
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : DOCKPRIDE PTY LTD & ANOR -v- SUBIACO
REDEVELOPMENT AUTHORITY
[2005] WASC 211

CORAM : LE MIERE J

HEARD : 6-17 DECEMBER 2004, 14-18 MARCH 2005

DELIVERED : 22 SEPTEMBER 2005

FILE NO/S : CIV 1505 of 1999

BETWEEN : DOCKPRIDE PTY LTD (ACN 081 380 967)
First Plaintiff

WESTPOINT CORPORATION PTY LTD
(ACN 009 395 751)
Second Plaintiff

AND

SUBIACO REDEVELOPMENT AUTHORITY
Defendant

Catchwords:

Trial of preliminary issue - Tender for purchase of land - Contract - Damages - Whether defendant is liable to plaintiffs? - Breach of contract - Misleading and deceptive conduct - Alleged express representations - Alleged oral representations - Implied contract - Process contract - Identity of tendering party - Whether process contract exists? - Terms of process contract - Implied terms - Compliance with tender Design Guidelines - Implied term to act fairly - Implied terms of fair dealing and good faith - Alleged breaches of process contract - Acceptable variance from Design Guidelines - **BP Refinery** criteria for implied terms - Content of the obligation to act fairly and in good faith - No established

case of breach of contract - Misleading and deceptive conduct - Alleged representations of defendant - "In trade or commerce" - Whether representation was misleading when acted upon? - Reliance - Causation

Legislation:

Fair Trading Act 1987 (WA), s 9, s 10, s 77, s 79

Subiaco Redevelopment Act 1994 (WA), s 18

Trade Practices Act 1974 (Cth), s 51A, s 52, s 82, s 87

Result:

The preliminary issue is determined in favour of the defendant

Category: A

Representation:

Counsel:

First Plaintiff	:	Mr S D Rares QC & Mr T J Carmady
Second Plaintiff	:	Mr S D Rares QC & Mr T J Carmady
Defendant	:	Mr W S Martin QC & Mr S M Standing

Solicitors:

First Plaintiff	:	Williams & Hughes
Second Plaintiff	:	Williams & Hughes
Defendant	:	Freehills

Case(s) referred to in judgment(s):

Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349

Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council [1990] 1 WLR 1195

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60; 212 ALR 357

Byrne & Frew v Australian Airlines Ltd (1995) 185 CLR 410

Chapman v Luminis Pty Ltd (No 5) (2001) 123 FCR 62

Chinook Aggregates Ltd v Abbotsford (Municipal District) (1989) 40 BCLR (2D) 345
Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594
Cubic Transportation Systems Inc v State of New South Wales [2002] NSWSC 656
Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd [1999] FCA 903
Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151
Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR 11,110
Poseidon Ltd & Sellars v Adelaide Petroleum NL (1994) 179 CLR 332
Pratt Contractors Ltd v Transit New Zealand [2003] UKPC 83
R v Ron Engineering & Construction (Eastern) Ltd (1981) 1 SCR 111
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234
Transit New Zealand v Pratt Contractors Ltd [2002] 2 NZLR 313
Village Building Co Ltd v Canberra International Airport Pty Ltd (2004) 139 FCR 330

Case(s) also cited:

Australian Woollen Mills Pty Ltd v Commonwealth (1954) 92 CLR 424
B Seppelt & Sons v Commissioner for Main Roads (1975) 1 BPR 9147
Central Exchange Ltd v Anaconda Nickel Ltd (2002) 26 WAR 33
Coogee Esplanade Surf Motel Pty Ltd v Commonwealth of Australia (1976) 50 ALR 363
Dalcon Constructions Pty Ltd v State Housing Commission (1998) 14 BCLR 477
Elders Trustee & Executor Co Ltd v EG Reeves Pty Ltd (1987) 78 ALR 193
Far Horizons Pty Ltd v McDonald's Australia Ltd (2000) VSC 310
Futuretronics International Pty Ltd v Gadzhis [1992] 2 VR 217
Gates v City Mutual Life Assurance Society Ltd (1986) 160 CLR 1
Global Sportsman Pty Ltd v Mirror Newspapers Ltd (1984) 2 FCR 82
Gore v Montague Mining Pty Ltd [2001] ANZ ConvR 8
Lyndel Nominees Pty Ltd v Mobil Oil Australia Ltd (1997) 37 IPR 599
March v E&MH Stramare Pty Ltd (1991) 171 CLR 506
Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191
Pratt Contractors Ltd v Palmerston North City Council [1995] 1 NZLR 469
Price Higgins & Fidge v Drysdale [1996] 1 VR 346
Shivas v BTR Nylex Holdings NZ Ltd [1997] 1 NZLR 318

Streamline Travel Service Pty Ltd v Sydney City Council (1981) 46 LGRA 168
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 211 ALR
342
Wardley Australia Ltd v State of Western Australia (Rothwells Loan Case)
(1992) 175 CLR 514
Wenzel v Australian Stock Exchange Ltd (2002) 125 FCR 570

1 **LE MIERE J:** This is the trial of a preliminary issue. The plaintiffs
claim against the defendant damages for breach of contract, damages
under s 79 of the *Fair Trading Act 1987* (WA) ("FTA") and s 82 of the
Trade Practices Act 1974 (Cth) ("TPA") and orders under s 77 of the FTA
and s 87 of the TPA.

2 The preliminary issue is, in essence, the question of the liability of
the defendant to the plaintiffs. Subject to the determination of the
preliminary issue in favour of the plaintiffs, the issue of quantum of
damages is to be tried subsequently.

Introduction

3 The plaintiffs or one of them was the unsuccessful tenderer in a
tender bid for the award by the defendant of a contract to purchase and
develop land in the Subiaco Redevelopment Area. The successful
tenderer was the Blackburne Consortium.

4 The core of the plaintiffs' action is the claim that the defendant by
contract or representation obliged itself to conduct the tender process
leading to the award of the contract fairly and in accordance with defined
criteria. The plaintiffs allege that in a number of respects the defendant
failed to satisfy these obligations. In particular, the plaintiffs allege that
the defendant awarded the contract to a tenderer whose design did not
comply with two items in the Design Guidelines that I will refer to as the
Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline.
The Rokeby Walk guideline is that a pedestrian route should link Station
Square to a car park to the north and should be on the same alignment as
Rokeby Road. The Anchor Tenancy Entrance Guideline is that the entry
to the anchor tenancy must be oriented towards Station Square having its
primary entrance being visually recognisable, and no more than
eight metres from the Square.

5 The plaintiffs claim damages against the defendant for a variety of
breaches of contract and for misleading or deceptive conduct. I will first
refer to the principal parties and persons involved in this controversy and
the events leading up to the award of the contract.

The parties

6 The second plaintiff (Westpoint) is a property developer. Norm
Carey was the managing director and principal of Westpoint. Nick Aitken
was at the material times, the general manager of Westpoint.

7 The first plaintiff (Dockpride) is a company related to Westpoint.
Norm Carey is the sole director and shareholder of Dockpride.

8 The defendant, which I will sometimes refer to as the Authority, is a
body corporate established by the *Subiaco Redevelopment Act 1994* (WA)
("the Act"). The Authority is an agent of the Crown in right of the State,
and except as provided in s 18 of the Act, enjoys the status, immunities
and privileges of the Crown. The Authority consists of five members
appointed by the Minister. The five members collectively were referred
to by witnesses as the Board and I will follow that convention. The
Subiaco Redevelopment Area is an area of approximately 80 hectares
adjoining the Perth to Fremantle railway line through part of Subiaco.
The functions of the Authority are to plan, undertake, promote and
co-ordinate the development and redevelopment of land in the Subiaco
Redevelopment Area, and, for that purpose, to prepare and keep under
review a redevelopment scheme for that area and to control developments
in that area.

9 The Subiaco Redevelopment Scheme ("the Scheme") was published
in November 1996. The Scheme divides the redevelopment area into
seven precincts. Precinct 1 is known as the Station Precinct. The Station
Precinct is itself divided into a number of lots. Of relevance to these
proceedings are lots, 1, 2, 3, 4 and 5 and which together became known as
Station Square. The five lots total 2.3 hectares of land.

10 Dr Cox was the acting chief executive officer of the Authority.
Dr Cox was not a member of the Board.

11 The successful tenderer, which I will refer to as the Blackburne
Consortium, is a joint venture between three companies involved in
property development – Blackburne Properties Ltd, Rockingham Park Pty
Ltd and Stockland Trust Group.

The Station Square Redevelopment tender

12 In August and September 1997 the Authority advertised in
newspapers circulating in the Perth metropolitan area that it proposed the
redevelopment of the Station Square Precinct as a retail precinct. The
advertisements stated that the Subiaco Redevelopment Project would
transfer 80 hectares of dormant industrial land into a vibrant,
cosmopolitan community, and at the centre of the project would be the
Station Square Precinct and the new subterranean Subiaco railway station.
The Authority invited expressions of interest from innovative developers
wishing to purchase part or all of the land surrounding Station Square.

The advertisements referred to five lots totalling 2.3 hectares of land, approval for 10,000 square metres of retail use and potential for an additional 15,000 square metres of commercial/mixed use.

Westpoint invited to lodge expression of interest

13 On 11 August 1997 Chesterton International (WA) Pty Ltd ("Chesterton") as agent for the Authority, wrote to Westpoint concerning the Station Square project. The letter said that a total of 2.3 hectares of land was available for purchase with pre-approvals for up to 10,000 square metres of retail space plus generous plot ratios for additional commercial/residential development and said that Chesterton would be pleased to provide a detailed briefing if Westpoint was interested in purchasing part or all of the land.

14 By that time Westpoint was already aware of the land and development project. Westpoint had approached Oldfield Knott Architects Pty Ltd to carry out preliminary design work for the development proposal. Subsequently, on 10 September 1997, Westpoint and Oldfield Knott executed a letter agreement setting out the terms on which Oldfield Knott would carry out the design work.

15 By letter of 20 August 1997 Chesterton provided Westpoint with a brochure entitled "Introducing an Exclusive New Retail Development Opportunity in Subiaco, Perth. For Sale by Expressions of Interest".

16 At about that time Chesterton provided to Westpoint, at Westpoint's request, an Information Package ("the Information Package").

17 In late 1997 Mr Carey provided Mr Aitken with a copy of the brochure and the Information Package. Mr Carey told Mr Aitken that he wanted Westpoint to tender for the project and Mr Aitken was to co-ordinate Westpoint's tender.

18 The brochure described the method of sale as follows. The land was being put up for sale by expressions of interest, which closed on 15 October 1997. The Authority would then review the proposals and invite a number of prospective purchasers to participate in a limited tender for the land. In the first round parties wishing to express an interest in the site were requested to obtain a due diligence package from the exclusive agents. Prospective purchasers were expected to submit proposed sketch plans and indicate a price range.

The Information Package

19 The Information Package stated that Chesterton had compiled the information in association with the Authority and project consultants, to assist potential purchasers in their deliberation on the landholding. The Information Package invited the recipient to submit an expression of interest to be included in the final limited tender. The package included a note that the document did not create any binding obligation on either party and the vendor was not bound to negotiate with any person who registers an interest. The Information Package stated:

"Design guidelines for development within Station Square have been prepared and will form part of the Authority's development control system. Whilst they are currently in draft form, they will in due course be formally adopted by the Authority.

They are included within this informative [*sic*] package to offer potential developers clear guidance as to the Authority's intentions for Station Square."

20 The Information Package included a disclaimer which stated, amongst other things, that the information contained in the package does not constitute all or any part of an offer or contract of sale and is intended as a guide to potential purchasers only.

21 The Design Guidelines were Appendix 1 to the package. The guidelines stated that they had been prepared to ensure appropriate development within Station Square. They went on to say:

"These guidelines will form the basis of a development agreement between the purchaser of the land, and the [Authority]. Under the terms of the Act the Authority issues development approvals in accordance with the Scheme Text. Building licences will be issued by the City of Subiaco.

These guidelines should be read in conjunction with:

1. Subiaco Redevelopment Scheme text and policies.
2. Building Code of Australia."

22 The guidelines stated that:

"Figure 2, Site Plan indicates site constraints and easements, including the alignment of the Subiaco Railway tunnel and the location of Subiaco Station."

23 Special condition 3.1 of the Guidelines stated:

"The northern portion of Subiaco Station precinct is deemed a highly desirable site for an anchor tenancy approximately 4,000 square metres in size. This anchor tenancy will be ideally placed by virtue of its location on one of the new connections through to Jolimont and Wembley from Subiaco.

An anchor tenant located within the Station precinct will attract shoppers and assist in supporting a range of specialty retail outlets located around the perimeter of the Square.

A pedestrian route that links the Square to a car park to the north of the site is required and should be on the same alignment as Rokeby Road. This pedestrian route shall be open to public access at all times and may be covered.

The anchor tenancy should aim to create a Main Street environment. An enclosed shopping mall is not acceptable.

Any pedestrian route to open parking must be kept open and well lit at all times.

The entry to the anchor tenancy must face Station Square and may not be from its northern building line."

24 Special Condition 3.1.1 entitled "Pedestrian Link" stated:

"The pedestrian link performs a major function in providing pedestrian access to the retail sites from the car park to the north and Station Square to the south. Its preferred location is on an axis line with Rokeby Road and as such its landscape treatment is essential to the precinct's success and character."

25 The pedestrian link was called Rokeby Walk. Figure 2, the Site Plan for the Station precinct, included an area marked and described as "Rokeby Walk" which, in the legend, was designated to be a "required pedestrian access within [the] building envelope".

Correspondence by Dr Cox

26 On 26 August 1997 Dr Cox, wrote to the editor of the Subiaco Post. In referring to expressions of interest to purchase land adjoining Station Square, Dr Cox said:

"Local residents can also be assured that the size of a prospective developer's cheque book will have no bearing on how their submission is regarded by the [Authority]. All expressions of interest submissions must adhere to the development and design guidelines, set out for the retail/commercial precinct. If they don't comply, they won't get asked to tender. It's that simple."

27 On 10 September 1997 Dr Cox wrote to Mr Walker, CEO of the City of Subiaco, referring to expressions of interest in the Station Square Precinct. Dr Cox said that any remaining issues would be resolved prior to the second phase, when formal tenders were called and that tenderers would be provided with all relevant information "to ensure a complying tender". Dr Cox stated that: "Any development will be fully compliant with the Scheme."

Westpoint submits expression of interest

28 On 15 October 1997 Westpoint submitted a written expression of interest. The expression of interest included a sketch plan and development proposal depicting a mixed retail, commercial and residential development on that part of the land known as lot 1. The plaintiffs plead that the sketch plan and development proposal complied with the draft Design Guidelines. The defendant pleads that Westpoint's proposal did not address all of the matters referred to and principles embodied within the draft Design Guidelines.

29 On 15 October 1997 R D Lester, Executive Chairman of Lester Group Ltd, delivered to Chesterton, as agent for the Authority, an expression of interest in participating in the Station Square Precinct Project. In a covering letter Mr Lester stated that the Lester Group acted on behalf of itself and on behalf of Multiplex Constructions and they were likely to join with Blackburne and Co and possibly Stockland Group in the tender. The expression of interest form stated that the persons or companies registering interest were Lester Group Ltd, Blackburne and Co, Stockland Group and Multiplex Construction joint venture.

30 In October 1997 Chesterton delivered its final marketing report to the Authority. The report stated that 16 formal expressions of interest had been received. The majority of expressions were for the development of all lots, however, some of the parties also registered their interest in purchasing only lot 1, or one or more of the other lots. The report assessed the expressions of interest lodged by each party. The report recommended six interested parties to be included in the tender list, including Westpoint and the "Stockland Trust Syndicate".

31 The Authority met on 30 October 1997. At its meeting the Board resolved to endorse the recommended shortlist, that is the six parties, including the Stockland Trust Syndicate and Westpoint, that were to be invited to tender.

Authority representative meets Blackburne representative on 3 November 1997

32 On 3 November 1997, Andrew Howe met with Mr Gavin Cann from Blackburne Real Estate. Mr Howe is a town planner. At the time he was the consultant manager for planning and development reporting to Dr Cox. He was subsequently designated as the contact for tenderers regarding planning issues. Mr Howe's notes record that Mr Cann asked: "Does Rokeby Walk have to be on exactly the same alignment as Rokeby Road and as shown on the Site Plan?" and that Mr Howe replied, "As close as possible. Any variation would need to be substantially justified." The notes also state that Mr Howe referred to a number of matters including the relationship of the supermarket to the Square.

Westpoint invited to tender

33 On 5 November 1997, Chesterton on behalf of the Authority, wrote to Westpoint and invited Westpoint to tender for the purchase of the land. Chesterton said that Westpoint had been included on the tender list of six parties who had been invited to formally tender for the purchase of all lots. Chesterton said that tender documentation was currently being prepared and Chesterton would contact Westpoint with the tender details as soon as possible.

34 On 2 December 1997, Chesterton forwarded to Westpoint "the formal tender documentation" for the project. The covering letter stated that tenders must be lodged by 5 February 1998 and that the tenders would then be assessed by a selection panel who would make a recommendation to the Board of the Authority. The letter stated that the Authority's Board would make a final decision at its February meeting.

The letter stated: "It is important to note that the selection process will be subject to a probity audit by an independent auditor selected from one of Perth's major accounting firms." The letter further stated that any inquiries for any technical and planning advice should be directed through Mr Howe from the Authority.

The tender documents

35 The tender documents sent to Westpoint consisted of a five page document containing an Invitation to Tender, particulars of property to be sold and Conditions of Tender; an 18 page document entitled "Conditions of Sale"; a tender form; a form of deed of guarantee and indemnity and design guidelines, revised edition, dated November 1997.

36 The Invitation to Tender invited tenders for the purchase of the lots on the terms of the Conditions of Sale.

37 The particulars of the property to be sold listed lots 1, 2, 3, 4 and 5 on the Site Plan and stated that the lots were sold free from encumbrances save and except, amongst other things, the covenants and easements specified in conditions 29 and 30. Conditions 29 and 30 are a reference to cl 29 and cl 30 of the Conditions of Sale. Clause 29 provides, amongst other things, that the grant of a ground lease or the issue of freehold title to land above the railway tunnel will be subject to such covenants which the Authority and Westrail deem necessary or desirable for, amongst other purposes, the construction and maintenance of the railway tunnel and buildings over the tunnel and accesses to it. Subclause 30.1 provides that the lots are offered for sale "subject to various easements as illustrated on the Site Plan and in the Design Guidelines". Subclause 30.2 provides that the purchaser acknowledges that the Authority has agreed to sell and transfer the lots to the purchaser subject to the purchaser granting easements for the vehicular and pedestrian access as illustrated on the Site Plan and in the Design Guidelines.

38 The Conditions of Tender define "Tender" to mean a "tender for the purchase of the lots on and subject to the terms and conditions of this Document". "Document" is defined to mean, amongst other things, the Conditions of Tender and the Conditions of Sale. Clause 2 of the Conditions of Tender sets out the formal requirements for the completion of the tender form and accompanying plans and schedules together with the tender fee. The tender fee is defined to mean 1 per cent of the purchase price, that is the amount specified in the tender form submitted by the purchaser as the purchase price of the lots. Clause 3 of the Conditions of Tender provides that the offer made by each tenderer will

remain open until the Acceptance Date, that is, 6 March 1998, and is irrevocable before that time. Subclause 5.1 provides that the tender may only be accepted by the Authority executing the tender form after the Closing Date, that is 5 February 1998, and on or before the Acceptance Date.

39 Clause 6 of the Conditions of Tender is important. I will set it out in full:

"NO OBLIGATION TO ACCEPT

The Vendor is not:

- (a) obliged to accept the highest or any Tender; or
- (b) precluded from accepting a Tender for the Lots which is not in strict conformity with this Document."

40 Clause 7 provides that the tender fee is to be returned to each unsuccessful tenderer after the Acceptance Date after deduction of bank fees, financial institutions duty, federal debits tax and statutory charges.

Conditions of Sale

41 Subclause 1.2 of the Conditions of Sale provides: "The Design Guidelines form part of this Document". Clause 5 of the Conditions of Sale provides that the lots are sold free from encumbrances save and except, amongst other things, the covenants and easements specified in conditions 29 and 30, to which I have already referred.

42 Subclause 15.1 of the Conditions of Sale provides that within 60 days of the Settlement Date the purchaser shall lodge with the Authority (in its capacity as the relevant planning authority) a formal application for approval to develop the lot or lots with such application to include plans and specifications in sufficient detail to obtain approval of such application which shall, in all respects, be in compliance with the Scheme, the Planning, Policies and the Design Guidelines.

43 Subclause 16.1 provides for the purchaser to apply for a building licence. Subclause 16.2 requires, subject to the Authority's prior approval of the Planning Application and the grant of the building licence, the purchaser to proceed with construction of the development on the lots in accordance with the Planning Application within 120 days of the issue of the building licence. Subclause 16.3 requires the purchaser to cause practical completion of the development of the lots within a specified

time. Clause 18 confers upon the Authority an option to repurchase excisable if the purchaser breached condition 16.

Design Guidelines

44 The Site Plan attached to the revised Design Guidelines continued to show Rokeby Walk to the north of the railway station and the centre line of Rokeby Walk being in a straight line with the centre line of Rokeby Road to the south of the railway station.

45 Section 1 of the guidelines is entitled "General Site Information". Paragraph 1.2 (Application) provides that the guidelines should be read in conjunction with the Scheme Text and Policies. I observe that cl 23 of the Scheme gave the Authority a discretion to approve development applications which did not comply with a standard or requirement prescribed by the Scheme or the Planning Policies which would otherwise be applicable.

46 Paragraph 1.5 of the Design Guidelines was amended to specify as an additional site development requirement the Rokeby Walk required pedestrian access. Previously the draft guidelines had referred only to an additional site constraint including required pedestrian access.

47 Paragraph 1.7 entitled "Adjacent Uses", stated that the land to the east of Station Square is owned by the Authority and is planned to incorporate R18 medium density housing. The revised guidelines added: "The design of the Church Street frontage is therefore important and should be sensitively planned and designed".

48 Section 2 of the Design Guidelines are entitled "Station Square Design Guidelines". Paragraph 2.1 states that the buildings and square that comprise the new Station Square must reflect the Subiaco character in terms of its human scale and its high level of mixed uses. Paragraph 2.3 is concerned with "building form". Subparagraph 2.3.3 ("Articulation") provides that building forms should be articulated in a manner which is appropriate to their size and bulk with particular attention being paid to create a pedestrian scale at ground floor level. It is stated: "Large blank walls abutting the Public Domain are not acceptable". The Public Domain includes Church Street.

49 Paragraph 2.4 ("Facades and Frontages") includes subparagraph 2.4.1 which states: "Station Square has been designed to facilitate retail, the anchor tenant on lot 1, commercial and residential development to ensure the efficient use of the Subiaco Station, and to

promote other uses that will contribute to the vibrancy and security of the precinct as a whole". The paragraph states: "Any anchor retail tenancy must have its entrance fronting the Square". Subparagraph 2.4.2 ("Street Frontages") includes the statement that Church Street will become a quiet residential street with predominantly terraced housing fronting the eastern side of the street. Subparagraph 2.4.2 further states that the "development of Station Square bounding Church Street must compliment residential use. Small commercial and residential tenancies are considered appropriate. Development of any major retail anchor tenancy adjacent to or backing onto Church Street must be adequately screened from the street". The revised guidelines added an additional sentence: "Anchor tenancy service areas must not front onto or impact on the residential amenity of Church Street". Subparagraph 2.4.6 states: "Large blank walls abutting the Public Domain are not acceptable". Subparagraph 2.9.2 ("Pedestrian Access") provides that the required locations for pedestrian access routes are as shown on figure 2 – Site Plan. The Site Plan shows Rokeby Walk as a required pedestrian access.

50 Section 3 is entitled "Special Conditions". Paragraph 3.1 is concerned with lot 1. The statement in the earlier guidelines that a pedestrian route that links the Square with a car park to the north of the site is required and should be on the same alignment as Rokeby Road was amended to identify the pedestrian route as Rokeby Walk and to state that the link must, rather than should, be on the same alignment as Rokeby Road. The paragraph goes on to say that the development should aim to create a Main Street environment fronting Rokeby Walk and Station Square. The requirement that the entry to the anchor tenancy must face Station Square was amended in the revised guidelines to state: "The entry to the anchor tenancy must be oriented towards Station Square having its primary entrance being visually recognisable, and no more than 8 metres from the Square. Schemes that do not comply with this requirement will not be accepted".

51 Subparagraph 3.1.1 ("Pedestrian Link") in the revised guidelines continued to state that the pedestrian link, that is Rokeby Walk, preferred location is on an axis line with Rokeby Road. It is stated that the pedestrian link must be designed to, amongst other things, allow for clear views along and across the pedestrian space for security purposes. An illustration on page 36 depicts part of the development as "shopping centre".

Westpoint prepares its tender

52 After it was invited to tender, Westpoint, through its servants and agents, prepared its tender including plans and drawings showing its design for the redevelopment. The plaintiffs submit that the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline had an important consequence in terms of design outcome. If they were complied with, they would, for all practical purposes, mean that the anchor tenant (which would most likely be a supermarket) would be located to the east of Rokeby Walk and that either a blank wall or services area would be located along the western side of Church Street.

53 That contention is denied by the defendant. The defendant submits that the plaintiffs' assertion that "compliance" in relation to Rokeby Walk meant "for all practical purposes" a blank wall or services on Church Street, is contradicted by the evidence, including that of the plaintiffs.

54 It is common ground that a blank wall or services area located along the western side of Church Street was a less than satisfactory design outcome because it was intended that the eastern side of Church Street would have a residential use.

55 Mr Aitken, Mr Oldfield, Mr Strzelecki and Mr Van Den Dries each gave evidence of discussions about the supermarket fronting Station Square and Rokeby Walk being in alignment with Rokeby Road and the effect of those design principles upon the redevelopment design. I accept that those matters were discussed amongst Mr Aitken, Mr Oldfield, Mr Strzelecki and Mr Van Den Dries and indeed by Mr Aitken with Mr Carey and Mr Artelaris, the manager of Westpoint Consulting – that is the architectural arm of Westpoint. I accept that the substance and outcome of those discussions was that Mr Strzelecki and Mr Oldfield considered that if the supermarket was to front the Square and Rokeby Walk was to be in alignment with Rokeby Road then the supermarket would have to be located to the east of Rokeby Walk. I accept that Mr Strzelecki found that locating the supermarket to front onto the Square and placing Rokeby Walk in alignment with Rokeby Road placed constraints upon the design of the redevelopment and Mr Strzelecki would have been able to come up with what he regarded as a better design result if Rokeby Walk had been moved to a different location. I also accept that Mr Strzelecki did not attempt a different design because he was instructed not to do so by Mr Aitken. Mr Aitken instructed the architects not to move Rokeby Walk out of alignment from Rokeby Road because he considered that to do so would be a departure from the Design Guidelines

and would risk the Westpoint tender being rejected, that is, not selected as the winning tender.

56 I accept that positioning the supermarket to front onto the Square and aligning Rokeby Walk with Rokeby Road significantly impacted upon Westpoint's design.

57 I do not accept the plaintiffs' contention that locating the supermarket so that it fronted onto the Square and placing Rokeby Walk in alignment with Rokeby Road forced them to produce a design which included either a blank wall or services facing Church Street. It was possible to include a residential use facing Church Street, even if the supermarket was placed to the east of Rokeby Walk and facing the Square. The Westpoint design included in its expression of interest included a residential component facing Church Street.

Communications between Authority and Blackburne

58 The Blackburne Consortium was also giving consideration to the location of Rokeby Walk.

59 On 3 December 1997, Gavin Cann of Blackburne Properties Ltd wrote to Dr Cox. Mr Cann referred to a meeting on 17 November 1997 and said:

"At that meeting, in response to a specific question, you stated that Rokeby Walk would be located off Station Square in any position that suited the developer's planning scheme. I note, however, that in the Tender Document just received under SPECIAL CONDITIONS (page 35, paragraph 3), and Rokeby Walk 'is required and must be on the same alignment as Rokeby Road.' But under clause 3.1.1 reference is made to a 'preferred location on an axis line with Rokeby Road ...' .

The pedestrian link proposed in paragraph 3 presumes a link to a car park on the north of the site. However, the car park could be below, above or somewhere else. We believe a similar planning outcome and better design can be achieved by locating Rokeby Walk more centrally off the square.

We would appreciate your confirmation that there is flexibility in the location of Rokeby Walk (as it significantly impacts on our preferred plan) and in exercising such flexibility that our proposal will not be adversely judged."

60 On 16 December Dr Cox wrote to Mr Blackburne in reply to Blackburne's letter of 3 December and a further letter of 10 December 1997. Dr Cox said, in relation to Rokeby Walk:

"There are a number of design criteria as to why Rokeby Walk has been located in the position as indicated on Figure 2 of the Guidelines. Access through to a 'carpark' is only one of them. The main reason is to ensure the 'continuation' of Rokeby Road in some form by its extension north of Roberts Road, across the Square and station bridge above the tunnel and continuing on through or into the development on Lot 1. The Authority is therefore committed to this design principle and would not look favourably upon any significant variation to the required alignment (plus or minus 5m). In addition, the architectural plans submitted as part of your Registration of Interest (as prepared by Grounds Kent) include this element in the preferred location. Your team was shortlisted on the basis of these plans and to make a fundamental change on the concept at this stage would be inappropriate."

61 On 16 December 1997 Howard Mitchell, a consultant urban designer and ultimately a member of the Authority's selection panel, wrote to Mr Howe at the Authority. Mr Mitchell referred to their telephone conversation the previous day and stated that Gavin Cann had approached Mr Mitchell to clarify an issue within the brief in regard to "interpretation of the location of Rokeby Walk". Mr Mitchell then referred to the discussion and Mr Howe's facsimile of 16 December 1997 and said it was apparent that an emphasis was being given to Rokeby Walk being seen as an extension to Rokeby Road. Mr Mitchell said:

"I think it is important to note that, in the preparation of the 'Registration of Interest' brief our recommendations were that flexibility was retained in regard to the alignment of Rokeby Walk as it was not as important as achieving frontage access from anchor tenancies to the Square. Also, visually there was no connection across the Square from Rokeby Road. Karen also recalls that the Subiaco Council had great concerns over any extension of Rokeby Road as this was seen to affect the viability of other areas of Subiaco. Your statement made in your facsimile would seem to have changed this view."

The reference to "your facsimile" was a reference to a facsimile Mr Howe had sent to Mr Mitchell earlier on 16 December 1997 and which had set out the responses that were to be provided to Blackburne.

Westpoint representatives meet Authority representatives on 10 December 1997

62 Meanwhile on 10 December 1997, Mr Aitken, Tony Van Den Dries from BSD Consultants and Ian Oldfield and Robert Strzelecki from Oldfield Knott Architects had attended a meeting with Dr Cox and Mr Howe, to receive feedback on Westpoint's expression of interest submission and to understand the tender decision-making and selection process.

63 Mr Aitken's evidence is that during this meeting Dr Cox said words to the effect that the Authority was pleased with the quality of Westpoint's expression of interest, Westpoint had read the signals well and adopted the design guidelines and included a good mix of land uses. Dr Cox said many of the would-be tenderers had not been invited to tender because their expressions of interest did not comply with the design guidelines and in particular those where the supermarket did not front onto Station Square. Mr Aitken said Dr Cox had said that the Authority wished to maximise the financial returns to itself whilst at the same time deliver a good outcome for the community. When asked by Mr Aitken what was meant by a good outcome for the community, Dr Cox referred to the design guidelines. The importance of the alignment of Rokeby Walk with Rokeby Road was also discussed and Dr Cox had stated that the visual extension of Rokeby Road across the Square into Rokeby Walk was important and it could not vary more than a couple of metres either way. Mr Aitken said Dr Cox had said that the tender process would be fair and open. The winning tenderer would be selected by an independent six-member assessment panel. The answers to any generic question relevant to all tenderers would be provided as advice to all tenderers whereas unique questions specific to an individual proposal would be answered only to the proponent and a probity auditor would be appointed to ensure equity and transparency of the selection process. One further thing that was discussed at that meeting was the issue of the distribution of retail space. Mr Aitken's note of the meeting is in evidence.

64 Mr Oldfield, Mr Strzelecki, Mr Van Den Dries, Dr Cox and Mr Howe gave evidence of the matters discussed at that meeting. Mr Strzelecki's note of the meeting is in evidence.

65 The Authority's note of the meeting incorrectly records the meeting to have occurred on 10 November 1997. The note says that Dr Cox confirmed that Westpoint's submission had picked up on the spirit of the guidelines and Subiaco and that Dr Cox had referred to the good mix of land uses proposed. The note says: "Issues to be addressed include pedestrian link from Station to car park to be removed. Westrail will not permit it".

Blackburne representatives meet Authority representatives on 17 December 1997

66 On 17 December 1997 John Blackburne, Gavin Cann and members of Stockland Property Trust met with Dr Cox and Mr Howe. The Authority's notes of the meeting record that Mr Blackburne asked whether or not the plus or minus 5 metres was the absolute limit on the alignment of Rokeby Walk and that Dr Cox confirmed that that was the Authority's preferred position and that options would be looked at when assessing the urban design aspects of the proposal. Mr Blackburne asked if a tenderer could put in a non-compliant bid. Dr Cox confirmed that in the event that the team was successful, the Authority would then discuss design issues which may vary from those in the Guidelines.

Westpoint representatives meet Authority representative on 21 January 1998

67 On 23 December 1997, Chesterton sent a facsimile message to Mr Aitken concerning whether the 7,000 square metre limit on retail use on Lot 1 still applied. Chesterton stated that the Authority originally included the requirement when it was unsure whether or not Lot 1 would be purchased separately as it wished to ensure that the remaining lots included a significant retail component of their own. Chesterton stated that as all of the short listed tenderers were bidding for the whole site, that specific requirement was no longer necessary. However, notwithstanding the relaxation of the 7,000 square metre limit, it was still a high priority of the Authority to ensure the development of active uses at ground level primarily fronting the Square on all sides and, where possible, the surrounding streets.

68 On 21 January 1997, Dr Cox and Mr Howe met with Mr Aitken of Westpoint. Mr Aitken's notes of the meeting include a note: "Scheme and Guidelines allow give and take".

69 Mr Aitken gave evidence that there was a discussion about Westpoint submitting its tender through a related entity. Mr Aitken said

that Dr Cox advised that the selection panel members had been finalised and confirmed that a probity auditor had been appointed.

Blackburne representatives meet Authority representatives on 21 January 1998

70 On 21 January 1997, Dr Cox and Mr Howe met with Mr Blackburne, Gavin Cann and members of the Stockland Property Trust. The Authority's note of the meeting does not refer to anything of significance in this action except that Mr Blackburne was told not to talk to Mr Mitchell regarding the Blackburne tender.

Further correspondence between Authority and tenderers

71 On 29 January 1997, Dr Cox wrote to each of Westpoint and Blackburne Properties Ltd in response to a number of concerns which had been raised regarding the Conditions of Sale.

72 Dr Cox said that the Authority was not an ordinary vendor. The Authority is a statutory body with responsibility for ensuring development of the Subi Centro Project. As such, the Authority must ensure that when disposing of land for development, adequate provisions are included in the Conditions of Sale which will ensure the land is developed in accordance with the winning tenderer's proposal. The letter went on to refer to condition 17 (sale or mortgage of lots) and condition 18 (option to re-purchase).

73 On 30 January 1998, Mr Howe sent a facsimile to Mr Strzelecki of Oldfield Knott and sent a copy to Mr Aitken. The facsimile included a section entitled "Station Square – Design Philosophy" and a section entitled "Station Square – Specific Points". The latter section included the following sentences: "Rokeby Walk will provide the gateway between Tafe Road and Station Square. It is an extension of Rokeby Road as a pedestrian spine through to Salvado Road and Wembley" and "The anchor tenancy opens directly to Station Square, opposite Rokeby Walk, contributing to the vitality of the public domain."

74 On 30 January 1998, Gavin Cann of Blackburne Properties wrote to Mr Howe. Mr Cann said: "Further to our discussion on planning issues would you please confirm that our consortium would not be held to the use and design of buildings shown in our tender bid. With further research, changing markets and the efflux of time there may be alternative uses and designs that are more appropriate. We do, of course, appreciate that any changes would need to comply with the Tender Document

Design Guidelines." Mr Howe replied by letter of 4 February 1998 "to clarify the Authority's position regarding the status of lodged tender plans". Mr Howe said that it was not acceptable to the Authority that the final development application lodged by the successful tenderer would vary greatly from the tendered plans.

75 On 2 February 1998, Dr Cox wrote to Blackburne Properties and said that the Authority had no objection to tenders being lodged by a variation to the original (invited) syndicate but the Authority might seek clarification from the tenderer as to the reason and extent of any changes.

Dockpride submits tender

76 On or about 5 February 1998, Mr Aitken submitted a tender for the purchase of the land. The covering letter is on a Westpoint letterhead. It states:

"We have great pleasure in submitting to you Westpoint Corporation's tender for the Station Square Precinct.

It is submitted under the legal entity of Dockpride Pty Ltd, an entity created specifically for the purpose of carrying out the Station Square Precinct development, supported by deeds of guarantee and indemnity from Westpoint Corporation Pty Ltd and Forestview Nominees Pty Ltd."

The Authority considers tenders

77 The tenders were considered by an assessment panel consisting of Ron Doubikin, the chairman of the Authority; Dr Cox; Mr Walker, the CEO of the City of Subiaco; Graham Iddles, the managing director of Chesterton; Mr Mitchell and Karen Hyde, a town planner contracted by the Authority. The assessment panel met to consider the tenders on 12, 17 and 23 February 1998.

78 At the meeting on 12 February 1998 each member of the panel was asked to review the tenderers' drawings and make their own individual assessments based on a scoring system and a selection matrix. The panel then discussed each item of the selection criteria for each tender and a consensus was reached. The tenderers were then ranked in order from one to six with the Blackburne tender being ranked first and the Dockpride tender being ranked second. The tender documents disclosing the tender price were then opened. Blackburne had tendered a price of \$10.5 million, Dockpride a price of \$12.188 million and the other tenderers lower prices. The panel members decided to eliminate all but

the Blackburne and Dockpride tenders on a combination of price and design considerations. The panel then asked Mr Mitchell to prepare a report on the advantages and disadvantages of the Blackburne and Dockpride tenders on technical merit. The meeting was adjourned to 17 February to assess the two tenders in light of Mr Mitchell's report.

79 The panel reconvened on 17 February. Mr Walker was not present. Mr Mitchell provided a report dated 16 February 1998 which the panel considered. The report set out a comparison of the two tenders. The comparison was based upon what its author described as the key criteria in the design and development briefs issued. The report listed 10 criteria:

- The supermarket relationship to the square;
- The development proposals in relationship to surrounding land uses;
- Vehicular access to Roberts Road;
- Non-vehicular access to the square;
- Development mix;
- Car parking requirement;
- Elevations;
- Plot ratio;
- Station Square vibrancy;
- Development time frame/viability.

80 Prior to the meeting on 17 February, the panel had caused questions to be faxed to each tenderer. Representatives of each tenderer attended the meeting on 17 February and answered the questions. Dr Cox considered that the most critical answer by the Westpoint representatives was a comment by Mr Oldfield to the effect that there would be a requirement to subdivide the large retail and commercial elements proposed in bt 1 into smaller units to create a shopping centre on lot 1. Dr Cox recalled that Mr Oldfield described Rokeby Walk through lot 1 as a typical shopping mall or words to that effect.

81 After the representatives of Dockpride and Blackburne had left the panel further discussed the two tenders. Dr Cox recalled that the majority of panel members expressed concern at Mr Oldfield's comments about a shopping centre or shopping mall and saw that as being a significant departure from the vision and draft design guideline requirement for the focus to be on a vibrant Subiaco Square and this would detract from that.

At the conclusion of the meeting the panel members decided to seek independent advice on the impact on adjacent land of the blank wall development along Church Street proposed by Dockpride as compared to a quality residential development.

82 The advice was sought by a facsimile dated 18 February 1998 from the Authority to Time Conti Sheffield and to Chesterton. Time Conti Sheffield responded by letter of 22 February 1998. Time Conti Sheffield concluded that the blank wall would have a detrimental impact of between \$25,000 to \$30,000 per single residential development and between \$15,000 to \$20,000 land content per unit. Time Conti Sheffield also opined that the negative effect of the blank wall could be reduced to some extent by redesign, for example providing a landscaped setback area alongside and in front of the wall and/or terracing the wall at each end of the three levels. Chesterton responded by a letter of 23 February 1998. Chesterton concluded that one would expect lots immediately opposite a blank wall development to be less desirable than lots nearby which have a slightly better outlook but the evidence in East Perth would not support a significant discount.

83 The assessment panel met again on 23 February 1998. The panel members undertook a comparative analysis of the Dockpride and Blackburne tenders. It was the unanimous view of the panel that the Blackburne tender was the best. Dr Cox said that the key issues were that the Blackburne proposal provided for a better overall development mix of the Station Square precinct that integrated and blended with existing Subiaco, a complementary extension of Rokeby Road and a more appropriate development along Church Street. The panel unanimously recommended that the Blackburne tender be accepted.

The Authority selects the Blackburne tender

84 The Authority's Board considered the panel's recommendation at a meeting on 26 February 1998. The minutes of that meeting record that a report summarising the tender and tender assessment processes, tender results and the panel's recommendation was presented to the Board for consideration. Mr Doubikin, as chairman of the tender assessment panel, briefed the Board on the major issues considered by the panel and the reasons for their choice of the recommended tenderer. After discussion it was the Board's view that the bid submitted by Blackburne was technically superior to the Dockpride bid. The proposal from Blackburne would significantly contribute to the achievement of the Subi Centro Vision and the price differential of \$1.45 million (based on net present

value) was compensated for by a better urban design and functional outcome. The Board noted that the tender submission from Dockpride varied significantly from its original expression of interest proposal because it did not include residential development on lot 1. The previously proposed land use mix was more in line with the Subi Centro vision. The Board resolved to accept the Blackburne tender subject to approval from the Minister for Planning. The Minister subsequently approved the acceptance of the Blackburne tender.

85 On or about 19 March 1998 the Authority executed the contract document accepting Blackburne's tender.

86 On 19 March the Authority sent written notice to each of the tenderers of the result of the tender. Meanwhile, on the afternoon of 19 March 1998, Mr Aitken had heard a rumour from a Westpoint employee that Westpoint had been unsuccessful in the tender. Mr Aitken telephoned Dr Cox. Dr Cox's file note says that Mr Aitken stated that he was disappointed not to win the tender and expressed surprise. Mr Aitken asked if the winning tender was higher or lower than Westpoint's bid and was told that the winning bid was about \$1.45 million net present value lower. Mr Aitken asked for feedback on the reasons for the trade-off. Dr Cox said that the key issues were land use and interface with Station Street residential. In his evidence Dr Cox explained that Station Street was a mistaken reference to Church Street. The note says that Mr Aitken asked why those issues had not been raised during the interview and Dr Cox responded that the interview was to clarify issues raised in the assessment, that is to obtain more information rather than to critique or negotiate. Dr Cox offered a formal briefing with Mr Mitchell present and that was tentatively arranged for the following Monday. Mr Aitken's note of the meeting noted that the Dockpride tender was acceptable but not as good as the winning tender, it was not a case of being non-compliant. Mr Aitken's note also referred to the following elements of the Dockpride proposal:

- Frontage to Church Street;
- Impact on residential;
- Land values;
- Integration of design.

The note refers to the overall balance of uses, retail and substantial residential on lot 1 and says "combination of uses better complimented vision".

87 On 24 March 1998 Mr Aitken wrote to Dr Cox, describing himself as general manager of Westpoint. Mr Aitken said that "we" understand the decision to reject our tender in favour of a lower tender rests upon the view that the successful tenderer's design concept is superior to ours and we were informed that the Authority prefers an urban/residential mix development on lot 1 rather than the commercial development upon which our tender is based. Mr Aitken complained that "we" were never informed that the Authority had a preference for a particular type of development, and we were given no opportunity to tender on that basis. Mr Aitken said that "we" are taking legal advice on the Authority's ability to reject our highest tender on a basis that was not disclosed to us and for which we could have catered in our tender had we known all the facts.

The debriefing meeting

88 On 24 March 1998 Messrs Carey, Aitken, Oldfield, Hocking and Strzelecki on behalf of Westpoint and Dockpride, met with Dr Cox and Mr Mitchell on behalf of the Authority. The Authority's file note records that Dr Cox summarised the selection process and then referred to specific issues. The first issue is described as "interface with Station Street". That is an erroneous reference to Church Street. The note records that Dr Cox read out the guideline requirement and indicated that the blank wall service area did not provide the same attraction as a residential frontage in view of the medium density residential proposed on the eastern side of the development. That was reinforced by Mr Mitchell. The second specific issue was recorded as "interaction with Square". Dr Cox advised that the design for lot 1 provided concern for potential to have internal mall focus as opposed to the alternative bid which provided retail closer to the Square. Mr Aitken asked why those issues had not been raised with Westpoint prior to the finalisation of the tenders and Dr Cox responded that the tender process was to clarify not to negotiate an outcome. There was reference to an assertion by Mr Carey that the Westpoint bid was induced by Chesterton's statement that it would be on the basis that the highest bid wins as long as the submission was compliant. Dr Cox's note records that Mr Aitken asked whether the selection panel was aware that Rokeby Walk was offset to Rokeby Road and whether they would have come to the same decision if they were aware of the guideline requirements. Dr Cox responded that the panel was aware of the requirements and considered the submission offered an appropriate design solution.

The plaintiffs' pleaded case in contract

89 The plaintiffs claim damages for breach of contract.

90 The plaintiffs plead that it was an express or alternatively a term implied by necessary implication on the true construction of the Tender Document (and incorporated Conditions of Sale and Design Guidelines), that the plans submitted to the Authority with any tender submitted pursuant to the Invitation to Tender must show a design of the redevelopment which complied with two specified requirements of the Design Guidelines.

91 The first requirement is that the pedestrian route described as Rokeby Walk which was to link the proposed Station Square to a car park to the north of the land, must be on the same alignment as Rokeby Road ("the Rokeby Walk Guideline"). The second requirement is that the proposed building to house the anchor tenancy on lot 1 must be orientated towards Station Square, having its principal entrance visually recognisable and no more than eight metres from the proposed Station Square ("the Anchor Tenancy Entrance Guideline").

92 The defendant denied that there was such an express or implied term of the Tender Document. The defendant says that such a term would contradict or be inconsistent with documents comprising the Tender Document and that on their proper construction none of those documents required designs to comply with any of the Scheme, the Planning Policies or the Design Guidelines. The defendant says that such a term would contradict cl6 of the Conditions of Tender which reserved to the Authority the right to accept a tender not in strict conformity with the Tender Document (including, amongst other things, the Design Guidelines or the Conditions of Sale).

93 The plaintiffs plead that on or about 10 December 1997, the Authority by its servant, Dr Cox, represented orally to Westpoint by Mr Aitken that the Westpoint sketch plan and development proposal contained in its expression of interest complied with the Design Guidelines, and further that many would-be tenderers had not been invited to tender because their expressions of interest did not comply with the design guidelines; and that the Authority wished to maximise the financial returns to itself from the tender process and also wished to achieve a good outcome for the community, and further that if the design for the redevelopment complied with the Design Guidelines, that would achieve such a good outcome for the community. The plaintiffs plead that by necessary implication those express representations gave rise to the further representation that the Authority would only consider tenders which complied with, and would not accept tenders which did not comply with, the Design Guidelines in the respects referred to. These are referred

to by the plaintiffs as the Oral Representations. They are denied by the defendant.

94 The plaintiffs plead that from or about November 1997 to January 1998 Westpoint prepared a detailed design for the proposed redevelopment for incorporation in a tender for the land ("Westpoint's design"). Westpoint's design is said to have complied with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. The defendant denies that either of the plaintiffs prepared or submitted as part of a tender a detailed design that complied with the Design Guidelines in the respects referred to.

95 The plaintiffs plead that at all material times, Westpoint intended, as the Authority knew, or it was within the contemplation of Westpoint and the Authority, that Westpoint's tender should be submitted by a related company and if it were, that Westpoint would provide a guarantee of the obligations thereof, in or to the effect of the form of the guarantee contained in the Tender Document. That is denied by the defendant which says that at no time did Westpoint communicate the alleged or any intention that its tender would be submitted by a related company.

96 The plaintiffs plead that on or about 5 February 1998, Westpoint and/or Dockpride submitted Dockpride's tender for the land and incorporated within it Westpoint's design and a guarantee by Westpoint in or to the effect of the former guarantee contained in the Tender Document in respect of Dockpride ("the Westpoint guarantee") together with a further such guarantee by one of its associated companies, Forestview Nominees Pty Ltd.

97 The plaintiffs plead that by reason of the matters referred to thus far, the Authority, Westpoint and/or Dockpride, entered into an implied contract, the terms of which were that in consideration of Westpoint and/or Dockpride preparing and submitting a tender and/or Westpoint providing the Westpoint guarantee, the Authority would do certain things and conduct itself in certain ways. The plaintiff referred to this alleged implied contract as a process contract. That is the terminology used by Finn J in *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, to describe a preliminary contract between the organisation seeking tenders and any tenderer who puts in a complying tender.

98 The terms of the process contract are pleaded in par 14 of the statement of claim as follows:

"14.1 the Authority would only consider with a view to accepting, and accept, a tender containing plans for a design for the redevelopment, which complied with the [the Rokeby Walk Guideline and the anchor tenancy entrance requirement].

14.1A The Authority would act fairly at all times in its dealings with each of the persons or companies or groups which it had invited to tender (collectively the Invitees) prior to selecting a tender for acceptance;

14.1B The Authority would not communicate to any of the Invitees material information as to any matters which a tender should or could address or omit unless it communicated that information to all the other Invitees;

14.1C the Authority would deal with each of the Invitees fairly and in good faith;

14.1D the Authority would accept for consideration a tender submitted by a company associated with an Invitee provided that the form of guarantee required in the Tender Document was also given by the Invitee concerned;

14.1E save as provided in 14.1B the Authority would not accept a tender which did not comply with a mandatory and/or material requirement in the Design Guidelines including, inter alia, the Rokeby Walk Guideline and the anchor tenancy entrance requirement.

14.1F the Authority and each respective Invitee would do all things necessary or reasonably necessary on its part to be done to give the other the benefit of the tender process contract;

14.2 that the Authority would act fairly in considering competing tenders and, if the Authority decided (inter alia) that it would permit other tenderers to submit tenders containing plans for a design which did not comply with the Rokeby Walk Guideline and the anchor tenancy entrance requirement it would inform each tenderer (including Dockpride) of that fact, and give each

tenderer the opportunity to modify its design and plans comprised, or to be comprised, in its tender;

14.3 the Authority would accept the tender which:-

14.3.1 contained plans for the redevelopment which complied with the Rokeby Walk Guideline and the anchor tenancy entrance requirement;

14.3.2 offer the highest price;

14.4 The Authority would not accept a tender which did not offer the highest price in preference to a tender which:-

14.4.1 contained plans for the redevelopment which complied with the Rokeby Walk Guideline and the anchor tenancy entrance requirement.

14.4.2 offered a higher price.

14.5 the Authority would not, merely on the basis of a subjective preference for another design, fail to accept a tender which offered the highest price and which complied with the Rokeby Walk Guideline and the anchor tenancy entrance requirement;

14.6 the Authority would assess competing tenders by reference to the criteria contained in the Design Guidelines in each of the Rokeby Walk Guideline and the anchor tenancy entrance requirement."

99 The defendant denies that the parties entered into a contract, whether implied or otherwise. The defendant says that its Invitation to Tender was an invitation to treat. The defendant further says that the purported Dockpride tender was an offer to the Authority to purchase the land. The defendant further says that cl6 of the Invitation to Tender was inconsistent with, and mitigated against, the implication of a tender process contract between tenderers and the Authority.

100 The defendant further pleads that if there was any implied contract entered into then the contract was between the Authority and Westpoint, but Westpoint did not submit a tender and consequently there was no breach of any contract with Westpoint.

101 The plaintiffs plead that on or about 19 March 1998, without informing Westpoint or Dockpride that it would consider and accept plans of the proposed redevelopment (submitted with tenders) that did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline, the Authority accepted a tender from the Blackburne Consortium containing plans of a redevelopment which did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline and which was a tender at a lower price than Dockpride's tender.

102 The defendant admits that it did not inform Westpoint or Dockpride that it would consider and accept plans for the proposed redevelopment that did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline but says it had no obligation to do so.

103 The defendant admits that on or about 26 February 1998 it decided to consider and accept the Blackburne tender and admits that the Blackburne tender was at a lower price than the purported Dockpride tender. The defendant pleads that the Blackburne tender did not materially depart from the matters referred to and the principles embodied in the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. The defendant further says that the Blackburne tender was the tender which best addressed or complied with the matters referred to, and principles embodied in, the Design Guidelines, including the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline and the Scheme, Residential Design Manual and Planning Policies. The defendant pleads that it decided to accept the Blackburne tender after its assessment panel conducted a formal assessment of the tenders and determined that the Blackburne tender best addressed the defendant's overall requirements for Station Square as expressed in the Design Guidelines, Scheme, Residential Design Manual and Planning Policies.

104 The plaintiffs plead that in accepting the Blackburne tender, the Authority acted in breach of one or more of the terms pleaded by the plaintiffs to be express or implied terms of the Tender Document and each or one or more of the terms of the implied or process contract. The conduct of the Authority said to constitute those breaches of contract are said to breach those contracts in three ways. First, the plaintiffs say that the Authority decided to consider and accept the Blackburne tender which contained plans of a redevelopment which did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline and which was a lower price than Dockpride's tender. Secondly, the plaintiffs say that the Authority did not act fairly and in good faith in its dealings

with Westpoint and/or Dockpride prior to selecting the Blackburne tender when that tender did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. Thirdly, the plaintiffs say that the Authority had communicated material information in relation to the alignment of Rokeby Walk to the Blackburne Consortium without communicating that information to Westpoint or Dockpride, namely that while the alignment of Rokeby Walk and Rokeby Road in the Rokeby Walk Guideline was the Authority's preferred position, tenders which did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline would be considered.

105 The plaintiffs plead that the Authority accepted the Blackburne tender notwithstanding that it did not comply with one or more mandatory and/or material requirements constituted by the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline and failed to accept Dockpride's tender on the basis that the Blackburne tender offered, by subjective assessment, a preferable design notwithstanding that the latter was for a lesser price than Dockpride's tender and did not comply with one or more of the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. Those matters are denied by the defendant.

106 The defendant pleads that if there was an implied contract between the defendant and the plaintiffs or either of them then such a contract would have required the Authority to address the extent to which tenders addressed, or alternatively, complied with, the matters referred to, and the principles embodied in the Scheme, Design Guidelines, Planning Policies and Residential Design Manual. Further, the purported Dockpride tender, objectively assessed against the matters and principles referred to, failed to address or alternatively comply with, those matters and principles or, alternatively, failed to address or comply with those matters or principles to a significantly greater extent than the Blackburne tender. The defendant says that by reason of those matters the defendant could not, consistently with any implied contract, have accepted the purported Dockpride tender, or alternatively, have selected it in preference to the Blackburne tender, and did not act in breach of contract in awarding the tender to Blackburne.

107 The plaintiffs plead that Westpoint and/or Dockpride have suffered loss and damage by reason of the asserted breaches of contract. Particulars of loss and damage are that had Dockpride's tender been accepted, Dockpride would have purchased the land and carried out the project at a net profit in the order of \$23.85 million. Alternatively, Dockpride had the opportunity of winning the tender or submitting a

design which did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline.

The tender process contract issue

108 The plaintiffs plead that Westpoint prepared, and Westpoint and/or Dockpride submitted, Dockpride's tender for the land and incorporated within it Westpoint's design and a guarantee by Westpoint. The plaintiffs plead that by Westpoint and Dockpride preparing and submitting the tender, and by the Authority, Westpoint and Dockpride engaging in conduct prior to the submission of the tender, the Authority, Westpoint and/or Dockpride entered an implied contract, the terms of which I have referred to earlier.

109 The existence of a pre-award or process contract in tenders is not automatic. Whether or not a process contract exists depends on the intention of the parties: *Cubic Transportation Systems Inc v State of New South Wales* [2002] NSWSC 656 at [31] – [44] per Adams J; *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313 at [77] – [78]. In an appropriate case a bilateral contract is formed with each tenderer who submits a complying tender. The contents of this bilateral contract depend on the intentions of the parties. The terms, express or implied, of the request for tender will be an important factor in determining the intention of the parties.

Identity of the tenderer

110 The plaintiffs plead that Westpoint and/or Dockpride submitted Dockpride's tender for the land.

111 Westpoint prepared the tender. The tender was submitted under cover of a letter on a Westpoint letterhead. It was signed by Mr Aitken who described himself as general manager of Westpoint. The letter commenced by saying: "We have great pleasure in submitting to you Westpoint Corporation's tender for the Station Square precinct".

112 Notwithstanding those matters, the tender was submitted by Dockpride not Westpoint. Mr Aitken's letter went on to say that the tender "is submitted under the legal entity of Dockpride Pty Ltd, an entity created specifically for the purpose of carrying out the Station Square precinct development". The Invitation to Tender issued by the Authority stated that each tenderer must complete two copies of the tender form by inserting, amongst other things, the name, address and ACN of the tenderer. The tender form stated that the tenderer was Dockpride as

trustee for the Dockpride Unit Trust. Dockpride's ACN was inserted and the document was executed by the application of Dockpride's common seal.

113 The defendant Authority submitted that there was no process contract because, amongst other reasons, the Invitation to Tender was issued to Westpoint and the tender was submitted by Dockpride. If the Invitation to Tender comprised the offer to enter into a process contract, it was submitted, that offer was made to Westpoint, which Westpoint, by failing to lodge a tender, declined to accept. It was not open to Dockpride to accept the offer because the Invitation to Tender was made to Westpoint.

114 The plaintiffs plead that at all material times Westpoint intended, as the Authority knew, or it was within the contemplation of Westpoint and the Authority, that Westpoint's tender should be submitted by a related company and if it were, that Westpoint would provide a guarantee of the obligations thereof.

115 On 21 January 1998 Dr Cox and Mr Howe of the Authority met with Mr Aitken of Westpoint. Mr Aitken's evidence is that at this meeting he informed Dr Cox that Westpoint was considering submitting its tender through a related entity which would be a company specifically incorporated to submit the tender and carry out the development if the tender was successful. Mr Aitken's evidence is that Dr Cox responded, in effect, that through his experience at East Perth as Chief Executive Officer of the East Perth Redevelopment Authority he understood that developers established entities for particular projects and this would not affect Westpoint's tender provided that the tender was supported by appropriate guarantees. Dr Cox's evidence is that there was a discussion in which Mr Aitken said that at some stage after the submission Westpoint may be interested in assigning the contract to another party and he, Dr Cox, responded that in that event the Authority would be favourably disposed to it because he had had prior experience at East Perth with the same sort of issue.

116 Mr Aitken produced his note of the meeting. Mr Aitken's note made no reference to the tender being submitted through a related entity. The note includes the following: "s.25 never a problem at East Perth, will insist on same obligations, wouldn't be disposed of new entity be a range of entities". "S.25" appears to be a reference to cl 25 of the Conditions of Sale. That clause provides "that no party may assign or transfer any of its rights or obligations under the Document without the prior consent in

writing of the other party". That supports Dr Cox's evidence. Mr Howe's note of the meeting includes: "Clause 25 – Assignment after purchase. SRA ok with this provided new entity is prepared to accept all conditions of contract". That too supports Dr Cox's evidence.

117 In cross-examination it was put to Mr Aitken that until the day or the day before the tender was submitted no thought had been given to the tender coming from another entity. Mr Aitken said he disagreed because he got advice from solicitors. In re-examination Mr Aitken said that the advice that he received that made it so clear in his mind about the conversation he had with Dr Cox was that if "we" were to assign the rights under the tender after winning the tender and a contract had effectively been entered into for the purchase of the land, we may be up for stamp duty on the further assignment. It was subsequently agreed that the legal advice was not obtained any earlier than 4 February 1998.

118 In closing submissions, counsel for the plaintiffs submitted that bearing in mind that a further meeting or conversation occurred between Mr Aitken and Dr Cox on 4 February 1998, it is possible that Mr Aitken has his dates wrong and the issue was discussed at the later meeting rather than the meeting of 21 January 1998. Mr Aitken's note of his conversation with Dr Cox on 4 February 1998 contains no reference to Westpoint submitting its tender through a related entity. Mr Aitken did not say in evidence that he had discussed the issue with Dr Cox on 4 February 1998. In cross-examination it was put to Dr Cox that it was possible that in his phone conversation or meeting with Mr Aitken on 4 February 1998 Mr Aitken may have raised the issue as to whether or not a related company could have put in the bid rather than Westpoint. Dr Cox said he had no recollection of that question being asked of him.

119 I find that Mr Aitken did not inform Dr Cox that Westpoint was considering submitting its tender through a related entity and Dr Cox did not say to Mr Aitken that that would not affect Westpoint's tender provided that it was supported by appropriate guarantees. The file notes of Mr Aitken and Mr Howe of the 21 January 1998 meeting are inconsistent with Mr Aitken's evidence and support the evidence of Dr Cox that what was discussed on 21 January 1998 was assignment of the contract after award. The fact that Mr Aitken obtained legal advice about double stamp duty being payable if the contract was assigned to another entity after it had been awarded to Westpoint does not support the plaintiffs' case. The obtaining of that advice is consistent with Mr Aitken and Westpoint deciding that Dockpride should submit the tender but it does not follow that Mr Aitken raised the matter with Dr Cox. The fact

that the legal advice was obtained no earlier than 4 February does not support Mr Aitken's evidence that the matter was discussed on 21 January. The submission that Mr Aitken got his dates wrong and that the issue was discussed by Mr Aitken and Dr Cox on 4 February 1998 is not supported by any evidence. Furthermore, there is no reference to the issue in Mr Aitken's note of his conversation with Dr Cox on 4 February 1998. I would expect Mr Aitken to have made some note of the matter if it had been discussed on that day.

Existence of a process contract

120 The Invitation to Tender was issued to Westpoint. Westpoint did not submit a tender. No process contract was made between the Authority and Westpoint. Westpoint guaranteed Dockpride's performance of the contract, if it was awarded to Dockpride but that does not give rise to a contract between Westpoint or the Authority of the sort pleaded.

121 No Invitation to Tender was issued to Dockpride. Therefore, the submission by Dockpride of its tender did not constitute the acceptance of an offer by the Authority constituted by its Invitation to Tender. However, the subsequent conduct of the Authority may be construed as an acceptance by the Authority of an offer by Dockpride. Alternatively, a contract may be made without the formalities of offer and acceptance. A contract may be inferred from the acts and conduct of parties: *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 per McHugh JA.

122 Dockpride and the Authority conducted themselves on the basis that there was a contract between Dockpride and the Authority. Dockpride submitted its tender together with a bank cheque in favour of the Authority's agent for the tender fee of \$121,880, being one per cent of the tendered purchase price, in accordance with the terms of the Authority's Invitation to Tender. The Authority accepted, in the sense of receiving, Dockpride's tender. The Authority accepted and banked the bank cheque tendered by Dockpride. The Authority proceeded to consider Dockpride's tender and to hold meetings and communicate with Dockpride, or its representatives, in relation to Dockpride's tender.

123 On 27 February 1998, Chesterton wrote to Mr Aitken and stated that the Authority would require further time to consider all of the tenders received. Chesterton said:

"We therefore seek your agreement to extending the Acceptance Date (as defined in the Conditions of Tender) for a further

14 days until Friday 20 March 1988. Could you please signify your agreement to extend the Acceptance Date until Friday 20 March 1998 by return facsimile."

124 The Invitation to Tender provided that the tender may only be accepted by the Authority executing the tender form on or before the Acceptance Date. The conduct of the Authority in seeking the agreement of Dockpride to an extension of the Acceptance Date is a recognition that in the absence of Dockpride's agreement the Authority would not be able to accept Dockpride's tender after the Acceptance Date so as to give rise to a binding contract and impliedly that in the absence of an agreed extension of time, it was open to the Authority to accept Dockpride's tender at any time before the Acceptance Date.

125 The defendant submits that no process contract should be implied because there is no evidence of any intention to contract, and the pleaded contract terms would be entirely inconsistent with the evidence of what the defendant said to Westpoint at meetings, in correspondence and in the tendered documents, particularly cl 6 of the Conditions of Tender.

126 The defendant submitted that there was no evidence from any witness that anyone on behalf of the defendant, Westpoint or Dockpride intended to contract with each other as regards process, or proceeded on that basis. However, the question of contractual intent is to be determined objectively not subjectively.

127 It is to be inferred from the terms of the tender documents and the conduct of the Authority and Dockpride that they intended to enter into a process or preliminary contract. The tender form contains an offer by Dockpride to purchase the lots subject to the Conditions of Sale for the purchase price of \$12,188,000. Dockpride agreed to pay a deposit of \$1,096,920 within five business days of the Contract Date, that is the date on which the Authority executes the form of tender so as to accept the tender. Furthermore, the conduct of the Authority, particularly the letter of its agent, Chesterton, of 27 February 1998 seeking the agreement of Dockpride for an extension of the Acceptance Date, is an acknowledgement that the parties were in a contractual relationship.

128 Each of the tenderers had expended substantial time and resources in preparing and submitting its tender. To conclude that Dockpride and the Authority had no intention to enter into contractual relations does not recognise the commercial realities of the Station Square tender process. Such an approach does not accord with the legitimate expectations of the

Authority and Dockpride. As Bingham LJ said in *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 at 1201 there would be "an unacceptable discrepancy between the law of contract and the confident expectations of commercial parties" if that approach were adopted.

129 The defendant submits that cl 6 of the Conditions of Tender is inconsistent with a process contract being intended. Clause 6 provides that the Authority is not obliged to accept the highest or any tender or precluded from accepting a tender which is not in strict conformity with the tender document.

130 Clauses of the kind being discussed are referred to by N C Seddon in "Government Contract", 3rd ed, as privilege or disclaimer clauses. Seddon writes (at p 301):

"There has been a tendency to read such clauses, which provide that the lowest or any tenderer will not necessarily be accepted, against the government party (contra proferentem) so that their protective effect is minimised. ... The clause does not provide protection if a contract *is* awarded in breach of one of the express or implied obligations of the pre-award contract (see *M J B Enterprises Ltd v Defence Construction* (1951) Ltd [1999] 1 SCR 619, *Martel Building Ltd v Canada* [2000] 2 SCR 860 at [89]."

131 At 278 Seddon writes:

"Nor does the inclusion of a clause that states that the government is not obliged to award the contract to the lowest or any tender indicate a lack of intention to contract. There are plenty of cases that have held that this clause does not in any way excuse a breach of the process contract."

132 I find that there was a process contract between the Authority and Dockpride.

Terms of process contract

133 It is now necessary to consider the terms of that contract.

134 The terms of the tender documents are an important factor in determining the intention of the parties and the terms of their contract.

Implied term that Authority would not accept tender not complying with specified guidelines

135 The first implied term pleaded by the plaintiffs is that the Authority would only consider, with a view to accepting, and accept, a tender containing plans for a design for the redevelopment, which complied with the Rokeby Walk guideline and the Anchor Tenancy Entrance Guideline. Other implied terms pleaded by the plaintiffs are concerned with the notion of compliance with standards, principles, requirements or features in the Design Guidelines. The plaintiffs allege that an implied term is that the Authority would not accept a tender which did not comply with a mandatory and/or material requirement in the Design Guidelines including, amongst others, the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. Another alleged implied term is that the Authority would act fairly in considering competing tenders and, if the Authority decided that it would permit other tenderers to submit tenders containing plans for a design which did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrancement Guideline it would inform each tenderer of that fact, and give each tenderer the opportunity to modify its design and plans comprised, or to be comprised, in its tender. The plaintiffs also allege an implied term that the Authority would accept the tender which contained plans for the redevelopment which complied with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline and offered the highest price.

136 The plaintiffs submit, in effect, that it was an implied term of the process contract that the Authority would only consider, or accept, a tender containing plans which complied with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. Each of those alleged implied terms requires some consideration of the notion of compliance with the Design Guidelines in the context of this tender process.

137 The Invitation to Tender sets out a number of things which must be contained in a tender and a number of things which a tenderer must do as well as provisions dealing with acceptance of the tender and other matters. The Invitation to Tender does not refer to the Design Guidelines. However, the Invitation to Tender invites tenders for the purchase of the lots on the terms of the Conditions of Sale. The Conditions of Sale state that the Design Guidelines form part of "this Document". The Design Guidelines are annexed to the Conditions of Sale. The only other express references to the Design Guidelines in the Conditions of Sale are as follows. The "no representations" clause provides that the purchaser shall be taken to have satisfied itself, amongst other things, with the terms and

conditions of the Design Guidelines. Clause 15 provides that within 60 days of the settlement date the purchaser shall lodge with the vendor a formal application for approval to develop the lot and the application shall in all respects be in compliance with the Subiaco Redevelopment Scheme, the Planning Policies and the Design Guidelines. Those provisions do not support the plaintiffs' case.

138 The Design Guidelines state that the guidelines had been prepared to ensure appropriate development within Station Square and that the guidelines will form the basis of a development agreement between the purchaser of the land and the Authority. The form, structure and language of the Design Guidelines are not consistent with being terms of a contract. For example, it is stated in the introduction section of the Design Guidelines that the design of the roads and parking within the Square is conceptual at that time with further detailed design development to be undertaken prior to settlement on the lots. In par 1.12 of the Design Guidelines it is stated that the use of artists as part of the design team for new development is strongly encouraged. Subparagraph 2.4.1 includes a statement that ground floor tenancies other than the anchor retail tenancy are encouraged to incorporate entrances to external street frontages. Paragraph 3.1 states that a pedestrian route (Rokeby Walk) that links the Square to a car park on the north of the site is required and must be on the same alignment as Rokeby Road. However, that is different from subparagraph 3.1.1, which states that the preferred location of the pedestrian access is on an axis line with Rokeby Road.

139 Having regard to the form, structure and contents of the Design Guidelines and the other contents of the tender documents I conclude that the Design Guidelines are a guide to what the Authority considers to be appropriate development within Station Square and against which the Authority will assess tenders. The Design Guidelines are not, and do not contain, a series of mandatory or prescriptive requirements compliance with which is a pre-condition to the tender being considered or accepted by the Authority. It is to be inferred from the form, structure and contents of the Design Guidelines and the other tender documents that the Design Guidelines leave the Authority a significant margin of discretion to determine what in its opinion constitutes acceptable variances from the standards, principles or requirements stated in the Design Guidelines.

140 In *Hughes (supra)*, Finn J found that there was a process contract governing the conduct of the tender before the award and that there had been breaches of that contract, the principal breach being that the CAA had failed to evaluate the tenders in accordance with the priorities and

methodology prescribed in the request for tender. The plaintiffs' case is that a term is to be implied into the process contract which requires the Authority to select the winning tender by a process which requires strict adherence to the terms of the Design Guidelines and leaves the Authority with a limited discretion to select among designs responding to the Design Guidelines the one which, all things considered, is considered by the Authority to be the preferable design and tender bid.

141 There is no express term to the effect argued for by the plaintiffs. Nowhere in any of the tender documents does it say that the Authority will only consider or accept a tender containing a design that complies with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline. The plaintiffs' case depends upon a term to that effect being implied.

142 The Information Package stated that the Design Guidelines were included to offer potential developers clear guidance as to the Authority's intentions for Station Square. The Design Guidelines themselves stated that they would form the basis of a development agreement between the purchaser of the land and the Authority. Having regard to those matters and the form, structure and contents of the tender documents, a term might be implied into the process contract between the Authority and Dockpride to the effect that in evaluating the competing tenders the Authority would evaluate the design of the tenderer against the Design Guidelines, that is the manner and extent to which the design responded to the standards, principles, requirements and features of the Design Guidelines taken as a whole.

143 If such a term is to be implied then the obligation upon the Authority is for it to carry out its evaluation in that way. In determining whether the Authority has breached such an implied term it is not for this Court itself to step into the shoes of the Authority and decide for itself the manner and extent to which the competing tender designs respond to the standards, principles, requirements or features of the Design Guidelines. Rather, the task for the Court is to determine whether or not the Authority failed to perform the task it had undertaken to do.

144 An assertion that all of the standards, principles, requirements or features of the Design Guidelines are mandatory requirements that must be absolutely observed is inconsistent with cl6 of the Conditions of Tender. That clause expressly provides that the Authority is not precluded from accepting a tender which "is not in strict conformity with this Document".

145 The plaintiffs argue, in effect, that the language of the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline makes them different from other standards, principles, requirements or features of the Design Guidelines. I accept that in determining whether the Authority evaluated the tender designs in the manner it undertook to do the Court must have regard to the language of the particular standards, principles, requirements or features of the Design Guidelines.

146 The plaintiffs submit, in effect, that cl 6, upon its proper construction, permits the Authority to accept a tender which is not in strict conformity with the Tender Document but only if the tender is in substantial conformity with the Tender Document. Further, the terms of the Anchor Tenancy Entrance Guideline leave the Authority no discretion in determining whether a design sufficiently complies with the Design Guidelines if the Anchor Tenancy Entrance Guideline is not met. That is because the Anchor Tenancy Entrance Guideline expressly states that designs that do not comply with this requirement will not be accepted.

147 There are a number of Canadian cases which support a flexible approach that allows consideration of tenders which are substantially compliant. For example, in *R v Ron Engineering & Construction (Eastern) Ltd* (1981) 1 SCR 111, Estey J said 278:

"It would be anomalous indeed if the march forward to a construction contract could be halted by a simple omission to insert in the appropriate blank in the contract the numbers of weeks already specified by the contractor in its tender."

Estey J foresaw a situation where a bid might be so lacking as not to conform with the call for tenders and therefore would not amount in law to a tender and would not be capable of creating contract A (the preliminary or process contract).

148 In my view, cl 6 does not permit the Authority to accept a bid that so fails to meet the requirements of the tender documents that it does not amount to a response to the Invitation to Tender. In this case, the tender must respond to the Design Guidelines. If the bid is clearly unresponsive to the Design Guidelines then it is not a tender in response to the Invitation to Tender and it is not open to the Authority to award the contract to that bidder.

149 The process contract does not include an implied term that the Authority would only consider or accept a tender which complied with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline.

However, the process contract between Dockpride and the Authority includes an implied term that the Authority would not accept a bid that was unresponsive to the Design Guidelines. The implication of the latter but not the former term is consistent with the principles set out in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 and *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410. The implication of the latter but not the former term is not inconsistent with cl 6 of the Conditions of Tender.

150 In any event, any implied term must relate to an evaluation by the Authority not to whether as a matter of absolute fact the design complies with a particular standard, principle, requirement or feature of the Design Guidelines. That is, the obligation is upon the Authority to make the evaluation. In determining whether there has been a breach of that obligation the Court must confine itself to determining whether the Authority genuinely carried out the evaluation. It is not for the Court to second guess the evaluation undertaken by the Authority. If a design is clearly unresponsive to the Design Guidelines it may be open to the Court to conclude that the Authority could not, and did not, carry out the evaluation in accordance with the Design Guidelines. However, that is a different matter from determining whether or not in the opinion of the Court the design complies with the particular standard, principle, requirement or feature of the Design Guidelines or is sufficiently responsive to the Design Guidelines. I will consider this matter further when considering whether or not the Authority breached the implied terms pleaded by the plaintiffs.

Implied term to act fairly

151 The plaintiffs further submit that there should be implied in the process contract a term that the Authority would act fairly at all times in its dealings with each of the persons or companies or groups which it had invited to tender ("the invitees") prior to selecting a tender for acceptance. The plaintiffs also plead an implied term that the Authority would deal with each of the invitees fairly and in good faith.

152 Good faith has been recognised as implied in a contract in a number of cases in Australia: eg *Hughes (supra)*; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349.

153 A duty to act in good faith in the performance of a contract is an emerging doctrine in Australian contract law: see N C Seddon and

M P Ellinghaus "Cheshire & Fifoot's Law of Contract", 8th Australian ed, 2002 [10.43 – 10.46]. Seddon argues that not only can this duty apply to the performance of the pre-award contract but that the tendering procedure to be followed in awarding a government contract is a prime candidate for the imposition of such a duty. Seddon says that the milieu of tendering, with its attendant emphasis on conducting a fair competition and, in public contracts, the need to ensure the best use of public money, militates in favour of finding a duty to act in good faith: Seddon "Government Contracts", at 7.21.

154 In *Hughes (supra)*, Finn J found that it was an implied term of the process contract that the CAA would conduct its evaluation of the tenders fairly and in a manner that would ensure equal opportunity to the two tenderers. Finn J also found that, as a matter of law, a term would be implied in any event that obliged the CAA to deal fairly with the tenderers in its performance of the process contract.

155 In *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83, the parties accepted that, in general terms, a duty to act fairly and in good faith existed in that case. Their Lordships said that the issue in that case was as to the specific content of that duty in relation to the particular acts required to be performed by Transit in evaluating the tenders. Their Lordships stated their agreement with Finn J in *Hughes (supra)* where his Honour had said that the implied term "does not as such impose on [the employer] under the guise of contract law, the obligation to avoid making its decision or otherwise conducting itself in ways which would render it amenable to judicial review of administrative action". Their Lordships then stated at [47]:

"... it is nevertheless necessary to identify exactly what standard of conduct was required of the TET in making its assessment. In their Lordships opinion, the duty of good faith and fair dealing as applied to that particular function required that the evaluation ought to express the views honestly held by the members of the TET. The duty to act fairly meant that all the tenderers had to be treated equally. One tenderer could not be given a higher mark than another if their attributes were the same. But Transit was not obliged to give tenderers the same mark if it honestly thought that their attributes were different ... The obligation of good faith and fair dealing also did not mean that TET had to act judicially. It did not have to accord Mr Pratt a hearing or enter into debate with him about the rights and wrongs of, for example, the Pipiriki contract. It would no

doubt have been bad faith for a member of the TET to take steps to avoid receiving information because he strongly suspected that it might show that his opinion on some point was wrong. But that is all."

156 I accept that it was an implied term of the process contract between the Authority and Dockpride that the Authority would deal with Dockpride, fairly and in good faith.

157 There should not be implied a term that if the Authority decided that it would permit other tenderers to submit tenders containing plans for a design which did not comply with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline, that it would inform each tenderer (including Dockpride) of that fact and that it would give each tenderer the opportunity to modify its design and plans comprised or to be comprised in its tender. I have found that a term is not to be implied that the Authority would not consider or accept a tender containing plans for a design which did not comply with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline. Such a term is inconsistent with cl 6 of the Conditions of Tender. Dockpride, and the other tenderers, knew or ought to have known that the Authority was at liberty to, and might, consider and accept a tender containing plans for a design which did not comply with the specified parts of the Design Guidelines. That is the effect of cl 6 of the Conditions of Tender. Accordingly, fairness does not require that the Authority should inform Dockpride or any other tenderer that it would permit tenderers to submit tenders containing plans for a design which did not comply with those specified requirements or features of the Design Guidelines.

158 Whether or not a term of good faith or fair dealing is implied in the process contract cannot be usefully divorced from the content of such a term. The process contract imposes a duty to act in good faith at least to the extent that the Authority is precluded from acting subjectively in bad faith and must treat all tenderers fairly: see eg *Chinook Aggregates Ltd v Abbotsford (Municipal District)* (1989) 40 BCLR (2D) 345. I will further consider this term when considering the plaintiffs' case of breach.

Implied term not to make relevant communication to only one tenderer

159 The plaintiffs plead that it was an implied term of the process contract between Dockpride and the Authority that the Authority would not communicate to any of the invitees material information as to any matters which a tender should or could address or omit unless it communicated that information to all the other invitees. The plaintiffs

also plead that it was an implied term that the Authority would act fairly in considering competing tenders and, if the Authority decided that it would permit other tenderers to submit tenders containing plans for a design which did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline it would inform each tenderer of that fact and give each tenderer the opportunity to modify its design and plans comprised, or to be comprised, in its tender. I will consider those alleged implied terms further when considering the plaintiffs' case of breach of those terms.

Other implied terms

160 The plaintiffs have pleaded that the process contract between Dockpride and the Authority contained a number of other implied terms. Those terms were either not pressed by the plaintiffs or do not meet the principles for the implication of a term set out in *BP (Westernport)* (*supra*) and *Byrne v Australian Airlines* (*supra*).

Alleged breaches of the process contract

161 The first alleged breach of the process contract by the Authority is that the Authority considered and accepted the Blackburne tender which contained plans of a redevelopment which did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline.

162 The Rokeby Walk Guideline is found in s 3 of the Design Guidelines which is entitled "Special Conditions". Paragraph 3.1 deals with lot 1, which is the relevant lot. The guidelines say:

"A pedestrian route (Rokeby Walk) that links the Square to a car park on the north of the site is required and must be on the same alignment as Rokeby Road. This pedestrian route shall be open to public access at all times and may be covered."

163 Five paragraphs further on the guidelines say:

"The pedestrian link performs a major function in providing pedestrian access to the retail sites from the car park to the north and Station Square to the south. Its preferred location is on an axis line with Rokeby Road and as such its landscape treatment is essential to the precinct's success and character."

164 There is a difference between the plaintiffs and the defendant as to the meaning of "alignment". The plaintiffs say that the reference to alignment means that the centre line of Rokeby Walk must be on a

straight line drawn down the centreline of Rokeby Road and extending to the north through Station Square and beyond. The defendant says that Rokeby Walk is in alignment with Rokeby Road if it is parallel to it. The defendant says that alignment is to be contrasted with axis. The pedestrian link is on an axis line with Rokeby Road if the centreline of Rokeby Walk is on the straight line produced by continuing the centreline of Rokeby Walk to Station Square and beyond.

165 I prefer the plaintiffs' construction. The draftsman of the Design Guidelines has not used language with the precision to be expected of a parliamentary draftsman. I would not draw the inference that the words alignment and axis are used to connote different meanings. The ordinary meaning of "alignment" and the Site Plan support the plaintiffs' construction.

166 The tender submitted by the Blackburne Consortium has Rokeby Walk, for most of its length, in parallel to Rokeby Road but not on the same straight line as Rokeby Road. It is located about 20 metres to the east of the straight line formed by a continuation of the centreline of Rokeby Road. Furthermore, the southern most portion of Rokeby Walk is curved rather than being in a straight line. I conclude that Rokeby Walk on the Blackburne tender is not in alignment with Rokeby Road as that phrase is used in the Design Guidelines.

167 However, it does not necessarily follow that the Blackburne tender is a non-compliant tender and that the Authority breached its process contract with Dockpride by considering and accepting the Blackburne tender.

168 I have found that there should be implied in the process contract between the Authority and Dockpride a term to the effect that the Authority would not accept a bid that was unresponsive to the Design Guidelines but there should not be implied a term that the Authority would only consider or accept a tender which complied with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline. I will now consider whether or not the Authority breached a term to the effect that it would only consider or accept a tender which complied with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline if a term to that effect is to be implied.

169 The Rokeby Walk Guideline is one of myriad design specifications, principles, preferences, policies and other features referred to in the Design Guidelines.

170 The plaintiffs' case requires that there be implied a term that the Authority is not to consider or accept a tender that contains a design that does not comply with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline. A term that the Authority is not to consider or accept a tender that contains a design that does not strictly comply with those guidelines or either of them cannot be implied because it is inconsistent with cl 6 of the Conditions of Tender.

171 If there is to be implied a term that the Authority must not consider or accept a tender which contains a design which is not in substantial conformity with the Rokeby Walk Guideline then the Authority has not breached that term. The Blackburne tender contains a design which includes a pedestrian link, Rokeby Walk. The pedestrian link is, for the most part, parallel with Rokeby Road. The Blackburne design is not clearly unresponsive to the Design Guidelines in relation to the Rokeby Walk pedestrian link. The Blackburne tender responds to the Design Guidelines notwithstanding the variance between the Blackburne tender and the Rokeby Walk Guideline. I have earlier set out my finding that the Design Guidelines and the other tender documents leave the Authority a significant margin of discretion to determine what in its opinion constitutes acceptable variances from the standards, principles or requirements stated in the Design Guidelines. It is for the Authority to determine whether the guideline is sufficiently met by the particular design. The Authority considered that the Blackburne design was an acceptable variance from the requirement stated in the Design Guidelines in relation to Rokeby Walk. Upon their proper construction the tender documents gave the Authority a significant margin of discretion to determine what in its opinion constituted acceptable variances and it is not for this Court to second guess the Authority's decision as to whether the Blackburne design was sufficiently responsive to the Design Guidelines and whether its variance from the Rokeby Walk Guideline was acceptable.

172 The plaintiffs further submit that the Blackburne Consortium tender does not comply with the Anchor Tenancy Entrance Guideline. The requirement is found in par 3.1 of the Design Guidelines in these terms:

"The entry to the Anchor tenancy must be orientated towards Station Square having its primary entrance being visually recognisable, and no more than 8 metres from the Square. Schemes that do not comply with this requirement will not be accepted."

173 The statement that "Schemes that do not comply with this requirement will not be accepted" indicates that the Authority would not accept a tender containing a design which did not comply with the Anchor Tenancy Entrance Guideline. It is for the Authority to determine whether the anchor tenancy in a design is "orientated towards Station Square", has "its primary entrance being visually recognisable" and has its primary entrance "no more than 8 metres from the Square". Each of those statements is not to be given the meaning or absolute nature ascribed to them by the plaintiffs. It is for the Authority to determine whether the guideline is sufficiently met by the particular design.

174 The design of the supermarket on the Blackburne tender shows the entrance at its southeast corner. The Authority could properly conclude that the supermarket on the Blackburne tender was orientated towards Station Square and its primary entrance was visually recognisable. The plaintiffs submit that the design in the Blackburne tender shows the anchor tenancy having its primary entrance more than eight metres from the Square. Parts of the entrance are within eight metres of the Square but the greater part of the entrance is not. The purpose for such a guideline is to ensure interaction between the supermarket and the Square and to see that visitors do not enter the supermarket without being exposed to the Square. It is for the Authority to determine whether or not that design sufficiently complies with its guideline that the supermarket have its primary entrance no more than eight metres from the Square. It is for the Authority to determine whether or not the Blackburne design sufficiently complied with its guideline.

175 I conclude that the process contract between Dockpride and the Authority does not contain a term that precludes the Authority from considering or accepting a tender if any part of the entrance to the anchor tenancy is more than eight metres from the Square. Such an implied term does not meet the *BP Refinery* criteria. It is not reasonable and equitable. It is not necessary to give business efficacy to the contract and the contract is effective without it. Such a term is not so obvious that it goes without saying. Most fundamentally, such a term contradicts cl 6 of the Conditions of Tender.

176 The Blackburne tender responds to the Design Guidelines notwithstanding the variance between the Blackburne tender and the Anchor Tenancy Entrance Guideline. Mr Mitchell's report considered by the assessment panel on 17 February 1998 listed as its first criteria "the supermarket relationship to the Square". The report also considered "Station Square vibrancy". It must be accepted that the Authority

considered whether the Blackburne tender sufficiently met its guidelines having regard, amongst other things, to the orientation and proximity of the supermarket and its entrance to the Square and concluded that it did. It was open to it to do so. There was no breach by the Authority of any implied term in relation to the Anchor Tenancy Entrance Guideline.

Fair dealing in good faith

177 The next term or terms alleged by the plaintiffs to have been breached by the Authority are terms requiring the Authority to act in good faith and fairly towards the bidders.

178 In par 15 of their statement of claim the plaintiffs plead the acts or omissions of the Authority which they assert constituted a breach of the implied terms of the process contract, including the implied term to deal fairly and in good faith with Dockpride and the other tenderers.

179 The plaintiffs plead that the Authority did not act fairly and in good faith in its dealings with Westpoint and/or Dockpride prior to selecting the Blackburne tender when that tender did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline.

180 Assuming that the Blackburne design did not comply with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline there was no obligation, in fairness or otherwise, on the Authority to inform Dockpride, or any other tenderer, that it had decided to consider and accept a tender which did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline, at least in circumstances where the Blackburne tender responded to those features of the Design Guidelines. Dockpride knew, or ought to have known, that the Authority might consider and accept a tender which contained plans which did not strictly comply with one or more of the features of the Design Guidelines. Clause 6 of the Conditions of Tender expressly stated that the Authority may do so. There could be no duty on the Authority to inform Dockpride that another tenderer had submitted plans which varied from the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline in the manner in which the Blackburne tender did. To do so would be to communicate to one tenderer the contents of the plans of another tenderer. That would be a breach of confidentiality and would be to deal unfairly with Blackburne.

181 The plaintiffs plead that the Authority breached the process contract with Dockpride by communicating material information in relation to the alignment of Rokeby Walk to the Blackburne Consortium without

communicating that information to Dockpride. The plaintiffs plead that the information communicated to the Blackburne Consortium and which should have been communicated to the plaintiffs was that while the alignment of Rokeby Walk and Rokeby Road in special condition 3.1 of the Design Guidelines was the Authority's preferred position, tenders which did not comply with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline would be considered.

182 There was no obligation on the Authority to communicate such information to the plaintiffs, even if such information was communicated to the Blackburne Consortium. The plaintiffs assert that the information was communicated to the Blackburne Consortium in response to matters raised by the Blackburne Consortium. It would have been a breach of confidentiality, and a breach of the duty to act equally and even-handedly to all tenderers, for the Authority to disclose to Dockpride communications it had made to the Blackburne Consortium in response to matters raised by the Blackburne Consortium concerning its design.

183 In any event, fairness did not require the Authority to inform the plaintiffs that tenders which did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Requirement would be considered because cl 6 of the Conditions of Tender has the effect that the Authority was at liberty to accept a tender which did not strictly comply with those requirements.

184 For the reasons stated, there was no breach by the Authority of any obligation to deal fairly and in good faith with the plaintiffs.

Breach of contract claim – summary

185 For the reasons stated, the plaintiffs have not established their case of breach of contract. There was no relevant contract between Westpoint and the Authority. There was a process contract between the Authority and Dockpride but the plaintiffs have not established any relevant breach of that contract by the Authority.

Misleading or deceptive conduct

186 The plaintiffs claim damages under s 79 of the *Fair Trading Act 1987* (WA) ("FTA") for contravention of s 10 of the FTA. The plaintiffs also claim damages under s 82 of the *Trade Practices Act 1974* (Cth) ("TPA") for contravention of s 52 of the TPA. However, the claim under the TPA adds nothing to the claim under the FTA and I will consider the plaintiff's claim under the FTA.

187 The plaintiffs plead that by delivering the Information Package to Westpoint which contained the express terms referred to earlier and by delivering the Tender Document to Westpoint which contained the express terms referred to, the Authority represented, impliedly or expressly, to Westpoint that:

- "1. It would consider only tenders containing a design for the redevelopment which complied with the Rokeby Walk Guideline and the anchor tenancy requirement.
2. It would not accept a tender containing a design for the redevelopment which did not comply with the Rokeby Walk Guideline and the anchor tenancy requirement.
3. Alternatively, it would not accept a tender containing a design for the redevelopment which did not comply with the Rokeby Walk Guideline and the anchor tenancy requirement, without first offering all tenderers an opportunity to submit a tender containing a design which departed from the Design Guidelines."

188 These representations are referred to as the Written Representations.

189 The defendant denies each and every allegation in relation to the Written Representations. It says further that the alleged Written Representations are contradictory to, or inconsistent with, the express terms of the Invitation to Tender, Conditions of Sale, Information Package, Scheme, Brochure and other materials provided to Westpoint and with Westpoint's own conduct.

190 The plaintiffs then plead further representations which they describe as the Character Representations. The plaintiffs plead that in advertisements dated in or about August 1997, in the Information Package and in the Tender Document, the Authority represented that it invited tenders incorporating designs for redevelopment for a retail precinct, that is a redevelopment which was primarily retail and commercial in character, and in which residential parts were subsidiary or relatively minor. It is further said that on or about 23 December 1997 the Authority represented by letter from its agent, Chesterton, to the invitees, that the limit on the retail component on lot 1 was increased from 7,000 square metres to 10,000 square metres. Such representations are said to have carried with them by necessary implication, the further representation that the Authority favoured, and would prefer designs which were primarily retail and commercial in character, and in which the

residential parts were subsidiary and relatively minor. Those representations are denied by the defendant.

191 The plaintiffs repeat, as part of their misleading or deceptive conduct case, the plea that on or about 10 December 1997 the Authority, by Dr Cox, represented orally to Westpoint, by Mr Aitken, that the Westpoint sketch plan and development proposal contained in its expression of interest complied with the Design Guidelines, that many would-be tenderers had not been invited to tender because their expressions of interest did not comply with the Design Guidelines, and that the Authority wished to maximise the financial returns to itself from the tender process and also wished to achieve a good outcome for the community and if the design for the redevelopment complied with the Design Guidelines, that would achieve such a good outcome for the community. The plaintiffs plead that by necessary implication those express representations gave rise to the further representation that the Authority would only consider tenders which complied with, and would not accept tenders which did not comply with, the Design Guidelines in the respects referred to. These representations are referred to by the plaintiffs as the Oral Representations. They are denied by the defendant.

192 The plaintiffs then plead that implied in each, or in one or more of, the Written Representations, the Character Representations and the Oral Representations, when viewed together, and/or by reason of the conduct of the Authority adopting the tender procedure pleaded earlier, were further representations described as the Implied Representations. The Implied Representations are essentially the same as the implied terms of the process contract pleaded in par 14 of the statement of claim and set out above. That is denied by the defendant.

193 The plaintiffs plead that the officers of Westpoint were the officers of Dockpride and the Oral, Written, Character and Implied Representations were all communicated by Westpoint to Dockpride. That is denied by the defendant.

194 The plaintiffs plead that the Oral Representations, the Written Representations, the Character Representations and the Implied Representations were conduct engaged in by the Authority in trade or commerce. That is denied by the defendant.

195 The plaintiffs plead that the Oral Representations, the Written Representations, the Character Representations and the Implied Representations were representations as to future matters, as that term is

used in s 9 of the FTA (and s 51A of the TPA). That is denied by the defendant.

196 The plaintiffs plead that that conduct was misleading or deceptive or was likely to mislead or deceive in contravention of FTA s 10 (and/or s 52 of the TPA). The conduct of the defendant pleaded by the plaintiffs to be misleading or deceptive is essentially the same conduct as the plaintiffs plead to constitute a breach of the pleaded process contract. In addition, the plaintiffs plead that there was no reasonable basis for the Oral Representations, the Written Representations, the Character Representations or the Implied Representations and rely upon s 9 of the FTA (and/or s 51A of the TPA).

197 The defendant denies that it engaged in any conduct which was misleading or deceptive in contravention of s 10 of the FTA or otherwise.

198 The plaintiffs plead that the Character Representations gave rise to a reasonable expectation in any tenderer, including Westpoint and Dockpride, that if the Authority proposed to consider favourably, with a view to acceptance, a design for redevelopment which was not predominantly retail and commercial in character, then that fact would be disclosed to all tenderers who could consider and prepare their tenders accordingly. That is denied by the defendant. The defendant further says that the alleged reasonable expectation was not either reasonable or arising from the documents pleaded.

199 The plaintiffs plead that at all material times or at the time of considering the tenders, the Authority did propose, or was prepared, or decided to consider favourably, with a view to acceptance, a design for redevelopment which was not predominantly retail and commercial in its character, and/or a tender which did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline, but did not disclose that fact to Westpoint or Dockpride. That is denied by the defendant.

200 The plaintiffs plead that the failure to disclose was conduct engaged in by the Authority in trade or commerce which was misleading or deceptive in contravention of FTA, s 10 and/or TPA, s 52. That is denied by the defendant.

201 The plaintiffs plead that Westpoint and Dockpride relied on the Oral Representations and/or Written Representations and/or the Character Representations and/or Implied Representations in incurring expenditure,

in preparing and submitted its tender to the Authority, and submitted a tender which complied with the Design Guidelines.

202 The defendant does not admit that Westpoint or Dockpride incurred expenditure in relation to any tender submitted to the Authority. The defendant denies that Westpoint or Dockpride relied on any of the alleged representations and denies that Westpoint submitted a tender and that the purported Dockpride tender complied with the Design Guidelines.

203 The defendant further says that the plaintiffs did not rely, or alternatively could not reasonably have relied, upon or have been induced by the alleged representations.

204 The plaintiffs then plead that they have suffered loss and damage by reason of the defendant's misleading or deceptive conduct. The particulars of loss and damage are stated to be the cost to Westpoint and/or Dockpride of submitting the tender; \$300,000 or thereabouts. Further, Westpoint and/or Dockpride have foregone commercial opportunities. That is denied by the defendant.

In trade or commerce

205 Section 10(1) of the FTA provides that "[A] person shall not, in trade or commerce, engage in conduct which is misleading or deceptive or likely to mislead or deceive".

206 The defendant submits that its conduct was not in trade or commerce for the purpose of s 10 of the FTA (or TPA, s 52). For those provisions to apply, the conduct must be in the course of (and not merely in respect of or relating to) trading or commercial activities which of their nature bear a trading or commercial character: *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, *Chapman v Luminis Pty Ltd (No 5)* (2001) 123 FCR 62 at 95, 108 - 109. The defendant submits that what was involved here was not a sale of land for the highest price, but the calling of tenders, by a regulatory body, for the sale and development of land pursuant to the *Subiaco Redevelopment Act*, in accordance with numerous regulatory provisions and guidelines. The sale contract included a buy back right relating to the performance of development obligations. The Authority was seeking to achieve the development that best met the interests of the public. It was doing no more than carrying out its statutory function, and thus was not acting in trade or commerce: *Chapman v Luminis (supra)* at 109 and 113; *Village Building Co Ltd v Canberra International Airport Pty Ltd* (2004) 139 FCR 330 at 124, 125.

207 In *Concrete Constructions* (*supra*) at 604, Mason CJ, Deane, Dawson and Gaudron JJ said that the TPA, s52 is concerned with the conduct of a corporation towards persons, be they consumers or not, with whom it has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character.

208 The relevant conduct of the Authority is conduct of the Authority in making statements to the plaintiffs, or their representatives, in the course of conducting the tender process and doing things to carry out that tender process. The tender process was a process that involved calling for and obtaining tenders for the purchase and development of land with the successful tenderer to enter into a contract with the Authority. That contract was to be a contract to purchase land from the Authority. The contract would include conditions requiring the purchaser to develop the land broadly in accordance with its tender design. Conduct towards tenderers in the course of a tender for the purchase and development of land is conduct in trade or commerce. That is not any less so because the body calling for tenders is required to have regard to matters other than the profit motive.

209 I concluded that the alleged conduct of the Authority is conduct in trade or commerce.

The alleged representations

210 The expression "conduct" in FTA, s 10 (and in TPA, s 52) extends beyond "representations". However, the plaintiffs' case as pleaded is one based on representations to them by representatives of the Authority or in writing by the Authority, or representations said to be implied by things said to them by the Authority in writing or by its representatives orally. It is appropriate to consider the plaintiffs' pleaded case by considering the representations the plaintiffs allege arise from the conduct of the Authority: see *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; 212 ALR 357 per Gleeson CJ, Hayne and Heydon JJ at [32].

211 It is commonly said that for a representation to be misleading it must be shown to have been misleading when made. But that is not correct. The real question is whether the representation was misleading when acted upon. The issue is whether the representee was misled and this could only have occurred when he altered his position on the faith of the representation. If the representation was a continuing one and was misleading when acted on, it is a misleading representation and the representor engaged in misleading conduct, however true or accurate the representation may have been when originally made.

212 A representation will normally be regarded as continuing, being repeated until acted on.

213 The plaintiffs allege that they acted on the alleged representations in preparing and submitting their tender to the Authority. Whether the conduct of the Authority is misleading is to be determined at those times.

The Written Representations

214 The Written Representations are, in essence, that the Authority would only consider or accept a tender containing a design which complied with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. The alternative representation is that the Authority would not accept a tender containing a design which did not comply with those guidelines without first offering all tenderers an opportunity to submit a tender containing a design which departed from the Design Guidelines.

215 The Written Representations are said to arise from the Authority delivering to Westpoint the Information Package and the Tender Document. The plaintiffs submit that the terms of those documents give rise to the Written Representations.

216 I conclude that the Authority did not, by delivering to Westpoint the Information Package and the Tender Document, make the Written Representations.

217 In broad terms, whether the statements or conduct of the Authority are misleading or deceptive must be assessed having regard to the likely effect of the conduct complained of on reasonable members of the class to which it was directed. In this case, the Information Package and the Tender Document were delivered to persons who proposed, or were considering, entering a project requiring significant capital. The relevant audience comprised persons of whom some degree of sophistication might be expected and who might be expected to have experience in tendering for large scale property development or to seek the advice or assistance of people who did. That was the case with Westpoint and Dockpride.

218 A reasonable person in the position of Westpoint or Dockpride would not have understood the Information Package and the Tender Document to represent that the Authority would only consider or accept a tender containing a design which complied with the Rokeby Walk Guideline in the sense that Rokeby Walk was not more than 5 metres out of alignment with Rokeby Road and complied with the Anchor Tenancy

Entrance Guideline in the sense that the whole of the entrance faced the Square and no part of it was more than 8 metres from the Square. I have discussed the notion of compliance with the Design Guidelines when considering the plaintiffs' claim in contract. Those considerations are relevant to the present issue. I conclude that a reasonable person in the position of Westpoint and Dockpride would have considered that the Design Guidelines are a guide to what the Authority considers to be appropriate development within Station Square and against which the Authority would assess tenders. Such a reasonable person would understand from the Information Package and the Tender Document that the tender must respond to the Design Guidelines and a design that was clearly unresponsive to the Design Guidelines would not be accepted by the Authority. Such a reasonable person would understand from the special condition of the Design Guidelines relating to the Anchor Tenancy Entrance Guideline that the design must, in the opinion of the Authority, substantially comply with the Anchor Tenancy Entrance Guideline.

219 The defendants' conduct in accepting the Blackburne Consortium tender did not make the continuing representations constituted by the Information Package misleading, nor render the Tender Document misleading. As I have found, the Blackburne design, in the opinion of the Authority, sufficiently responded to and complied with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. Further, the plaintiffs have not established that the Authority's consideration of the Blackburne design's response to the Anchor Tenancy Entrance Guideline was not made in good faith or was not reasonably open to it.

The Character Representations

220 The Character Representations are that the Authority represented that it invited tenders incorporating designs for redevelopment which were primarily retail and commercial in character and in which residential parts were subsidiary or relatively minor and that the Authority would prefer designs which were primarily retail and commercial in character and in which the residential parts were subsidiary and relatively minor. Those Character Representations are said to arise from advertisements by the Authority, from the Information Package, from the Tender Document and from the facsimile letter of 23 December 1997 from Chesterton to Westpoint concerning the relaxation of the 7,000 square metre limit on retail use on lot 1.

221 The advertisements referred to the redevelopment of the Station Square precinct as a retail precinct. The advertisements referred to five

lots totalling 2.3 hectares of land, approval for 10,000 square metres of retail use and potential for an additional 15,000 square metres of commercial/mixed use. The Information Package and the Tender Document invited tenders for the purchase of the lots on the terms of the Conditions of Sale. It referred to development approvals for up to 10,000 square metres of retail and up to 15,000 square metres of commercial/residential. The Information Package referred to the preferred uses in the precinct being commercial, retail, residential and community uses. In referring to the intended future of the precinct the document said that the precinct would have a high regard for a safe main street shopping environment and "will incorporate a significant residential component in single and mixed use buildings at densities of up to 80 dwellings per hectare". The Design Guidelines stated that the Authority anticipated that Station Square would include residential, commercial and retail components. It was stated that the Authority had set a limit of retail development for lot 1 at 7,000 square metres and a limit of 10,000 square metres for the whole of Station Square. Paragraph 2.1 ("Desired character and streetscape") stated that Subiaco is renowned for its intimate residential streetscapes. It was stated that the buildings and square that comprised the new Station Square must reflect this Subiaco character in terms of its human scale and its high level of mixed uses.

222 A reasonable person in the position of Westpoint or Dockpride would not understand from the Information Package and the Tender Document the Authority to have represented that it was inviting tenders for designs which incorporated a relatively minor residential component.

223 The Chesterton letter of 23 December 1997 did not address whether or not the Authority favoured or would prefer designs which were primarily retail and commercial in character and in which the residential parts were subsidiary and relatively minor. The letter was in response to an inquiry from Westpoint concerning whether the 7,000 square metre limit on retail use on lot 1 still applied. Chesterton, on behalf of the Authority, responded that that specific requirement was no longer necessary. However, Chesterton stated that notwithstanding the relaxation of the 7,000 square metre limit it was still a high priority of the Authority to ensure the development of active uses at ground level primarily fronting the Square on all sides and, where possible, the surrounding streets. The letter did not detract from what had been said in the Information Package about residential use.

224 The Authority did not engage in misleading conduct by considering or accepting the Blackburne Consortium tender that incorporated a significant residential component. Furthermore, the Authority did not engage in misleading or deceptive conduct by accepting the Blackburne Consortium for the reason, amongst others, that it contributed to the achievement of the Subi Centro vision and that the Dockpride tender did not include residential development on lot 1. The Authority's preference for some residential development on lot 1 was expressed in the documents distributed to Westpoint by the Authority.

The Oral Representations

225 The plaintiffs plead that on 10 December 1987 the Authority, by Dr Cox, represented orally to Westpoint by Mr Aitken that the Westpoint sketch plan and development proposal contained in its expression of interest complied with the Design Guidelines, that many would-be tenderers had not been invited to tender because their expressions of interest did not comply with the Design Guidelines, and that the Authority wished to maximise the financial returns to itself from the tender process and also wished to achieve a good outcome for the community and if the design for the redevelopment complied with the Design Guidelines, that would achieve a good outcome for the community. The plaintiffs plead that by necessary implication those express representations gave rise to the further representation that the Authority would only consider tenders which complied with, and would not accept tenders which did not comply with, the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline.

226 Everyone present at the 10 December 1997 meeting gave evidence of the meeting. Their accounts differ in varying degrees. I do not wholly accept any witness' account of the meeting. I found Mr Aitken's account of the meeting, which I have set out earlier, to be mostly reliable. His evidence was credible and generally not inconsistent with the notes of the meeting.

227 Mr Oldfield said that he recalled that either himself, Mr Aitken or Mr Strzelecki asked Dr Cox or Mr Howe in effect whether or not Rokeby Walk could be moved out of alignment with Rokeby Road. The response from Dr Cox or Mr Howe was in effect, no, it could not be moved out of alignment with Rokeby Road. However, Mr Oldfield said that he did not recall much of the detail of the meeting. The issue of the alignment of Rokeby Walk with Rokeby Road had been discussed by members of the Westpoint project and design team on occasions other than the meeting on

10 December 1997. I do not place much reliance on Mr Oldfield's recollection of what was said at that meeting in view of his concession that he does not recall much of the meeting, a concession confirmed by my observations of Mr Oldfield in the course of his evidence.

228 In the course of his evidence Mr Strzelecki was referred to his notes of the meeting of 10 December 1997. Before referring to his notes Mr Strzelecki had little recollection of what was said at the meeting. After reading his notes Mr Strzelecki said that he recalled that Dr Cox said that it was essential that Rokeby Walk be aligned with Rokeby Road and that was reflected in his note "centre the development on the Square essential". That note does not expressly refer to Rokeby Walk or indeed the "pedestrian link" referred to elsewhere in Mr Strzelecki's note. I do not find Mr Strzelecki's recollection based on that note to be very reliable. Mr Strzelecki also referred to discussions regarding the entrance to the supermarket fronting Station Square. His note of the meeting contains no reference to the supermarket or anchor tenancy facing the Square other than the note I have referred to and a note stating "pedestrian link outside shopping suprm entry to Square" (*sic*). I do not find Mr Strzelecki's recollection based on those notes to be very reliable.

229 Mr Van Den Dries was adamant that at the 10 December 1997 meeting there was a discussion about Rokeby Walk and Dr Cox said that the guidelines were an important part of the tender and that a non-conforming tender would not be accepted. Mr Van Den Dries was adamant that Dr Cox said that tenderers must comply with the guidelines. I found Mr Van Den Dries to be an unsatisfactory witness. He was plainly hostile to counsel for the Authority and made it clear to everyone in the court that he had been subpoenaed to give evidence and that he considered his attendance at court to be an imposition upon his time for which he was not being paid and he wished to be done with it as quickly as possible. Mr Van Den Dries appeared to have a poor recollection of relevant matters other than the 10 December 1997 meeting. I formed the impression that he was being stubborn about his recollection of what occurred at the meeting and I am not satisfied that he was a reliable witness.

230 Dr Cox did not appear to have a very good recollection of what occurred at the meeting. His evidence was principally a reconstruction. That is perhaps not surprising given the number of meetings and communications that he was a party to in the course of the tender process and the project as a whole.

231 The plaintiffs plead that by necessary implication the express representations made by Dr Cox at the 10 December 1997 meeting give rise to the further representation that the Authority would only consider tenders which complied with, and would not accept tenders which did not comply with, the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. I find that Dr Cox did not expressly state that at the meeting. Mr Aitken made a fairly detailed note of the meeting. His note contains no note to that effect. I have already referred to Mr Strzelecki's note. That note does not contain any note that Dr Cox made statements to the effect that a tender containing a design that did not comply with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline would not be considered or accepted. The Authority's note does not refer to those matters. I accept the evidence of Mr Aitken that Dr Cox said words to the effect that some would-be tenderers had not been invited to tender because their expressions of interest did not comply with the Design Guidelines and in particular those where the supermarket did not front onto Station Square. I accept Mr Aitken's evidence that there was a reference to the alignment of Rokeby Walk and that Dr Cox stated words to the effect that Rokeby Walk should be in alignment with Rokeby Road and should not vary more than a few metres either way. I do not accept that Dr Cox said, or that it would have been understood by a reasonable person in Mr Aitken's position, that if a tenderer's design located Rokeby Walk more than a couple of metres out of alignment with Rokeby Road then the tender would not be considered or accepted. Rather, I find that a reasonable person in the position of Mr Aitken would have understood that Dr Cox was expressing the Authority's preference as expressed in the Design Guidelines.

232 The discussion at the 10 December 1997 meeting must be considered in the context of the tender documents delivered to Westpoint and other communications between Westpoint and the Authority. The tender documents include cl 6 of the Conditions of Tender. That clause made it clear that the Authority might accept a design that did not strictly comply with the Design Guidelines.

233 I have discussed the form, structure and content of the Design Guidelines earlier. A reasonable person in the position of Westpoint would have understood that the Design Guidelines were a guide to what the Authority considered to be appropriate development within Station Square and against which the Authority would assess tenders. The Design Guidelines did not contain a series of prescriptive or mandatory requirements compliance with which was a pre-condition to the tender being accepted or considered by the Authority. A reasonable person

would have understood that the Design Guidelines and the other tender documents left the Authority a significant margin of discretion to determine what in its opinion constituted acceptable variances from the specifications, principles, preferences, policies and other features stated in the Design Guidelines.

234 What was said by Dr Cox at the 10 December 1997 meeting would not have altered the understanding a reasonable person would have had from a consideration of all those documents and communications with the Authority. I find that what was said at the 10 December 1997 meeting, taken together with the tender documents and other communications between Westpoint and the Authority, did not constitute a representation by the Authority that the Authority would only consider tenders which complied with, and would not accept tenders which did not comply with, the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. The Authority did not engage in misleading conduct by considering or accepting the Blackburne tender containing a design which varied from the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline in the manner and to the extent that I have discussed.

The Implied Representations

235 The plaintiffs plead that implied in each, or in one or more of the Written Representations, the Character Representations and the Oral Representations, when viewed together, and/or by reason of the conduct of the Authority adopting the tender procedure, were further representations described as the Implied Representations. The Implied Representations are essentially the same as the implied terms of the process contract pleaded in par 14 of the statement of claim and referred to earlier in these reasons.

236 The first Implied Representation is that the Authority would accept the tender which offered the highest price provided that tender contained plans for the redevelopment which complied with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. I find that the conduct of the Authority did not give rise to that representation. Clause 6 of the Conditions of Tender stated that the Authority was not obliged to accept the highest or any tender and was not precluded from accepting a tender which was not in strict conformity with the tender document. Nothing said by or on behalf of the Authority to Westpoint or Dockpride withdrew that fundamental principle of the tender process. Furthermore, the Authority expressly stated to Westpoint that urban design would be an important factor in determining the successful tenderer. That is conceded

by Mr Aitken and recorded in his note of the 10 December 1997 meeting where Mr Aitken noted that price was a criterion and urban design was important.

237 The second of the pleaded Implied Representations is that the Authority would act fairly at all times in its dealings with each of the persons invited to tender prior to selecting a tender for acceptance.

238 I accept the evidence of Mr Aitken that at the 10 December 1997 meeting Dr Cox said words to the effect that the tender process would be fair. Dr Cox said that the process would include a probity auditor. I find that what was said by Dr Cox on behalf of the Authority at that meeting, together with the tender documents and other communications, represented to Westpoint that the tender process would be fair.

239 The principal complaints made by the plaintiffs are as follows. The Authority accepted the tender of the Blackburne Consortium which contained a design that did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. Secondly, the Authority did not, prior to accepting the Blackburne tender, inform the plaintiffs that it might accept a tender containing a design that did not comply with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline. Thirdly, the plaintiffs say that the defendant in effect communicated to the Blackburne Consortium that it would consider and might accept a tender containing a design which did not comply with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline and did not make a similar communication to Westpoint.

240 The Authority did not act unfairly to the plaintiffs by selecting a tender containing a design which varied from the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline in the manner and to the extent that the design in the Blackburne tender did. As I have said the Design Guidelines were, and would have been understood by a reasonable person in the position of Westpoint or Dockpride, to be guidelines which must be responded to by the tenderer, not a series of prescriptive or mandatory requirements non-compliance with which would cause the Authority to not consider or accept the tender. Furthermore, having regard to cl 6 of the Conditions of Tender, a reasonable person in the position of Westpoint or Dockpride would have understood, that the Authority might accept a tender containing a design that did not comply with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline in the manner and to the extent that the design in the Blackburne Consortium tender varied from those guidelines.

241 In those circumstances, fairness did not require that the Authority inform Westpoint that it might consider or accept a tender containing a design that did not comply with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline.

242 It was not unfair for the Authority to not inform Westpoint or Dockpride of its communications with the Blackburne Consortium concerning the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline.

243 Mr Aitken gave evidence that at the 10 December 1997 meeting Dr Cox said words to the effect that the answer to any generic question relevant to all tenderers would be provided as advice to all tenderers whereas unique questions specific to an individual proposal would be answered only to the proponent. Mr Aitken gave further evidence that at the same meeting Dr Cox said words to the effect that a probity auditor would be appointed to ensure the equity and transparency of the selection process. That is reflected in Mr Aitken's note of the meeting.

244 That process is consistent with a duty of confidentiality being owed by the Authority to the tenderers. During the tendering process a duty of confidentiality may arise to protect information provided by either party. This duty exists whenever information is provided in circumstances where it is obvious that it is being provided in confidence. This may arise by implication. The existence of a duty of confidentiality may preclude the body seeking tenders from disclosing to one tenderer a design feature or approach being considered by another tenderer. So long as the feature or design approach was provided in confidence, the disclosure would be in breach of confidence.

245 It is submitted by the plaintiffs, in effect, that the Authority should have disclosed to Westpoint or Dockpride that it might consider or accept a tender containing a design that did not comply with the Rokeby Walk Guideline or the Anchor Tenancy Entrance Guideline without disclosing what had been said by the representatives of the Blackburn Consortium to the representatives of the Authority during their meeting on 17 December 1997.

246 Mr Blackburne and other representatives of the Blackburne Consortium met with Dr Cox and Mr Howe on 17 December 1997. Mr Blackburne's evidence is that the effect of what Dr Cox and Mr Howe said was that the Authority regarded the alignment or axis of Rokeby Walk as important and as a result Mr Blackburne had no illusion that if

they relocated Rokeby Walk off axis with Rokeby Road they would be taking a commercial risk. Mr Blackburne said he never came away from any meeting with the Authority representatives with any belief other than that the Authority would be concerned if Rokeby Walk was located other than on an axis with Rokeby Road. In cross-examination Mr Blackburne agreed with the proposition put to him that Dr Cox had said at a meeting that Rokeby Walk could be located off Station Square in any position that suited the developer's planning scheme or words to that effect. In cross-examination Mr Blackburne was referred to the letter of 16 December 1997 from Dr Cox to Mr Blackburne. The letter referred to the location of Rokeby Walk. It said that the main reason for the location of Rokeby Walk indicated on figure 2 of the Design Guidelines was to ensure the continuation of Rokeby Road in some form by its extension north of Roberts Road across the Square. The letter continued: "The Authority is therefore committed to this design principle and would not look favourably upon any significant variation to the required alignment (+ or - 5 metres)". In cross-examination Mr Blackburne agreed that when he received the letter he was quite worried that if he moved Rokeby Walk he would have a non-complying tender and it would not get looked at. It was then put to him that at the meeting on 17 December 1997 he asked Dr Cox directly whether a tenderer could put in a non-compliant bid because he was very concerned on that topic. Mr Blackburne replied: "I do not recollect that but I can imagine that I would have asked the question." He further agreed with the cross-examiner that Dr Cox said something to the effect that if he wanted to make a significant deviation from any of the guidelines he would carry a risk but that his tender would be assessed at the time of the submissions and would be considered by the assessment panel. Mr Blackburne agreed with cross-examining counsel that he formed the view that if he could justify a departure from the location of Rokeby Walk on the Design Guidelines, he might get his tender accepted but there was still a risk.

247 In my view, fairness did not require that the Authority make any disclosure to Westpoint about, or as a result of, the communications between the Authority and the Blackburne Consortium concerning the location of Rokeby Walk. It would have been unfair to the Blackburne Consortium to do anything more than refer Westpoint to the Design Guidelines and cl 6 of the Conditions of Tender.

248 The third Implied Representation is that the Authority would not communicate to any of the invitees material information as to any matters which a tender should or could address or omit unless it communicated that information to all the other invitees.

249 The Authority represented, in effect, that it would act fairly and even-handedly to the invitees, that general information relevant to all invitees would be provided to all invitees but that the answers to specific matters raised by individual invitees would remain confidential to that invitee. To the extent that the alleged Implied Representation goes beyond that I find that the representation was not made. For the reasons stated when considering the second Implied Representation I find that the Authority did not breach the representation in the form in which I find it was made.

250 The fourth Implied Representation is that the Authority would deal with each of the invitees fairly and in good faith. I find that the Authority did represent, in effect, that it would act fairly in its dealings with each of the invitees and would act even-handedly in its dealings with each of them. To the extent that the fourth Implied Representation goes further than that I find the representation was not made. I have already discussed the representation that the Authority would act fairly and even-handedly in its dealings with the invitees. The Authority did not act contrary to that representation and hence did not engage in misleading conduct in that respect.

251 The fifth Implied Representation is that, in effect, the Authority would not accept a tender which did not comply with a mandatory and/or material requirement of the Design Guidelines including, amongst others, the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. For the reasons already stated, I find that the Authority did not make such a representation and hence did not engage in misleading conduct in that respect.

252 The sixth Implied Representation is that the Authority would not fail to accept a tender which offered the highest price if that tender contained plans for the redevelopment which complied with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline. For the reasons already stated, I find that the Authority did not make such a representation and hence did not engage in misleading conduct in that respect.

253 The seventh Implied Representation is that the Authority would assess competing tenders by reference to the criteria contained in the Design Guidelines in each of the respects referred to in the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline.

254 I find that the Authority did represent to the would-be tenderers that in assessing would-be tenderers it would have regard to the tenderer's

response to the Design Guidelines. I find that the Authority did do so. I find that the Authority did not represent that in assessing the competing tenders it would regard the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline as mandatory requirements and not consider or accept a tender containing a design which had any significant variation from those requirements. The Authority did not engage in misleading conduct in that respect.

255 The eighth Implied Representation is that the Authority would not fail to accept a tender which offered the highest price and which complied with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline merely on the basis of a subjective preference for another design. For the reasons given, I find that the Authority did not make that representation and did not engage in misleading conduct in that respect.

256 Finally, the plaintiffs plead that the Authority represented that it would act fairly in considering competing tenders and if it decided, amongst other things, that it would permit other tenderers to submit tenders containing plans for a design which did not comply with the Rokeby Walk Guideline and the Anchor Tenancy Entrance Guideline, it would inform each tenderer of that fact and give each tenderer the opportunity to modify its design and plans comprised or to be comprised in its tender. For the reasons stated, I find that the Authority did not make such a representation and did not engage in misleading conduct in that respect.

Defendant did not contravene FTA, s 10

257 For the reasons stated, I find that the plaintiffs have not established the defendant contravened FTA, s 10 (or TPA, s52). Nevertheless, in case these matters shall be considered elsewhere I shall go on to make such observations and findings on other aspects of the plaintiffs' case as I am able to do so consistently with the findings I have made thus far.

Representations made to Dockpride

258 The plaintiffs plead that the officers of Westpoint were the officers of Dockpride and the Oral, Written, Character and Implied Representations were all communicated by Westpoint to Dockpride. I have found that the alleged representations were not made or were not misleading. However, I find that the documents and letters delivered by the Authority to Westpoint, and statements made on behalf of the Authority to officers of Westpoint were made to Dockpride. Mr Aitken acted on behalf of Dockpride in submitting the Dockpride tender. The

Authority, through Dr Cox, Mr Howe and others, knew that Dockpride was a related entity to Westpoint and that Westpoint had, in a commercial if not legal sense, submitted its tender through Dockpride. After Dockpride had submitted its tender the representatives of the Authority knew that Dockpride had acted on and would continue to act on documents and statements made by the Authority to Westpoint. Any representations made by the Authority in the documents provided by the Authority to Westpoint, and in statements made to officers of Westpoint, were continuing representations and were made to Dockpride.

Reliance

259 The plaintiffs plead that Westpoint and Dockpride relied on the Oral, Written, Character and Implied Representations in incurring expenditure in preparing and submitting its tender to the Authority, and submitted a tender which complied with the Design Guidelines.

260 I find that Westpoint and Dockpride did rely on the documents and letters delivered to Westpoint by the Authority and did rely upon statements made by representatives of the Authority to Westpoint in preparing and submitting the Dockpride tender. I have set out earlier my findings as to the representations arising from that conduct of the Authority and that the plaintiffs have not established the conduct to have been misleading.

261 Westpoint did incur expenditure in preparing and submitting the Dockpride tender. There is no evidence that Dockpride incurred any expenditure in doing so.

262 The plaintiffs plead that they have suffered loss and damage by reason of the defendants misleading or deceptive conduct. As I have said, I find that Westpoint incurred expenditure in preparing and submitting the Dockpride tender but Dockpride did not. I have found that the defendant did not engage in misleading or deceptive conduct and it necessarily follows that the plaintiffs did not suffer loss or damage by reason of any misleading or deceptive conduct by the Authority.

263 The defendant further argues that in any event, the plaintiffs have failed to establish that some damage was caused by the defendants allegedly contravening conduct.

264 The cause of action under FTA, s 79 (TPA, s 82) is incomplete unless the claimed loss and damage was caused by conduct in breach of s 10. The plaintiffs must establish that some damage is caused by

allegedly contravening conduct. Causation is a factual question to be determined by reference to commonsense and experience. The defendant argues that the plaintiffs pleaded loss is the cost of submitting the tender, or that the plaintiffs have "forgone commercial opportunities". These claims cannot succeed, it is submitted, because they require proof that, but for the alleged representations, the plaintiffs would not have submitted the tender, and/or that they would have pursued other commercial opportunities. The defendant submits that the plaintiffs adduced no such evidence.

265 The plaintiffs submit that it is only necessary for them to establish that they have suffered some loss for the cause of action to be complete. The quantum of that loss is not an issue at this hearing and awaits determination at a later time.

266 The plaintiffs submit that Westpoint incurred considerable expenditure in preparing and submitting the tender. In relation to Dockpride, the plaintiffs submit that it has, at the very least, lost the commercial opportunity of competing on a level playing field during the tender process. The plaintiffs submit that this was conceded by senior counsel for the Authority to constitute the loss of a real commercial opportunity in the sense used in *Poseidon Ltd & Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

267 I have given thought to whether I should make findings in relation to the issues of causation, in case those matters may fall for determination elsewhere. However, I am unable to make findings on that issue because I have found that the alleged representations were not made and/or the defendant did not engage in the alleged misleading or deceptive conduct. In those circumstances I am unable to make any findings as to whether any loss or damage was caused to the plaintiffs by the misleading conduct which I have found did not occur.

Conclusion

Answer to preliminary issue

268 The order for the trial of the preliminary issue is:

"The question or issue of the liability of the defendant to the first and second plaintiffs in this action, and the issues arising under par 16A and 29A or the re-amended defence, be tried as preliminary issues before the question or issue of quantum damages under par 16 and 30 of the amended further

re-amended statement of claim, and that, subject to the determination of the above preliminary issues in favour of the first and second plaintiffs, the questions or issues of quantum of damages be tried subsequently in such manner as may be directed by the trial Judge or by further order."

269 I have come to the conclusion that the defendant is not liable to the plaintiffs for the reasons I have stated. I will hear the parties as to the orders which should be made to give effect to these reasons.