

PART II – Trade Practices Act 1974 (Cth)

I BREACH OF S 52

A Section 52

s 52: Misleading or Deceptive Conduct:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

B 'Misleading or Deceptive'

Contravention of s 52 depends on there being misleading or deceptive conduct.

1 What conduct is misleading (or deceptive)?

Conduct can mislead or deceive without its perpetrator intending to have such an effect. An intention to mislead is not needed in order to be said to have engaged in misleading or deceptive conduct (*Henjo*).

Henjo v Collins Marrickville:Facts

- The York Deli, a café in Double Bay, is for sale by its then owners, Henjo (a corporation)
- The buyers, having entered into a contract of sale, apply for an order for rescission, alleging that the sellers mislead them about the capacity of the restaurant and its ability to serve alcohol
- The alleged misrepresentation occurred in the following way: a card written down by the sellers' agent from an advertisement for the property stated the following: 'Seats 128. Licensed.'
- In fact, it was only licensed to seat 80, and the restaurant lacked a bar area, to which the license applied
- The sellers argue that their agent did not intend to mislead the buyers, and intended only to convey their property's capacity; further, it *is* licensed, so advertising that fact ought not to be misleading or deceptive

Issue

- Did presenting the card constitute a misrepresentation, even if that effect was unintentional?

Reasoning

- The question to be asked is: 'what would a person to whom the card was shown think?'
- To be misleading under s 52, the conduct must be *objectively* misleading

- No subjective intention to mislead is required

Decision

- Here, the ordinary receiver would infer that the license refers to 128 people
- Because this is not the case, the presentation of the card constitutes misleading or deceptive conduct

There is thus an objective test for establishing whether conduct is misleading or deceptive.

In considering whether conduct is misleading or deceptive, the focus should be on the mind of the representee (*Byers v Dorotea*).

Byers v Dorotea:

Facts

- Two apartment buildings, Boulevard Towers and Boulevard North, faced one another on a Gold Coast beach
- The buyers, Mr and Mrs Byers, had previously bought units in Boulevard Towers, and now sought to buy an investment property in the new building
- They were told that the new building would be 'bigger and better' and the brochure contained a picture of a swimming pool
- Property prices later dropped and the value of the apartment fell below the purchase price
- Byers sought to rescind the contract on the basis of the seller's misrepresentation

Issue

- Were the statements made objectively misleading?

Reasoning

- Though a statement that something will be 'bigger and better' is just an opinion, it is still be statutorily misleading if, for example, its maker 'never intended it to be bigger and better'
 - However, even if there was no dishonesty, such a statement can still be objectively misleading
- Misleading conduct encompasses more than misrepresentations – it also includes misleading opinions (and puff)
 - The representation that there would be a swimming pool was a statement about the future; it was misleading because the developers never had any intention of building a pool
 - In considering whether conduct is misleading, the focus is on the mind of the representee

Decision

- Here, the Byers were misled; an ordinary person would also be misled, so it was objectively misleading

2 Can liability attach to the passing on of information?

There is no liability for mere 'passing on' of information (*The Saints Gallery*).

The Saints Gallery:

Facts

- Flannery, the director of an art gallery, was involved in the sale of several paintings by prominent Australian artists
- Flannery tells the buyer that the paintings are, according to their previous owner, by these prominent artists
- Normally the gallery deals with lesser known artists
- In fact, the paintings are not by the well-known artists claimed by their previous owner, reducing their value
- The buyer alleges Flannery's conduct in passing on the information of the previous owner is misleading or deceptive

Issue

- Is Flannery's conduct misleading or deceptive?

Reasoning

- Where information is passed on to a buyer, the statement-maker is merely an intermediary through which the representation flows
- Here, the statement cannot be misleading or deceptive because F is only passing on a representation made by the previous owner
- If F had been himself providing the information, the outcome would be different
- Plumber, the buyer, is himself an expert art examiner; he ought to be aware of the nature of the statements of the previous owner (whether dubious or trustworthy) – a factor which mitigates against the conduct being misleading
- In asking whether a representation is objectively misleading, it is also important to consider the audience to which it is addressed – here, Mr P (an art expert) was unlikely to be deceived by a passing on of information of whose source he should have been professionally sceptical

Decision

- Flannery's conduct was not objectively misleading or deceptive

The effect of a representation is not evaluated objectively, by reference to a reasonable person. Instead, it is judged by reference to its probable effect on the intended audience.

The probable audience of the statement includes both 'the astute and the gullible, the intelligent and the not so intelligent' (*Puxu v Parkdale*).

C 'Engage in Conduct'

1 Silence as conduct?

s 4(2)(c)(i) of the TPA states that 'doing or refusing to do any act' constitutes 'conduct' for the purposes of s 52. Thus, non-disclosure can amount to conduct.

s 4 – Interpretation:

(2) In this Act:

(a) 'Engaging in conduct' includes doing or refusing to do any act, including:

- Making a contract/covenant
- Giving effect to a provision of a contract/covenant
- Understanding or requiring the giving of a covenant

(c) 'Refusing to do an act' includes:

- (i) Refraining (otherwise than inadvertently) from doing that act; or
- (ii) Making it known that that act will not be done

Importantly, s 4 includes omissions in its definition of 'engaging in conduct'. It also treats the making and carrying out of contractual or other agreements as conduct in the relevant sense.

Henjo v Collins Marrickville:Issue

- Did failing to disclose the true capacity of the liquor license constitute misleading or deceptive conduct under s 52?

Reasoning

- In staying silent, the purchaser was prevented from knowing the lawful capacity of the business to seat and serve alcohol
- The vendors allowed business to continue unlawfully during a four week period in which the purchaser was to observe the workings of the business
- Because it was important for the purchaser to know the true nature of the business, there arises a duty to disclose the true capacity
- The fact that the purchaser's solicitor ought to have discovered the capacity does not negate the duty to disclose

At common law there are three situations in which a duty to disclose may arise (half-truth, falsification, fiduciary duty). In the context of the *Trade Practices Act 1974* (Cth), the scope of the duty to disclose is significantly broader. It should instead be asked whether there is an 'expectation of disclosure'. This looks to the representee's (*reasonable*) expectations. A duty to disclose will arise if, in the circumstances, the representee was entitled to say 'this should reasonably have been disclosed' (*Demagogue v Ramensky*).

Demagogue v Ramensky:Facts

- Mr and Mrs R entered into a contract with D to purchase an estate
- The contract stated that, upon completion, the land and building would be subdivided into lots and common property would be subdivided into lots and common property
- Mr and Mrs R had asked about access to the property, and were told the developer would build a driveway to the road

- Later, Mr and Mrs R were shown a plan that showed a driveway coming from the road; they believed this represented the usual situation on whereby this road would run through common property
- In fact, the driveway was a public road and the respondents would need to enter into a lease with the Crown
- D bought a unit off the floor plan, and now wants to escape the contract because of a property bust
- The statement, 'we'll build an access road [to the property]' was made by the vendor; however, the road would need to cross over public land, requiring an application to be lodged and granted (retrospectively)
- Fees would be payable to maintain the access road
- The buyers (Ds) claim that failure to disclose the costs of upkeep for the public access road was misleading or deceptive, and sought rescission of the contract

Issues

- Was the failure to disclose relevant costs misleading?
- Is there a duty to disclose such information?

Reasoning

- In relation to the sale of land, a specific doctrine exists that there is *only* a duty to disclose any defects of title
- No other duties of disclosure are imposed upon a seller (eg, as to the quality of land)
- Here, there is no duty to disclose because the defective title doctrine does not apply to misleading conduct
- Instead, however, it should be asked whether there is an 'expectation of disclosure'
 - In the circumstances, was the representee entitled to say 'this should reasonably have been disclosed'?

Decision

- Ramensky's failure to disclose here constitutes misleading or deceptive conduct

2 *Intention to Mislead through Silence*

Generally, intent to mislead or deceive is not required breach s 52. However, there is debate as to whether remaining silent must be deliberate before s 52 can apply. s 4(c)(i) appears to require an intent to mislead by not disclosing information: refusing to do an act must be done 'otherwise than inadvertently'.

This suggests that non-disclosure must be deliberate (*Rhone-Poulenc v UIM* per Gummow J). Therefore, an intention to mislead may be required if silence or non-disclosure forms the relevant conduct for the purposes of s 52.

However, it is to be noted that contemporary case law provides no definitive answer on whether intention is relevant to the question of conduct constituted by omission.

3 *Statements about the Future*

In *Byers*, a statement about future facts (the existence of a swimming pool) was made without any intention of bringing about that state of affairs. Such a statement constitutes an actionable misrepresentation.

At common law, predictions of fact or promises about the future made with the intent to perform them or an honest belief in their veracity may only be actionable if their eventual falsification is provided for in the contract.

However, under the TPA, it may be possible for false predictions to be classed as misrepresentations. Two issues arise:

- a) Can a prediction or promise about the future amount to conduct?
- b) If they can, is it misleading or deceptive if they turn out to be wrong or broken?

s 51A deals with representations about future matters. It considers promises or warranties representations. It deems any such representation made without reasonable grounds misleading for the purposes of s 52. Non-promissory statements or predictions about the future are not expressly considered.

s 51A – Interpretation:

- (1) Where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation should be taken to be misleading.
- (2) In establishing (1), the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

Importantly, the onus is on the corporation to adduce evidence that reasonable grounds were had for making the representation. The effect is thus to reverse the onus of proof.

Brown v Jam Factory:

Facts

- Mrs Brown leased a garments shop in the Jam Factory, which was still under construction at the time, in reliance on three statements made by the developer:
 - (Present fact) all shops bar two had been let
 - (Future) all shops will be open when the centre's construction is complete
 - (Future) she will be able to open her store for all seven days each week
- In fact, only 25 out of 50 shops had been opened, and no permission for seven day trading had been granted; these were false statements
- Mrs B's business fails, and she sues the owner and agent of the Jam Factory for damages for contravening s 52
- Her claim is also based on s 53A(1)(b) (false representations about real property or land)
 - There are other provisions prohibiting misleading conduct, of which s 52 is the head; others deal with it in specific forms (eg, advertising, supply of services, land, etc)
 - Eg, the *ASIC Act (2001)* (Cth) reproduces the TPA's misleading or deceptive conduct and unconscionability prohibitions in relation to the supply of financial services
- *Brown* was decided prior to the introduction of s 51A

Issue

- In the absence of s 51A, did the three statements made about the present and future constitute actionable misrepresentations?

Reasoning

- Statement 1: relates to a present fact, is untrue, and is misleading (actionable)
- Statement 2: relates to a future fact (all shops being open)
 - Is a positive statement (engaging in conduct)
 - Needs to be expansive; doesn't matter that it's a provision
 - Is it misleading? Can't be deemed true or false because the construction was not complete at the time of the hearing
 - The state of affairs hasn't yet eventuated where it would be possible to determine whether the representation is misleading conduct or just a mistaken belief induced by the statement, which turns out to be wrong
 - However, it *is* misleading, even without s 51A
 - TPA expands significantly the scope of misrepresentation in a statutory context
- Statement 3: relates to the future (being able to trade seven days)
 - Not misleading because it is very rare and quite difficult to gain permission from the Council to trade on all seven days
 - This statement was just sales puffery, and Mrs Brown was not misled by it

Decision

- Yes, Mrs brown is entitled to damages in respect of two out of the three statements
- Damages are recoverable for reliance costs: money invested in the venture (plus interest); however, damages are discounted by 20% on account of some of the loss being caused by their limited experience in business and management

If one applies *Brown* to contractual promises (a form of conduct) under s 52, there are significant implications for actions thereupon. The position of a party making a false prediction by failing to meet a future promise may be radically altered:

- The TPA could potentially allow termination where any promise is misleading
- Breach of contract may be replaced by a statutory action for misleading conduct
- Falsification of promissory statements about the future may be sufficient to terminate
- The TPA would create concurrent liability at common law and in statute
- Would contract be replaced? (Hardly – may just grant an alternative cause of action)

Making a promise in the context of forming contractual relations falls within s 4(2) as 'engaging in conduct'. However, since *Brown*, the scope of s 52 has been confined to representations pertaining to the present, with statements and promises about the future needing to be brought within s 51A (*Accounting Systems 2000*).

Accounting Systems 2000:Facts

- Stokes is the director of Accounting Systems ('AS'), which develops computer software
- AS acquires a license to use Focus' accounting software to make a new program for use by tax agents

- The arrangement just grants AS a license to use the software, and does not assign copyright over it
- CCH and AS engage in a joint venture to develop another new program
- AS does not disclose that it is developed on the Focus software
- 'Castle Douglas' is a new corporate entity created for the purposes of the joint venture
- One of the contracts states that 'the Castle Douglas contract assigns copyright of AS's new program to Castle Douglas, which licenses the program to CCH'
- Cl 3.1 includes three warranties; AS asserts that:
 - 'We are the sole owners of the copyright';
 - 'We are entitled to transfer the copyright to CD'; and
 - 'No claims exist by anyone else for our infringement of their copyright'
- CCH becomes aware that AS's program is based on Focus software
- Focus discovers CCH's usage of the program, and demand a license payment of \$1m
- CCH sues AS and Stokes as its director for misleading or deceptive conduct under s 52 by making warranties in the contract that were false
- Thus, the three warranties are probably false:
 - Ownership – it is not immediately certain whether this warranty false, since the software was developed by AS (even though it was based on F's technology); however, it seems unlikely that AS is the *sole* owner
 - Entitlement to transfer copyright – false, since AS needs F's permission
 - No infringements – false, since AS is in breach of their license in assigning rights to CCH

Issue

- Does making a (false) contractual promise fall within the ambit of s 52?

Reasoning

- The promisor has made a factual promise (warranty) as to present states of affairs
 - Making a promise in the context of forming contractual relations falls within s 4(2) as 'engaging in conduct'
 - Therefore, if the warranties turn out to be false, they are misleading or deceptive
 - Here, the statements are promises, and false, so they are misleading
- However, if the statements were about the future, this would not be a form of conduct to which s 52 applies
 - Instead, s 51A may apply
 - In this case, there would need to be no reasonable grounds upon which to make the prediction
 - *Contra Brown*: future promises are now removed from s 52's ambit and shifted within the confines of s 51A
 - Thus, purely contractual promises as to future events can only be misleading if they are successfully brought within the ambit of s 51A

Decision

- AS engaged in the conduct of making promissory representations that were false, and thus misleading or deceptive for the purposes of s 52

Case law since *Brown* suggests that, with the introduction of s 51A, s 52 will be confined so as to exclude promises about the future (*Futuretronics*).

Futuretronics:Facts

- F wants to sell a building to a prospective buyer, Mr G
- Sweet, the auctioneer, invites G to inspect the building; G offers to buy it for \$2.4m, but in instalments
- F wants cash, so he places the property up for auction; 11 bids are made, but none are actually genuine; bidding halts at \$2.2m
- Sweet tells G he can have the property for just \$50k more
- G bids \$2.25m and the hammer is knocked down
- G wins the auction, but refuses to sign the contract of sale
- F brings an action seeking specific performance of the contract, due to its breach by G
- However, the statute of frauds requires a signature for the sale of land so F cannot sue on the contract for the sale of land
- Thus, it is alleged that a collateral contract exists such that G promises to sign the main contract of sale
- F also argues the alternative claim that in bidding, Mr G made a representation that he was going to sign the contract, and that in failing to do so, this conduct was misleading
- The *Fair Trading Act* (Vic) s 4 (which is equivalent to s 51A) is used as the cause of action, since this permits litigation against individuals (and not just corporations)

Issue

- Was bidding and then refusing to pay misleading or deceptive conduct under s 52?

Reasoning

- Ormiston J:
 - Apart from s 51A, statements of the future may *not* (note: unlike *Brown*) be misleading or deceptive conduct
 - Otherwise, every breach of contract would be misleading
 - (Dishonestly) making promises knowing they will not be performed will be misleading, because this is misrepresentation not as to the future but as to the present state of mind of the party
 - Did Mr G make the bid honestly?
 - Yes, he was intending to sign
 - He was a 'quick thinking, impetuous man'
 - However, he subsequently made the decision not to sign, so he could use this as leverage to negotiate payment terms
 - Under s 51A, it may be possible for breach of a contractual promise to be misleading, but only if there were no reasonable grounds to making the representation
 - The onus is on Mr G to show reasonable grounds
 - Here, reasonable grounds consist in showing the ability to perform the contract
 - Because he could not have paid the full amount in 90 days (as specified in the contract of sale), Mr G is liable under s 51A
 - Note that in most commercial transactions, it ought to be relatively easy for a representor to make out reasonable grounds; it is a subjective question: 'why would *they* have acted as they did?'

Decision

- Though the s 51A equivalent provision has been contravened by Mr G's honest though unreasonably-grounded bid, no liability arises in respect of damages payable to F, because there is no loss under s 87
- F placed no reliance upon Mr G's conduct, and cannot obtain specific performance

If *Brown* is still good law, false predictions made in a contract are misleading or deceptive in and of themselves, without recourse to s 51A.

However, after *Accounting Systems* and *Futuretronics*, it seems more likely that breached warranties about the future are actionable under s 52 only if they are made dishonestly (ie, misrepresent the representor's state of mind) or honestly but without reasonable grounds (ie, contravene s 51A).

D 'Trade or Commerce'

The definition of 'in trade or commerce' is provided by *Concrete Constructions*.

Concrete Constructions:

Facts

- P fell down a shaft when constructing a commercial building, and sued for misleading or deceptive conduct

Issue

- Was P presently engaged in trade or commerce when he was injured?

Reasoning

- A distinction is drawn between things incidental to trade or commerce and activities part of trade or commerce
- Things incidental to trade or commerce will not fall within its ambit [???]; however, activities part of trade or commerce will
 - Thus, transactions between ordinary commercial parties are clearly activities 'part of' trade or commerce
 - However, private transactions are clearly non-commercial or 'incidental to' trade or commerce
 - Thus, the private sale of items will not fall under the TPA
 - It remains somewhat unclear whether professional services (lawyers and doctors) are part of or incidental to trade or commerce
 - 'Professional' services may be incidental to 'commercial' ones
 - There has been a mixed approach taken to this issue
 - It is also unclear whether universities and educational services are part of trade or commerce
 - It may be relevant whether a fee is paid to the institution, as in the cases of HECS/fee-paying tertiary students
- Conduct 'divorced from any relevant actual or potential trading or commercial relationship or dealing will not, of itself, constitute conduct "in trade or commerce"'
 - Eg, the giving of a misleading hand signal by the driver of one of its trucks is not conduct by a corporation 'in trade or commerce'
 - Eg, a misleading statement by one of a building company's own employees to another employee in the course of their ordinary activities is, without more, not 'in trade or commerce'
 - The relevant conduct refers to 'transactions which, of their nature, bear a trading or commercial character'

Decision

- Here, the conduct consisted of ‘an internal communication’ by one employee to another in the course of their ordinary activities in and about the construction of a building
- Such conduct is not ‘in trade or commerce’ and cannot give rise to a contravention of s 52 of the Act
- Appeal allowed

II AVAILABLE REMEDIES

A Preliminary Issues

Having established a contravention of s 52, it is necessary to consider what remedies are available to a claimant. Two sections are potentially applicable: ss 82 (which provides for a right to damages for loss) and 87 (which allows a court to make orders of rescission).

Two preliminary issues arise:

- 1 To what extent can contractual provisions restrict rights to damages?
- 2 What is the liability of participants and accessories to conduct contravening s 52?

B Restricting Rights

Contracts cannot exclude rights conferred by the TPA for conduct, whether fraudulent or innocent (*Byers, Henjo, Demagogue*).

For example, in *Byers*: the clause restricting liability for innocent misrepresentation (cl 8) may operate in respect of common law misrepresentation, but any rights arising under the TPA are not excluded.

Similarly, in *Henjo*, the merger clause and the clause that prohibited reliance on Henjo’s representations were invalid. It is contrary to public policy to allow these clauses to deny liability under the TPA.

Thus, contractual provisions cannot limit or exclude liability under the TPA or its state or territory equivalents.

C Liability of Participants and Accessories

A contravention of s 52 also attaches to persons deemed to be accessories by s 75B (*Yorke v Lucas*).

Yorke v Lucas:Facts

- Yorkes, the purchaser of a business, has successfully sued every owner of the business under the TPA for misrepresenting its weekly turnover and profits, inducing Y to buy it
- Y appeals to the HCA, but L claims no knowledge of the representations' falsity – that he was merely passing on information

Issue

- Is Lucas liable as an accessory for the contravention of s 52?

Reasoning

- s 75B is not subject to strict liability; there needs to be an intention to deceive
 - Thus, there needs to be knowledge of the misrepresentation
 - Lack of this knowledge can be a defence to the mere passing on of misleading or deceptive information
- The words of the statute are interpreted in light of their criminal meaning: aiding and abetting thus require knowledge of the offence being committed
 - s 75(1)(c) also refers to *knowledge* of the contravention

Decision

- Lucas is not guilty of misleading or deceptive conduct because he had no knowledge that the representations were false, so it cannot be said he had knowledge of the contravention in the relevant sense
- Yorke's appeal is dismissed

D s 82 Damages

s 82 confers a right to sue for damages in respect of loss caused by misleading or deceptive conduct.

Note: a new section has been inserted into the TYPAs as of 26 July, 2004. [Insert???

s 82 – Actions for damages:

- (1) A person who suffers loss or damage by conduct of another's breach of Part IV, VI, IVB, V or s 51AC may recover the amount of loss or damage by action against the other or any person involved in it.
- (2) Any action under subsection (1) may be commenced within 6 years of the cause of action accruing.

There are thus two requirements for recovery:

1 *Loss or damage*

TPA damage connotes a tortious (not contractual) measure of loss (*Gates v Mutual Life Insurance*).

In *Gates*, no damages were awarded because there was no reliance loss, demonstrating that a claimant cannot obtain an expectation loss-based remedy under the TPA. Instead, it is only possible to claim loss that makes the claimant worse off than they already are (ie, the breach of s 52 must worsen their position).

Thus, in *Gates*, Mr Gates needed to have shown that he would have been able to obtain insurance similar to the kind he thought he was obtaining elsewhere. Were that the case, then the expected benefit under the policy would become part of his reliance loss, since he forewent an opportunity to obtain the benefit elsewhere.

However, Mr Gates could not establish that any similar policies were available, and that he would have pursued them. Because of this, he is only entitled to the difference, if any, between what he paid for the policy, and the value of the policy he received. Since the benefit was conferred (he still obtained the benefit of the policy for the duration of his premium payment), Mr Gates cannot demonstrate overpayment; therefore, he suffered no loss.

Marks v GIO:

Facts

- Marks borrowed money from GIO
- He was told that the interest rate of the loan would be fixed at a set percentage above the designated market rate
- However, in the actual contract, a provision allows GIO to vary the percentage rate
- GIO increases the margin beyond the original amount, but grants Marks the option of reneging without penalty when the change is first announced
- Marks do not want to refinance and borrow money elsewhere, because it would cost still them *more* – even after the increased interest rate – to move to a similar loan elsewhere
- This is because the revised rate is still well below the market average
- However, Marks brings an action under the TPA, seeking specific performance (s 87) (removing from the contract the provision allowing variation) and enforcement of the fixed percentage rate

Issue

- Has Marks suffered loss or damage for the purposes of s 82?

Reasoning

- The Court applies the tort measure of damages
 - Since the borrowers could not have obtained the represented benefit, they – like Mr G – have lost no opportunity and can recover no expectation benefit
- It is not possible to give an order to remedy loss of what they would have gained had the interest rate stayed fixed because Marks is still better off having entered into the contract with GIO than if they had borrowed money from anyone else
 - Marks is no worse off since GIO's breach of s 52
 - However, 'dishonest people finish up with the fruits of their dishonesty' – such a decision would seem to encourage dishonest dealings
- Even so, a claimant cannot get what was represented if nothing has been lost – that is, they cannot sue for loss as defined by only difference between expected promise and actual result
 - If a claimant is not worse off, no damages will be available

- However, there are a number of ways to demonstrate loss:
 - Lost opportunity may be relevant – here, the opportunity to obtain a loan at the fixed rate elsewhere (though on the facts no such opportunity existed)
 - See, eg, *Brown v Jam Factory*: the claimant was not suing for the profit they would have accrued had the representation been truthful and the business successful – that would be expectation loss (according to the contract measure of damages)
 - Instead, the loss of an opportunity to lease elsewhere was said to comprise the lessee's loss, as did their incurred debts, operating costs, lost assets, and loss of the opportunity to invest the money elsewhere
 - In short, a claimant can recover for costs incurred as a direct result of the other party's breach of the TPA, but cannot recover savings or other benefits that would have arisen had the contravention not occurred

Decision

- No competitor offered as low an interest rate as GIO, so Marks cannot be said to have lost either money (they're still better off than had they contracted with any other company) or an opportunity to borrow elsewhere (since no similar deal exists)
- Though GIO acted in contravention of s 52 of the TPA, because Marks suffered no loss they can recover for it nothing by way of damages

2 Causation by contravention

There must also be a causal link between loss or damage and the legal wrong for which damages are sought. This requirement is imported by the use of the phrase 'by conduct of another person' in s 82.

The principles of mitigation (that a wronged party has a duty to minimise the extent of the damage they suffer) and remoteness (that some forms of damage are beyond the legal liability of the perpetrator) are factors whose relevance to s 82 remains unclear.

Several difficulties arise in considering the issue of causation:

- Where misleading conduct occurs a long period before the signing of the contract, it can be difficult to establish that the representation was what induced entry into it
 - See, eg *Byers*:
 - The representation about the future existence of a pool was made seven months before the Byers signing the contract of sale
 - In the interim, the depiction of the pool had been removed from subsequent editions of the brochure
- It is enough that misrepresentation is a cause; thus, the presence of a source of conduct that could be considered misleading or deceptive under s 52 is sufficient to rescind or claim an action for damages under s 82
 - s 82 makes no mention of any apportionment
 - However, note s 82(1B)

s 82 – Actions for damages:

(1B) Despite subsection (1), if:

(a) a person (the claimant) makes a claim under subsection (1) in relation to

- (i) economic loss; or
- (ii) damage to property

caused by conduct of another person (the defendant) that was done in contravention of s 52; and

(b) the claimant suffered the loss or damage

- (i) as a result partly of the claimant's failure to take reasonable care; and
- (ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant

- (i) did not intend to cause the loss or damage; and
- (ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

Note: Part VIA also applies proportionate liability to a claim for damages under this section for a contravention of section 52.

Note that *Penville* and *L&L Securities* were decided prior to the introduction of s 82(1B).

Penville:Facts

- A developer purchased a block of land after a representation was made that, once built, a property would sell at a certain price
- However, the developer also substantially underestimated the costs of the project
- Losses were suffered in part due to the misrepresentation and in part due to the underestimation
- The vendor says that there should be an apportionment of damages, so that the loss was only partly caused by their misrepresentation

Issue

- Should damages be apportioned?

Reasoning

- There is no mention of apportionment in s 82, so the damages will not be apportioned

Decision

- The vendor is liable for the full extent of the loss or damage, despite only being a single cause thereof

L&L Securities:Facts

- A finance company lends money based on the misrepresentation of a land valuer, which amounts to misleading conduct
- However, the financier also failed to check on the ability of the developer to pay back the loan
- The lender lost the money when the developer subsequently becomes insolvent and the land cannot be sold for sufficient value to cover the cost of the loan

Issue

- Should damages for the land valuer's misrepresentation be apportioned to account for the additional failure on the part of L&L to make enquiries about the suitability of the purchaser to repay the loan?

Decision

- The lender can recover the whole of the loss; there is to be no apportionment, even though the relevant loss was caused by the vendor

Note, however, the addition of a new section into Part VI – Enforcement and Remedies: s 82(1B) – Apportionment.

s 82(1B) provides that apportionment is now allowed where two requirements are satisfied:

- (1) Where loss is in part due to the claimant's failure to take reasonable care; and
- (2) The representor's misrepresentation is not intentional or fraudulent.

E s 87 Remedies

s 87 outlines the Court's ability to make orders for rescission and contract variation:

s 87 – Other Orders:

- (1A) The Court may:
- (a) On the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in contravention of Part IVA, IVB, or V
 - (b) make such orders as the Court thinks appropriate against the person who engaged in the conduct (or a person involved in the contravention) if such orders will
 - (c) compensate the person who made the application in whole or in part for the loss or damage; or
 - (d) prevent or reduce the damage suffered or likely to be suffered

The section does not confer a right beyond that of a claimant to *apply* to the Court for judgment. The Court retains discretion to grant any application for a remedy.

1 *Is there a difference between ss 82 and 87 conceptions of 'loss or damage'?*

Interestingly, the type of damage required to is that the claimant 'has suffered, or is likely to suffer, loss or damage'. This suggests that the section is forward-looking (ie, that the anticipation of future loss may be sufficient to found an order for rescission or variation). This grants the Court a very wide discretion in construing loss and determining the appropriate order.

For example, in *Marks*, though no immediate loss was experienced, substantial loss in the future may be a result of GIO further increasing the percentage rate to a point well above market rates.

The question arises: 'is the concept of 'loss or damage' in s 87 the same as that in s 82?' To answer this definitively, it is necessary to consider several applications of the ss 82 and 87 and provisions.

Demagogue:

Facts

- [Buying of the plan on the representation that an access road would be built – see above Part I(c)(2)]

Issue

- Have the purchasers suffered loss?

Reasoning

- At the time of purchase, the property was worth what they paid for it
 - Further, the road *will* be built, and the costs of maintaining it will be negligible
 - It is unlikely that any pecuniary loss was suffered at this stage
- However, the misrepresentation induced the buyers to enter into a contract
 - This constitutes a loss because it imposes obligations upon the buyers and exposes them to legal liability for failing to perform
 - Entering into the contract is a loss for the purposes of s 87, even if it is not under s 82
- Gummow J:
 - Look at future events to determine the reliance loss – later, the land was worth less than when it was bought
 - Of course, the vendor is not responsible for the slump in land value – this is an intervening factor
 - Arguably, at the time of the contract, the buyer got 'for what he paid' (just like Mr Gates in *Gates*)
 - Gummow J appears to value loss by reference to future events
 - This is somewhat controversial
 - Loss as at the time of formation is not required under s 87 to enable rescission
- Black CJ:
 - The 'loss or damage' required by s 87 is different to that required by s 82
 - Detriment suffered by being obliged to perform a contract induced by misleading conduct is within the scope of loss

Decision

- Section 87 thus encompasses a weaker, wider conception of loss – it accepts legal obligations which impose liability if breached as a type of loss

Gummow J's valuation of loss by reference to future events has since been questioned in footnote 832 of *Marks* ([57], *Australian Cases on Contracts* at 577). The High Court of Australia casts doubt on the special meaning of loss in s 87, perhaps suggesting it is more similar to that of s 82 than the meaning for which *Demagogue* stands (viewed as somewhat controversial).

According to Gummow J in *Demagogue*, the phrase 'loss or likely loss' in s 87 does not refer to a tort concept of reliance loss (like s 82 does):

- Instead, his Honour suggests that mere entry into a contract (ie, the assumption of unwanted or misunderstood obligations) constitutes a loss
- Even if pecuniary loss is required, the facts of *Demagogue* would satisfy that requirement – the buyers were sold land which diminished in value after the sale
- This goes against the traditional measure of loss as at the time the contract was made

Accounting Systems 2000:Issue

- Is there a less rigorous conception of loss under s 87 than s 82?

Reasoning

- Is the prospect of having to pay \$1m a loss recognised by s 87?
 - This is unclear

Marks v GIO:Reasoning

- There is no loss other than that of the gain that would have occurred had the representation that the interest rate would remain fixed been true
- There is no loss under ss 87 or 82: expectation loss is *not* the appropriate measure of damages
 - A disparaging reference is made to Gummow J's judgment in *Demagogue*
 - The Court does not recognise the idea that injury is suffered just because an expectation is lost
 - It is rare that the only loss will be expectation loss
 - However, if there is no reliance loss, no damages may be awarded under either s 82 or 87
- Expressly overrules *Demagogue*, but there are a number of interpretations of this ruling
 - Does not (according to Ellinghaus) overrule *Demagogue*'s measure of damages
 - We *do* know that reliance loss is required
 - In relation to other kinds of loss and in other circumstances (eg, 'likely loss'), it is still unclear which measure should apply

2 Causation

Like s 82, s 87 requires there to be a causal relationship between the contravention of s 52 and the loss or damage suffered.

3 Discretionary factors

(a) Restitutio

If the Court cannot effect restitutio (ie, they cannot bring the parties back to their pre-contravention states), the court may exercise discretion and not award a remedy under s 87.

For example, in *Henjo*, there was an actionable misrepresentation and misleading or deceptive conduct, but an order for rescission could not be made because the restaurant's business value had diminished in the two years subsequent to the misrepresentation due to mismanagement on the part of the purchasers. Instead, damages were awarded.

(b) Motive

The motive for seeking relief may also be relevant. If, for example, the claimant's primary motive is not that they were misled, but that their newly-purchased asset has diminished in value, the Court may be less willing to order rescission (*Henjo, Demagogue*).

(c) Unconscionability

It may also be unconscionable to rescind the contract. This is also a factor of which the award under s 87 may take account.

In considering the above discretionary factors, the Court may also draw analogies with the loss of a right to rescind for misrepresentation. Thus, whether a party has waived their rights (expressly or by conduct), is estopped from seeking an order for rescission or variation, or has affirmed the contract despite the misleading conduct, are all matters which will influence the exercise of discretion.

F Hypothetical

1 Issue overview: Can B or J rescind for misrepresentation?

- B and J made a contract
- Can rescind if she can make out a case of misrepresentation
- A case of misrepresentation will only be made out if entry into the contract was causally connected with (ie, induced by) the misrepresentation
- Can sue for damages only if the misrepresentation is fraudulent or negligent
- Can apply for rescission of the contract under s 87
- Can sue for damages under s 82
- Potential sources of misleading conduct
 - The advertisement
 - Not telling students when their application for approval was rejected

2 *Is the alleged misrepresentation fraudulent or innocent?*

- There are two relevant misrepresentations
- The advertisement
 - Conscious of falsity (subjectively)
 - But application not yet rejected, they were just reporting what they believe true
 - But: objectively misleading? No – need subjective understanding of fraudulent nature
- The non-disclosure of the application's failure
 - Is there is a duty to disclose?
 - There is a subjective belief of falsity
 - If an actionable misrepresentation exists, then it was fraudulently made

3 *Restitutio*

- Education can't be 'given back' to the university
- However, the university can give back fees
- CL: strict – this poses a problem for B and J
- Equity: may be possible to assign a value to the education
- The longer the time that has lapsed since entering into the contract, the harder restitutio is to establish

4 *Is the advertisement an actionable misrepresentation?*

- False statement of fact?
 - Objectively: not false because it stated that the application was impending
 - Need to interpret meaning
 - Element of prediction involved
 - However, the asterisk objectively conveys the meaning that 'it is only a matter of time before we are approved'
 - If the university does not believe what it is claiming, then the misrepresentation is actionable
 - Otherwise, a mere prediction about the future is not actionable
- Material inducement?
 - The effect of the advertising was material, being a material cause of B and J's decisions to undertake study at the university

5 *Is the failure to disclose the denial of approval an actionable misrepresentation?*

- False statement of fact?
 - It is not a statement, but silence
 - There needs to be a duty to disclose
 - Such a duty arises here, because the situation has changed such as to render the original statement of fact false
 - 'Application pending' – now untrue, since it has been processed and denied
 - The facts have changed so there is a duty to disclose
 - A fiduciary relationship is unlikely to exist

- The university has thus failed to disclose an existing fact which is now clearly false
- Material inducement?
 - Did either student make a contract as a result of the failure to disclose?
 - No, because the non-disclosure occurred 1 year after their entry into full-time study
 - Though they were induced to continue, the law of misrepresentation is not concerned with that – only *entry* into a contract is relevant
 - Therefore, this conduct is not a ground of misrepresentation and neither B or J can rescind
 - An action for misrepresentation on the basis of non-disclosure must fail because neither party was induced to enter into the contract by the misrepresentation constituted by failing to disclose the failure of their application for approval
 - A pre-contractual misrepresentation is necessary

6 *Restrictions on the exercise of the right to rescind*

- Contractual provisions
 - Able to limit exercise
 - Here, precludes innocent (but cannot exclude fraudulent) misrepresentations
 - Unless the contract was actually made at a point in time *before* that clause was included – eg, *Oceanic* (signing the application *after* being approved)
- Partial rescission
 - It may also be possible to rescind the contract before the silence, prior to their finding out about the misrepresentation

7 *Loss of the right to rescind*

- It may also be argued that B and J actually affirmed the contract by not enquiring about the rumour
- They were warned by a friend, but did nothing
- Is this to be viewed as an abandonment of their right to sue for the misrepresentation of the university?
 - Unlikely: it is just a rumour, after all, and not an authoritative statement that the original representation had, in fact, been falsified

8 *Trade Practices Act 1974 (Cth)*

- B and J's main source of damages is the TPA
- Trade or commerce
 - Education in trade and commerce?
 - If not, the TPA is not applicable
 - Is there a distinction to be drawn between fee-paying and HECS students?
- Misleading or deceptive conduct
 - Advertisement

- Objectively misleading? (Don't need intent)
- Or just passing on information?
 - No: misleading to potential audience
 - Interpret its meaning objectively
- Engage in conduct
 - Statement about the future
 - Prediction
 - Can be dishonest or can also be misleading innocently (*Brown v Jam Factory*)
 - Lacking in reasonable grounds?
 - s 51A: deemed misleading unless the university can adduce evidence to the contrary
- Failure to disclose
 - Silence: no duty to disclose required (*Demagogue*)
 - Reasonable to expect disclosure? Yes
 - But: inadvertence to non-disclosure may not be conduct according to s 4(2)(c)
 - Needs to be advertent; however, here, it clearly was
 - (Narrower ambit of operation than for misrepresentation)
- Remedies
 - Void ab initio
 - Void from the date of disclosure
 - Order to refund all monies paid by B and J: s 87

9 Damages for misleading or deceptive conduct

- A contractual provision cannot exclude TPA/consumer-protection provisions
- B and J might also sue individuals involved in the advertisement or non-disclosure as accessories
- s 87: loss – advertisement
 - Fess to the university and Commonwealth (reliance loss)
 - But: was the course worth what was paid for it?
 - The education still received by both students, in full
 - No accreditation was granted, but they still received the education as claimed
 - Arguably, however, the accreditation was worth something, and the value of the resulting degree was significantly diminished by virtue of its unrecognised stature
 - Loss of the opportunity to work at \$200 000 per annum (reliance loss)
 - Loss of the expected income of \$300 000 per annum (expectation loss)
 - Loss of the opportunity to study elsewhere and gain accreditation and thus get the \$300 000 salary (reliance loss)
- s 87: loss – failure to disclose
 - Lost opportunity to pull out and return to work for the second year of their studies
 - Causation requirement: 'by contravention' – the failure to disclose did not induce the making of the contract since both B and J were already in it
 - But they were arguably induced to stay on

- The loss in second year can be linked to the misleading conduct because it can be before, during, or after the entry into the contract
- Here, it occurred during the contract's execution
- s 82: damages
 - There is loss
 - It was caused by the misleading or deceptive conduct
 - Calculation of damages
 - Tort measure is applied
 - No recovery of future expected earnings *unless* there existed another opportunity to gain accreditation elsewhere, which was given up in favour of the university's course
 - Given the nature of the accreditation (it exists and employers are seeking qualified employees), it seems likely that other courses of a similar nature were available at other institutions – unlike *Gates*
 - Does mitigation apply? It B and J must minimise their loss, it may be reasonable to view them as simply set back by two years, and thus able to go to another university and start a similar course again
 - Includes lost fees but reduced for the value of the education
 - Includes lost income, but may be apportioned given their failure to make enquiries
 - Apportionment
 - s 81B suggests that B and J's failure to take care in relation to the rumours renders the second year's reliance loss unrecoverable
 - s 81B introduces the mitigation doctrine, so B and J's failure to take reasonable care to mitigate their loss by returning to work or beginning a new course elsewhere after learning of the university being denied approval for accreditation may prevent them from recovering loss from their second year