

The relevance of *intention and means* and the meaning of *unconscionable conduct*

***Body Bronze International Pty Ltd v Fehcorp Pty Ltd* [2011] VSCA 196**

By Aneita Browning

The Victorian Court of Appeal¹ considered the *Trade Practices Act 1974* (Cth) (the TPA)² ss52 and 51AC in *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* [2011] VSCA 196.³ Central issues included the *intention and means* of a representor in relation to the misleading and deceptive conduct claim (s52) and the meaning of *unconscionable conduct* under s51AC.

BACKGROUND

Body Bronze was a franchisor of body tanning salons and Fehcorp was the franchisee of a new salon. Its franchise arrangement was effected through a *Heads of Agreement*⁴ (the Heads) and the later *Franchise Agreement* (the Agreement). The former document contained a finance clause to the effect that, '...if the salon fit-out costs, which were to be met by the franchisee, exceeded \$250,000, Body Bronze would lend the franchisee additional funds required for the fit-out at a flat rate of 10 per cent per annum'⁵ (the 'Finance Arrangement'). Such a clause was not included in the Agreement.⁶

A time arose when Body Bronze advanced Fehcorp \$19,250 for payment of invoices.⁷ Fehcorp later required further funds, but Body Bronze refused. Whether the initial amount advanced was a loan or a loan pursuant to the finance arrangement and whether the threshold of \$250,000 had been

reached were two contentious issues.

The lease arrangement for the business premises saw Body Bronze as head lessee and Fehcorp as sub-lessee. Body Bronze declined to supply further funds and Fehcorp, relying on the terms of the finance arrangement, then refused to pay the lessor's invoice of \$22,207.08. Ultimately, the invoice was paid by Body Bronze. Fehcorp was then served with a formal notice of Breach of Agreement, demanding payment within 14 days or the Agreement would be terminated in accordance with its terms. Fehcorp did not pay and Body Bronze entered into possession.

Saccardo J awarded damages to Fehcorp for breach of contract⁸ and held that there were contraventions of s52, s51AC and s75B⁹ of the TPA by Body Bronze. On appeal, all but the breach of contract finding were overturned.

MISLEADING AND DECEPTIVE CONDUCT

As to Body Bronze's breach of s52, Fehcorp advanced two arguments. First, that Body Bronze had engaged in misleading or deceptive conduct by making the representation about the finance arrangement prior to entering the Agreement, which was relied upon by Fehcorp, and that this representation was actually 'false and untrue'.¹⁰ The alternative relied on s51A, 'that the representation was with respect to future matters, for the making of which

Body Bronze lacked any reasonable ground'.¹¹

Representation

Saccardo J found that the representors, Body Bronze, had intention to honour the representation at the time it was made. Considering 'whether the intention...to honour the finance arrangement continued at the time at which the Franchise Agreement was entered', he held that it was 'of little relevance' to a misleading and deceptive conduct matter.¹² He went further, concluding 'the intention of Body Bronze when it *made* the representation was also irrelevant in determining whether a breach of s52 had occurred'.¹³

His Honour was satisfied that Body Bronze made the representation to honour the finance agreement. Fehcorp relied on that representation as an inducement, and Body Bronze did not honour it in circumstances in which it was obliged to do so. Therefore, Body Bronze contravened s52(1), constituting misleading and deceptive conduct.¹⁴

Error was found by the appeal court:¹⁵

'It has long been held that the mere fact that representations as to future conduct or events do not come to pass does not make them misleading or deceptive even though the plaintiff has relied on them and has altered his position on faith of them.'

Future conduct, intention and means

Body Bronze's representation was as to future events or conduct.¹⁶ Such a representation 'may contain an implied statement of existing fact', that the promisor has a present intention and the means to make good the promise.¹⁷ If there is no means or intention, then it may be misleading or deceptive.¹⁸

As the trial judge was satisfied as to both elements, that Body Bronze had the 'intention to lend the money and the means to make good that promise', Body Bronze therefore 'had reasonable grounds for making the representation'.¹⁹

Reasonable grounds

Macaulay AJA found error in the reasoning that Body Bronze did not have reasonable grounds for making the representation. As the trial judge found at the time of the representation that an intention and the means to honour the promise existed,²⁰ there was no basis for the finding that Body Bronze did not have reasonable grounds for making the representation when it did.²¹

UNCONSCIONABLE CONDUCT

Section 51AC of the TPA provides that a corporation must not engage in conduct that is unconscionable in relation to supply. Fehcorp argued that Body Bronze breached that requirement when it refused to lend the money requested, served the notice and took possession of the business premises.²²

The trial judge agreed that Body Bronze had engaged in unconscionable conduct. The basis being that it knew the importance of the finance arrangement to Fehcorp before entering the Agreement, the relative strengths of the parties, and the circumstances of Body Bronze taking possession of the business and premises.²³

Strength of the parties

It was not evident that a difference existed in the relative strengths of the parties and the appeal court was critical of the lack of analysis provided in the reasons.²⁴ The appeal court also noted that Fehcorp had accepted the repudiation by Body Bronze, which it was not compelled to do as other

measures were available.²⁵ In the circumstances,²⁶ there was no 'misuse of bargaining position' or 'any relevant mismatch' in strength.²⁷

Unconscionable conduct

The appeal court considered the scope of s51AC,²⁸ noting that it 'prescribes a standard rather than a rule...wherein the boundaries of its application are normative rather than logical'. The court is to be guided by the listed factors. 'Any promise that is deliberately broken could easily be characterised as unconscionable. That is not the sense in which the term is used in s51AC.'²⁹ In a breach of contract, a 'high level of moral obloquy'³⁰ applies.

Macaulay AJA said:³¹

"There may be nothing offensive to conscience in a commercial participant taking such a commercial decision in given circumstances. Whether or not it amounts to unconscionable conduct does not simply flow from it being a deliberate breach; it must be evaluated in 'all the circumstances'."

The question of what more than conscious breach is required can be gleaned from s51AC(3).³² On analysis of applying the circumstances³³ to the principles, moral obloquy was not satisfied and the conduct was not irreconcilable with 'what is right or reasonable,' nor did it show that Body Bronze had 'no regard for conscience'.³⁴ ■

Notes: **1** The judgment was delivered by Macaulay AJA with Harper and Hansen JA agreeing. **2** At the trial, Fehcorp also relied upon ss8A and 9 of the *Fair Trading Act 1999* (Vic). **3** This was an appeal from the County Court decision in *Fehcorp Pty Ltd v Body Bronze International Pty Ltd & Ors* [2009] VCC 1001. **4** The Heads of Agreement contained essential terms of the franchise agreement and bound parties to proceed with their respective obligations to establish the business, and use best endeavours to prepare a franchise agreement including terms of the Heads of Agreement; at [10]. **5** Per Macaulay AJA at [11]. **6** [12]. The Agreement did contain an entirety clause. In the pleadings, Body Bronze asserted that it did not make a representation or enter a binding agreement to the effect of the finance arrangement. It expressly pleaded and relied upon the entirety clause by way of answer to any such representation. However, this was not pursued at trial. See [27]-[28]. **7** See [17]-

[19] for more detail on the parties dealings.

8 The breach of contract is not looked at in detail here. The appeal court upheld the findings that the finance arrangement was a term of the Agreement and that the threshold had been reached, triggering the loan obligation. Body Bronze was in breach by failing to advance the funds and by taking possession of the premises and business.

See [20], [27]-[33], [37]-[40]. **9** Section 75 deals with accessorial liability, which is not addressed here. Once the appeal court found that there was no breach by Body Bronze of ss52 and 51AC, then Meneilly and Mitchell could not be held liable as 'involved' persons. See [25], [66]-[73], [103].

10 [21]. The argument that it was *false and untrue* was (i) expenditure had exceeded the threshold; (ii) there had been a loan but not for the entire excess; and (iii) the refusal to make a further loan. See [22]. **11** [21].

Section 51A 'Interpretation' appears in the same Division as s52 and provides, 'where a corporation makes a representation with respect to any future matter...and the corporation does not have reasonable grounds for making the representation [it] shall be taken to be misleading'. In such a proceeding, if it relates to a future matter, then the corporation shall be deemed 'not to have reasonable grounds for making the representation' unless evidence to the contrary is adduced. **12** [45] quoting reasons at [96]. **13** See Macaulay AJA at [46].

14 [46] referring to reasons at [102]. **15** [48].

16 [49]. **17** Macaulay AJA at [49]. **18** *Ibid*.

19 [50]. See also [48]-[54]. **20** [42] referring to Reasons [89].

21 Macaulay AJA at [62].

22 [77]. **23** [78] referring to Reasons [110]-[112]. **24** [82]. There was little issue over the other two factors. **25** [83]. Such as injunctive relief. **26** Such as, among other factors,

Fehrer being 27 years old, tertiary educated, with previous business experience running a business, and that Fehcorp had retained a solicitor in the early dealings and insisted on the finance clause. See [81]. **27** [84].

28 See [87]-[89]. Macaulay AJA compared the scope of s51AC and s51AA. See the extract from *Australian Competition & Consumer Commission v Allphones Retail Pty Ltd (No. 2)* [2009] FCA 17 referred to at [89]. **29** Citing Weinberg J (as he then was) in *Macdonald v Australian Wool Innovation Ltd* [2005] FCA 105. **30** See [89]-[91].

31 [92]. **32** [93]-[94]. **33** [95]. Such

circumstances included the lack of disparity between the strength of the parties; that Body Bronze may have acted in its 'own legitimate commercial interests'; Fehcorp understood the legal documents; no evidence of undue influence; the intended conduct was disclosed; and as there was a contractual promise, with remedies available, there was no reliance by Fehcorp on the good faith of Body Bronze. **34** [97].

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