IN THE HIGH COURT OF AUSTRALIA NO M158 of 2010
MELBOURNE REGISTRY NO M159 of 2010

BETWEEN:

WYNTON STONE AUSTRALIA PTY LTD
(in liquidation) (ACN 065 625 498)
Applicant

and

MWH AUSTRALIA PTY LTD
(formerly Montgomery Watson Australia Pty Ltd)
(ACN 007 820 322)
Respondent

RESPONDENT'S SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1. These submissions are suitable for publication on the internet.

PART II: ISSUES

2. There are four issues identified in Part II of the Applicant's Submissions ("AS"). There is also, however, a further issue.

3. **Incompetent appeal/constitutional issue.** The further issue relates to the matters sought to be argued in AS[22]-[34]. No part of the Court of Appeal's orders is based on a finding of contravention of the *Trade Practices Act* 1974 (Cth) ("*TPA*"). That part of the applicant's proposed appeal is in reality against reasons for decision which do not constitute the Court of Appeal's operative act, or, in terms of s 73 of the *Constitution,* its judgment, decree, order or sentence.

Filed on behalf of the Respondent by:
Monahan + Rowell
Level 31, 525 Collins Street
Melbourne VIC 3000
DX 640 Melbourne

Date of this document: 2 May 2011
Contact: Mr Mark Attard, MJA/KED/980197
Telephone: 03 8624 2000
Facsimile: 03 8624 2031
Email: mattard@mrlaw.com.au

4. **Abandoned claim.** Whether the Court of Appeal erred in concluding that the respondent had not abandoned[1] its claim alleging breach of the warranty in cl.4 of the Deed of Novation? The respondent submits that the answer is "no".

5. **Inferred reliance.** Whether it was open to the Court of Appeal to infer that the respondent relied on the applicant's misrepresentation contained in cl.4 of the Deed of Novation? The respondent submits that the answer is "yes".

6. The respondent also contends that the applicant's statement of the "inferred reliance" issue is misconceived. Even if an appeal on this issue be available, the proceeding could not be an appropriate vehicle for determining the issue stated by the applicant in AS[3]. The issue as stated does not arise because the respondent did not pursue[2] relief by way of damages pursuant to s 82 of the *TPA* (the relevant relief was s 87 relief[3]).

7. **Contractual construction.** Whether the Court of Appeal erred in construing the Deed of Novation? The respondent submits that the construction which the Court of Appeal gave to the document was open and correct as a matter of law.

8. **Procedural fairness.** Whether the Court of Appeal failed to accord the applicant procedural fairness as alleged in AS[5]? The respondent submits that the answer is "no".

PART III: *JUDICIARY ACT 1903*, SECTION 78B

9. Notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) were served on the Attorneys-General for the Commonwealth, the States and the Territories on 1 April 2011.

PART IV: BACKGROUND FACTS

10. The respondent agrees with AS[8]-[21], subject to the following.

11. *Re AS[8].* The applicant was also found to be in breach of its contract with the respondent in respect of the period prior to 6 May 1997.[4]

12. *Re AS[9].* The effect of the Deed is not merely that "TTW was substituted for WSA". Its effect is to be determined by reading the Deed in its entirety.

---

[1] *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* [2010] VSCA 245 (hereinafter, "CA") at CA [111] – [112] per Buchanan and Nettle JJA; at CA [24] and [58] per Warren CJ.
[2] The respondent had pleaded that it suffered loss and damage, but it did not ultimately seek, or obtain, such relief.
[3] See respondent's written submissions in reply (14 December 2005) paragraph 8: AB E41.
[4] *Aquatec-Maxcon Pty Ltd v Barwon Regional Water Authority (No 2)* [2006] VSC 117 per Byrne J ("Judgment No 2") at [202].

13. *Re AS[10][and [11].* Again, the Deed should be read and construed in its entirety.

14. *Re AS[12].* The second sentence of AS[12] is not correct. Evidence of a circumstantial nature *was* adduced by the respondent, to demonstrate its reliance on the applicant's acknowledgment contained in cl.4 of the Deed. That was consistent with the respondent's pleading.

15. The final sentence of AS[12] is also not correct. The respondent did not allege that its reliance was merely to be inferred "from the terms of the Deed". Rather it alleged that the inference of reliance was to be drawn from the surrounding facts and circumstances as pleaded in paragraphs 5 and 5A (and the particulars thereto) of its Amended Reply, and from the fact that it had entered into the Deed.[5]

16. *Re AS[13].* The first sentence of AS[13] is not correct. The Judge's statement in his reasons did not "accurately record..." what he said at the outset of the trial. His admonition to the parties[6] was to the effect that he would only determine the case on pleadings and not go beyond them, and only decide those issues that were "run". Only after the trial, in his reasons, did he refer to issues that were "pressed in final address".

17. *Re AS[14].* In the course of the trial the judge circulated a working draft of an initial part of his proposed reasons, setting out the claims and defences of all parties.[7] This was described as an analysis of the pleadings and was really a summary of the live issues for determination by the court.[8] Paragraph 34 of that document, entitled "Draft 24 Nov 05", read:[9]

---

[5] AB A109 at 110-112, paragraphs 5-11.

[6] T216-7 (19 October 2005), where his Honour said:

> *"If anyone's got any claims that are not pleaded perhaps they should have regard to the pleadings and make their application promptly if they want to seek an amendment. Whether it will be successful or not remains to be seen but I certainly won't go beyond the pleadings, unless everybody wants me to, and even I will cut back on the pleadings in the sense that if issues are pleaded and nobody actually runs those issues, I will treat those issues as having been not pursued. That's the way I will conventionally approach the pleadings in a case such as this and if anyone wants to make some submission to the contrary I will hear you...".*

[7] AB J1. The working draft was never made an exhibit at the trial. The Court of Appeal was taken to a copy of the document (AB J1) with annotations by senior counsel for the respondent.

[8] T2544:5 (23 November 2005).

[9] Citations referring to the pleadings are omitted. This paragraph became paragraph 48 in the principal judgment (Judgment No 2), the only alteration being the addition of the words "deed of" (in square brackets above).

"The [deed of] novation entered into between Montgomery Watson, Wynton Stone and TTW is said to contain a warranty by Wynton Stone that its work prior to 6 May 1997 had been performed in accordance with the April agreement. It is then said that if the claims against Montgomery Watson are made out, Wynton Stone is in breach of its warranty and that loss and damage will be suffered by Montgomery Watson."

18. The judge invited comments from counsel on his draft reasons.[10] Senior counsel for the respondent responded to his Honour's invitation on 5 December 2005.[11] No criticism was made of paragraph 34. At no time did counsel for the applicant make any comments concerning the judge's draft paragraph 34 or suggest that the warranty issue was other than a live issue.

19. *Re AS[15].* The warranty claim was pleaded,[12] opened[13] and identified as a live issue.[14] The written submissions of the applicant[15] and the exchanges between senior counsel for the applicant and the Judge[16] made it apparent that the construction of cl.4 and the possible operation of the acknowledgment as a warranty was a live issue for determination. Counsel for TTW (the other party to the Deed) made oral submissions on the construction of the Deed and acknowledged to the judge that a breach of cl.4 would sound in damages.[17] The warranty claim was dealt with by the respondent in final address, although referred to as an "undertaking" which was "breached"[18] and referred to by the respondent in written[19] and oral[20] submissions in reply. At no point did senior counsel for the applicant suggest in response to the judge in final address or after the final reply submission of the respondent that the respondent's warranty claim had been abandoned. The Judge found that the respondent

---

[10] T2544-5 (23 November 2005).
[11] T3441-2 (5 December 2005).
[12] Respondent's "Fifth Amended Statement of Claim" dated 8 December 2005, paragraphs 33I – 33K: AB A3, 83.
[13] T1455 (7 November 2005).
[14] See Respondent's Submissions ("RS") [17] – [18]; AB J1.
[15] AB E45-48 at [16]-[23], especially paragraphs [22]-[23] (AB E47-8).
[16] T3754 – 3766 (8 December 2005), especially at T3758-66. Note that the applicant's closing submissions and those of TTW (the other party to the Deed) preceded the respondent's submissions.
[17] T4109-4110 (13 December 2005).
[18] AB E17, paragraph 45b.
[19] AB E39-41.
[20] T4204 (14 December 2005).

"has... been successful in its breach of warranty claim",[21] and the Court of Appeal unanimously upheld this finding.[22]

20. *Re AS[16].* The Judge found that the applicant was in breach of contract and breached its duty of care. The applicant was found, however, to have been released from such liabilities by reason of the operation of cl.2 of the Deed of Novation.[23] The Court of Appeal unanimously held that the Judge's construction of cl.2 was erroneous.[24]

21. *Re AS[17].* After the final reasons were published, but before judgment was entered, the applicant submitted for the first time that the warranty claim should be taken to have been abandoned and that the Judge should decline to make orders consequent upon the finding made in the published reasons[25] that there was a breach of warranty by the applicant.[26] The Judge rejected that submission and gave reasons for doing so.[27] They should be read in their entirety. He subsequently entered judgment for the respondent for breach of warranty.

22. *Re AS[18].* For the reasons referred to above, the parties were *not* on notice from the outset that the judge would only decide issues "both pleaded and pressed in final submissions".

23. *Re AS[19], [20] and [21].* It should be noted that the revised reasons for decision of the Court of Appeal preceded the making of the final orders by that Court. It is from those orders[28] that the applicant is seeking special leave to appeal.

PART V: APPLICABLE PROVISIONS

24. The applicant's statement of applicable provisions should also include the following:

---

[21] Judgment No 2 at [364].
[22] CA [111] – [112] per Buchanan and Nettle JJA; at CA [58] per Warren CJ.
[23] Judgment No 2 at [213].
[24] CA [72] – [85], [109] per Buchanan and Nettle JJA; at CA [21] – [24], [56] per Warren CJ.
[25] Judgment No 2 at [233].
[26] The submission was made at a hearing on 29 March 2007. The exchanges between senior counsel for the applicant, and senior counsel for the respondent and the Judge are at T19-22 (29 March 2007). See also the exchange between senior counsel for the applicant and the Judge at T12 (29 March 2007).
[27] *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 6)* [2007] VSC 127 per Byrne J (" Judgment No 6") at [8] – [11].
[28] The Orders were made on 3 November 2010: AB [...].

(a) section 73 of the *Constitution*; and

(b) section 52 of the *Trade Practices Act* 1974 (Cth).

PART VI: ARGUMENT

25. ***CONTRACT.*** The AS, with respect, underplay significantly the applicant's failure on the contractual issues under cll.2 and 4 of the Deed of Novation. They are at the heart of the matter and these Submissions ("RS") deal first with those questions.

26. The respondent succeeded against the applicant in contract in the Court of Appeal on two bases:

(a) The release provided for by cl.2 was held applicable in respect of the period after, but not before, the date referred to in cl.3, namely 6 May 1997. The applicant's liability in contract and in tort before that date continued.

(b) The applicant's "acknowledgement" in the second sentence of cl.4 was a warranty by the applicant in favour of the respondent. It applied in respect of the period prior to 6 May 1997.

27. The applicant cannot succeed in an appeal unless it sets aside both those holdings. And even if, contrary to the respondent's contentions, the applicant showed that the respondent had "abandoned" a claim for damages under cl.4, the presence of the second sentence of cl.4 would yet have to be taken into account in interpreting cl.2.

28. It is submitted that the Court of Appeal's interpretation of the Deed was the better interpretation of its provisions, for the following reasons:

(a) As Recital B made apparent the applicant was to be released by the respondent from further performance of the Lorne and Apollo Bay contract on the basis that TTW was to perform it thereafter.

(b) By cl.3 the parties agreed that they would treat the date of the Deed (6 May 1997) as the effective date for such substitution and transfer. It was on that date that cll.1, 2 and 4 were to become effective.

(c) By cl.1, TTW was to take the place of the applicant as contracting party under cl.1. By the second part of cl.2, TTW was thereafter to be treated as if it were named in the contract with the respondent in lieu of the applicant. And, by the first sentence of cl.4, the respondent undertook

to pay the applicant for work under the contract up to 6 May 1997, and to pay TTW for work done under the contract thereafter.

(d) It is in that context that the issue arises as to the operation of the second sentence of cl.4 and the first part of cl.2.

(e) In this regard it seems clear that the second sentence of cl.4 is a term of the contract. It is a statement by the applicant, intended to have contractual effect, that it had performed, in accordance with the terms of the contract, the services to be performed by it under the contract to 6 May 1997. That acknowledgment is given directly in return for the promise given by the respondent in the first sentence of cl.4.

(f) That leads one to the first part of cl.2. It is possible, of course, as the primary Judge ultimately held, that that part of cl.2 might be construed as releasing the applicant from all claims and demands in respect of the contract whether they arose before or after TTW was substituted for it as the contracting party. But that, it is submitted, is not the better view.

(g) In the first place, that view is not consistent with the second part of cl.2 which clearly enough only operates from the date referred to in cl.3.

(h) Secondly that view is not consistent with the second sentence of cl.4 which contemplates that the applicant is *not* released from "all claims and demands ... in respect of the contract" arising prior to the date in cl.3.

(i) Thirdly, in the light of the fact that TTW's undertaking to perform the contract is to perform a contract already partly performed, and only then from a certain date, the acceptance in cl.2 "of liability of TTW under the contract in lieu of the liability of WS" appears a reference to liability to perform the contract after the date of substitution. Similarly the "release and discharge" in the first part of cl.2 should be regarded as relating to the period after the date of the deed.

29. The Court of Appeal was correct, it is submitted, in its conclusion on the operation of each of cl.2 and cl.4. Further, the arguments at AS[43]-[49] should not be accepted for the following reasons:

(a) *Re AS[49].* The "natural meaning" of the first part of cl.2 is *not* obviously in favour of the applicant. As noted earlier it may be accepted that the interpretation contended for by the applicant is a

possible view of the operation of that part of cl.2, if considered alone. When one looks at the provision in the light of the remainder of cl.2, and the terms of cll.1, 3 and 4, however, it is apparent that it is not the only view and that the Court of Appeal's interpretation is the better view of the provision.

(b) *Re AS[43] and [44].* These contentions again turn on the assumption – unjustified, it is submitted – that the relevant words of cl.2 were to be construed in favour of the applicant because they were "unambiguous", "plain and unambiguous" or because that was "the only way that the words may be read as a matter of ordinary English". This assumption, for the reasons set out above, is not correct.[29] The decision of the Court of Appeal, it may also be noted, does not require the addition of the words in the last sentence of AS[44].

(c) *Re AS[45] and [46].* The second sentence of RS[45] gives to cl.3 a rather more insipid role than does the Deed itself. In this regard the terms of cl.3 relate directly to the events in cll.1 and 2, and are utilized in three places in cl.4. The Court of Appeal is hardly acting erroneously by using cl.3 in the roles given it by the Deed. The reference in AS[46] to the "plain meaning" of cl.2 once again makes an assumption which is not justified. The same is true of the last sentence of AS[48].

(d) *Re AS[57].* To decide what was the commercial common sense view of a commercial contract was the function of the Court of Appeal. It was not obliged to accept the applicant's view of the contract.

(e) *Re AS[48].* Each of the matters discussed by the Court of Appeal at [79], [81] and [82] of its reasons reflects an entirely orthodox approach. If there was a lack of relevant evidence which would have advanced the applicant's case, it was for the applicant to adduce it. The contention that these matters were not the subject of submissions in the Court of

[29] Even the Judge, who in the end decided this issue in favour of the applicant, did not regard the question as "free from difficulty": Judgment No 2 at [213].

Appeal and were not urged by the respondent in the appeal is insupportable.[30]

30. Further the more general arguments developed at AS[35]-[42] should not be accepted. Again, they start with the assumption that the first part of cl.2 should be construed unambiguously in favour of the applicant – see AS[35]. They give only lip service to the *dictum* from Lord Diplock quoted at AS[40]. They also, in AS[41], do not give any weight to the discussion by the Court of Appeal at CA[74], [77]-[84]. Finally, and in relation to the contention at AS[42], the construction of cl.2 was always an important issue. If there was further evidence germane to that issue, the applicant itself might have been expected to adduce it.

31. It may be noted that the AS, in relation to the claim based on cl.4, offer no argument in support of a construction of cl.4 different from that arrived at by the two courts below, but rely entirely on the contention that that was not an issue in those courts. It is surprising that no such submissions are made, because the issue is one of law. It is even more surprising when it is appreciated that whether or not relief based on cl.4 was sought the interpretation of cl.4 was germane to the interpretation of cl.2.

32. The respondent would add that when the Court of Appeal used the expression "commonsense business point of view", it was properly considering the objective intention of the three parties to the Deed, which were all commercial or business enterprises.[31]

33. ***DID THE RESPONDENT ABANDON A CAUSE OF ACTION AGAINST THE APPLICANT FOR BREACH OF CLAUSE 4?*** The course of the proceedings at first instance makes it apparent, it is submitted, that the question of breach by the applicant of the term in the second sentence of cl.4, and the respondent's entitlement to damages in consequence *was* in issue at trial (and, of course, on appeal).

34. The claim for damages appears in the pleadings in the respondent's Fifth Amended Statement of Claim (8 December 2005) at paragraphs 33I-33K.

---

[30] As to CA[79] see T16, L6-L16; T17, L12-L24; T17, L1-L17; T26, L8-L14; T85, L5-27; T17, L16-L24. As to CA[81] see T28, L18-L29. As to CA[82] see T5, L29 - T6, L3; T6, L5-L8; T9, L2-L14; T9, L26-L31. See also the oral submissions of the applicant: T56, L22-T57, L27. All the preceding transcript references are to the 10 November 2009 hearing before the Court of Appeal.

[31] This Court sanctioned such an approach: see *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [8] per Gleeson CJ.

35. The claim was opened by Mr Levin QC at T1455 (7 November 2005) and identified as a live issue at T2544-5 (23 November 2005).

36. The claim was dealt with by all parties to the Deed in their final submissions: see RS[19].

37. It was clear from the written submissions of the applicant at trial at [16]-[23], and from the exchanges between senior counsel for the applicant and the Judge - T3754-3766 (8 December 2005) - that the construction of cl.4 and its operation as a warranty was a live issue. Nor was it suggested to the Judge during final addresses that the claim based on cl.4 had been abandoned. Had the applicant understood after the close of the respondent's final submissions, that the respondent had abandoned the warranty claim, it would have been open to it to make such a submission to the Judge, drawing his attention to paragraph 34 of the draft reasons circulated a short time previously,[32] and inviting him to remove the warranty issue from consideration. Instead the applicant waited over 15 months,[33], until almost a year after the Judge's reasons had been finally published,[34] to make the submission as to abandonment.

38. It was clearly open to the Judge, having regard to the evidence and the conduct of the trial, to find that the respondent had pursued its claim for breach of warranty. The Court of Appeal was also correct in taking that view.

39. It is submitted that the Court of Appeal correctly applied the principles derived from *Water Board v Moustakas*[35] that:

    (a) in deciding whether a point was raised at trial no narrow or technical view should be taken;

    (b) it is necessary to look to the actual conduct of the proceedings to see whether a point was or was not taken at trial.

40. At the hearing of the appeal, senior counsel for the applicant conceded that the alleged abandonment "*couldn't have been apparent until my learned friend finished his submissions*" and further conceded, having regard to the respondent's written submissions, that the alleged abandonment must have

---

[32] See RS[17] above.
[33] 29 March 2007.
[34] 31 March 2006.
[35] (1988) 180 CLR 491 at 497.

occurred in the course of the final address by senior counsel for the respondent [36]

41. Despite specifically footnoting the transcript of the reply submissions in AS[53], the applicant continues to contend that MWH did not "*mention, make or press the breach of warranty claim in final addresses or written submissions*". It is submitted that this is clearly wrong.

42. It is of some significance that the Judge, as noted earlier, was in no doubt that it was a live issue and dealt with it in his reasons for judgment.[37]

43. The applicant's contentions would have the Court take a narrow and technical view, in circumstances where the applicant itself suffered no want of procedural fairness. The applicant's submissions were considered and taken into account by the Judge before he made his finding of breach of warranty. The AS, as mentioned above, do not offer any substantive answer to the respondent's claim under cl.4.

44. ***PROCEDURAL FAIRNESS.*** The Court of Appeal accorded the applicant procedural fairness.

45. It is apparent from the transcript[38] of the hearing before the Court of Appeal that the applicant was aware that the Court was expressing the objective test for construction as one properly viewed from the position of a reasonable business person. Counsel for the applicant had the opportunity to make submissions in response to this but did not do so.

46. In AS[57] and [48], it is said, in effect, that the respondent did not contend for the construction of the Deed adopted by the Court. In fact, the substance of CA[79], [81] and [82] were dealt with extensively in oral submissions by each party. See the references given in the footnote to RS[29](e).

47. The reasons of the majority make clear that they directed themselves by reference to the appropriate authorities and principles concerning the drawing of an inference as to reliance under the *TPA*.

---

[36] T63, L27; T64, L1-L5 (10 November 2009).
[37] Reasons No 6, [2007] VSC 127 at [8] – [11]. See also Judgment No 2 at [48], [50], [212], [213] and [233].
[38] T11, L7-L11; T12, L16-L17 and L22-L26; T20, L3-L7 (10 November 2009).

48. The applicant's submissions were reconsidered and the reasons for judgment were revised following the provision of a joint memorandum to the Court of Appeal on 1 October 2010, before orders were made.[39]

49. ***TRADE PRACTICES ACT GROUND.*** There are three questions, namely:

(a) whether an appeal lies;

(b) assuming an appeal lies, the principles applicable; and

(c) the application of those principles to the facts.

50. **No appeal lies.** To the extent that the applicant seeks to rely upon the "inferred" reliance point, it is submitted that no appeal lies. The judgment from which the applicant seeks to appeal is not based upon the findings on the *TPA* claim.[40] The operative judicial act of the Court of Appeal was to order that the appeal be allowed in part on the basis that the respondent had established liability in *contract* and *negligence* on the part of the applicant (in addition to upholding the Judge's finding that the applicant breached its warranty).[41] No relief has been granted which is founded on the findings on the *TPA* claims.

51. The applicant is not entitled to appeal to this Court from the *reasons* of the Court below concerning the *TPA* claims.[42]

52. There is no right of appeal at common law[43] and this Court does not have an inherent jurisdiction to hear and determine an appeal. Its appellate jurisdiction is conferred by s 73 of the *Constitution*. Appeals are to be from judgments, decrees, orders or sentences, not from reasons. The application for special leave to appeal on the *TPA* issue should be refused.

53. **Principles governing the drawing of inferences of reliance.** If, contrary to the above, an appeal on the *TPA* issue is available, the respondent makes the following submissions.

54. Courts can and do infer that a person relied upon a representation made by another person.[44] Such an inference will be drawn from the facts and

---

[39] The joint memorandum was dated 1 October 2010: AB [...].
[40] See reasons of Buchanan and Nettle JJA at CA [106] – [108].
[41] Order of the Court of Appeal dated 3 November 2010, Orders 1.1 and 1.2: AB [...].
[42] *Constitution*, s 73; *Driclad Pty Ltd v Federal Commissioner of Taxation* (1968) 121 CLR 45 at 64 per Barwick CJ and Kitto J; *National Australia Bank v Russell* [1990] VR 929 at 935 – 937 per Young CJ, Kaye and Murphy JJ.
[43] *Lacey v Attorney-General of Queensland* [2011] HCA 10 at [8].
[44] *Gould v* Vaggelas (1985) 157 CLR 215 at 236 per Wilson J.

circumstances surrounding the representation and the making of the representation.[45] Both at first instance and on appeal,[46] courts regularly draw inferences from facts and evidence. *Direct* evidence probative of a particular fact does not have to be adduced to satisfy a court that a particular finding should be made, and there are many reasons why direct evidence may not be adduced in a particular case. Courts are concerned only with the admissible evidence the parties have adduced. Courts act on the evidence before them - they are not concerned with the antecedent or "background" gathering of the evidence or the decisions which cause a party to adduce, or not to adduce, particular evidence.[47]

55. A party is entitled to lead evidence which does not directly prove a material fact and to ask the court to draw inferences from that evidence. Similarly, an opposing party is entitled to lead contrary evidence, which tends to disprove the material fact. Of course, where, other things being equal, the contest is between direct evidence on the one hand and circumstantial evidence on the other, a court will usually accept the direct evidence. However, where the contest is between competing inferences to be drawn from circumstantial evidence, the court will evaluate all the evidence put forward by both parties and draw the inference which, on the balance of probabilities, is more compelling and should, in all the circumstances, be drawn.[48]

56. In *Smith v Chadwick*,[49] Sir George Jessel MR said that:

> "*if the court sees on the face of it that [a statement] is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement, to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, and you want no evidence that he did so act...*".

---

[45] *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [102] per Gummow, Hayne, Heydon and Kiefel JJ.
[46] *Warren v Coombes* (1979) 142 CLR 531; *Waterways v Fitzgibbon* (2005) 221 ALR 402 at 429 [132] per Hayne J.
[47] The rule in *Jones v Dunkel* (1959) 101 CLR 298 allows, in certain circumstances, for an inference to be drawn to the effect that particular evidence not called by a party would not assist a party's case. However, it does not permit the Court to inquire into that party's reasons for not adducing the evidence, nor does the rule influence the court's reception or acceptance of other evidence that is adduced. The other evidence is properly treated on its own merits.
[48] *Luxton v Vines* (1952) 85 CLR 352 at 358 per Dixon CJ, Fullagar and Kitto JJ.
[49] (1881) 20 Ch D 27 at 44-5 (Court of Appeal).

In those circumstances, "*[u]nless it is shown*" that the person avowedly did not rely upon the statement, or that he bound himself by contract to take the risk that the statement may have been false, "*the inference follows*".[50]

57. This principle, drawn from the common law of deceit, is apt in determining questions of misrepresentation and reliance within the meaning of s 52 of the *TPA*.[51] The principle depends upon the impugned statement being material in that, on its face it is of such a nature as would induce or tend to induce a person to enter into a contract.[52] "*Material*" means not "*trivial*"[53] or "*trifling*".[54]

58. The concept in *Gould v Vaggelas*[55] that the statement must be "calculated to induce the representee" does not mean that a subjective intention on the part of the representor to mislead or deceive must be demonstrated.[56] Rather it contemplates that the statement, objectively and as a matter of common sense, is of a kind likely to provide an inducement to enter into the contract.[57]

59. Put simply, the inference of reliance will arise where a statement is material and of a kind likely to induce entry into the contract, and where additional evidence is not called which requires a contrary inference to be drawn.

60. Direct evidence of reliance in the form of evidence from the representee that he or she relied on the statement or representation is usually of little weight.[58] As Lord Halsbury LC said not long after *Smith v Chadwick* was decided:[59]

> "*[i]t is an old expedient, and seldom successful, to cross-examine a person who has read a prospectus, and ask him as to each particular statement what*

---

[50] Ibid.
[51] *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [102] per Gummow, Hayne, Heydon and Kiefel JJ; *Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471 (citing *Gould v* Vaggelas (1985) 157 CLR 215).
[52] *Smith v Chadwick* (1884) 9 App Cas 187 at 196 per Lord Blackburn (the appeal to the House of Lords).
[53] (1881) 20 Ch D 27 at 45-6 per Jessel MR.
[54] Fowler gives "*trifling*" as an antithesis of "*material*" (in the relevant sense of "*material*"): H W Fowler, *A Dictionary of Modern English Usage* (1st ed., reprinted 2009) at 344.
[55] (1985) 157 CLR 215 at 236 per Wilson J.
[56] *Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471.
[57] *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 43 IPR 545, [45] per Kiefel J (with whom Wilcox J agreed).
[58] Such formulaic evidence of reliance must always be approached with caution, since it is easily given and not easy to disprove: see the decisions of the Full Court of the Federal Court in *Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471 and *Hanave v LFOT Pty Ltd* (1999) 43 IPR 545 at [50] per Kiefel J (with whom Wilcox J agreed); *Mindshare Communications Ltd v Orleans Investments Pty Ltd* [2007] NSWSC 1352 at [69] – [70] per Hamilton J.
[59] *Arnison v Smith* (1889) 41 Ch D 348 at 369.

> *influence it had on his mind, and how far it determined him to enter into the contract.*"

Inevitably, such evidence, whether it emerges in examination-in-chief or in cross-examination, is self-serving and of little assistance.

61. Evidence of the facts and circumstances surrounding the entry into the contract is important in showing whether reliance by the person entering into the contract should be inferred. Also of importance is the fact of the entry into the contract. As the applicant concedes:[60]

> "*a combination of factors may, if unanswered, lead to the conclusion that a person was induced by a representation of another to make the relevant decision [to enter into the contract]*".[61]

62. **Application of principles: the inference was properly drawn.** The applicant did not "answer", with evidence of its own, the respondent's pleaded claim whereby the respondent invited the court to draw the necessary inference. The applicant had the opportunity to do so, but did not point to evidence which should result in an inference that the respondent did not rely on the misrepresentation.

63. In its pleading,[62] the respondent relied upon the whole matrix of facts and circumstances leading to the execution of the Deed of Novation and sought to have the court construe the Deed as a whole. The reliance pleaded was reliance by inference. In those circumstances, it was not open to the respondent to lead direct evidence of reliance. The applicant:

(a) never pleaded that there was some legal ground to challenge the respondent's plea;

(b) did not seek to strike out the respondent's plea; and

(c) led no evidence to contradict the inference, for example it did not call Mr Waterhouse, the identified signatory of the Deed.

64. There was evidence at trial of the circumstances surrounding entry into the Deed of Novation by the parties and there was evidence going to the materiality of the acknowledgment and the likelihood that it would have induced the respondent to enter into the Deed. That evidence included

---

[60] Applicant's Submissions ("AS") [28].
[61] *Ricochet Pty Ltd v Equity Trustees Executors and Agency Company Ltd* (1993) 41 FCR 229 at 234.
[62] AB A109 at 110-11, paragraph 7.

evidence from Mr Robinson of the respondent,[63] from Mr Angus of the respondent,[64] from Mr Sloggett of the applicant[65] and the covering letter enclosing the draft Deed for execution.[66]

65. Mr Sloggett gave evidence that, as "*part of the process of transferring the* business *arrangements*"[67] from the applicant to TTW, "*it was necessary to enter into a Deed of Novation in respect of all of [WSA's] current contracts, including [WSA's] contracts in respect of the facilities at Lorne and Apollo Bay. Accordingly, on or about 6 May 1997, [WSA], [MWH] and TTW each executed a Deed of Novation*".[68]

66. Mr Sloggett met with Mr Angus and Mr Robinson of the respondent in or about early April 1997 to explain and inform them of the proposed "merger" of the applicant with TTW.[69] The covering letter enclosing the Deed was received by the respondent on or about 15 April 1997. Mr Angus passed the letter and Deed to Mr Robinson to arrange for execution. It took some time to arrange for the Deed to be signed by a director of the respondent. Mr Angus completed the details in handwriting on the Deed including the date of 6 May 1997. Mr Waterhouse, a director of the respondent, signed the Deed on or around that date.[70]

67. The Deed itself contained a requirement (followed by the applicant's warranty) that the respondent pay and accept liability to the applicant to pay all moneys due and owing under the contract up to the date of the Deed. It also included a "release" by the respondent.

68. Notwithstanding the above, and the broader evidence of the commercial arrangements between the parties whereby the applicant was contracted to perform design works in connection with the construction of the sewage treatment plants, the AS invite the Court to conclude that the Deed was somehow executed in a vacuum.

---

[63] AB C39.
[64] AB C25; T1611-12 (9 November 2005).
[65] AB C76.
[66] AB D269-70.
[67] Emphasis added.
[68] AB C76 at [69].
[69] AB C25 at [81]; AB C39 at [32].
[70] The references to this evidence are in footnotes 63-69, supra.

69. The applicant appears to advance the erroneous proposition that direct evidence of reliance (such as a statement from a witness to the effect that "I relied on the representation when I entered into the contract") must be led by a party alleging reliance in order to enable a finding of reliance to be made. That is contrary to the authorities referred to earlier. See RS[54] – [61] and the footnotes thereto.

70. This is a case in which:

(a) The representation made was as to the past, not the future;[71]

(b) The representation went to the heart of the contract between the parties, namely the design works for the tanks;

(c) There is no evidence which shows that the respondent would have entered into the Deed if it had known that the representation was false;

(d) Entry into the Deed in such circumstances, thereby releasing the applicant from liability, would be not only uncommercial but irrational behavior on the part of the respondent;

(e) The applicant called no direct evidence showing that the respondent did not rely on the representation in cl.4 of the Deed; and

(f) The applicant called no evidence-in-chief or in cross-examination which proved or tended to prove non-reliance by the respondent, with the consequence that the court had only the undisputed evidence of the surrounding circumstances from which to draw an inference.

71. Given the absence of evidence to the contrary, on the facts of this case the inference could and should have been drawn that the applicant's misrepresentation contributed to the decision to enter the contract. There was, in short, nothing in the evidence which might have led the Court of Appeal to do other than find reliance by drawing an inference from the undisputed facts and circumstances surrounding the parties' entry into the Deed.

72. Further, the very entry into the Deed by the respondent was a fact to be taken into account.[72] Understood in light of the evidence of the circumstances surrounding entry into that Deed, the Court was entitled to *infer*, on the balance of probabilities, that the respondent relied on the warranty contained therein.

---

[71] See *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [36] per French CJ.
[72] *Gould v* Vaggelas (1985) 157 CLR 215 at 236.

73. Buchanan and Nettle JJA were correct to hold that "we do not consider that the acknowledgment can be regarded as uninfluential on the mind of MWH considering whether to accept the novation and make payment for what [work] had already been done [by WSA]" and that the respondent relied on that acknowledgment or warranty.[73]

74. Buchanan and Nettle JJA reached the correct conclusion as to reliance on the evidence before them. They did not, in determining the appeal, need to set out in the reasons every fact from which they drew the inference of reliance. This was especially unnecessary when the relevant facts were not disputed by the applicant, either on appeal or at the trial. The facts and evidence were known to the parties and were made known to the Court of Appeal. The Court considered them closely, and properly drew the inference.

75. The materiality of the representation made by the applicant, and the objective likelihood that the respondent was induced by the warranty to enter into the Deed, are obvious when one considers the assurance given by the applicant in the covering letter accompanying the Deed.[74] That assurance was:

> *"the newly merged company is committed to completing all current Wynton Stone Australia contracts, under the terms and conditions originally set down, as well as all future contracts and work undertaken, on the same basis of trust and understanding..."*

76. ***ORDERS.*** The respondent contends that if special leave be granted the appeal should be dismissed with costs.

77. The respondent further contends, however, that the parties' Submissions have made it apparent that the case is one where special leave should not be granted. What emerges from those Submissions is that:

(a) In relation to cl.2, the Court of Appeal, unanimously, has taken a view different from that of the primary Judge. A difference in view as to the interpretation of a contract would not ordinarily attract a grant of special leave, particularly where the contract does not contain provisions of general application and where the view taken by the Court of Appeal is not obviously erroneous.

---

[73] CA [106].
[74] AB D269-70.

(b) The applicant's contention that the respondent had abandoned a case for breach of the warranty in cl.4 was not accepted by the primary Judge, nor by the Court of Appeal. (Nor, the respondent would submit, is it supported by the facts.) This is a pure matter of practice and procedure in the Supreme Court of Victoria, not meriting the intervention of the Court. That is particularly so where nothing appears to suggest that the conclusion of the primary Judge and the Court of Appeal on the substantive question of the operation of cl.4 was actually erroneous.

PART VII: ARGUMENT ON NOTICE OF CROSS-APPEAL OR NOTICE OF CONTENTION

78. In relation to the respondent's *TPA* appeal, a majority of the Court of Appeal held as follows:

> "*[107] There is then a question as to the relief which should follow [the finding of a contravention of s 52 of the* TPA*]. Given the conclusion to which we have come concerning the effect of cl 2, we are not satisfied that MWH suffered any loss and damage by reason of the misleading and deceptive conduct. As we see it, Wynton Stone remained liable to MWH for breach of contract in respect of engineering design services undertaken before the date of the Deed.*
>
> *[108] In case it matters, however, we should say that, if cl 2 of the Deed of Novation had the effect which the judge attributed to it, we would be prepared to order pursuant to s 87 of the Trade Practices Act 1974 that Wynton Stone be disentitled from relying on cl 2 as a release from its liability in negligence for any breach of duty committed before the date of the deed.*"

79. In the event that cl.2 of the Deed of Novation has the effect contended for by the applicant, the respondent seeks relief from this Court pursuant to s 87 of the *TPA*. The form of that relief is set out in the Proposed Notice of Cross-Appeal and Notice of Contention. The respondent only relies upon this Notice if the particular circumstances set out therein arise.

80. In the premises, unless this Court determines to remit the matter, this Court should, in its discretion, grant the s 87 relief precluding Wynton Stone ("WSA") from relying on cl.2 to defeat MWH's claims for damages in contract and tort.[75] That is because WSA's reliance on the release is likely to

[75] See *Demagogue Pty Ltd v Ramensky & Anor* (1992) 39 FCR 31; *Akron Securities v Iliffe* (1997) 41 NSWLR 353.

cause MWH loss or damage.[76] The practically just[77] result is achieved by relief of this kind.

81. The effect of the relief would be that MWH is entitled to judgment against WSA for damages for breach of contract and negligence together with interest as ordered by the Court of Appeal.

Dated: 2nd May 2011

10 .....

D.F. Jackson QC	D.S. Levin QC	I. H. Percy	J.R.M. Tracey
Seven Wentworth Chambers	Owen Dixon Chambers West	Owen Dixon Chambers West	Owen Dixon Chambers West
Sydney	Melbourne	Melbourne	Melbourne
T: 02 8224 3000	T: 03 9225 7043	T: 03 9225 7788	T: 03 9225 7706
F: 02 9233 1849	F: 03 9225 8186	F: 03 9225 7684	F: 03 9225 7728
jacksonqc@ sevenwentworth.com.au	dlevin@ vicbar.com.au	ipercy@ vicbar.com.au	jtracey@ vicbar.com.au

[76] *I & L Securities Pty Ltd v HTW Valuers* (2002) 210 CLR 109.
[77] *Alati v Kruger* (1955) 94 CLR 216 at 223.