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# Legal notes

## Private action

### **Bruce William Bowler and Janelle Joy Bowler & Ors v Hilda Pty Ltd**

*Black CJ, Heerey and Cooper JJ*  
*Federal Court of Australia*  
*25 February 1998*

#### **Background**

This case arose out of the redevelopment and subsequent sale to the public, through a corporate Units Plan, of residential and serviced apartments. The appellants (Bowler & Ors) entered into a contract for the purchase of a unit in a redevelopment of buildings by the first respondent (Hilda). The second respondent, Leader Real Estate, was retained by Hilda as its executive agent to effect sales of proposed units in the redevelopment. The third respondent, Leader Holdings Pty Ltd, is the holding company of Leader Real Estate.

The essence of the complaint made by the Bowlers at first instance was that the Leader companies, in promoting the sale of the units, made representations to them which were misleading and deceptive and which induced them to acquire Unit 23 to their damage and loss. The alleged contravening conduct is claimed to have occurred during meetings between the Bowlers and Mr Singh (an employee of one of the Leader companies) on 22 and 23 July 1993. The representation relevant to this appeal was the assertion by Mr Singh that the Bowler's unit could be 'lived in, rented out privately, or rented to the management company which would sub-let it as a serviced apartment' (the 'unit use' representation as described by the trial Judge and as supported in an advertising brochure given to the appellants). At the time this statement was made, the property could not

lawfully be used for any purposes other than those of a residential hotel and an ancillary car park. The vendor then applied to the planning authority to vary the subdivision plan to allow home occupation, but this application was subsequently rejected.

#### **Judgment at first instance**

Contraventions of ss 52, 53(g) and 53A(1)(b) of the Trade Practices Act were alleged at first instance. The trial Judge characterised the representation in question as a representation that a particular state of affairs would exist in the future in relation to the units. Accordingly, he found it to be a representation relating to a 'future matter' within the meaning of s. 51A of the Act. His Honour further characterised the representation, when made by Leader, as one of present belief or opinion that 'the Leader companies were reasonably of the view that Hilda would take the steps within its power necessary to bring about the represented state of affairs'. His Honour proceeded to find that Leader did have such reasonable grounds, notwithstanding its unexplained failure to call evidence. Leader had, in his Honour's view, been 'deceived' into making the representation 'by the failure of the principal to disclose the true state of affairs to it'. Justice Finn concluded, amongst other things, that the claim based upon the unit use representation had not been made out. Accordingly, his Honour ordered that the appellants' proceedings be dismissed with costs. The appeal in question was against that order.

#### **Appeal**

The relief sought by the appellants under the Act included orders setting aside the whole of the transaction or alternatively guarantees of their obligations under the sub-lease. The appellants claimed they had entered into the transaction in reliance upon representations made by Hilda's agent, Leader Real Estate, or,

alternatively, by Leader Holdings, and that these representations were misleading and deceptive contrary to s. 52 of the Act and false and misleading contrary to ss 53(g) and 53A(1)(b) of the Act. Chief Justice Black allowed the appeal on the basis that the evidence did not justify the conclusion that the Leader companies had reasonable grounds for making the unit use representation. Justice Heerey was in agreement with the Chief Justice, and viewed Leader's state of mind as to its principal's intention as irrelevant. His Honour, in assessing the applicability of s. 52 to future representations, agreed with Lee J's statement of the law in *Wright v Wheeler Grace & Pierucci Pty Ltd* (1989) ATPR 40-940 at 50-251 that:

A positive unqualified prediction by a corporation may be misleading conduct in trade or commerce if relevant circumstances show the need for some qualification to be attached to that statement or the possibility of its non-fulfilment to be disclosed as a requirement of fair trading. The fact that the corporation believed or had reasonable grounds for belief that the prediction would be fulfilled, would not answer the question as to whether the conduct was misleading or deceptive conduct in trade or commerce.

Justice Heerey identified two basic principles which have emerged in the jurisprudence of s. 52. First, it is the objective nature of the alleged contravener's conduct that ultimately determines liability and not his or her state of mind. Second, the words of the statute are to be given their natural meaning and not moulded to fit the pre-existing common law. His Honour saw the representation in question as an unqualified assertion as to the lawful use to which the unit could be put and, coming from an estate agent, a professional who might reasonably be seen as having expertise as to the planning restriction applicable to the property it was engaged to sell, the representation was not something merely passed on by Leader for what it was worth. His Honour also noted that exclusionary and disclaimer clauses cannot override the statutory prohibition against misleading and deceptive conduct or prevent the grant of appropriate statutory relief where loss or damage is, as a matter of fact, caused by contravention of the statute.

Justice Cooper gave a dissenting judgment. His Honour believed that the case articulated by the appellants was not one which was apparent from a fair reading of the pleadings. Furthermore, his Honour said that although real estate agents may be better informed than other members of the public as to land use and concepts of town planning, it cannot be unreasonable for a person to seek legal advice as to the accuracy of a representation from a competent lawyer conversant with the particular proposal to redevelop the complex as a mixture of residential apartments and serviced apartments. For these reasons, Cooper J held that there was no contravention of s. 53A(1)(b) and therefore that the appeal should be dismissed.

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