NOTES

TRADE PRACTICES CASE MOUNTS AN ASSAULT ON ESTABLISHED DOCTRINES OF CONTRACT

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A recent case decided by the Full Federal Court has held that false warranties in a contract could constitute misleading and deceptive conduct and therefore provide the basis of an action under section 52 of the Trade Practices Act 1974 (Cth). This decision has implications for the legal classification and treatment of breach of contractual terms as well as the doctrine of privity of contract. As the majority in the case reaffirmed: "The precise boundaries of the territory within which section 52 operates remain undetermined."[1] This decision, which has the potential to erode substantial segments of established contract law, was arrived at, ironically, not by any innovative or inspirational legal reasoning but by the comparatively prosaic means of simply referring to a statutory definition in its literal sense.

Accounting Systems 2000[2] (AS 2000) acquired a right to use, but not an assignment of, copyright in a particular computer programme, which it developed as the AS programme. It purported to assign to Castle Douglas (a company controlled by CCH) copyright in various computer programmes, including the AS programme. The assignment agreement contained certain warranties. In clause 3.1(b), AS 2000 warranted that it was entitled to assign the copyright it purported to own to the assignee without the consent of any

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1. *Accounting Systems 2000 (Developments) Pty Ltd v CCH Aust Ltd* (1993) 114 ALR 355, 387. See *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 601.
2. This term was used by the trial judge to identify, without distinction, two closely related companies: (i) Accounting Systems 2000; and (ii) Development & Systems 2000.

person. In clause 3.1(c), the assignor warranted that there was no claim or potential claim against it for breach of copyright in respect of any computer programme. There was no evidence that AS 2000 had, prior to the making of the copyright assignment agreement, made any representations to the effect of these warranties.

CCH, in the belief that copyright had been assigned to Castle Douglas, took a licence from Castle Douglas. The conduct of AS 2000 was thus a direct cause of CCH's expenditure under its licence.

The court found as a matter of fact that AS 2000 had breached both warranties. AS 2000 contended that, as a matter of law, the mere giving of a warranty was not capable of constituting a misrepresentation in contravention of section 52 of the TPA. CCH argued that a contractual warranty was a statement or promise that something was true and that this was a representation which, if false, could constitute misleading or deceptive conduct under section 52.

The majority of the court (Lockhart and Gummow JJ) upheld the decision of the trial judge and found in favour of CCH: AS 2000 were ordered to pay damages to CCH under the TPA, section 82. Although not itself a party to the Castle Douglas/AS 2000 agreement, CCH in reliance on the warranties given to Castle Douglas had paid for a licence to use the programme. Under section 87 the Castle Douglas agreement (and other relevant agreements) was declared void ab initio. The basis for their Honours' decision was the meaning of "engage in conduct" in section 52. For this determination they referred to the interpretation provisions of the TPA, specifically section 4(2)(a):

> A reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of a contract of arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of a covenant.

They concluded that this provision applied to the TPA generally, wherever the word "conduct" was used, and was not confined in its application to any particular part of the Act.[3] The conduct that AS 2000 had engaged in that was misleading or deceptive was the making of false statements which had been

3. Northrop J, who dissented, argued strenuously that the words of inclusion in s 4(2)(a) & (b) should be limited to the making of a contract or arrangement or arriving at an understanding of the kind referred to in Pt IV of the TPA, in particular s 45, and not be given an unrestricted meaning. According to his Honour, s 52 type conduct was never intended to extend beyond pre-contractual conduct to the making of the contract itself. This was clear from both the Second Reading speech, and the Explanatory Memorandum for the Trade Practices Amendment Act 1977 (Cth), which introduced s 4(2)(a).

embodied as provisions of the contract.

As added justification for this conclusion, their Honours noted that to give effect to the policy underlying Part V of the TPA, and the purpose of section 52 in particular, the legislation should be interpreted "so as to give the fullest relief which the fair meaning of its language will allow".[4] The categories of section 52 conduct were not closed. They added that a court should not be inhibited from giving full effect to this provision simply because to do so could result in liabilities and remedies different from those created and provided by the general law. Neither of these observations were novel judicial pronouncements.[5] Further bolstering their conclusion, the majority reaffirmed that representations were only a sub-class of the much wider concept of "conduct" referred to in section 52. Although many of the decided cases were concerned with what would be classified at general law as "representations", the provision addressed itself to "conduct".[6]

IMPLICATIONS

1. Section 52 available for breach of contract

According to this case, where a contractual warranty is false, the innocent party is not limited to an action on the contract but may bring an action under section 52. Actions for breach of contract have the potential to be significantly supplanted by section 52: assuming constitutional requirements are met,[7] and the conduct engaged in is "in trade or commerce",[8] the contractual term need only satisfy the "misleading or deceptive" criterion.[9] This will clearly be the case where a contractual promise about a present fact (when given) is false or misleading.[10] Where there is a contractual promise about a future matter which fails to materialise there will be no automatic contravention of section 52.[11] If the promisor is unable to lead evidence of

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4. *Accounting Systems v CCH* supra n 1, 387.
5. As cited in the case: see *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32; *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83; *Demagogue v Ramensky* (1992) 110 ALR 608.
6. For cases in which it has been held unnecessary that there be a representation for s 52 to apply, see eg *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) ATPR Digest 46-054.
7. The Fair Trading Acts of the States and Territories have provisions identical to s 52, unrestricted by the Constitution.
8. See *Concrete Constructions* supra n 1.
9. As with breach of contract, there need be no knowledge of the falsity of the contractual provision.
10. As in *Accounting Systems v CCH* supra n 1.
11. Eg a promise to do X on or by a certain date which the promisor fails to fulfil. The fact of

reasonable grounds for making such a promise, the promise will be deemed misleading. The majority alluded to this type of contractual promise falling within section 52 but involving consideration of section 51A, a provision designed to facilitate proof in cases involving representations as to future matters. Although section 51A speaks in terms of "representation" rather than "conduct" the majority found no difficulty in equating the former with the latter, applying the section to "representation(s) with respect to a future matter ... contained purely in a contractual promise".[12] If evidence of reasonable grounds for making this type of promise is adduced, there will be no infringement of section 52. In such a case an action for breach of contract will still be available.

The majority noted that where there is a breach of any of the non-excludable conditions implied into consumer contracts by Division 2 of the TPA, there is a special statutory right of rescission given by section 75A. This they contrasted with breach of an express "warranty" (as occurred in the case), which is covered by Division 1 (which includes section 52) and the remedies in Part VI.[13] If the implication is that section 52 will not cover breaches of the implied conditions in Division 2 because of the special remedy provided, attention must be drawn to section 74A(4) which provides that "the right of rescission conferred by this Section is in addition to and not in derogation of any other right or remedy under this Act ... or any rule of law." Clearly, according to this section the existence of the statutory right alone would not preclude an action for misleading or deceptive conduct for breach of any of the implied conditions.[14]

(i) Applicability of section 52 concepts

In those cases of contractual breach where section 52 does have application, it is arguable that concepts developed in relation to section 52 will be applicable. In deciding whether conduct is misleading or deceptive, a two-stage test must be administered. The first stage enjoys universal judicial consensus: the class of consumers likely to be affected by the conduct must be identified.[15] The second stage is less clear. There is case law which

failure per se does not necessitate a finding that the promise when given was misleading or deceptive.

12. *Accounting Systems v CCH* supra n 1, 389.
13. Id, 388.
14. Implied warranties are also not precluded. Ss 69 (1)(b) & (1)(c) are implied warranties of quiet possession and freedom from encumbrances respectively. As warranties, the remedy of statutory rescission has no application to them.
15. *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199.

suggests that it is only the effect of such conduct on reasonable members of the class identified that must be considered,[16] but there is also case law which supports a more "consumer friendly" standard (viz, the effect of the conduct on those who may be regarded as less than reasonable, on "a person, not particularly intelligent or well informed, but perhaps of somewhat less than average intelligence and background knowledge, although the test is not the effect on a person who is, for example, quite unusually stupid").[17] Since the making of contractual promises may be regarded as "engaging in conduct", it would follow that the interpretation of these promises will not necessarily be in accordance with the standards of the "reasonable" person, the general approach adopted when construing contractual terms and in determining whether there has been a breach. Rather, it may be according to the standards of the "ordinary" person.

The application of this more liberal section 52 standard will mean that there may be some cases of incorrect contractual terms that will not support breach of contract actions but will still be regarded as misleading or deceptive conduct. In the area of consumer contracts this would be a desirable outcome. There are strong policy reasons why the understanding of a concept such as the merchantable quality of goods, an implied condition in all consumer contracts, should be determined in each case by reference to a person who may be "less" than reasonable.

(ii) Remedies

If a successful action is brought under section 52 for the making of a false contractual term, one of the remedies sought may be damages under section 82. It is generally thought that the appropriate measure of damages recoverable under this provision is similar to that which would be recoverable in an action for the tort of deceit.[18] Nevertheless, section 82 itself lays down no definitive choice of the measure of damages to be applied in all cases. There have also been judicial pronouncements canvassing the possibility that the tort measure of damages may not be appropriate in all cases, in some of which it may give way to the contract standard.[19] Although this point was not argued in *Accounting Systems v CCH*, the majority affirmed that the tort measure of damages was not always applicable and warned that, especially

16. Ibid.
17. *Taco of Australia v Taco Bell Pty Ltd* (1982) 42 ALR 177, 181.
18. *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1.
19. *Hubbards Pty Ltd v Simpson Ltd* (1982) 60 FLR 430; *Frith v Gold Coast Mineral Springs Pty Ltd* (1983) 65 FLR 213.

in a case where a false contractual term formed the basis of an action for misleading and deceptive conduct under section 52, there was "a danger" in automatically applying it.[20]

Remedial orders under section 87 may also be granted by the court where conduct is misleading or deceptive. The wide powers of the court conferred by this provision of the TPA effectively include rescission of a contract.[21] This would mean that where a false warranty, as opposed to a condition, is characterised as misleading or deceptive conduct under section 52, the remedy of rescission of the contract, although discretionary, would be available, where it would not otherwise have been if an action had been brought for breach of contract.

2. Privity

(i) General

The remedies provided in Part VI of the TPA are not limited to parties in a contractual relationship with the party who has contravened section 52. Where the misleading conduct is a false contractual term, the complainant needs no contractual privity with the defendant to obtain relief. In *Accounting Systems v CCH* itself, CCH was not a party to the critical Castle Douglas agreement, yet it was granted relief. The case not only illustrates a statutory means of avoiding the straight-jacket of the doctrine of privity, but may well be a contributor to its further demise.

At common law, where a false contractual promise is given, only parties to the contract can sue for breach.[22] According to section 52 it is not simply the contracting parties but members of the conduct's targeted audience, actual or deemed, who can be considered as potential plaintiffs. Any person who could be expected to rely on the contractual term would form part of this group and would thus be entitled to the benefits of the remedies referred to in sections 82 and 87. Application of this can be seen in the case of financiers and investors. Those who, for example, advance money to buyers of businesses because of terms in the contract of sale about weekly takings, volume of sales or any other characteristics of the business would be able to

20. *Accounting Systems v CCH* supra n 1, 390.
21. See s 87(2)(a): "an order declaring the whole or any part of a contract ... void ab initio ..."; and s 87(2)(c): "an order directing the person who engaged in the conduct ... to refund money or return property to the person who suffered the loss or damage".
22. *Price v Easton* (1833) 4 B & Ad 433; *Tweddle v Atkinson* (1861) 121 ER 762; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847; *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460.

obtain relief under Part VI if these terms were incorrect and therefore misleading or deceptive. At common law, in the case of default by the borrower, the lender would be confined to a potentially barren action against its debtor, now possibly the owner of a failed or failing business, while the seller would remain out of reach.

Another application of this would be the case of a lender advancing money to a borrower on the basis of an employment contract, that is, on the basis of ability to repay the loan.[23] If the employment contract is breached by the employer, and as a result the employee/borrower defaults on the loan, it may be more advantageous for the lender to bring an action for misleading or deceptive conduct against the employer than to sue the borrower for breach of the loan contract (particularly if there is no security).

The doctrine of privity in the context of breach of implied terms in consumer transactions has already been significantly eroded by Division 2A of the TPA whereby a consumer is given a statutory right to sue a manufacturer for breach of certain terms implied by law.[24] Although it is true that there need be no actual implied terms in the contract between manufacturer and supplier on which the consumer may rely,[25] from the consumer's perspective, these terms exist in a notional sense in that contract and there is a notional reliance on them. Division 2A provides special statutory relief to the consumer where these terms are unfulfilled.[26] If relief is allowed on the basis of notional reliance on a contract, there should be no logical objection to its being granted on the basis of actual reliance.[27]

(ii) Named third parties

Clearly, where a contract refers to a promise to confer a benefit on a named third party, the third party would be able to enforce the contract

23. In consumer contracts, a lender must not fail to assess this if it is to avoid the risk of the credit contract being held "unjust" and therefore subject to re-opening under the Credit Act (In WA, see Credit Act 1984, pt IX). It is therefore a matter very likely to be relied on by the lender in considering whether to provide finance.
24. See TPA s 74B–s 74G.
25. In non-consumer sales, these implied terms may be excluded under the Sale of Goods Act. See eg Sale of Goods Act 1895 (WA) s 54 .
26. It is generally thought that relief will be granted for breaches of Division 2A after the form of tort damages, although there is some uncertainty about this, given the contractual-type language used in the provisions of the Division.
27. Mason CJ & Wilson J in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, in justifying the enforcement of insurance contracts by third party beneficiaries, focused on the element of reliance by the third parties on the contract "that they will refrain from making their own arrangements for insurance on that footing".

according to the reasoning of the majority in *Accounting Systems v CCH*. If A promises B to pay C and A fails to pay C, it may be argued by C that A's promise was misleading or deceptive.[28] If C relied on the promise and suffered loss because of it C could sue A for damages under the TPA, section 82.[29]

In *Accounting Systems v CCH*, the majority made reference to *Trident Insurance v McNiece*[30] while emphasizing that where "the misleading conduct is found in the making of a contractual provision [it is no objection that the] complainant does not have contractual privity with the defendant".[31] They contrasted this with the "uncertain (and perhaps unsatisfactory) state of the general law disclosed in *Trident*".[32] In that case a contract of insurance had defined the "assured" as including not only the contracting party but all its contractors and sub-contractors. The policy covered liability to the public for accidents occurring during construction work. After an employee of the principal contractor recovered judgment against the latter for injury, the contractor claimed indemnity under the policy. The insurance company denied liability. A majority of the High Court found for the contractor, but only three out of five did so on the basis of an exception to the doctrine of privity of contract. In noting only that in that case, the plaintiff did not plead section 52, the majority in *Accounting Systems v CCH* were not foreclosing the possibility of doing so in a similar case. It could be inferred that by so saying approval was given to the use of section 52 by third party beneficiaries.

(iii) Exclusion clauses

This case may also have implications for exclusion clauses which confer immunities or privileges on third parties, particularly in contracts of carriage or transport. At common law, a third party, according to the traditional doctrine of privity, was precluded from taking advantage of such contractual terms, to avoid tortious liability. This was so even if the term specifically referred to the third party.[33] Only the carrier itself could derive benefit from the exclusion clause.

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28. See TPA s 51A for promises about future matters.
29. In WA, ss 11(2) & 11(3) of the Property Law Act 1969 would allow C to enforce the contract. In Queensland, third party rights have been created by the Property Law Act 1974, s 55.
30. (1988) 165 CLR 107.
31. Supra n 1, 390.
32. Ibid.
33. See eg *Wilson v Darling Island Stevedoring & Lighterage Co Pty Ltd* (1956) 95 CLR 43.

The privity rule was applied by the House of Lords in *Scruttons Ltd v Midland Silicones Ltd*,[34] in denying the protection of an exclusion clause in a bill of lading to a stevedore. Lord Reid suggested that a third party might succeed on the basis of an application of the principle of agency, laying down four requirements that had to be met before a third party could shelter under the protection of an exclusion clause.[35] Subsequent cases have confirmed the necessity of compliance with Lord Reid's conditions.[36]

At first sight, *Accounting Systems v CCH* appears to offer a more accessible avenue for third party relief than Lord Reid's conditions, and certainly one of more general application. Where although the text of an exclusion clause provides immunity from liability to a third party, the third party is successfully sued, the third party may have an action against its "principal" on the basis that the insertion of the exclusion clause contravened section 52. The clause could be misleading or deceptive in the fact that it afforded no protection to the named third party as it purported to do. Relief by way of damages under section 82 would be obtainable if it could be shown that the third party relied on the clause for immunity, failing to take other protective measures (eg, some form of insurance) because of the existence of the clause. Thus, according to section 52, the third party beneficiary would need to show knowledge of the exclusion clause and reliance on it to gain relief. For this reason, it is unlikely that section 52 will completely supersede compliance with Lord Reid's formula as a means of allowing third parties to benefit from exclusion clauses. Although his conditions still need to be formally met, judicial developments since they were first enunciated have made satisfaction of them less onerous: the third and fourth conditions (the ones that have traditionally caused the most difficulty) have been liberally interpreted. Satisfaction of the third (viz, that the carrier has authority from the stevedore to contract on his behalf), may be achieved simply by the third party's pleading the exemption clause,[37] despite ignorance of the clause at the time of performance. Neither knowledge of nor reliance on the clause is required. The fourth requirement, that consideration move from the third

34. [1962] AC 446.

35. Id, 474. The bill of lading had to make it clear that the third party was intended to be protected by the exclusion clause; and also that the carrier, in addition to contracting on its own behalf was also contracting as agent for the third party; the carrier had authority from the third party to so contract - later ratification might suffice; difficulties with consideration moving from the third party would be overcome.

36. *NZ Shipping Co Ltd v Satterthwaite & Co Ltd* [1975] AC 154; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1980) 144 CLR 300.

37. *Celthene Pty Ltd v WKJ Hauliers Pty Ltd* [1981] 1 NSWLR 606.

party, has continued to be easily satisfied.[38] The main limitation on these requirements is in their application. Thus far, they have been held only to apply to contracts involving the carriage of goods, by road or sea, although there seems no reason in principle why their relevance should be so restricted.

This case cannot simply take its place as yet another illustration of the ever-widening application of section 52. The first two decades of that section's operation led to the significant rewriting of tort texts in the area of misrepresentation. As a result of *Accounting Systems v CCH*, the assault on contract has begun. The sacred boundaries between what is pre-contractual and what is contractual are becoming more blurred. According to this case both are "engaging in conduct", both may be governed by concepts that have been developed around the operation of section 52, and both may be serviced by remedies in Part VI.

The doctrine of privity already weakened at common law is further debilitated as a result of this case. Even *Trident Insurance* is not foreclosed as an opportunity for section 52 to operate in favour of a third party beneficiary. There may need to be some significant re-writing of contract texts in the light of this case.

38. *Lifesavers Ltd v Frigmobile Pty Ltd* [1983] 1 NSWLR 431.