residential units and a single basement. Viljoen again acknowledged in cross-examination that these sketch plans called for commercial space substantially in excess of the approved SDP – Mr Rose-Innes put to him that the commercial space was 427 m². (The kitchen and public toilet areas were now located in the single basement level.) I doubt whether the City would have regarded building plans in accordance with these sketch drawings as being substantially in accordance with the approved SDP drawings. There would in any event have been the further difficulty that in terms of the opening stipulation in clause 2.1 of the APA, the development had to be in accordance with the November 2006 SDP drawings. Although clause 2.1 went on to refer in particular to the external envelope (with which Viljoen's drawings may have complied), the affected parties might well have taken the view that this did not derogate from the opening stipulation in the clause. Building plans in accordance with Viljoen's drawings might thus well have attracted objections from the affected parties.

[76] At the project meeting on 14 October 2008 the change in Viljoen's design was noted. It was also noted that there was still no further information about the 'small query' which the City had raised in regard to the DFBA plans.

[77] Although not so explained in evidence, I suspect that the reduction in the number of habitable rooms (from 11 to 5) in Viljoen's sketches of 7 October 2008 reflected the result of the increased retail space for which his design called and the application of the habitable room factor to the remaining bulked-up area. For example, if the commercial space properly calculated in accordance with the zoning

scheme was 400 m², the remaining bulked-up area would be 171 m², which would allow only five habitable rooms.⁷

[78] About two weeks earlier, on 29 September 2008, Terblanche had emailed Main to ask whether she (Terblanche) could talk to Tullis ‘regarding the approvals that was sold to you by Fabian’. She said that she did not like the ‘delays and hickups now with a plan that was sold as “approved”’. Terblanche also wrote to Annenberg on 30 September 2008 complaining that they were having problems with the City and asking whether there had been any guarantees of which he was aware regarding plan approvals – she could not see anything in the purchase agreement ‘but both Gary [Tullis] and Sue [Main] seems to think that they bought the building with approved plans’. Annenberg forwarded this query to Faclier, who emailed Fabian to say that as far as she was aware the plans for the property were ‘confirmed and in place’. (We know from contemporaneous documents that both Annenberg and Faclier knew prior to the auction that the building plans had not yet been approved though their approval in the future was regarded as a formality.) Fabian replied that Annenberg had been given copies of the stamped approvals; Fabian asked whether Faclier wanted further copies. What Fabian then put out for collection by Faclier were the approved SDP drawings. (The ‘stamped approvals’ must have been the departure approvals stamped on each of the June 2006 SDP drawings.) It would thus seem that Fabian and Terblanche were at cross-purposes. This was the state of play when the project meeting of 14 October 2008 took place which I have already mentioned.

[79] I should record here that Terblanche’s query of 29 September 2008 is susceptible of two meanings. It could mean that she believed the understanding of Main and Tullis to have been that the building plans had already been approved at the time of the sale. It could also mean, though, that she understood from them that there was an undertaking or warranty that the building plans would be approved. The initial muted response from Dormell’s team to the fact that the DFBA building plans had been sent back because of a minor query and the later annoyance with

⁷ 171 ÷ 34 (see footnote 2 above). The five habitable rooms might still have covered an area of 1 100 m² as per the Fabian design but would have been much larger apartments. To make the project feasible, each of the five larger apartments would have to be sold at a significantly higher price than each of the 11 smaller Fabian apartments.

the continued delay in plan approval could be consistent with the second of these meanings. Terblanche, as noted, was not called as a witness.

[80] On 24 October 2008 Terblanche sent Main a feasibility study based on the five-apartment scheme. This reflected that net income from the sale of the five apartments would be R88 839 830 while the cost of the entire structure (including the Grand Cafe to be retained by Dormell) would be R103 221 793, meaning that the net cost to Dormell of the Grand Cafe would be R14 381 963. What the team had been aiming for was at least a break-even position in which the income from the sale of the apartments would cover all expenses, leaving Dormell with the Grand Cafe at no additional cost. Main testified that even at a cost for the Grand Cafe of R14 481 963 she would have gone ahead with the project. However, no feasibility figures seem to have been prepared to show that a reasonable return on the Grand Cafe could be made at an initial capital cost of R14 381 963.⁸

[81] If the project had proceeded, this would only have been in the next year. In the meanwhile Dormell had submitted plans in respect of the existing structure with minor alterations so that Main could at least start operating the Grand Cafe. The Grand Cafe opened its doors around October 2008, and the plans for that structure were approved in December 2008.

[82] Without much more having happened, Terblanche on 19 November 2008 wrote a letter to the professional team notifying them that the project was being aborted, at least for the time being:

‘After many many meetings and number crunching we regrettably had to inform Sue that the scheme in its current status is not financially viable.

⁸ Reference was made by Mr Sholto-Douglas in Main’s re-examination to Nedbank’s valuations of the property in November 2009 and June 2010 [A486-488 and A503-515]. These were internal bank documents but as I read them the bank valued the restaurant (as distinct from the potential of the remaining unutilised space or developable area) at R8 363 714 [A488] and R9 221 250 [A509 read with A513] respectively, based on the restaurant’s capitalised net rental value. The expenses taken into account by the bank in arriving at the net rental value of the restaurant do not include finance costs on the initial capital expenditure of R14 381 963 predicted by Terblanche. On the bank’s figures it would certainly not have made any sense to pay R14 381 963 for the restaurant.

Sue has decided to abort all work on this in favour of going for an application for more bulk. We hope that we will have a more viable alternative around middle next year when we will again contact you all regarding services required.'

[83] Terblanche's reference to 'more bulk' was to the obtaining of more commercial space for the Grand Cafe than the commercial space contemplated in the DFBA plans. Importantly, the abort letter did not state that the delay associated with the approval of the DFBA building plans was the reason, or even one of the reasons, for the abort decision. In an internal Nedbank memorandum dated 4 May 2009 the bank recorded that Dormell had decided not to move ahead with the proposed mixed-use development 'due to the present economic climate and the fact that it would be difficult to sell the residential component right now'. This information must have come from Main or Tullis. The 'present economic climate' would be a reference to the global financial crisis which struck around September/October 2008 and which *inter alia* had an adverse effect on property values. Main and her team had no further communication with Rowmoor or DFBA prior to the issue of summons about 14 months later on 21 January 2010. Main has continued to operate the Grand Cafe from the existing structure (after making minor alterations).

[84] In terms of the City's final notification letter of 15 October 2007 the approved departures would lapse if not exercised within two years, ie by 15 October 2009. Main evidently wished to keep the approved departures in place in case she should decide to utilise them, because on 7 September 2009 a town planner engaged by her, David Saunders ('Saunders'), wrote to the City asking in terms of s 15(2) of LUPO for a two-year extension (ie to 11 October 2011). He stated in the letter that the building plans had taken substantially longer than normal to be approved for a number of 'technical reasons'. His letter included the following statement:

'My client is committed to develop this important property in accordance with the approvals given and the conditions attached to this approval. My client has however not been able to achieve approval for a set of final building plans submitted to the City some seventeen months ago. This application for an extension of time for the departures is a precautionary step given that only a month remains for the City and my client to resolve any outstanding issues pertaining to the plans currently in your Zoning Department. In this regard we await your instructions.'

[85] Main testified that she had no such commitment and that this statement was probably made by Saunders because otherwise the City would not have granted the extension. Saunders, who was called by Dormell as an expert, agreed. Dormell was not in truth engaging either with the City or with DFBA regarding the approval of the plans then with the City. The extension, which was granted, was merely a precautionary step.

[86] As it happens, though, DFBA (which had heard nothing from Dormell) continued to try to get the building plans approved in case (so said Fabian) Dormell should eventually decide to go ahead with the DFBA proposal. I have already mentioned the query raised in Architectural Services' email to Van Lonkhuyzen of 4 June 2008 in response to which DFBA had submitted amended drawings to the City on 21 August 2008. (On 20 August 2008 Van Lonkhuyzen sent Viljoen, at the latter's request, the amended drawings, which seemingly related only to the basement and ground floor.) The plans were put up to the BCO for approval. On 3 September 2008 the BCO (Moir) returned the plans to the Zoning Department for reasons which do not clearly appear. This must have been the 'small query' noted in SBDS' minutes of 16 September 2008. It appears that DFBA did nothing further for some time in response to the query, only delivering amended drawings to the City on 3 December 2008. On 9 December 2008 Greg September noted a concern that heights should be shown for certain areas set aside for hot water cylinders ('HWC') and heat ventilation air conditioning ('HVAC'). He wanted comfort that these were not disguised habitable rooms. On 29 January 2009 the plans were returned to DFBA to insert the necessary detail. The amended plans which DFBA submitted on 2 February 2009 still did not satisfy September. Architectural Services had to seek clarification from September as to what exactly his difficulty was. In early April 2009 Architectural Services ascertained that he wanted sections drawn through all the HVAC areas. Van Lonkhuyzen expressed annoyance because September had told him the previous year that only one additional section was needed. On 6 April 2009 DFBA resubmitted the plans with the further section drawings. On 24 April 2009 September noted that his difficulty had now been resolved. He sent the plans to Moir for approval.

[87] On 29 April 2009 Moir declined to approve the plans in their current form, noting that the (second floor) mezzanine formed part of the main containing wall, and that the containing wall thus exceeded the 10-metre height restriction specified in section 98 of the zoning scheme. There was sporadic communication between Architectural Services and the City. It is unclear whether the 10-metre issue was communicated to DFBA. It seems that there may have been internal disagreement within the City concerning Moir's opinion, because the zoning department sent the plans back to him on 9 September 2009 for approval. Moir did not at that stage repeat the 10-metre height issue but sent the plans back to the City's environmental and heritage branch because the heritage demolition permit (issued on 25 August 2004 with a 36-month validity period) had lapsed and because the proposed construction was within 100 metres of the high watermark, thus requiring an environmental authorisation in terms of the National Environmental Management Act 107 of 1998 ('NEMA').

[88] On 13 October 2009 Fabian, with understandable frustration, emailed Architectural Services (with a copy to Moir's superior Jaco Theron, the official who would give final building approval on Moir's recommendation) saying that the City's conduct was 'ridiculous' and that the plans had to be approved as a matter of urgency 'to avoid serious repercussions'. Theron replied that the City had to comply with the law and that the NBA did not allow the City to approve building plans unless there had been compliance with all applicable law (ie including heritage and environmental law). Although Fabian said that the 'serious repercussions' he had in mind were the repercussions if Dormell should eventually engage to DFBA proceed with the Fabian design, I would not exclude the possibility that he felt distinct embarrassment as towards Dormell (even though there was no communication between Dormell and DFBA). However, this embarrassment would not necessarily point to a conclusion that he felt guilty for having represented to Dormell at the time of the purchase agreement that there were approved building plans; the embarrassment could as readily be explained by the fact that he had predicted to Annenberg and to Auction Alliance that plan approval was a mere formality and would only take a few weeks.

[89] Without further steps having been taken to deal with the impasse, Dormell on 21 January 2010 issued summons. On 8 February 2010 Brummer met with Moir to establish why the building plans had not yet been approved – this apparently at the request of Auction Alliance’s attorneys. Moir then told him about the 10-metre height issue (this was a matter arising from the city’s zoning scheme – the heritage and environmental issues concerned other public bodies). Moir informed Auction Alliance’s attorneys of this in a letter dated 9 February 2010. He pointed out that Moir’s interpretation of section 98 apparently differed from that of other City officials. On 24 February 2010 Architectural Services notified the City that Fabian wanted to collect the building plans to make the required changes. However, from Fabian’s evidence it seems that around this time the Rowmoor partners decided on legal advice that in the light of the summons DFBA should take no further steps to have the building plans approved.

[90] As noted, Dormell itself took no further steps to obtain approval either for the DFBA plans or for plans drawn by its own architect. The approved departures lapsed on 15 October 2011. By the time the matter came to trial the approval of building plans would thus have required a new process of seeking departures with all the advertising and objections which this might attract.

[91] The unresolved issues in connection with the building plans as at February 2010 were [a] the need for a heritage demolition permit; [b] the need for NEMA authorisation for construction within the 100-metre zone; [c] Moir’s 10-metre height issue. These issues did not arise from the technical requirements of the NBA but from heritage and environmental legislation and from the zoning scheme, these being other laws with which there needed to be compliance before the City could in terms of s 7(1)(a) approve building plans.

The trial

[92] The factual witnesses for Dormell were Main, Tullis, Faclier (who had left Auction Alliance a few months after the auction) and Viljoen. Dormell called two expert witnesses, Philip Jackson regarding the valuation of the property and Saunders on town planning matters. Rowmoor called Fabian, Annenberg and Moir,

and Auction Alliance called Brummer. Although expert summaries were delivered in respect of the evidence of Moir, Fabian and Brummer, they (particularly Fabian and Brummer) testified on factual matters as well. An expert summary on heritage matters was delivered by Rowmoor in respect of the evidence of Chris Snelling but the parties accepted the content of his report without the need for him to be called.

[93] As to the factual evidence, none of the witnesses made an unfavourable impression on me in their demeanour. Factual disputes must thus be resolved, where necessary, with regard to other factors bearing on credibility and with reference to the inherent probabilities (cf *Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie & Others* 2003 (1) SA 11 (SCA) para 5). The primary credibility attacks were directed at Main and Fabian respectively. As I have already mentioned, Tullis worked in a broad sense for the Mains in their various enterprises. Viljoen was friendly with Main, had apparently been with her in New York in late March 2008 shortly after Dormell bought the property, and was working for Main on design aspects of the Grand Café by the time of the trial, having given up his practice as an architect. Neither Tullis nor Viljoen could thus be viewed as entirely independent witnesses. In regard to Annenberg and Brummer, I bear in mind that although neither has a direct interest in the affairs of the defendants, they operate in a sphere where the maintenance of good relationships with a leading firm of architects such as DFBA might be viewed by them as beneficial.

[94] On town planning matters, Saunders, Moir and Brummer gave their evidence in a fair and balanced way and I am satisfied they were doing their best to assist the court. Ultimately the differences between them were slight.

[95] Jackson's evidence on valuation, by contrast, did not impress me. Its content, objectively viewed, was in my view deeply flawed and nothing about the way in which he gave his testimony made it more convincing.

Misrepresentation – the law

[96] Dormell's pleaded case is [a] that the statements I have set out from the brochure and transcript of the auction were representations which meant,

alternatively reasonably conveyed to the public including Dormell, that the relevant authorities, including the City, had approved construction of the building as described in the advertising and promotional material; [b] that the defendants knew, alternatively Auction Alliance ought reasonably to have known, that the representations were false; [c] that Auction Alliance (Rowmoor's agent) made the representations intending persons such as Dormell to act thereon by purchasing the property at Rowmoor's reserve price of R40 million excluding commission, alternatively to conclude the purchase at an inflated price; [d] that Dormell was induced by the representations to buy the property for R40 million excluding commission, whereas if Dormell had known the true facts it would have paid not more than R19 million including commission, which amount represents the market value of the property at the date of purchase; and [e] that Dormell has, as a result of Auction Alliance's misrepresentation, suffered damages of R25 million for which both defendants are jointly and severally liable. In argument, though, the allegation of fraud in relation to the primary cause of action was abandoned.

[97] There is an alternative cause of action which alleges [a] that at the time of the purchase the defendants knew that there were no approved building plans for the building described, depicted and displayed by Auction Alliance; [b] that the defendants were aware that Dormell did not know that building plans had not been approved; [c] that the defendants thus had a duty to inform Dormell thereof; [d] that the defendants intentionally failed to inform Dormell of the true state of affairs with the intention of inducing Dormell to purchase the property at R40 million excluding commission, alternatively negligently failed to inform Dormell of the true state of affairs; [e] that as a result of the non-disclosure Dormell was induced to conclude the purchase at a price of R40 million excluding commission; [f] that as a result of the negligent or intentional non-disclosure, Dormell suffered damages of R25 million for which the defendants are jointly and severally liable.⁹

⁹ Para 19 of the amended particulars of claim is inelegantly formulated and as it stands does not make sense. I have restated the elements of this cause of action in accordance with the obvious intention of the draftsman.

[98] There is thus a primary case based on positive misrepresentation made negligently and an alternative case based on fraudulent or negligent misrepresentation by non-disclosure.

[99] Although there is no allegation of wrongfulness, the case was argued on the footing that Dormell was advancing a delictual claim for fraudulent alternatively negligently misrepresentation or non-disclosure. That such a case based on negligence can be advanced by a party who claims to have been induced to conclude a contract by the counter-party was, despite earlier controversy, accepted in *Kern Trust (Edms) Bpk v Hurter* 1981 (3) SA 607 (C) and confirmed in *Bayer South Africa Pty Ltd v Frost* 1991 (4) SA 559 (A).

[100] Because the contract in this case is one of sale, Dormell could notionally have asserted the aedilician remedy of the *actio quanti minoris* without having to allege or prove negligence or fraud, because the alleged representations were statements bearing on the quality of the *merx*, ie *dicta et promissa* (see *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A)). As observed in Christie *The Law of Contract in South Africa* 6th Ed at 311, one of the reasons why recognition of the delictual claim for negligence in the contractual setting was such a drawn out affair was because most representations which came before the courts were in respect of sales where the existence of a delictual remedy was unnecessary.

[101] Dormell's allegations in the present case might have been sufficient unwittingly to cover the *actio quanti minoris*. However, no reference to this remedy was made during argument. I assume that Dormell chose to pursue a delictual claim because [a] the aedilician remedy could only have been asserted against Rowmoor; [b] negligence or fraud not being a requirement of the aedilician remedy, its invocation would have been defeated by the disclaimer in the brochure or the exemption clause in the purchase agreement, whereas (as will appear) Dormell argued that these clauses did not protect the defendants in respect of negligent conduct.

[102] In *Bayer supra* the elements of the delictual remedy in relation to negligence were stated in broad outline to be [a] that the defendant or someone for whom he is

vicariously liable made a misstatement to the plaintiff; [b] that the maker acted (i) negligently and (ii) unlawfully; [c] that the misstatement caused the plaintiff to sustain loss; and [d] that the damages claimed represent the proper compensation for such loss (at 568B-F).

[103] Counsel made their submissions on the basis that Dormell needed to prove, regardless of whether one was dealing with fraud or negligence, that the misrepresentation was material, was intended to induce Dormell to enter into the contract, and did induce Dormell to do so. Reference was made *inter alia* to the judgment of Gautschi AJ in *Standard Bank of South Africa Ltd v OK Bazaars (1929) Ltd* 2000 (4) SA 382 (W) at 392F-393G.¹⁰ The learned judge recognised that these three elements were not specifically stated in *Bayer* nor in several other leading Appellate Division cases. However, that these were requisites for actionable misrepresentation was held to be the case in *Novick & Another v Comair Holdings Ltd & Others* 1979 (2) SA 116 (W) at 149D-150D, and Gautschi AJ considered that in *Bayer* and other cases these requirements were either taken for granted or recognised in other aspects of the court's reasoning. He concluded that materiality, intention to induce and actual inducement were distinct elements of the cause of action and should be pigeonholed under the unlawfulness enquiry.

[104] I would respectfully suggest that the flexible policy-based assessment of wrongfulness does not compel one to insist on these three elements as distinct indispensable requirements of wrongfulness. Actual inducement appears to me to belong most naturally to the causation requirement. Materiality may be a factor in assessing wrongfulness (see *Bayer* at 575A) but it might generally suffice to take it into account at the stage of factual and legal causation: if the misrepresentation was one to which a reasonable person would not have attached weight (ie was objectively immaterial), this might militate against a finding that the plaintiff was in fact induced; and might in any event result in a finding that the policy-based element of legal causation was not satisfied and that the loss was too remote (considerations relevant to wrongfulness and legal causation may overlap – see *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) paras 35-36).

¹⁰ This decision was in the result upheld on appeal (2002 (3) SA 688 (SCA)) but these particular aspects were not touched upon in the appeal.

Materiality may also play a role in determining negligence – less care might need to be taken before making an objectively immaterial statement. As to the need for an intention to induce, I do not see why this should be a requirement of a claim for negligent misrepresentation in this context. Where a third party (such as a firm of auditors) makes a negligent misrepresentation which induces one party to conclude a transaction with another, intention to induce the transaction does not have to be proved and I do not see why it should be different as between the contracting parties. Part of the negligence may lie in the very fact that a reasonable person in the defendant's position would have appreciated (though the defendant did not) that the other party would rely on the statement in question. *Novick* was decided before *Kern Trust* recognised a delictual claim for negligence in the contractual setting and was furthermore a claim for rescission for innocent misrepresentation, not a delictual action for damages.

[105] Silence (non-disclosure) may amount to a misrepresentation where there is a duty to communicate the omitted information. There may be particular circumstances, usually associated with the prior conduct of the person who remained silent, that require such person to speak – Christie *supra* at 288 gives as examples where only part of the truth has been told and the omission of the remainder gives a misleading impression; where a true representation has been made and the facts subsequently change; and where the person has done something (albeit innocently) having the effect of concealing the true facts. Outside of particular cases of this kind, there is in general no duty on one contracting party to tell the other everything material to the transaction – policy only requires him to speak if the information falls within his exclusive knowledge (so that the counter-party must needs rely on the other) and the information is such that the right to have it communicated 'would be mutually recognised by honest men in the circumstances' (*Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) para 5).

Was there a misrepresentation?

[106] The question whether a misrepresentation has been made is a matter of ordinary interpretation, determined with reference to the context, surrounding circumstances and the intended recipients. In this case the recipients were potential

purchasers of a prime commercial property with valuable development rights and likely to cost many millions of rands. The question is whether, properly interpreted, the brochure and transcript represented that building plans had been approved for the development described in the brochure.

[107] The brochure did not expressly say that building plans had been approved. It referred in para 3 to the restrictions pertaining to the property with reference to the SDP and also with reference to the final notification letter and APA. In para 5 reference was made to the 'approved development' and it was said that 'the approved and detailed plans, depicting each level of accommodation, are attached to this document'. Although the attachments mentioned in paras 3 and 5 may not have physically been attached to the colour brochure, they did exist and were presumably made available to any person interested in bidding for the property. They were as a fact in Dormell's position. The statements in the brochure must thus be interpreted in the context of those other documents, because the brochure was drafted on the supposition that the recipients would have reference to the detail in the additional documents mentioned in the brochure.

[108] What the reader would have seen, on obtaining the documentation mentioned in the brochure, was that the City had, in its final notification letter, approved various departures as well as the SDP drawings. Attached to the notification letter were the SDP drawings, each one containing an SDP drawing reference and the City's stamp 'Departures granted 12 Oct 2007'. The reader would also have seen that the APA set out the terms on which the affected parties had withdrawn their objections to Rowmoor's removal and departures applications, and that attached to the APA were drawings again containing SDP references. The APA would not have appeared to the reasonable reader to be a document executed at a time when building plans yet existed, because it contained the basis on which objections were drawn to applications which would necessarily have been preliminary to the submission of building plans.

[109] In context, therefore, the approved plans which were mentioned in the brochure were the SDP drawings which, in turn, had the purpose of defining and depicting the restrictions which had been removed or altered and the departures

which had been granted so as to allow development of the property along the lines described in the brochure.

[110] Persons like Fabian, Annenberg and Brummer knew that SDP drawings were not building plans and I think on the evidence I can accept that anyone with experience in property development would probably have known that. Although bidders at the auction might perhaps not have been experienced property developers, there was enough in the overall context of the final notification letter and APA to indicate that the 'approved plans' were the plans with reference to which the Province and the City had granted the removal and departures applications and that these would necessarily precede the submission of building plans in terms of the NBA. The SDP drawings did not contain the extensive detail one would expect in a building plan pursuant to the requirements of the NBA.

[111] I thus do not think that the brochure represented that building plans had been approved. What the brochure conveyed was that the relevant authorities had, with reference to the SDP drawings, removed and amended certain title deed restrictions and granted certain departures so that a building of the kind described in the brochure could be built.

[112] At best for Dormell, the brochure was in this respect unclear. There is in my opinion an important difference between making a statement which the reasonable reader would understand as meaning X; a statement which the reasonable reader would understand as meaning Y; and a statement which would leave the reasonable reader uncertain whether the meaning was X or Y. The first and second would be statements of known content which might be true or untrue; the third would be a statement of unclear content, and in such a case it cannot be said that the maker was making statement X or that he was making statement Y at the election of the reader, because in the posited circumstances the reasonable reader would seek clarification. In the present matter, if the statements in the brochure did not in their context clearly convey that what had been approved were SDP drawings in the context of defining the development rights needed before building plans could be submitted, the statements were at best for Dormell unclear to the reasonable reader. This being so, there was still no representation that building plans had been

approved. A reasonable reader to whom this question was important would have made enquiry to clarify the matter. The fact that subjectively a particular reader latched onto one meaning which the reasonable reader would not have taken as the clear import of the statement is not relevant at the stage of determining whether a misrepresentation has been made.

[113] I am prepared to accept that some potential bidders may have been uncertain on this question – perhaps because they did not go to the trouble of asking for or examining the brochure in the context of the documents which it mentioned as intended attachments. Stewart's email to Fabian of 28 February 2008 indicates that some potential purchasers wished to know 'what else is needed' to start immediate construction and whether what already existed constituted 'stamped and approved final plans'. Stewart himself professed ignorance as he was not a property developer. These are the sorts of queries one might expect if the brochure was unclear or if the potential buyer had not read the documents carefully. It is no evidence that there were potential purchasers who understood the brochure as clearly meaning that there were approved building plans or that such an understanding was reasonable.

[114] We know that Fabian responded to Stewart's question by stating that building plans had not yet been approved though he regarded this as a mere formality. It was accepted by Dormell's counsel that this represented Fabian's genuine opinion at the time.

[115] The statements made by Levitt at the auction were the patter of an excited auctioneer. Levitt commenced his remarks by referring to the information pack, and what followed would have been understood by his hearers as being his flamboyant summary of that material. He spoke on several occasions of the 'development plans' which had been approved and of the long fight to get the 'rights to this development'. It is true that he said at one point that because these approvals had been given a buyer could 'go right ahead' and could 'start developing here as soon as possible so you are ready for 2010' and that in this context he said that the 'plans are in place, the rights are in place'; but I do not accept that a reasonable bidder, having seen the brochure and intended attachments, would have understood Levitt's remarks to be

making claims for the property different from the documents or as being intended to clarify that building plans were indeed in place (he nowhere mentioned building plans). On several occasions before bidding started, attendees were invited to ask questions.

[116] I thus find that the alleged misstatements were not made by positive assertion.

[117] If that is right, I do not think it has been shown that the defendants had a duty to disclose that building plans had not yet been approved. This is not a case where only part of the truth had been told. On my interpretation of the representations, they were to the effect that development approvals (ie removal/amendments of title deed restrictions and departures from the zoning scheme) had been given to allow an owner to build the described structure, not that building plans had yet been approved. The truth was told on one particular attribute of the property (the existence of the development approvals) while nothing was said about another aspect (the existence or non-existence of approved building plans). There was no relevant change of circumstances nor did the defendants conceal any hidden problem. The fact that the property did not yet have the arguably attractive feature of approved building plans did not mean that it suffered from some concealed defect (as, for example, in *Dibley v Furter* 1951 (4) SA 73 (C)).

[118] If one then falls back on the general rule stated in *Absa Bank Ltd v Fouche supra*, I do not consider that there was a duty of disclosure. The question whether there were approved building plans did not lie within the exclusive knowledge of the defendants; the status of the building plans could have been ascertained upon enquiry to the City (which is the source from which Dormell's counsel surmised that Nedbank may have ascertained the facts when undertaking its valuation of 10 April 2008). From the defendants' perspective, Rowmoor (represented by Fabian) honestly viewed the approval of building plans as a mere formality and thus not a matter of great moment; and this view had been communicated by him to Auction Alliance on 28 February 2008 who no doubt, like Annenberg, accepted that view. The attributes which they regarded as truly noteworthy and valuable were those

which had been achieved by obtaining development rights through the approval of the removal and departure applications.

[119] It follows, in my opinion, that's Dormell fails at the threshold requirement of a misstatement by commission or omission.

Wrongfulness

[120] If I am wrong on the misrepresentation point, I accept that there was a legal duty on the defendants to exercise care in making the relevant statements. I was not addressed on the issue of wrongfulness. The statements in the brochure were made in order to make the property attractive to potential buyers. The statements were made in the context of a proposed transaction of substance and where the necessary proximity existed between the defendants and potential bidders such as Dormell. There was no danger of limitless liability – essentially only one person, the successful bidder, could be a potential claimant. These considerations favour the imposition of a legal duty (see, in general, *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 769I-771B; *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar & Others* 2010 (5) SA 499 (SCA) para 25.)¹¹ (This issue is relevant only to negligence – the wrongful nature of fraudulent misrepresentation is uncontroversial.)

[121] Although materiality might perhaps be a factor relevant to an assessment of wrongfulness, I find it preferable in this particular case to address it in the context of causation and damages.

[122] After the close of argument my attention was drawn to the case of *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) though no supplementary submissions were made as to the implications of that judgment for the present case. In *Cape Empowerment Trust* the court, in upholding the cross-

¹¹ I would respectfully suggest that in the first bullet point in para 25 of *Delphisure* the reference to a 'disclaimer' appears inapposite – I think the learned Judge of Appeal had in mind the avoidance by a plaintiff of risk through the obtaining of a warranty. What is also relevant, though, in assessing whether a legal duty should be imposed is whether the defendant (the maker of the representation) could have protected itself by adding a disclaimer when finishing the information (see *Standard Chartered Bank of Canada supra* at 763A-B).

appeal, held that no legal duty had rested on a firm of auditors in respect of a profit certificate issued by them. An important part of Brand JA's reasoning on the wrongfulness issue was a consideration of the plaintiff's vulnerability to risk as a relevant consideration. If a plaintiff was not vulnerable to risk in that there were steps reasonably open to it by which it could have protected itself from harm, this is a factor militating against the imposition of a legal duty (paras 28). In that case the plaintiff (the purchaser of businesses) had indeed protected itself against the risk by procuring an express profit warranty from the sellers but through its own conduct allowed its contractual remedies to lapse. One might say, in the present case, that Dormell was not vulnerable to risk because it could have protected itself by insisting on a warranty that there were approved building plans. However, in *Bayer supra* Corbett CJ, in confirming that a delictual remedy for damages could in principle be brought for negligent misrepresentation inducing a contract, rejected a contention that such a remedy should not be recognised because a contracting party can safeguard itself against loss by requiring the representor to guarantee the truth of his representation (at 569E-G). Perhaps no firm rule can be laid down in that regard; the question of wrongfulness, including vulnerability to risk, depends on the precise facts of the case. In *Cape Empowerment Trust* the enquiry into non-vulnerability was facilitated by the fact that there the purchaser of the businesses had in fact obtained a warranty and it was thus unnecessary to investigate whether, had there not been a warranty in the contract, the purchaser could reasonably have been expected to insist on one and how matters would have been affected if on the evidence the seller was likely to have refused the warranty. In the present case an auction was conducted on standard conditions of sale. Although strictly speaking Dormell did not buy at the fall of the hammer and only signed following post-auction discussions, it may not be reasonable to expect that changes to the standard conditions would have been countenanced. In the absence of evidence and argument directed at that question, I am not prepared to find that there was no legal duty in this case on account of Dormell's non-vulnerability.

[123] In reaching my conclusion on wrongfulness I have disregarded the existence in the auction brochure of the disclaimer. On the pleadings the disclaimer was relied upon by both defendants as having contractual force. As I shall indicate when dealing later in this judgment with the disclaimer (see para 211 below), the existence

of a disclaimer when information is furnished might will be relevant, in a delictual claim, to the wrongfulness issue, in which case it would be unnecessary for the defendants to prove that the disclaimer operated as (or as part of) a contract. It is possible that the defendants' pleas would entitle them to raise this argument (because once the disclaimer has been alleged, its significance to wrongfulness might be regarded as a matter of law) but since the matter was not argued along those lines it would be preferable for me not to base my judgment on that approach.

Fraud

[124] Fault for delictual purposes can take the form of fraud or negligence. Both have been alleged in this case, and Dormell bears the onus on both. I shall take fraud first. Although in a civil case an allegation of fraud only has to be proved on a balance of probability, a court does not lightly find that fraud has been shown (*Gates v Gates* 1939 AD 150 at 155; *Loomcraft Fabrics v Nedbank Ltd & Another* 1996 (1) SA 812 (SCA) at 817G-H).

[125] The allegation of fraud is pressed only in relation to the alternative claim based on non-disclosure (misrepresentation by omission) though the argument on the duty to disclose still relied *inter alia* on the context of the statements in the brochure and transcript – ie that in the absence of further disclosure only 'half the truth' had been told. I find it difficult in these circumstances to disentangle the primary and alternative claims in relation to the fraud element. In particular, I cannot conceive how a non-disclosure in this case could be fraudulent unless the fraudsters knew that the brochure or transcript would, in the absence or more, leave potential buyers under a false apprehension and intended to leave them in that mistaken state of mind. I understand the case of fraud to be that Rowmoor allowed its agent Auction Alliance to make the statements in the brochure and transcript in circumstances where both of them knew that in the absence of disclosure about the status of the building plans a buyer such as Dormell would be misled, and that they both intended by their silence on this question to induce potential buyers to purchase the property or to pay more for it than it was really worth.

[126] The amended particulars of claim do not identify the persons whose fraudulent intentions are attributable to Rowmoor and Auction Alliance respectively. The trial particulars furnished by Dormell are non-specific: in the case of Rowmoor, reference is made to 'one or more of the directors' of the company and to the knowledge of Rowmoor's agent, Auction Alliance; in the case of Auction Alliance, the relevant individuals are alleged to have been Levitt and/or Stewart and or unknown employees.¹² I mention here that Faclier, whose involvement on behalf of Auction Alliance was known to Dormell prior to the issue of summons and who passed on certain information to Main prior to the issue of summons¹³ and was subsequently called by Dormell as a witness, was not alleged to have had fraudulent intent.

[127] In the oral evidence and argument, the fraud case against Rowmoor seems to have been directed at Fabian. He was at no material time a director of Rowmoor – its only director was Selwyn Fabian, Dennis' cousin. What Selwyn Fabian did or did not know about the status of the building plans was not established. Since no reference was made in argument to any limitations arising from the trial particulars furnished by Dormell, I shall assess the case against Rowmoor on the basis that Fabian's knowledge is attributable to Rowmoor or that an assumption can be made (of which I am by no means certain) that Selwyn Fabian would have known as much as Dennis Fabian did.

[128] One must be clear on the nature of the alleged fraud. If the brochure had expressly stated that there were approved building plans, it would clearly have been fraudulent for Fabian, Stewart or Faclier to have associated themselves with the statement because they knew it was untrue and because it would only have appeared in the brochure as a piece of information potentially relevant to a buyer. But the brochure does not contain such a statement in express terms, nor did Levitt make it at the auction. If, contrary to my earlier conclusion, it were held that the brochure or transcription would nevertheless have been understood by the reasonable reader or listener as meaning that there were approved building plans or

¹² See para 5 of plaintiff's reply to first defendant's request for trial particulars at P178.

¹³ On 5 March 2009 Faclier forwarded to Main the email exchange which had taken place between Stewart and Fabian on 28 February 2008 – see A210.

might have been so understood, the question, insofar as fraud is concerned, is whether Fabian or Auction Alliance's representatives, by failing to say more, intended to leave potential buyers under that impression and intended thereby to induce potential bidders to act to their prejudice.

[129] In answering that question, one is not concerned with conflicting versions. Main's witnesses, apart perhaps from Faclier, could not speak as to the state of mind of Rowmoor or Auction Alliance. Faclier's evidence was that although at the time she read the email exchange between Stewart and Fabian on 28 February 2008 it did not 'register' in her mind, she accepted at the time that the approval of building plans would be a mere formality, a *fait accompli*. If she and Stewart had thought otherwise, they would have required the true position to be made known. Her own email to Annenberg of 3 March 2008, where she copied and pasted from Fabian's response to Stewart, confirms that she knew the status of the building plans (this letter emerged, unfortunately, only after she had completed her evidence). She conceded in cross-examination that she knew that the SDP drawings mentioned in the brochure were not building plans. Her evidence under cross-examination about not having really taken cognisance of para 3 of Fabian's reply to Stewart struck me as somewhat feeble and implausible, as did her evidence that she did not recall why she had sent the Stewart/Fabian email exchange of 28 February 2008 to Main on 5 March 2009 (after she had left Auction Alliance and well after Dormell's abort decision of 19 November 2008 – it seems clear to me that she must have known that Main was looking for evidence to mount a case against one or both of the defendants).

[130] Having observed Fabian in the witness box, I would not readily find that he was capable of the fraud alleged against him. Even if certain aspects of his evidence were subject to criticism (I shall mention these later), they are not criticisms consistent only with a finding of fraud.

[131] Fabian testified that he never intended to represent that building plans had already been approved and he denied that the brochure had that meaning or that anything said by Levitt at the auction made him uncomfortable. This evidence is

incompatible with fraudulent non-disclosure. I cannot reject this version, particularly since in my view it is supported by the inherent probabilities:

[a] If Fabian intended to inveigle bidders into buying (or paying more for) the property on the false basis that there were approved building plans, why not say so expressly rather than by statements which are at best ambiguous?

[b] It was accepted by Dormell's counsel that Fabian's honest view was that the building plans would be approved in the near future and that such approval was a mere formality. I think Mr Sholto-Douglas for Dormell was inclined to deploy that version in support of an argument that Fabian would probably have told the lie at the time of the auction because he was confident that the false representation would soon come to fruition and thus be unproblematic. It is more probable, I think, that if Fabian intended in the brochure to convey anything about the status of the building plans he would have given his honest view, because he would have expected others to share it and because on that basis it would not have been a matter of great moment to potential buyers.

[c] The lie would have been a silly one to tell and easily exposed. What if the successful bidder had intended to do the precise development depicted in the brochure and had immediately asked for the approved building plans? Fabian would on the probabilities also have expected that anyone willing to bid millions for a prime Camps Bay property would have made their own investigations and would have enquired (if it was important to them) about the status of building plans, at which point the true position would emerge. There was thus no point in making a contrary representation whether by commission or omission. Indeed, we know that Main, with Annenberg's assistance, made enquiries and was told about the status of the building plans. (There was no evidence as to what investigations, if any, Moti undertook. Whether he knew or cared that building plans had not yet been approved is unknown.)

[d] When Stewart posed his questions to Fabian on 28 February 2008, the latter without prevarication gave an honest reply – that the building plans were in council awaiting final sign-off which he thought to be a mere formality. Fabian knew that

Stewart's email was the result of queries from potential buyers and would thus have expected Stewart to pass on the information to them. If Fabian wished potential buyers to be under the false impression that building plans had been approved, he would have told Stewart that there were approved building plans.

[e] When Annenberg met with Fabian a few days before the auction, Fabian again gave him an honest answer regarding the status of the building plans. Fabian did not at that stage know for whom Annenberg was acting but he would have realised that Annenberg would or might to convey the information to the party on whose behalf he was making the enquiries.

[f] Given Fabian's experience in property development and his involvement in the arduous process Rowmoor had followed to achieve success in the removal and departures applications, the brochure and auction patter could quite plausibly to him have been perfectly clear in making no claim about the status of building plans. Even Stewart's email query of 28 February 2008 did not say that potential buyers believed from the brochure that building plans were in place – they wanted to know what more was needed for construction to be able to begin without delay. Stewart then asked whether the plans attached to the final notification letter were the final stamped and approved plans – this could as well have been his question as that of the potential buyers: in other words, he wanted to know whether he could tell buyers that the plans attached to the notification letters were plans which enabled construction to begin.

[132] My conclusion is that the case of fraud against Rowmoor, based on Fabian's state of mind, has not been proved.

[133] Turning to Auction Alliance, there is no evidence as to what knowledge Levitt had concerning the status of the building plans. I do not believe that he was intending to make the claim that there were approved building plans, even if his statements were to be construed as reasonably conveying that impression. And if Levitt did intend to make that claim, it has not been shown that he knew it to be false.

[134] Stewart and Faclier both knew, by the time of the auction, that building plans had not yet been approved. Faclier was called as Dormell's witness. She is not identified in Dormell's readings or trial particulars as a person who had fraudulent intent on behalf of Auction Alliance. Unless she were behaving dishonestly at the time of the auction, one must accept that she did not understand the brochure and Levitt's pattern to be claims that building plans were approved, because she says she would have intervened if a wrong claim was being made.

[135] The probabilities suggest, to my mind, that at the time the brochure was prepared the persons at Auction Alliance who were involved with Rowmoor in its preparation did not particularly apply their minds to the question of building plans. They would have obtained the information appearing in paras 3 and 5 of the brochure from Rowmoor. Stewart's email of 28 February 2008 indicates that when potential buyers asked about the requirements for immediately commencing with construction, he needed to refer to Fabian. If he had harboured the intention of making a dishonest claim in the brochure, he would simply have told buyers that there were approved building plans.

[136] The absence of fraudulent intent by Faclier is shown by the readiness with which she replied to Annenberg's query in her email of 3 March 2008. She passed on to him exactly what Fabian had said to Stewart. Her evidence was that both she and Stewart fielded queries from buyers, and that if any buyer had asked about the status of building plans they would have given the answer that the plans were in council awaiting approval. Her evidence is not consistent with the view that she intended the brochure or Levitt's pattern to be making the claim that building plans had already been approved.

[137] A final consideration bearing on the inherent probabilities is that although Auction Alliance stood to make a substantial commission from the sale (in the event, R4 million), the additional commission (if any) which might have been generated by a false claim that building plans had already been approved was hardly such as to have induced a substantial and then reputable auction house to act dishonestly in marketing the property.

[138] The claim of fraud against Auction Alliance thus also fails.

Negligence

[139] I must assess negligence on the footing that, contrary to my earlier conclusion, the brochure and transcript would have conveyed to the reasonable reader/listener that approved building plans existed. If this is what the reasonable reader would have understood, it is also what the reasonable author or auctioneer would have appreciated. It follows, in my opinion, that in framing the brochure as they did, the defendants departed from the standard of the reasonable person and were negligent. On the same basis, Levitt was negligent in speaking as he did and Rowmoor, whose representatives Selwyn and Dennis Fabian were both present, were negligent in failing to correct him.

Causation – Dormell's knowledge

[140] There are two main questions under the heading of causation: [a] whether Dormell knew at the time of the auction that there were no approved building plans (if so, Dormell could not have been induced to act to its prejudice by a contrary representation); and [b] whether, if Dormell did not know the true position, it would have acted differently from the way it did. I shall take these two questions in turn.

[141] A third question in respect of causation was raised by the defendants to the effect that nothing said by Levitt at the auction (as distinct from the content of the brochure) affected the way Dormell acted because by the time Main and Annenberg arrived at the auction Dormell already intended, with the approval of Tullis (who did not attend the auction and did not hear what Levitt said), to bid up to R35 million; and that what caused Dormell thereafter to offer a price of R40 million was not anything said by Levitt at the auction but the fact that Main was very keen to lay her hands on the property, that Rowmoor would not accept less than R40 million, and that Moti was not prepared to go beyond R39,5 million. I accept that argument. I would put it thus: If there was no misrepresentation by commission or omission in the brochure, Levitt's statements did not change the position; and if, conversely, there was a misrepresentation by commission or omission in the brochure, Levitt's

statements would not have disabused a bidder's mind of any misapprehension created by the brochure.

[142] Returning to the first of the two main causation issues, the question of Dormell's knowledge raises two sub-issues: [a] Did Main or Tullis know the true position? [b] If not, is Annenberg's knowledge attributable to Dormell?

The knowledge of Main and Tullis

[143] Main denied that she knew at the time of the auction that there were no approved building plans. Tullis said that he was also under that impression. Their evidence indicated that they were not, at the time of the auction, familiar with the planning field and did not necessarily understand the difference between SDP drawings and building plans. It is possible that their evidence really amounts to this: that they did not know what was needed to start construction immediately and did not consciously think about the existence or otherwise of approved building plans but thought that everything was in place, with 'everything' encompassing (as they subsequently learnt) building plans approved under the NBA and not only the SDP drawings referred to in the brochure. If that was their state of mind, it would tend to confirm that there was no misrepresentation in the brochure or transcript and that such effect as their view may have had on the decision to buy the property was the result of their own error and not the result of inducement by misrepresentation.

[144] However, I shall approach this part of the case on the basis that the brochure and transcript conveyed to the reasonable reader that approved building plans existed and that Dormell alleges this to have been its state of mind.

[145] There is no direct evidence that Main was told the true position prior to signing the purchase agreement. There are, however, certain facts, both pre- and post-auction, suggestive that Main did know that the building plans had not yet been approved.

[146] Firstly, she asked Annenberg to make enquiries about the property and give her advice. Although Annenberg could not positively assert that he told her about

the status of the building plans, he had no reason to conceal the information. If such information was important (which is the premise of Dormell's case) it increases the likelihood that he would have mentioned it to her, as they had a number of interactions prior to and at the auction.

[147] If Annenberg did not volunteer the information to Main, and if she was attaching importance to the existence of approved building plans, it would be odd if she had not asked the question directly to Annenberg or Faclier (who testified that she knew Main), given that the brochure was certainly not explicit on the point.

[148] Then there is the fact that Main and Annenberg met with Van Lonkhuyzen on 10 March 2008 at DFBA's offices. It was agreed at this meeting that a set of the building plans would be made available to Annenberg. Main met again with Van Lonkhuyzen and Stephan Karl (both of DFBA) at Gail Behr's home on the late afternoon of 11 March 2008. A design brief was discussed at the latter meeting. Since there are no minutes of these meetings, the witnesses would have to rely on memory. The defendants did not call Van Lonkhuyzen or Karl, and Annenberg and Brummer could not positively state that the status of the DFBA building plans was specifically discussed at the first meeting. Nevertheless, it seems odd to me that at neither of these meetings anything should have been said about the status of the DFBA plans, even if just in passing (Van Lonkhuyzen, Karl and Annenberg would have had no reason to be secretive about it). The likelihood that something was said about the status of the plans is increased by Annenberg's email to Fabian on 12 March 2008 where he referred to the meeting on 10 March 2008 with Van Lonkhuyzen, saying 'he promised to let me have a set of the plans that are in Council for approval...'. That must be a reference to something said to Annenberg at the meeting. What is clear is that if the status of the building plans was mentioned at either of these meetings, Main did not react as one who had been misled.

[149] A further important consideration is Fabian's evidence of his alleged discussion with Main on 12 March 2008. His evidence in this respect was criticised on several grounds. The first was that Rowmoor's counsel had put to Main in cross-examination that Fabian would testify that he phoned her on 12 March 2008 and that his contemporaneous note was made on that occasion, whereas Fabian testified in

chief that he phoned Main on the previous day and left a message for her to contact him, which she did on 12 March 2008. It was put to him in cross-examination that he had tailored his evidence to fit in with the telephone records that had been produced after Main's testimony but prior to Fabian's testimony. The second criticism was that it was not his usual practice to make a contemporaneous note of phone conversations and that this particular note had a defensive quality about it in circumstances where, if it were truly contemporaneous, there was no reason to expect controversy. It was put to Fabian that if he was trying to keep DFBA involved in the project he would not have told Main that the building plans had been withdrawn – he would simply have got her permission to carry on processing them. Another possible criticism is that it might seem peculiar for Fabian to have had this conversation with Main on 12 March 2008 at the very time that Rowmoor was writing a letter to the City to withdraw the building plans.

[150] I accept that Fabian may have adapted his evidence to correspond with the telephone records but this would simply show that he previously had a faulty recollection of the precise sequence of events on 11/12 March 2008, which is hardly surprising. Apparently Main's cellphone records (which were not adduced as an exhibit) did show that he made a short telephone call to Main at 17h29 on 11 March 2008, sufficient for leaving a message. This at least tends to confirm that he was trying to get hold of her. Fabian gave explanations for the other criticisms, in which he distinguished between Rowmoor's position after the sale and his own position as the senior partner at DFBA. To reject his version I would need to find that he deliberately fabricated a purportedly contemporaneous note (post-summons, it was put to him) and then perjured himself on the matter in the witness box – both extremely serious allegations. As Rowmoor's counsel observed, there was no room for honest error – either Fabian was telling the truth or he deliberately concocted the note and lied about it in court.

[151] There is nothing inherently implausible about Fabian's version. Indeed, I can understand that he might have wanted to retain the project for his firm. His view that Main's hotel idea was a non-starter was genuinely held and apparently shared by Brummer. Fabian had no reason not to speak with Main (and the telephone records show that he made an attempt to do so on 11 March 2008) or to withhold

information from her about the status of the building plans. By 12 March 2008 Fabian knew that Main was the person on whose behalf Annenberg had made enquiries a few days earlier. He also would have remembered his email to Stewart of 28 February 2008. Fabian had no reason to think on 12 March 2008 that what he said to Main about the building plans would come as a surprise to her.

[152] In Main's case the contrast between perjury and the truth may not be so stark. If she had learnt from Annenberg before the auction or from Fabian shortly after the auction that the DFBA plans were likely to be approved in the near future, it may not have made a great impression on her and she may not have remembered the discussion with Fabian. She had very different ideas about the development, as post-auction events show, so the existence of approved DFBA building plans as at March 2008 was not critical to anything she wanted to do there and then. Over the months, and as her dream of a Grand Cafe & Rooms (a restaurant and boutique hotel) crumbled and the financial feasibility even of selling off apartments was called into serious doubt, she may have begun to convince herself that the real fault lay with someone else rather than her own somewhat hasty decision to buy the property at what everyone else seemed to think was a very high price.

[153] Main's architect, Viljoen, certainly knew the true position by 8 August 2008. There appears to have been no reaction at that stage indicative of surprise that the building plans had not yet been approved. This does not tally with the testimony of Main and Viljoen regarding the manner and timing of their discovery that building plans had not been approved.

[154] The SBDS project minutes of 2 September 2008 refer in very muted terms to the fact that the DFBA building plans were still awaiting approval. We know that the matter was not taken up with Rowmoor or Auction Alliance then or at any time prior to the issue of summons nor did Main challenge Annenberg.

[155] Terblanche, who was not called as a witness, was the one who started asking questions about the 'approvals' that were sold to Dormell. This was in an email of 29 September 2008. What was subsequently delivered to her in early October 2008

were the approved SDP drawings. There is no evidence that she or Main reacted to this by complaining that Rowmoor or Auction Alliance had promised more than this.

[156] I have not overlooked Main's email to Tullis of 15 March 2008 where she said that she now had the original plans 'as well as the approved plans done by Dennis Fabian'. This can certainly be construed as supporting her version of her belief but the email could also be construed as a loose reference to the building plans for the approved Fabian development, ie the development in accordance with the rights granted by the City with reference to the SDP drawings.

[157] The onus of proof on causation rests on Dormell. This requires proof on a balance of probability *inter alia* that Dormell did not know the true position when it bought the property. I feel unable to make a finding that Fabian concocted the note of 12 March 2008. That evidence (including the lack of remonstrance from Main), taken together with the other considerations I have mentioned, lead me to conclude that on this particular issue the probabilities are at best for Dormell equivoiced. This conclusion is fatal to a favourable finding for Dormell on causation.

Attribution of Annenberg's knowledge

[158] Annenberg knew prior to the auction that the building plans had not yet been approved. Assuming that Main and Tullis did not also know, is Annenberg's knowledge attributable to Dormell? Both defendants amended their pleadings to advance this defence.

[159] The law in this regard is normally stated with reference to agency. An agent in the narrow sense is one with authority to perform a juristic act on behalf of a principal, typically concluding a contract in the name of the principal. Generally the knowledge of such an agent on a matter bearing on the transaction will be attributed to the principal. But our law goes further – it is sufficient, in order to attribute knowledge, that the agent was instructed to receive or ascertain information for his principal, a so-called 'agent to know' (see, for example, *Ying & Another v South British Insurance Company Limited* 1957 (2) SA 194 (E) at 198C-G). Such a person will not necessarily be an agent in the strict sense. For example, an employee of a

company or an official of a local authority may, in regard to matters of a specific kind, be an 'agent to know' in the broad sense even though he has no authority to conclude a contract for his employer (see, for example, *Farmer v Robinson Gold Mining Company Limited* 1917 AD 501 at 518 and 532-3; *Town Council of Barberton v Ocean Accident and Guarantee Group Ltd* 1945 TPD 306 at 310-311). Whether knowledge of the 'agent' is to be attributed to the 'principal' will depend on the scope of the former's authority and the importance or materiality of such knowledge to the principal. Information will be material if it is 'such that in the ordinary course of business a reasonable man would be expected to impart such knowledge to the person who has delegated to him the conduct and control of his affairs' (*Town Council of Barberton supra* at 311). A mandatary's mandate, though falling short of power to conclude a contract for the mandator, may include a duty to impart information to the mandator (*LAWSA* 17th Ed *Mandate and Negotiorum Gestio* para 12).

[160] In the present case Annenberg was formally mandated to bid for Main at the auction. Although she bound herself to sign the conditions of sale, she would in any event have been bound at the fall of the hammer. In a sense, therefore, Annenberg had authority to perform a juristic act which would result in Main (or Dormell) being bound by a contract in accordance with the conditions of sale. However, this is not in my view the relevant arrangement which might cause Annenberg's knowledge to be attributed to Dormell but was rather a later manifestation of an earlier broader confidence which she had reposed in him. This had occurred shortly after Main learnt of the auction on 29 February 2008. She testified in chief that she

'... gave him the mandate to, you know, come with me to the auction and bid but before then he would go into the detail of, you know, the building and make sure that it is what it is and that we can actually go to the auction and bid on the building'.

She agreed, in cross-examination, that she expected Annenberg to investigate aspects such as zoning, restrictions, planning approval and building plan approval, that there were report-back meetings before the auction, and that she placed reliance on Annenberg's advice and guidance. Annenberg's evidence in chief was that she told him she was interested in the property

‘... and she asked me to investigate, get the information on the property and look at the feasibility of possibly buying it. ... Well she wanted me to advise her as to what she – (a) whether she should buy it you know is it viable and (b) you know what sort of price she should pay for the property.’

Under cross-examination by Mr Sholto-Douglas he was asked whether, apart from the bidding authority, he had been given an authority to do anything else on behalf of Dormell or Main. He replied:

‘MR ANNENBERG: ‘No, ... her instructions to me was: will you please investigate this property on my behalf as I would like to buy it and look at what potential it has... and give me a sense of what I should pay for the property.

MR SHOLTO-DOUGLAS: So it was to determine a reasonable price for the property in essence? ... Correct.

Both Main and Tullis agreed that it was important for Dormell to have a property expert such as Annenberg to assist them and that Annenberg was the only property expert engaged by Dormell.

[161] Although no specific remuneration was agreed or contemplated for the work which Annenberg did for Main in the days leading up to the auction (and thereafter), I reject the notion (if it were relevant) that Annenberg was merely assisting Main out of friendship. He conducted business in the property field, and there was an expectation that if Main bought the property and the development came to fruition Annenberg would receive commission on the sale of apartments. The investigative work he did for and the advice he gave to Main reflected a serious business relationship.

[162] The evidence satisfies me, therefore, that Main delegated to Annenberg the task of investigating the property with a view to advising on its proposed purchase and on an appropriate price. There was a mutual expectation that Annenberg would report to Main on anything material to the proposed acquisition. She certainly knew he would talk to Auction Alliance. She also knew he was in contact with Fabian.

[163] I would thus regard Annenberg as having been, in the broad sense, an ‘agent to know’. Consider it from the perspective of Fabian: assume Annenberg had

specifically identified Main or Dormell as the person for whom he was investigating the property and had asked about the status of the building plans. Even if Fabian had hitherto been aware that Main was under a misapprehension about the status of the building plans, he would surely have said, in response to any later complaint, 'But I told the very person whom you asked to investigate the property.' In other words, a person in Fabian's position would not have thought it necessary to go further and communicate the information directly to Main.

[164] In arguing to the contrary, Mr Sholto-Douglas referred me *inter alia* to *Estate Francis v Land Sales (Pty) Ltd & Others* 1940 NPD 441. There a company, through its director Motala, decided to bid for a property at an auction. Certain representations concerning the property were made by the auctioneer in an advertisement. Motala was unable to attend the auction so authorised one Pather to attend and bid on behalf of the company up to a certain amount. Before bidding began the auctioneer corrected an erroneous representation which had been made in the advertisement. Pather did not regard the correction as a matter of great moment. After the property was knocked down to the company, the latter refused to complete the transaction, alleging that it had been induced by an innocent misrepresentation to conclude the sale. Broome J held that Pather's knowledge was not attributable to the company and that the company (represented by Motala) would not have bought the property had it been aware of the true state of affairs. This case, if correctly decided, is distinguishable because Pather's only authority was to bid for the property. He was not mandated to perform any prior investigative work in relation to the property.

[165] What then remains is the question whether the information regarding the status of the building plans, which Annenberg learnt both from Fabian and Auction Alliance, was material as contemplated in *Town Council of Barberton*. Dormell's case is based on the supposed materiality of the information – so material that it allegedly made a difference of R25 million to the price Dormell would have paid for the property.

[166] Although the authority to bid was in the name of Main and although Dormell was not specifically named when Main asked Annenberg to look into the property, I

do not think it was seriously contended by Mr Sholto-Douglas that if Annenberg's knowledge was attributable to Main it was not also attributable to Dormell. Main did not testify that she ever intended to buy the property in her own name. Dormell had recently purchased the Grand in Plettenberg Bay, and Main intended to extend the brand to Cape Town. If Annenberg did not specifically know about Dormell, both Main and he would have understood that he was making investigations for the benefit of Main or whichever entity she chose to use for the acquisition.

[167] On this further basis, Dormell must fail in regard to causation, since it must be treated as having known the true position.

Causation – what difference, if any, did it make?

[168] The second main question is whether, if Dormell did not know the true position, a disclosure of the truth would have affected its conduct. I have remarked previously that Main was very enthusiastic about the proposed acquisition and the extension of her Grand brand to Cape Town. She seems personally to have paid very little attention to matters of detail. Despite the references in the brochure to a final notification letter, the approved SDP drawings and the APA, she did not call for them and showed no interest in them. She disregarded Annenberg's perhaps conservative view on price, authorising him to bid up to R35 million rather than his recommendation of R23,5 million. Shortly after losing out at the auction when Annenberg declined to top Moti's bid of R36 million, she was willing in the post-auction discussions to jump up to R40 million in order to lay her hands on the property. Her ideas for the property were very different from those of Rowmoor and DFBA, even if, in a vague sense, she knew she would have to stay within the 'Fabian envelope'.

[169] It is in this setting that one must consider how events would have unfolded if Fabian or Auction Alliance had made the disclosure which they hypothetically should have done to remove the alleged misrepresentation. One must not answer this question with the benefit of hindsight – one knows in the event that the process of building plan approval was protracted by a combination of slow officialdom, unforeseen technicalities of debatable merit and a lack of energy by DFBA (brought

about by the fact that it was no longer on brief and did not know that anything would come from the approved plans); one must ask how matters would have been dealt with in late February/early March 2008 with the knowledge the parties then had. We know from Fabian's oral statements to Annenberg and from Fabian's email to Stewart of 28 February 2008 what Main and Tullis would themselves have been told if they had asked directly: that the building plans were in council for approval which was viewed as a mere formality and would take only a few weeks. If further information had been sought, Main and Tullis would probably also have been told that the building plans had successfully passed the pre-scrutiny phase. In the 'but-for' enquiry which must be undertaken in regard to factual causation, this is the hypothetical lawful course of action one would substitute for the alleged misrepresentation or non-disclosure (cf *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-I).

[170] This was Fabian's honest opinion, and it is the view which Rowmoor and Auction Alliance would have accepted as correct and would have conveyed upon request (or would have included in the brochure, if that were necessary). If Fabian had told Main herself what he in fact said to Annenberg and to Stewart, Main would, one can safely assume, have asked Annenberg what he thought. And we know what Annenberg would have thought because Fabian did in fact tell him: Annenberg accepted Fabian's statement and thus did not regard the matter as being of great moment. On a balance of probability, Main would have accepted Annenberg's advice and not been deterred by what she would have understood was a formality which would take only a few weeks. There was no suggestion that DFBA would even have billed her for completing the building approval phase – Fabian's firm had already been paid by Rowmoor for that phase, though he would have expected a further fee if DFBA was engaged to supervise the construction of the building. Main did not say in her evidence what she would have done if she had been told what Annenberg was told by Fabian and she certainly did not say that she would then have bid only up to R19 million (nor did Tullis). I consider that in all probability she would still have bought the property for R40 million.

[171] Tullis indicated in his evidence that had he been told that the building plans had not yet been approved he might have required the inclusion of a suspensive

condition or warranty regarding building plan approval. I am somewhat sceptical about that though in fairness to Tullis he was simply hypothesising as to what he might have done. After all, Tullis and Main did not insist on any warranty relating to the facts which, on their evidence, they assumed to be correct and germane to the transaction. Be that as it may, Dormell's pleaded case is not that but for the misrepresentation the sale would have been concluded at the same price though subject to a suspensive condition. Whether Rowmoor would have accepted a suspensive condition and if so what the terms of that condition would have been and whether the condition would (with the exercise of the requisite diligence and vigour from all concerned) have been fulfilled are matters of speculation.

[172] It may be said that the hypothetical disclosure would have been negligent because Fabian should not have said that building plan approval was a mere formality and would happen within a few weeks. However, the only representation of fact in the hypothetically honest answer was that the building plans were in council for approval, ie were not yet approved, and that was the crucial piece of information allegedly withheld. Whether approval was a formality and would only take a few weeks were expressions of opinion. Fabian did not misrepresent his state of mind (which would have been a fraudulent misrepresentation – see *Ruto Flour Mills (Pty) Ltd v Adelson* 1959 (4) SA 120 (T) at 122G-123C; *Presidency Property Investments (Pty) Ltd & Others v Patel* 2011 (5) SA 432 (SCA) para 28); it was accepted that this was his honest view.

[173] I accept that in the law of delict the negligent expression of an opinion may in appropriate circumstances give rise to liability if there is a legal duty to take care in the expression of the opinion and it is expressed without taking such steps as a reasonable person would take in the circumstances to satisfy himself that the opinion is justified (cf *Kern Trust supra* at 618A-D). However the case against the defendants was based on the alleged factual misrepresentation or misstatement of the simple fact that building plans had already been approved. Whether the opinions which we know would have accompanied a correct disclosure concerning that simple fact would have been actionably negligent was not the subject of the trial. I very much doubt whether Dormell could successfully have sued Rowmoor or Auction Alliance merely because Fabian expressed the view that the approval of the

building plans was a mere formality and would only take a few weeks. That was a matter on which Dormell could have formed its own opinion and taken its own advice. The evidence in this case suggests that once SDP plans have been approved and once the building plans themselves have passed the pre-scrutiny phase, building plan approval does follow as a matter of course in the vast majority of cases. None of the problems which bedevilled the approval in this case were foreseen, or I venture to suggest foreseeable, at the time of the auction. The evidence also indicates that the issues raised by officialdom were either resolved or could have been resolved, and that all of this might have happened a lot quicker if the approval process had been energetically pressed.

[174] Dormell has thus not proved on a balance of probability that the alleged misrepresentation or non-disclosure factually caused it to pay more for the property than it would otherwise have done. In view of this conclusion it is unnecessary to discuss legal causation, an issue which was barely touched upon in argument, save to record that if Dormell had succeeded on all other issues I doubt whether it would have failed at this hurdle.

Damages

[175] if I am wrong in finding that the alleged misrepresentation or non-disclosure made no difference, the damages enquiry focuses on how much difference it would have made. In delict the proper measure of damages is the amount by which the wronged party's patrimony has been diminished in consequence of the delict, so-called negative *interesse* (see the majority judgment in *Ranger v Wykerd* 1977 (2) SA 976 (A)). The method of quantifying this amount will depend on the circumstances of the case.

[176] In the present matter the appropriate method seems to me to be to be the difference between the price actually paid by Dormell for the property (R44 million inclusive of commission) and the market value of the property without approved building plans. The latter price (assumed to be lower than the price actually paid) would either have been accepted by Rowmoor, in which event Dormell would have paid that much less; or the lower price would have been rejected by Rowmoor, in

which case Dormell, one must assume at this stage, would not have bought the property at all (a conclusion I actually regard as unlikely for reasons explained in the previous section), in which event Dormell's loss is the difference between the market value of the property of which it acquired ownership and the higher amount of cash with which it parted as the purchase price.

[177] Dormell called Jackson as an expert to determine the lower value as R19 million. Whether this would exclude commission payable by a buyer on auction is unclear from his evidence but Mr Sholto-Douglas treated Jackson's evidence as establishing the lower gross market value as being R20,9 million inclusive of commission as against the R44 million actually paid, yielding damages of R23,1 million.

[178] Jackson valued the property as at 6 March 2008 not only on the assumption that there were no approved building plans but also on the assumption that the title deed restrictions had not been removed and amended in accordance with the removal application and that no departures had been granted in accordance with the departures application. (That he disregarded the outcome of the removal application as distinct from the departures application is by no means clear from his expert report, because he annexed the title deed of 4 June 2008 including the endorsements which reflected that prior to the valuation date of 6 March 2008 various title deed conditions had been removed or amended. However, he confirmed under cross-examination by Mr Hodes that he had not taken into account the value flowing from either the granting of the removal or the departures application.¹⁴ In argument Mr Sholto-Douglas confirmed that this was the basis of the valuation.) Mr Sholto-Douglas' argument in that regard was that the granting of the removal and departures applications counted for nothing unless one could actually erect the new building, for which approved building plans were needed. Jackson adopted that view in his evidence.

[179] In my view, Jackson's valuation assumptions are profoundly flawed. Perhaps he was asked to make the assumptions he did in the light of the subsequent history

¹⁴ Transcript 1032.

and eventual lapsing of the approved departures on 15 October 2011. However, that is not a proper valuation of the property as at 6 March 2008, and Mr Jackson should have known that. As at 6 March 2008 the existence of what I shall call the development rights was highly material to a valuation of the property. The obtaining of development rights by way of the removal and departure applications after an arduous process lasting about three years undoubtedly enhanced the value of the property relative to the unrealistic assumptions Jackson made. A willing buyer who knew that it would have to engage town planners and architects and fight trench warfare with the Association, neighbours and officialdom over a period of several years before it could even submit building plans for approval of the structure described in the brochure would, it is quite evident to me, have paid considerably less for the property than if those steps had already been successfully completed. Even the assumption as to the non-existence of approved building plans needs to be more nuanced than Jackson's approach – it is not a case that building plans had been rejected or could not be approved. A willing buyer as at 6 March 2008 would have formed a view as to the likelihood of the building plans being approved.

[180] The additional value a willing buyer would have attached to the existence of approved building plans as at 6 March 2008 is what should have been the focus of the expert evidence but there was no evidence directed to that question. It is quite conceivable to me that an expert who had objectively and diligently investigated that question might have concluded that the difference was so insubstantial, if any, as to be *de minimis*. We know what Fabian's view was as at 6 March 2008 – he thought plan approval was a formality which would take only a few weeks. We know that Annenberg, an experienced property broker, accepted that view. There was no evidence to indicate that any of the problems that actually arose subsequently would have been foreseen or foreseeable to a willing buyer as at 6 March 2008. The removal and departures applications entailed a process of public participation and value judgments by the relevant decision-makers but those hurdles had been crossed. A value judgment can also arise in respect of building plan approval by virtue of sub-para (b) of s 7(1) of the NBA, but the prospect that the building plans in this case would have been rejected on that basis was virtually nil, because the factors listed in sub-para (b) would already have received attention in the procedures followed in the removal and departures applications and in the APA. The

City was thus for all practical purposes obliged to approve the building plans (and to do so within 60 days) if they met the technical requirements of the NBA and if there was compliance with other laws. The fact that the removal and departures applications were granted and that the building plans themselves successfully passed the pre-scrutiny phase would have given a high degree of confidence that the building plans would be approved timeously. If a potential buyer wanted in the meanwhile to begin demolition and basement work, this could have been done by a provisional authorisation in terms of s 7(6) – it was not necessary that approved building plans should already exist.

[181] We know that the Rowmoor partners granted Auction Alliance a mandate to sell for R42 million (excluding commission) and that they ultimately accepted R40 million (again excluding commission). They, we can assume, knew the true facts (ie that the building plans were in council but not yet approved). As willing sellers, they were holding out for R40 million on a property with development rights but where the building plans were not yet approved. Faclier testified that one of the Fabians (she thought it was Jeff) told her before the auction that Rowmoor was adamant that if it did not get R40 million nett it would not sell but rather continue with the development. Fabian's evidence was that if Rowmoor had not achieved its price of R40 million it would not have sold the property and would instead immediately have sought authorisation to commence work in terms of s 7(6) pending building plan approval. That is confirmed by the DFBA technical minutes of 13 February 2008 which stated that the building plans were progressing through council and that the program required construction to begin on 10 March 2008 with completion on 30 November 2008. That is some evidence of Rowmoor's own view as a willing seller of the property's value as matters truly stood on 6 March 2008 and shows the degree of confidence that existed in the Rowmoor camp. (Jeff Fabian also told Main on 6 March 2008, shortly after the sale had been clinched, that if Rowmoor had not sold the property they would have commenced demolition 'on Monday'.)

[182] We do not know as a fact what Moti, who was prepared to pay R39,5 million plus commission, knew about the status of the building plans. It seems at least as likely as not that he was one of the interested buyers to whom Auction Alliance would have passed on the information given to Stewart on 28 February 2008.

[183] We also know that in April 2008 Nedbank valued the property at R45 million, taking into account the development rights but in the knowledge that the building plans had not yet been approved. The bank's valuer, Mr Janari, was not called as a witness but his valuation was performed and apparently relied upon by the bank in the context of an actual transaction in which the bank lent a large sum of money to Dormell.

[184] I do not need to rely on these matters to reach a final view as to the value of the property with its development rights but with as-yet unapproved building plans. The point I make is that it should not be assumed that there would necessarily have been a difference of substance between the price a willing buyer would have paid for the property with and without approved building plans, given the likelihood which then existed that building plans would shortly be approved.

[185] Jackson's valuation of R19 million I find to be of no assistance because his assumptions were simply wrong. Whether his valuation would have been correct on the basis of the assumptions he was instructed to make I need not decide. His choice of comparables was criticised for being too remote in point of time, too restrictive as to geographic location and to be based on an absence of proper enquiry into and discernment between the differing planning attributes of the supposedly comparable properties. There is some force in these criticisms but I am content to discount his evidence on the simple basis that he failed to conduct a valuation of the property with reference to the true state of affairs as at 6 March 2008.

[186] Ordinary common sense tells one that it is pure fantasy to say that as at 6 March 2008 a willing buyer would have attached a value of R23,1 million to the additional attribute of approved building plans (the difference between R44 million and R20,9 million), ie that more than half of the value of this prime Camps Bay property with its development rights and with the expectation of approval of building plans in the near future hinged on whether approval for the building plans already existed on 6 March 2008.

[187] Mr Sholto-Douglas argued that if I should be of this view I was nevertheless bound to do my best to arrive at a fair sum as damages if it has shown that some damage has been suffered. However, reliance on this sensible approach presupposes that the litigant has produced all the evidence available to him at the time of the trial (see, for example, *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118C-F; *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 965 (A) at 970D-H; *Aaron's Whole Rock Trust v Murray & Roberts Ltd & Another* 1992 (1) SA 652 (C) at 655F-656F). In this case I have no reason to doubt that an expert, properly directed to the right question, could have assisted the court in determining the type of value which a willing buyer might have attached to the additional attribute that building plans in circumstances such as the present case had not only been submitted against the known historical background but already approved. I have already given reasons why I am by no means satisfied that an expert so directed would have concluded that this additional circumstance would have made any or a material difference. If I were now to award an amount as damages, it would be pure guesswork.

[188] The subsequent problems that arose with the DFBA building plans appear to me not to be directly relevant to any of the questions I have to answer. However, because there may be a temptation to allow subsequent events to cast a negative retrospective shadow on the value of the property as at 6 March 2008, I briefly note the following. If a developer had decided, after buying the property on 6 March 2008, to improve the property in line with the DFBA design and had forthwith engaged DFBA (or a similarly competent firm) to finalise building plan approval and to supervise the works, I have no doubt that the entire process would have occurred far more expeditiously than it did and that the problems subsequently raised by the City would have come to light and been dealt with a lot sooner. The question of the HVAC areas was merely a matter of inserting additional detail on the building drawings, not a design obstacle. The lapsing on 25 August 2007 of the heritage demolition permit issued on 25 August 2004 was an oversight easily corrected – there was no dispute about this. The evidence regarding the need for NEMA authorisation was similarly to the effect that it was not an issue of great moment. The properties on the mountainside of Victoria Road are in an area characterised by building development. For a time the City approved building plans without regard to

(or perhaps ignorant of) the NEMA issue (the 100-metre restricted zone was only introduced in 2006); subsequently the City did insist on environmental authorisation from the Province before approving building plans but such authorisations for properties above Victoria Road were routinely granted within a month or so of application. Dormell's own expert, Saunders, did not think this would have been a problem.

[189] This leaves Moir's 10-metre height issue, based on section 98 of the zoning scheme.¹⁵ This had not been raised during the processing of the departures application nor during the pre-scrutiny of the building plans. It was also not mentioned by the City's zoning department in the formal approval process. It was a belated issue raised by Moir. From a practical perspective a developer may not have been able to persuade Moir that his interpretation of section 98 was incorrect – that depended on whether the insertion of dormer windows in a sloping roof caused the dormers to become part of the 'facade', ie a 'main containing wall of a building' for purposes of section 98. I was not asked to determine that question. Whether Moir would have raised the same point if the building plans had remained exactly in accordance with the June or November 2006 SDP drawings (where there was a skylight window rather than dormer windows) is not entirely clear. Be that as it may, Moir testified that a 'technical departure' would probably have been granted, ie the City would have approved a departure from the 10-metre height restriction without requiring a process of publication and objection. This was because the 'real' height of the building had not changed from that approved by the affected parties in the APA. (In terms of s 15(2)(a) of LUPO, advertising is required only if the relevant official is of the opinion that any person may be adversely affected by the departure.) Moir thought the technical departure could have been finalised within about three weeks. Fabian and Brummer were of the same view.

[190] Moir was not himself the official who would have decided whether advertising should take place. Saunders, Dormell's expert, thought that advertisement might well have been insisted upon, though it is not apparent from his evidence on what basis the relevant official could properly have been formed the opinion that any

¹⁵ Section 98 was handed up as exhibit H.

person would be adversely affected by the departure (having regard to the departures already approved and the terms of the APA).

[191] If Moir could not have been persuaded that he was wrong about his interpretation of section 98 and if the relevant official had not permitted a departure without advertisement, the evidence of Moir was that the difficulty posed by section 98 could have been resolved by retracting the section of the roof where the dormers were situated by about 1 to 1 ½ metres. Fabian testified that if the City's stance would otherwise have led to delay, that is the solution he would have adopted. (He said that in order to get the building plans approved promptly he would have amended them to reflect a retraction of the dormers and would then have sought the 'technical' departure so that he could revert to the original idea.)

[192] It is not possible to say by what date all these matters would have been put to rest had the approval of the DFBA plans been pursued energetically by someone with an intention to build according to that design, but I am confident that this could have been achieved considerably sooner than February 2010, when DFBA was told by Rowmoor to take no further steps. DFBA did not have a strong commercial motive to press the approval of the building plans during 2008 and 2009 because it was not Dormell's chosen architectural firm and had no client (such as Rowmoor) pushing it. Main herself was pursuing other ideas for the property. When she aborted the development in November 2008 it was, I consider, for the reasons stated in Terblanche's letter of 19 November 2008 and the bank's memorandum of 4 May 2009. The fact that the DFBA plans had not yet been approved was not one of the stated reasons and I do not accept Main's evidence that this was the real reason. Terblanche was not called by Dormell to explain her letter of 19 November 2008 but the reasons recorded therein ring true in the context of surrounding events. She would have had no reason to refrain from referring to the non-approval of the DFBA plans if that were perceived to be the real problem. There was no known issue of serious import in relation to the DFBA building plans as at November 2008. Viljoen's own rider plans would have taken some time to assess (indeed, despite the expression 'rider plans', each page of the DFBA plans would have had to be changed and replaced in order to give effect to Viljoen's design, and there is no saying that the City officials may not have picked up other problems in relation to the

rider plans which were not applicable to the DFBA plans). Provisional authorisation to start work in terms of s 7(6) of the NBA could have been sought in the meanwhile. In my view, Terblanche's gloomy feasibility report of 24 October 2008, furnished as the global financial crisis was unfolding, coupled with the fact that the boutique hotel concept (Main's initial idea in buying the property) appeared to face insuperable planning challenges and that her Grand Café (which she was set on conducting) demanded more retail space than allowed for in the approved SDP, led Main to decide rather simply to conduct a Grand Cafe from the existing structure. The extended approval of the departures only lapsed on 15 October 2011. I have little doubt that building plans substantially in accordance with what was described and depicted in the brochure could have been passed well before that time had somebody pressed the matter.

[193] My conclusion is thus that even if earlier issues were decided in favour of Dormell, it has not proved the amount of its damages, if any.

The disclaimer and exemption clauses

[194] The remaining issues, which arise if Dormell (contrary to my view) were to succeed on all issues other than fraud, concern the effect of the disclaimer in the brochure and exemption provision in the conditions of sale, both of which I have quoted. It is necessary to deal with Rowmoor and Auction Alliance separately. The onus is naturally on the defendants to bring themselves within the disclaimer or exemption as the case may be (*Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA) para 9).

Rowmoor

[195] Although Rowmoor pleaded both the disclaimer and the exemption clause, Mr Hodes accepted the proposition I put to him in argument that the whole-contract provision in clause 23.1 of the conditions of sale precluded Rowmoor from relying on the disclaimer in the brochure.

[196] The correct approach to the interpretation of an exemption provision such as clause 23.1 is set out, with reference to earlier cases, in *Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltd & Another* 2008 (6) 654 (SCA) paras 19-24 and *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security* 2010 (4) SA 455 (SCA) paras 15-17. The question is one of ordinary contractual interpretation – the answer will be found in the language of the clause read in the context of the agreement as a whole in its commercial setting and against the background of the common law and with due regard to any possible constitutional implications. If there is ambiguity the clause must be construed against the *proferens* but the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible – it must not be fanciful or remote.

[197] Part of the immediate context within which clause 13.2 must be construed are the related provisions of clauses 13.1, 13.3 and 23.1, all seeking in various ways to protect the seller. Part of the broader factual matrix is that the parties knew that information had been supplied in the brochure, in advertisements, orally at the auction and upon *ad hoc* enquiries from potential buyers.

[198] Clause 13.2 comprises two sentences but they must be read together to determine the meaning of the clause as a whole. The phrase in the first sentence 'any express or implied information, statement, advertisement or representation' is as wide as could be (for convenience I shall refer compendiously to the specified forms of information simply as 'representations'). The phrase would plainly cover a representation, whether by commission or omission, that building plans for the Fabian design had been approved. Dormell's acknowledgement in the first sentence thus includes an acknowledgement that Dormell had not been induced to conclude the agreement by the (alleged) representation that building plans had been approved. That is an acknowledgement of a fact, the focus being the non-inducing effect of the representation – it would not matter for that purpose whether the information were conveyed by the seller or its agent innocently, negligently or fraudulently (though we know that fraud unravels all and that the exemption would thus be unavailing in the case of fraud on grounds of policy despite its wide terms). The second sentence gives legal effect to the acknowledgement in the first sentence

by containing a waiver by the purchaser of 'any rights whatsoever' which it might otherwise have obtained against the seller as a result of representations mentioned in the first sentence. The rights waived are expressed in the broadest terms.

[199] I accept that if clause 13.2 were confined to innocent representations it would still have a significant field of operation – it would exclude rescission or the *actio quanti minoris* arising from innocent misrepresentation. I nevertheless regard as fanciful the proposition that the phrase 'any rights whatsoever' does not include rights arising from representations made negligently. The purchaser's acknowledgement in the first sentence is that no representations (ie beyond those incorporated as terms of the contract) have induced it to enter into the agreement, and a purchaser could not plausibly claim that what induced him to enter into the contract was not the representation *per se* but the fact that it was negligently rather than innocently made; the acknowledgement in the first sentence does not permit a rational distinction between the state of mind with which the seller or its agent has made the representation, and there is thus no basis for importing that distinction into the second sentence, particularly given its very wide language.

[200] Mr Sholto-Douglas argued that Dormell could not waive the right which it seeks to enforce in the present action because it did not know that building plans had not been approved. That is a fallacious submission. Clause 13.2 by its very nature is directed at representations which in the event turn out to be incorrect; no claim could arise in respect of representations which were either true or known by the buyer when purchasing to be untrue. On Dormell's case, it understood when it bought the property that there were approved building plans – that was a representation, and in clause 13.2 it nevertheless acknowledged that it was not concluding the agreement on the basis of (*inter alia*) that representation and knowingly waived 'any rights whatsoever' which it might otherwise have obtained against Rowmoor as a result of the representation (meaning, obviously, if the representation turned out to be incorrect).

[201] I thus conclude that Rowmoor is entitled to ward off Dormell's claim unless fraud has been proved, which it has not.

Auction Alliance

[202] Auction Alliance also relied both on the disclaimer and the exemption clause. Because of the whole-contract clause in the conditions of sale, one must begin with that agreement. Auction Alliance signed the agreement, and certain of its provisions deal with the auctioneer's rights, for example in regard to the conduct of the auction (though these events would all pre-date the signing of the conditions) and the payment of commission (clause 5). Clause 13.2 refers to the auctioneer in the first sentence but the waiver in the second sentence is only a waiver of rights as against the seller (Rowmoor). Mr Rose-Innes for Auction Alliance argued that the second sentence should, in the context of the first sentence and the rest of the contract, be construed as incorporating a waiver also for the benefit of Auction Alliance. He referred to *Soobramoney v Another v R Acutt & Sons (Pty) Ltd* 1965 (2) SA 899 (T) but there the exemption was expressly given in favour of both the seller and the agent.

[203] It is true in the present case that the first sentence appears to distinguish between representations made 'by the Auctioneer or any other person' and those made 'by or on behalf of the Seller'. However, the exemption could not have been intended to operate in favour of the world at large ('or any other person'), ie persons unrelated to the auctioneer or the seller. It would make sense, in the context of an exemption in favour of the seller, to make reference in the first sentence to representations made *inter alia* by the auctioneer because the auctioneer is a person for whose representations the seller might otherwise be held liable. The auctioneer might in any event be encompassed by the phrase 'by or on behalf of the Seller' but the express reference to the auctioneer in the first sentence is understandable as a precaution. Without a claim for rectification (and there was no such claim) I cannot construe the clause as a whole as exempting the auctioneer from liability for representations. Clause 13.2 stands in contrast, in this respect, with clause 13.1, where the auctioneer as well as the seller are absolved from responsibility for pointing out surveyor's pegs or beacons. (Clause 13.2 is, on my interpretation of it, the reverse of the clause which featured in *Faure en 'n Ander v Joubert en 'n Ander* NO 1979 (4) SA 937 (A), where clause 8 of the relevant

conditions of sale protected the auctioneer but not the seller. The majority held that the seller could not rely on the clause.)

[204] The next question is whether Auction Alliance can fall back on the disclaimer in the brochure, given the whole-contract provision in clause 23.1 of the conditions of sale. Mr Sholto-Douglas for Dormell did not, when it came to the disclaimer, contend that it was inapplicable because of clause 23.1 of the conditions of sale. On the contrary, his submission (in regard to clause 13.2) was that Auction Alliance was not a party to the purchase agreement save for accepting the benefit of commission, that there was no *stipulatio alteri* in favour of Auction Alliance, and that the word 'Seller' in clause 13.2 could thus not be read as including the auctioneer.

[205] In my view, the phrase 'between the parties as to the subject matter hereof' in clause 23.1 should be construed as referring to the contract between purchaser and seller as to the sale of the property. If, prior to the fall of the hammer and the signing of the conditions, a separate contract was concluded between bidders and Auction Alliance incorporating the disclaimer in the brochure, clause 23.1 of the conditions of sale would not preclude Auction Alliance from relying on that separate disclaimer. The scope of clause 13.2 reinforces that view. I have been persuaded that it does not provide protection in favour of Auction Alliance. If the earlier disclaimer (which undoubtedly does at least in some circumstances purport to provide protection for Auction Alliance) could not be invoked because of clause 23.1 of the conditions of sale, the disclaimer would invariably be unavailing, because the conditions of sale (including clause 23.1) were Auction Alliance's standard auction conditions and it seems likely that the disclaimer in the brochure was also Auction Alliance's standard disclaimer.

[206] Turning then to the disclaimer, the case for Auction Alliance was that the disclaimer was operative between the parties as a tacit agreement in accordance with the so-called ticket cases (see *Durban's Water Wonderland (Pty) Ltd v Botha & Another* 1999 (1) SA 982 (SCA) at 991D-992A; Christie *op cit* at 186-190).

[207] In the present case interested buyers were furnished with the auction brochure. Dormell certainly was. The disclaimer appeared, albeit in small print, on

the front cover of the brochure and in ordinary print in para 5 under a bold capitalised heading 'DISCLAIMER'. Main testified that she would have looked at para 5 of the brochure – indeed the information in para 5 and the impression it allegedly made on her was a large part of Dormell's case – but said she could not remember reading the disclaimer, she only read what she interested her. I have examined the brochure and do not consider that a person could have read the information in para 5 without seeing the heading 'DISCLAIMER'. The disclaimer was contained on the same page as some of the information in para 5. Tullis testified that he saw the disclaimer but did not read it because he sees many disclaimers in the course of his business activities.

[208] A reader who received the brochure and saw in para 5 that there was a disclaimer would know that the brochure contained a term relating to the basis on which information was supplied. I think that was proved to be the case in relation to Dormell. It is thus not necessary to determine whether, if the evidence did not establish this, Auction Alliance nevertheless did what was reasonably sufficient to give Dormell notice of the disclaimer.

[209] In the ordinary ticket cases the question is usually whether the disclaimer or exemption is incorporated as a term of a contract undoubtedly concluded between the parties (for example deposit, conveyance and so forth). Here the disclaimer in a sense stands on its own – it is not alleged to have been incorporated into the conditions of sale or as part of some other contract. However, a person with knowledge that information has been supplied subject to a disclaimer could reasonably be expected to know that if he proceeds to participate in an auction the disclaimer would be operative. Otherwise its insertion in the brochure would be utterly pointless. I am satisfied that the disclaimer operated as the contractual basis on which Auction Alliance supplied information in the brochure.

[210] I was referred to the cases dealing with the test to be applied in determining whether a tacit contract has been concluded. Differing versions of the test have been mentioned in decisions of the Supreme Court of Appeal (Christie *op cit* 86-90). I think those cases are concerned with the process of inferential reasoning where the existence and content of the contract are to be inferred entirely from conduct.

The present case is somewhat different. The disclaimer was expressed in writing and was clearly intended to have the effect that persons who came into possession of the brochure would not be entitled to sue Auction Alliance if, even because of negligence, the information turned out to be incorrect or incomplete. Once it is established that a recipient of the brochure saw the disclaimer, the latter's conduct in bidding at the auction constitutes acceptance by conduct of the express terms of the disclaimer. Formulated in terms of offer and acceptance, the bidder's conduct is an acceptance by conduct of an express offer.

[211] During the opening address and in closing argument I raised with counsel the question whether, when information is supplied subject to a disclaimer, it is necessary – in order to rely on the disclaimer – to prove that the disclaimer has contractual force. Somewhat to my surprise, neither of the defendants' counsel pursued that question. In my view there might well be a non-contractual basis on which a disclaimer could in appropriate circumstances operate to relieve a party of liability in delict. If a person makes representations to another but immediately adds that he does not take responsibility for the accuracy or completeness of the representations and will not accept liability for their accuracy or completeness, the representations as a whole, inclusive of the added disclaimer, might be viewed on grounds of policy as not being wrongful. In the English law of torts it has been held by the English Court of Appeal that a disclaimer in an estate agent's advertisement is relevant to the question whether a duty of care arises and thus should not be analysed along contractual lines (*McCullagh v Lane Fox & Partners* [1996] PNLR 205 (CA) at 237 [neutral citation [1995] EWCA Civ 8], reliance being placed *inter alia* on the landmark decision of the House of Lords on negligent misstatement in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL), where the plaintiff failed in essence because of the defendant's disclaimer; see also *Avrora Fine Arts Investment Ltd v Christie Manson & Woods Ltd* [2012] EWHC 2198 (Ch) para 124; Fleming *The Law of Torts* 9th Ed at 708-709; Clerk & Lindswell on Torts 20th Ed paras 8.121 – 8.123). In *Standard Chartered Bank of Canada supra* Corbett CJ, in determining whether there rested on the bank a legal duty not to furnish a false bank report, took into account that the bank could have refused to give the report or could have protected itself against the consequences of a negligent report by a disclaimer (771A-B; see also *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA) para 12). If

this were the preferable line of reasoning, it would render irrelevant (in relation to the disclaimer) the question whether clause 23.1 of the conditions of sale precluded Auction Alliance or for that matter Rowmoor from relying on the disclaimer. It would be unnecessary to investigate whether the disclaimer constituted, or formed part of, a contract between the parties. What would happen, one may ask, if the recipient of information accompanied by a disclaimer were to say to the representor that he thanks him for the information but rejects the disclaimer? There could then clearly be no contract incorporating the disclaimer yet it strikes me as absurd in such a situation that the representor would be deprived of the benefit of the disclaimer. The disclaimer might – on a non-contractual basis – lead to a conclusion in the present case that neither of the defendants acted wrongfully. I need not, however, express a final opinion on that question.

[212] If the disclaimer were found to be binding, Mr Sholto-Douglas argued that the opening phrase ‘Whilst all reasonable care...’ was a pre-condition for the ensuing exemption to operate. He placed strong reliance on *Minister of Education and Culture (House of Delegates) v Azel & Another* 1995 (1) SA 30 (A) where the court dealt with a disclaimer signed by parents in connection with a school excursion. However, there are important differences between the formulation of the disclaimer in that case and in the present one. There the ‘reasonable precautions/care’ phrase appeared at the end of the disclaimer; was introduced by the words ‘in the knowledge that’; and was formulated in the future tense (ie referring to the reasonable precautions which the principal and his staff would take in the future for the safety and welfare of the schoolchildren). The main body of the disclaimer did not refer expressly to negligence, and the ‘reasonable precautions’ phrase only restricted the indemnity insofar as it concerned negligence by the principal or his staff (not by other employees) and only in so far as it concerned claims relating to the safety and welfare of the children (not damage to property).

[213] In the present case, by contrast, the ‘reasonable care’ phrase is placed at the beginning of the disclaimer and is phrased in the past tense. The body of the disclaimer expressly refers to an exemption from liability for negligence and covers all the information contemplated in the ‘reasonable care’ phrase and the full range of persons who might have supplied the information. To interpret the disclaimer as

meaning that Auction Alliance, its subsidiaries and related companies would only be exempt for negligent errors or omissions in the information if they had taken reasonable care to obtain the correct information would be nonsensical – the very sort of antithesis rejected in cases such as *Elgin Brown & Hamers v Industrial Machinery Supplies (Pty) Ltd* 1993 (3) SA 424 (A) at 428D-429C and *First National Bank of SA Limited v Rosenblum & Another* 2001 (4) SA 289 (SCA) para 16.

[214] I thus find that Auction Alliance can avoid liability on the strength of the disclaimer in the absence of fraud (which has not been proved).

Conclusion

[215] For these reasons Dormell's action must be dismissed with costs. All the parties engaged two counsel, which was reasonable. The costs order is subject (by agreement) to the qualification that Rowmoor is to pay the wasted costs of Dormell and Auction Alliance caused by the postponement of the matter on 12 August 2013 for one day in consequence of the notice of amendment delivered by Rowmoor on that morning.

[216] Rowmoor is entitled to Moir's qualifying costs. Although an expert notice was delivered in respect of Fabian's evidence, Mr Hodes conceded that the latter's testimony was overwhelmingly factual and that no qualifying costs should be allowed for him.

[217] Auction Alliance asked for the qualifying expenses of Brummer. He gave both factual and expert evidence. His narrative of the history of the removal and departures applications was essentially factual in nature as was his evidence about his post-auction involvement in meetings and correspondence. Based on his oral evidence, my rough assessment is that 30% of the costs associated with his attendances (pre-trial and in court) should be allowed as qualifying expenses. Because I was not addressed on this aspect, my order will be provisional.

[218] I make the following order:

[a] The action is dismissed.

[b] Subject to [c], the plaintiff shall pay the defendants' costs, in each case including the costs of two counsel.

[c] The first defendant shall pay the wasted costs of the plaintiff and the second defendant arising from the postponement of the matter on Monday 12 August 2013 for one day, including the costs in each instance of two counsel.

[d] The costs order in favour of the first defendant shall include the reasonable qualifying and attendance costs of the first defendant's expert Mr Moir.

[e] The costs order in favour of the second defendant shall include the reasonable qualifying and attendance costs of the second defendant's expert Mr Brummer, such costs to be reckoned at 30% of all attendances in which Mr Brummer was involved, including his attendances at court.

[f] The order in [e] is provisional. The plaintiff and second defendant respectively shall be entitled, within two weeks of this order, to deliver written submissions as to why the said order should be varied. If such submissions are delivered, the court shall if necessary give further directions. If no such submissions are delivered the order in [e] shall become final.



ROGERS J

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