

# HIGH COURT OF AUSTRALIA

GLEESON CJ,  
McHUGH, KIRBY, HAYNE AND HEYDON JJ

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JEFFREY GORDON BUTCHER & ANOR

APPELLANTS

AND

LACHLAN ELDER REALTY PTY LIMITED

RESPONDENT

*Butcher v Lachlan Elder Realty Pty Limited* [2004] HCA 60  
2 December 2004  
S548/2003

## ORDER

1. *Appeal and cross-appeal dismissed.*
2. *Appellants to pay respondent's costs.*
3. *Renewed application by Robert Edward Harkins for special leave to appeal from the judgment of the Court of Appeal of the Supreme Court of New South Wales made on 28 August 2002 dismissed.*

On appeal from the Supreme Court of New South Wales

### Representation:

R J Ellicott QC with G A Moore for the appellants (instructed by Williams Woolf & Zuur)

L G Foster SC with I R Pike for the respondent (instructed by Murray Stewart & Fogarty)

J McC Ireland QC seeking leave to appear on behalf of Robert Edward Harkins (instructed by Mr Harkins)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## **CATCHWORDS**

### **Butcher v Lachlan Elder Realty Pty Limited**

Trade practices – Misleading or deceptive conduct – Sale of waterfront property – Real estate agent published brochure containing survey diagram obtained from vendor's solicitors – Survey diagram alleged to be inaccurate – Brochure contained a disclaimer by the real estate agent as to the reliability of information from other sources – Purchasers intended to develop property in reliance on the survey diagram – Whether real estate agent made a representation – Whether real estate agent engaged in misleading or deceptive conduct or conduct "likely to mislead or deceive".

Words and phrases – "misleading or deceptive conduct", "representation".

*Fair Trading Act 1987 (NSW)*, s 42.

*Trade Practices Act 1974 (Cth)*, ss 52, 82.



1 GLEESON CJ, HAYNE AND HEYDON JJ. On 18 February 1997, the appellants, Jeffrey Gordon Butcher and Judith Kay Radford ("the purchasers"), agreed to buy 10 Rednal Street, Mona Vale ("the Rednal land") from its then registered proprietor, Robert Edward Harkins ("the vendor"). The Rednal land was at all material times property under the *Real Property Act* 1900 (NSW). It was lot 14 in Deposited Plan 9500, evidenced by Folio Identifier 14/9500. The Rednal land was a valuable waterfront property on the southern shore of Pittwater, a large bay to the north of Sydney separated from the ocean by a narrow peninsula. The respondent real estate agent, Lachlan Elder Realty Pty Ltd ("the agent"), acted for the vendor in that sale.

2 The purchasers sued the agent for damages for misleading or deceptive conduct. The purchasers claimed (among other things) that a brochure issued by the agent was misleading because it misrepresented the location of the boundary of the Rednal land abutting Pittwater as being on the Pittwater side of a swimming pool on the land.

3 In the Supreme Court of New South Wales, Austin J dismissed that claim<sup>1</sup>. The Court of Appeal (Handley, Beazley and Hodgson JJA) dismissed an appeal<sup>2</sup>. By special leave, the purchasers appealed to this Court.

#### Background

4 In 1996, the purchasers were living as husband and wife at 41 Calvert Parade, Newport. Newport, like Mona Vale, is a suburb in a prosperous area of Sydney known as the Northern Beaches area, close to the sea. In August 1996, Mr Butcher met his accountant to formulate an investment plan in order to ensure long-term financial security for his family.

5 As a result, the purchasers decided to use the equity in 41 Calvert Parade as security to finance investments in land and shares. They sold their motor yacht in order to reduce their existing debt to a negligible level and to complete major renovations to 41 Calvert Parade. When the renovations were substantially complete, Mr Butcher began making inquiries with real estate agents in the Northern Beaches area about the availability of potential investment properties at a price between about \$800,000 and \$1 million. His main plan was to acquire a property suitable for immediate redevelopment and on-selling, while

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1 *Butcher v Harkins* [2001] NSWSC 15.

2 *Harkins v Butcher* (2002) 55 NSWLR 558.

continuing to live at 41 Calvert Parade. He had an alternative plan – selling 41 Calvert Parade and renovating a newly purchased property after moving in.

- 6 During December 1996 and January 1997, Mr Spring, an employee of the agent, showed the purchasers various properties which did not meet their requirements. On 6 February 1997, Mr Spring showed the purchasers the Rednal land. He gave them a glossy coloured brochure. He said words to the effect:

"These are all the details for the property. You have a full coloured brochure on the front and all the council outgoings land survey etc on the rear. That is everything you need to know."

The trial judge found that, in context, these words conveyed no more than that the brochure "was a very helpful document which conveniently put together in a single place the answer to some questions that purchasers typically asked"<sup>3</sup>.

- 7 The brochure consisted of a single sheet of paper with material on each side. The front consisted mainly of three coloured photographs, but there was some writing as follows. The page was headed "Mona Vale". Most of the bottom right hand quarter contained the words "10 REDNAL STREET NORTH EAST FACING DEEP WATERFRONT". At the bottom left appeared a reference to L J Hooker, Mona Vale (the agent's business name). In the left hand margin in small black type against a white background appeared the words "Produced by Williams Design Associates" and a telephone number. Across the bottom in slightly larger black type against a white background appeared the words:

"Lachlan Elder Realty Pty Ltd ACN 002 332 247. All information contained herein is gathered from sources we believe to be reliable. However we cannot guarantee it's [sic] accuracy and interested persons should rely on their own enquiries."

- 8 The bulk of the front of the brochure consisted of a photograph of the rear of the land, taken from Pittwater, showing boats moored at a jetty, then a lawn, then a metal picket fence with a gate, then the house. Two smaller photographs were inset on the bottom left quarter of the page. The second photograph, taken from the verandah of the house, showed part of a swimming pool, lawn, the metal picket fence and gate, more lawn, the jetty and Pittwater. The third photograph was of a large billiard room. The photographs conveyed an impression of some opulence.

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3 *Butcher v Harkins* [2001] NSWSC 15 at [17].

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9 On the back of the brochure, which was headed "10 Rednal Street Mona Vale", there appeared the following prose. In the top left quarter the document said:

"Set in the best position in Rednal Street, closer to the water than any other home, your privacy is guaranteed. Featuring a grand full brick residence with high ceilings, full size billiard room and a large outdoor entertaining balcony lapping up the year round sunshine and sensational views.

Offering scope for renovation or redecoration, rarely do you find deep waterfronts with six car garaging, jetty and pontoon with flexible berthing arrangements for two large vessels, visitor boats and runabouts, easy access, low maintenance grounds and level lawns to the waters [sic] edge.

A must see for the serious boating enthusiast."

10 The bottom half of the page was headed "North East Facing Deep Waterfront" and gave details of land area, council rates, water rates and permissive occupancy fee. It also gave the place and date (18 February 1997) of an auction and the contact number of Mr Lachlan Elder, a director and the principal of the agent. The third last line contained further references to L J Hooker Mona Vale. The last two lines were set in black type smaller than the equivalent material at the bottom of the front of the brochure but against a white background:

"All information contained herein is gathered from sources we deem to be reliable. However we cannot guarantee it's [sic] accuracy and interested persons should rely on their own enquiries. Williams Design Associates ph (02) 9905 7372."

11 The top right hand quarter of the page showed a survey diagram. Although it was partly illegible, it showed dimensions for the southern, western and eastern sides. It also showed, starting at the south end of the block and moving north towards Pittwater, a garage, a brick house, a pool, a line marked "MHWM" and a "reclaimed area". The trial judge found that a reader who compared the diagram with the photographs on the other side would conclude that the "MHWM" line was approximately the line of the fence. The number "14" was plainly visible, and the adjoining blocks were plainly numbered "13" and "15". The diagram bore other dimensions, and was dated "4.8.80".

12 To anticipate events, on 17 February 1997 the solicitor for the purchasers received a draft contract for the Rednal land. Annexed to it was a survey by

Mr F W Hannagan dated 4 August 1980. The survey had annexed to it a survey diagram identical to that appearing on the reverse of the brochure.

13 The provenance of the survey diagram in relation to the brochure was that the vendor provided the survey report to his solicitors for inclusion in the draft contract; the agent obtained a copy of the draft contract from the solicitors; and the agent took its reproduction of the diagram from the survey report included with the draft contract.

14 As a result of their visit to the Rednal land on 6 February 1997, the purchasers became interested in it. On 14 February 1997, accompanied by an architectural designer whom they had retained, Paul Gillmer, they inspected the Rednal land again, this time with Mr Elder. The trial judge found that on that occasion Mr Butcher told Mr Elder that he planned "to turn the pool around and have it [placed] by the side boundary", in order to "open up space for entertaining"<sup>4</sup>. Mr Elder said that the pool would "encroach [on] the mean high water mark". Mr Gillmer advised Mr Butcher that "the idea of 'moving' the pool was feasible, based on the position of the high water mark indicated by Mr Butcher, in reliance on the diagram in the brochure".

15 On 15 February 1997, Mr Butcher inspected the Rednal land with a builder, Scott Hindmarch. He was shown the brochure by Mr Butcher. After taking advice from Mr Hindmarch, the purchasers formed the view that they could carry out the proposed restructuring of the swimming pool area, provided that the development did not go beyond the side boundaries or the mean high water mark.

16 After their solicitor received the draft contract on 17 February 1997, the purchasers decided to bid at the auction. On 18 February 1997, they did so successfully and signed a contract to buy the Rednal land. The trial judge found that they would not have done so if they had known that the mean high water mark traversed the swimming pool<sup>5</sup>. They bid because they thought their plans for the swimming pool area could be achieved. They thought that because of the advice of Mr Gillmer and Mr Hindmarch. That advice relied on the mean high water mark being where Mr Butcher indicated, and he relied on the brochure. The contract price was \$1.36 million. The deposit was \$272,000: \$200,000 was payable immediately, and the balance was payable on the date the purchasers exchanged contracts for the sale of 41 Calvert Parade (or on completion, if that

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4 *Butcher v Harkins* [2001] NSWSC 15 at [26].

5 *Butcher v Harkins* [2001] NSWSC 15 at [31], [67].



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were earlier). By this time, the purchasers had decided to follow their alternative plan – to sell 41 Calvert Parade and renovate the Rednal land, rather than speedily redeveloping and reselling the Rednal land while remaining at Calvert Parade. But they still intended, after they moved into the Rednal land, to redevelop and resell it. The agent advised the purchasers that they could hope for at least \$1.2-1.3 million from the sale of 41 Calvert Parade.

#### Disputes break out

17           Thereafter the purchasers came to believe that, contrary to the impression they had gained from the survey diagram in the brochure, the rear boundary of the Rednal land traversed the swimming pool. They formed this belief partly because of disclosures by the vendor, partly because of a survey they procured on 14 March 1997, and partly because of dealings with the Department of Conservation and Land Management and the Pittwater Council. They were also informed on 30 May 1997 by an officer of that Department that they would not be permitted to relocate the swimming pool as they wished.

18           On 26 May 1997, the purchasers commenced proceedings against the vendor. The causes of action alleged were fraudulent misrepresentation, innocent misrepresentation and misleading or deceptive conduct.

19           On 24 June 1997, contracts were exchanged on 41 Calvert Parade. The price was \$1.1 million. Contrary to special condition 34.1 of the Rednal land contract, the balance of the deposit, \$72,000, was not paid. On that ground, on 2 July 1997, the vendor purported to terminate the contract for the sale of the Rednal land and claimed that the deposit of \$272,000 had been forfeited. On 4 July 1997, the solicitor for the purchasers alleged that that notice of termination was invalid and that the vendor had repudiated the contract. Thereafter, the purchasers and the vendor treated the contract as no longer being on foot.

20           The present proceedings, brought by the purchasers against the agent, did not commence until 26 February 1998. The purchasers claimed damages for misleading or deceptive conduct, comprising various items of expenditure occasioned by entry into the contract to buy the Rednal land. The two sets of proceedings brought by the purchasers, against respectively the vendor and the agent, were heard together.

#### The reasoning of the trial judge in relation to the vendor

21           The trial judge found that the vendor had made an innocent misrepresentation by authorising the preparation and distribution of the brochure and the inclusion of Mr Hannagan's survey report in the contract. The representation was that "the mean high water mark identified by applying the

registered plan measurements for lot 14 from fixed reference points at the street boundary was located beyond the swimming pool and did not traverse it"<sup>6</sup>. It was a misrepresentation because Mr Hannagan's report was inaccurate in that respect: the correct position of the mean high water mark in a survey identification report for lot 14 was through the swimming pool<sup>7</sup>. The trial judge regarded it as irrelevant that the vendor may have been entitled to additional land by accretion which might bring his waterside boundary beyond the swimming pool, on the ground that the vendor "made no representation about title by accretion"<sup>8</sup>.

- 22 The trial judge held that, for the same reasons, the vendor's conduct was misleading, but that it did not contravene s 42 of the *Fair Trading Act* 1987 (NSW) because it was not in trade or commerce<sup>9</sup>. The trial judge ordered the vendor to repay to the purchasers the deposit of \$200,000 with interest.

The reasoning of the trial judge in relation to the agent

- 23 In the second proceedings, against the agent, the trial judge found that, because of the statements at the bottom of each side of the brochure, it had not made the misrepresentations that the vendor had made. All it had said was, in effect<sup>10</sup>:

"Here is a diagram showing that the mean high water mark is located beyond the swimming pool. It is a diagram provided to us from a source that we believe to be reliable. However, we cannot vouch for the accuracy of what is shown in the diagram, and if the matter interests you, you should rely on your own inquiries."

He also said that even if the agent had been held to have distributed a misleading brochure, it was not liable since it had done no more than pass the information on<sup>11</sup>. The trial judge rejected other allegations of misleading conduct which are irrelevant to this appeal.

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6 *Butcher v Harkins* [2001] NSWSC 15 at [124].

7 *Butcher v Harkins* [2001] NSWSC 15 at [80], [82], [124]-[126] and [128]-[130].

8 *Butcher v Harkins* [2001] NSWSC 15 at [126].

9 *Butcher v Harkins* [2001] NSWSC 15 at [148].

10 *Butcher v Harkins* [2001] NSWSC 15 at [169].

11 *Butcher v Harkins* [2001] NSWSC 15 at [181].

The vendor's appeal to the Court of Appeal against the purchasers

- 24 The vendor appealed to the Court of Appeal. The Court of Appeal agreed with the trial judge that the contract of sale and the brochure, in incorporating the survey diagram, were misleading. It rejected various challenges to the trial judge's decision to order repayment of the deposit with interest, but substituted a more favourable costs order in consequence of the unnecessary allegations of fraud made by the purchasers.

The purchasers' appeal to the Court of Appeal against the agent

- 25 The purchasers also appealed to the Court of Appeal. The Court upheld the trial judge's view that the agent had done no more than pass on information received from the vendor<sup>12</sup>, and accordingly dismissed the appeal.

Notice of Contention issues

- 26 After the purchasers were granted special leave to appeal, the agent, as it was entitled to do as respondent to the appeal, filed a Notice of Contention. By that Notice, the agent alleged that the judgment in its favour in the Court of Appeal should be upheld on the basis that, contrary to the reasoning of the Court of Appeal, the northern boundary of the title to the Rednal land is, or at least was not shown at the trial not to be, on the Pittwater side of the swimming pool. This is a contention that the vendor had sought to raise in this Court by seeking special leave to appeal against the Court of Appeal's orders in the proceedings which the purchasers had brought against him for return of the deposit. Special leave to appeal was refused in that matter. At the oral hearing of the purchasers' appeal, the vendor renewed his application, contending, in effect, that if special leave were not granted, there would be a real risk of inconsistent outcomes in the litigation to which he, the vendor, was a party, and the litigation to which his agent was a party.

- 27 At the heart of both the agent's contention in the present appeal and the vendor's renewed application for special leave is the question of identifying the area of the earth's surface which the vendor was entitled to sell and to which he could pass title. In particular, the Rednal land being Torrens title land under the *Real Property Act* 1900 (NSW), the question is to what area of land did the vendor have title?

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12 *Harkins v Butcher* (2002) 55 NSWLR 558 at 566-570 [36]-[52].

28 It appears not to have been an issue at trial, or on appeal to the Court of Appeal<sup>13</sup>, that the Pittwater boundary to the Rednal land was the mean high water mark. Deposited Plan 9500, by reference to which the title to the Rednal land was to be identified, located the mean high water mark at a certain distance from the road frontage of the Rednal land. It by no means follows, however, that the Pittwater boundary to the Rednal land was a line identified by reference to those distances. It is at least strongly arguable that the boundary *was* the mean high water mark. If that is so, decisions of this Court<sup>14</sup>, courts at first instance<sup>15</sup> and commentary by learned authors<sup>16</sup> would suggest that it follows that if, as the result of wholly natural processes, that mark recedes over time, the area of the Rednal land the subject of the title could become larger.

29 The trial judge touched on questions about whether that mark had moved over time, and, if it had, whether that was the result of natural accretion or of reclamation. The trial judge concluded that "there are good grounds for arguing that the mean high water mark should now be located in a different position beyond the pool"<sup>17</sup> – that is, different from its location in 1919 when surveyed for the purposes of the Deposited Plan by which the registered title to the land is identified. But the trial judge made no more precise finding about the question. And in the Court of Appeal the finding that there had been no accretion to the land (as a result of a movement in the high water mark) was founded entirely upon what were said to be admissions made in 1964 and 1979 by predecessors in title to the vendor. Both vendor and agent wished to challenge that finding<sup>18</sup>.

30 At one stage it seemed that the question which founded the grant of special leave could be reached only by first examining whatever evidence was given about where the mean high water mark was, or was shown to have been, at the time of the agent issuing the brochure. That issue, of where the mean high

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13 *Harkins v Butcher* (2002) 55 NSWLR 558 at 560 [2], 561 [8].

14 *Lanyon Pty Ltd v Canberra Washed Sand Pty Ltd* (1966) 115 CLR 342 and *Hazlett v Presnell* (1982) 149 CLR 107. See also the Privy Council decision of *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706.

15 For example, *Verrall v Nott* (1939) 39 SR (NSW) 89.

16 For example, Moore, "Land by the Water", (1968) 41 *Australian Law Journal* 532 at 534.

17 *Butcher v Harkins* [2001] NSWSC 15 at [80].

18 *Harkins v Butcher* (2002) 55 NSWLR 558 at 563 [15].

water mark was in fact located at relevant times, was far from the forefront of the purchasers' case at the trial, or before the Court of Appeal, and in this Court they, like the trial judge<sup>19</sup>, contended that it was irrelevant. Rather, the purchasers argued that the relevant inaccuracy in the brochure is demonstrated by showing no more than that the boundary determined by measuring the distances found on the Deposited Plan from the road frontage towards Pittwater yields a line lying through the swimming pool.

31 The purchasers' Statement of Claim against the agent alleged that the agent had engaged in conduct in contravention of s 52 of the *Trade Practices Act* 1974 (Cth) ("the Act"), and sought damages under s 82 for loss allegedly caused<sup>20</sup>. There is no dispute that, whatever conduct the agent engaged in, it was in trade or commerce. The Statement of Claim relevantly alleged:

"17. The [agent] when distributing the ... brochure represented that:

...

- (b) the permissive occupancy [sic] did not affect any improvements of the land; and
- (c) the swimming pool constructed on the Rednal [land] was wholly constructed within the rear boundary towards Pittwater of the Rednal [land].

...

19. The [agent] throughout the period 1 February to 18 February 1997 failed to advise the [purchasers] that:

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19 *Butcher v Harkins* [2001] NSWSC 15 at [82] and [126].

20 Section 52(1) provided:

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

Section 82(1) provided:

"A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part ... V ... may recover the amount of the loss or damage by action against that other person ..."

- (a) the ... brochure was inaccurate in that [it] erroneously suggested that the swimming pool constructed on the Rednal [land] was wholly constructed within the rear boundary towards Pittwater of the Rednal [land], when the true position was that the Permissive Occupancy owned by the Crown included part of the swimming pool ..."

32 In this Court, the purchasers emphasised the proposition that the expression "conduct" in s 52 extends beyond "representations". That proposition is sound<sup>21</sup>. But the purchasers cannot claim any advantage out of an extension of "conduct" beyond "representation" in this case, since their case as pleaded was one based on representations to them by the agent. In this Court, counsel for the purchasers accepted that the alleged misrepresentation was a misrepresentation about the title to land.

33 In argument in this Court, counsel for the purchasers said that the pleaded representation that the swimming pool "was wholly constructed within the rear boundary towards Pittwater" of the Rednal land included an allegation that the representation was that the "swimming pool was within the curtilage of the land being sold", or that "the boundary of the land to which [the purchasers] would take title extended to the back fence". He also said that even if the doctrine of accretion gave the vendor title to more land than was indicated by the mean high water mark line marked on the survey plan in the brochure, or the right to a wider title, the agent's conduct would have contravened s 52, because the purchasers were not interested in buying "a bundle of trouble with a doctrine of accretion hanging to it and a lot of inquiries have to be made in order to get there".

34 For its part, the agent denied these contentions, and denied that the misrepresentation identified by the trial judge had been pleaded. Counsel said that even if the agent had represented that the swimming pool "was wholly

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21 *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546 at 555 per Lockhart J (Burchett and Foster JJ concurring). The contrary view was stated in the Court of Appeal: *Harkins v Butcher* (2002) 55 NSWLR 558 at 565-566 [32]. The passages in the authorities cited by the Court of Appeal were not directed to the precise distinction (*Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 88 per Bowen CJ, Lockhart and Fitzgerald JJ) or were seeking to illuminate the distinction between conduct which was merely confusing and conduct which was misleading (*Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202 per Deane and Fitzgerald JJ) or were qualified by reference to cases of a particular class (*Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112 at 131 per Hill J).

11.

constructed within the rear boundary" as par 17(c) of the Statement of Claim alleged, the purchasers had not shown that it was not.

35 In some cases of this kind it might be important to decide whether any representation made was made about the full extent of the title, or was simply made about the location of the swimming pool in relation to the line marked "MHWM". This is not one of them, because for reasons now to be given, the agent made no representation of any kind, beyond stating what information the vendor wished to communicate to the purchasers.

The alleged representation made

36 *The relevant class addressed.* Questions of allegedly misleading conduct, including questions as to what the conduct was, can be analysed from two points of view. One is employed in relation to "members of a class to which the conduct in question [is] directed in a general sense"<sup>22</sup>. The other, urged by the purchasers here, is employed where the objects of the conduct are "identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld"; they are considered quite apart from any class into which they fall<sup>23</sup>. Adoption of the former point of view requires isolation by some criterion or criteria of a representative member of the class. To some extent the trial judge adopted the former approach, pointing out that the class – potential home buyers for Pittwater properties in a price range exceeding \$1 million – was small (as suggested by the fact that only one hundred brochures were printed), and its members could be expected to have access to legal advice.

37 The former approach is common when remedies other than those conferred by s 82 (or s 87) of the Act are under consideration. But the former approach is inappropriate, and the latter is inevitable, in cases like the present, where monetary relief is sought by a plaintiff who alleges that a particular misrepresentation was made to identified persons, of whom the plaintiff was one. The plaintiff must establish a causal link between the impugned conduct and the loss that is claimed. That depends on analysing the conduct of the defendant in relation to that plaintiff alone. So here, it is necessary to consider the character

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22 *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at 85 [103] per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ.

23 *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at 85 [102]-[103].

of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known. Indeed, counsel for the purchasers conceded that the mere fact that a person had engaged in the conduct of supplying a document containing misleading information did not mean that that person had engaged in misleading conduct: it was crucial to examine the role of the person in question.

38           *The relevant principles.* In *Yorke v Lucas*<sup>24</sup>, Mason ACJ, Wilson, Deane and Dawson JJ said that a corporation could contravene s 52 even though it acted honestly and reasonably:

"That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false. If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive."

39           In applying those principles, it is important that the agent's conduct be viewed as a whole. It is not right to characterise the problem as one of analysing the effect of its "conduct" divorced from "disclaimers" about that "conduct" and divorced from other circumstances which might qualify its character. Everything relevant the agent did up to the time when the purchasers contracted to buy the Rednal land must be taken into account. It is also important to remember that the relevant question must not be reduced to a crude inquiry: "Did the agent realise the purchasers were relying on the diagram?" To do that would be impermissibly to dilute the strict liability which s 52 imposes.

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24 (1985) 158 CLR 661 at 666. In *Goldsbro v Walker* [1993] 1 NZLR 394 at 398, a decision of the New Zealand Court of Appeal on comparable legislation, Cooke P described *Yorke v Lucas* as supporting the "fairly obvious proposition" that "an innocent agent who acts merely as a conduit and *purports* to do no more than pass on instructions from his principal does not thereby become responsible for anything misleading in the information so passed on" (emphasis in original); Richardson J approved *Yorke v Lucas* at 402, and Hardie Boys J said at 405 that it "may be that" *Yorke v Lucas* "puts it somewhat too narrowly".



13.

40 For the following reasons, the agent did not engage in conduct towards the purchasers which was misleading. Whatever representation the vendor made to the purchasers by authorising the agent to issue the brochure, it was not made by the agent to the purchasers. The agent did no more than communicate what the vendor was representing, without adopting it or endorsing it. That conclusion flows from the nature of the parties, the character of the transaction contemplated, and the contents of the brochure itself.

41 *The nature of the parties.* The parties were, on the one side, a company director and his de facto wife. They engaged in a carpet cleaning business conducted from their home. They were proposing to engage in an investment for family purposes. The search for and making of that investment was the result of a three to five year plan designed to achieve long-term financial security, to educate their four children, and to provide for the wellbeing of the family. The plan involved making strategic investments in properties and shares. It involved the sale of an apparently valuable motor yacht. The purchasers were contemplating the expenditure of over \$1 million to be funded by the sale of another piece of valuable land for over \$1 million – land which, according to the agent, had had "absolutely magnificent" renovations effected and for which the purchasers hoped to get at least \$1.2-1.3 million. The purchasers were persons who were quite wealthy, and certainly aspired to become wealthier, by means of complex property and financial dealings. The transcript of their oral evidence reveals each of the purchasers to have been intelligent, shrewd and self-reliant. No doubt they appeared that way to the officers of the agent.

42 On the other side, the relevant party was a suburban real estate agent – a corporation, a franchisee of L J Hooker, but still a suburban real estate agent, which took the name of the man who was its principal. Its office was Shop 2, 19 Bungan Street, Mona Vale. Nothing in the evidence suggests that it had more than a very small staff, or that the purchasers believed that it had more than a very small staff. The representation alleged was a representation about title. It is a matter of common experience that the skill of suburban real estate agents lies in making contracts on behalf of sellers with buyers, in locating persons who wish to sell real property and interesting in that real property persons who might wish to buy it, and in advising the former what prices are obtainable and the latter what prices might have to be paid. Suburban real estate agents do not hold themselves out – and this agent did not hold itself out – as possessing research skills or means of independently verifying title details about the properties they seek to sell. It is also a matter of common experience – and it was certainly the fact here – that real estate agents, while they carry out tasks on behalf of their principals, are not agents in the sense of creating legal relationships between their principals and others. Here, the agent was obviously an agent for the vendor, but only in a limited sense. The legal relationship to be created by any contract of

purchase was to be created by the purchasers directly – by bidding at the auction and then signing a contract.

43        It is a matter of common experience that questions of title to land can be complex, both legally and factually. Hence they have to be dealt with by specialists. So far as the complexity is factual, the specialists are surveyors. So far as the complexity is legal, the specialists are solicitors or conveyancers, relying on specialists like surveyors. The skills of these specialists, and the problems on which those skills are brought to bear, are quite outside what suburban real estate agents hold themselves out as doing and are likely to be able to do.

44        While Mr Butcher said he regarded the agent as an expert in appraising property values, the appeal papers do not record any evidence from the purchasers that they regarded the agent as an expert in surveying or in land title.

45        *The character of the transaction.* The transaction was the purchase of very expensive property, to be used as an investment – a means of gaining future profits. While the purchasers initially told the agent that they were interested in properties to the value of between \$800,000 and \$1 million, they did not decline the agent's invitation to inspect the Rednal land, which was expected to sell for \$1.3-1.5 million according to Mr Spring, well above that level, and which was in due course sold to them for \$1.36 million, including an unusually large deposit of \$272,000. The area of which the Rednal land was part was "a well regarded, prestige, waterfront location". The purchasers bought it despite the fact that, as they told the agent, they saw it as needing "a huge amount of" building work in the form of "major corrective renovations". They intended to carry on their carpet cleaning business from the premises. The purchasers were contemplating extensive changes to the entertaining area of the Rednal land if they bought it. The changes would also be expensive, for, as Mr Elder told the purchasers, "it would cost a fortune". The purchasers engaged appropriate professional advisers to assist them – Mr Gordon, an accountant; Mr Gillmer, an architectural designer and building consultant; and Mr Hindmarch, a licensed builder. They also engaged solicitors to assist with the actual process of making and completing the contract.

46        The agent was acting for the purchasers not only on the purchase of the Rednal land but also on the sale of 41 Calvert Parade. The agent worked closely with the purchasers in both respects. The agent knew most of the key characteristics of the purchasers and the properties they wished to sell and to acquire – the fact that the purchasers owned a valuable house, their desire to use the equity in it to buy a valuable property to be redeveloped and on-sold, and their access to and reliance on various forms of professional advice.

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47        *The contents of the brochure.* As counsel for the purchasers acknowledged, the diagram on the back of the brochure was a survey diagram and "looks like" a copy of an original prepared by a professional surveyor. Mr Butcher appreciated that it was a survey diagram. Mr Hindmarch recognised it as "a survey" or a "survey document", and rejected any suggestion that it was merely a sketch. The trial judge found that potential purchasers would be likely to assume that the diagram had been taken from an identification survey report. Not only was it plain that the diagram had not been made by the agent, the circumstances also negated any suggestion that the agent had adopted the surveyor's diagram as its own, or that it had verified its accuracy.

48        The losses allegedly suffered by the purchasers arose from their entry into the contract to buy the Rednal land on 18 February 1997. Before they entered it, their solicitor had received a copy of the contract, and they themselves entered the contract by signing it. If they had not previously realised that the diagram in the brochure was from a survey not conducted by or on the instructions of the agent, they must have realised it then, because the contract annexed Mr Hannagan's survey report dated 4 August 1980, containing the survey diagram bearing that date.

49        It is now necessary to consider the two disclaimers, one on the front and one on the back. The courts below treated the one on the back as relating to the position of the agent. It may instead relate to the position of Williams Design Associates, on whose role the evidence is silent, save that it may be inferred that they played some role in producing the brochure. But it does not matter, for present purposes, whether both disclaimers relate to the agent or only one. If the disclaimers are examined from the point of view of what the agent was trying to do, the first at least establishes that it was trying not to make any representations about the accuracy of the information conveyed, save that it believed the sources of it to be reliable. If the disclaimers are examined from the point of view of a careful reader, they communicate the same message. In fact, Mr Butcher said that he did not notice either disclaimer when he received the brochure on or about 6 February 1997. Though he apparently studied the brochure, including the diagram, with sufficient care to pass on his impressions of it to Mr Gillmer and Mr Hindmarch, the evidence in the appeal papers does not suggest that he ever noticed them. There is no evidence in the appeal papers that Ms Radford noticed the disclaimers either. Yet, though the disclaimers were in small type, the brochure was a short document, there was very little written on it, and the disclaimers were there to be read. Only persons of very poor eyesight would find them illegible, and there is no evidence that the eyesight of Mr Butcher or Ms Radford was in any way defective.

50       The Court of Appeal declined to "accord [the disclaimers] decisive significance"<sup>25</sup>, but they do have some significance. If the "conduct" of the agent is what a reasonable person in the position of the purchasers, taking into account what they knew, would make of the agent's behaviour, reasonable purchasers would have read the whole document, given its importance, its brevity, and their use of it as the source of instructions to professional advisers. There are circumstances in which the "conduct" of an agent would depend on different tests. For example, those tests might turn on what purchasers actually made of the agent's behaviour, whether they were acting reasonably or not, and they might also call for consideration of how the agent perceived the purchasers. Tests of that latter kind might be appropriate for plaintiffs of limited experience acting without professional advice in rushed circumstances. They are not appropriate in the present circumstances. Hence, in the circumstances, the brochure, read as a whole, simply meant: "The diagram records what a particular surveyor found on a survey in 1980. We are not surveyors. We did not do the survey. We did not engage any surveyor to do the survey. We believe the vendor and the surveyor are reliable, but we cannot guarantee the accuracy of the information they have provided. Whatever you rely on, you must rely on your own inquiries."

51       Hence it would have been plain to a reasonable purchaser that the agent was not the source of the information which was said to be misleading. The agent did not purport to do anything more than pass on information supplied by another or others. It both expressly and implicitly disclaimed any belief in the truth or falsity of that information. It did no more than state a belief in the reliability of the sources.

52       *Specific contentions of the purchasers.* It is convenient to deal briefly with several specific contentions advanced by the purchasers.

53       First, it was said that the disclaimers were to be read down, because the agent was not the source of all the information: it was plainly the source of the information and the photographs on the front of the brochure. That assertion is not correct: it is possible that the agent was the source of everything on the front of the brochure, but it has not been demonstrated that it was.

54       Secondly, it was submitted that there should have been "something ... in plain print near the [allegedly misleading] information that [readers] should check its accuracy and [the agent does] not stand behind it". The statement that the agent did not guarantee the accuracy of any information and that readers

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25 *Harkins v Butcher* (2002) 55 NSWLR 558 at 568 [46].

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should make their own inquiries meant that readers should check its accuracy. That statement was sufficiently near both the picture of the back garden on the front and the diagram on the rear, since it was reproduced on both pages where the allegedly misleading information appeared and clearly applied to everything on the respective pages.

55 Thirdly, it was submitted that the location of the boundary was a matter highly material to a valuable property being sold specifically as a waterfront property, and the agent should have given a proper warning disassociating itself from any representation on that subject. Yet there were two explicit warnings, which, although general, were for that reason comprehensive, and there were other warnings implicit in the totality of the brochure.

56 Fourthly, it was contended that agents carrying on business in the Pittwater area "presumably ought to know about mean high-water marks around Pittwater". That submission is highly questionable factually and asserts no more than part of what it is trying to prove.

57 Fifthly, stress was placed on the large commission that the agent was probably seeking, and the expectation this would generate in the purchasers that any representations about the property would be correct. There is no evidence that the purchasers knew what commission the agent would get, and whatever the size of the agent's commission, the circumstances remain inconsistent with its having made any relevant representation.

58 Sixthly, it was submitted that while it was open to an estate agent to put a disclaimer on marketing brochures which could prevent its conduct from falling within s 52, the disclaimer would be so antithetical to the goal of selling properties that no estate agent would ever employ it. Yet the disclaimers on the brochure are not of that character, and they do negate any relevant representation.

59 *Extreme consequences of the purchasers' arguments.* Further difficulties are created by certain extreme consequences which counsel for the purchasers acknowledged would flow from their arguments. It was accepted that if their arguments were sound, it must follow that when a real estate agent produces a brochure offering land for sale by a vendor, the real estate agent is representing that the vendor had good title. That would be so radical a conclusion as to suggest that even the wide words of s 52 could not bring it about; that in turn suggests that the principles that supposedly lead to that radical conclusion are unsound.

60 It was also said that while Mr Spring's handing over of the brochure made the agent liable, the handing over of it by a junior employee at the front desk could not. The basis for this distinction was not explained. If the brochure made

any representation, the conduct of the junior employee in handing it over would be engaged in on behalf of the agent as much as the conduct of the senior officer, and would therefore be deemed by s 84(2) to have been engaged in by the agent<sup>26</sup>. The status of the employee might be relevant to whether it was probable that the employee was personally liable as a secondary party (for example, an aider or abettor)<sup>27</sup> by reason of having knowledge of the essential elements of the contravention<sup>28</sup>; but it is not, subject to s 84(2), relevant to whether the corporation – here, the agent – is liable.

61 *Authorities analysed by the purchasers.* Counsel for the purchasers submitted that the Federal Court had repeatedly held "that disclaimers of this nature are not likely to overturn the effect of otherwise misleading and deceptive conduct". However, the Federal Court authorities do not say that disclaimers cannot make clear who is and who is not the author of misleading or deceptive conduct. While acknowledging that each case depended on its own facts, the purchasers relied on various authorities as supporting their argument.

62 In *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd*<sup>29</sup>, a real estate agent ("John G Glass") placed a typed document emanating from the principal of a firm of consultants acting for the vendor with other materials in a folder with a glossy cover. The typed document showed that the net lettable area of a building being offered for sale was 180 m<sup>2</sup>. In fact, the net lettable area was 137.4 m<sup>2</sup>. John G Glass contended that the only representation it had made was that it had obtained the information in the brochure from the vendor; that it had

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26 Section 84(2) provided:

"Any conduct engaged in on behalf of a body corporate:

(a) by a ... servant ... of the body corporate within the scope of the person's actual or apparent authority; ...

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate."

27 Section 75B(1)(a) provided that a reference in Pt VI to a person involved in contravention of Pt V (which included s 52) should be read as a reference to a person who "has aided, abetted, counselled or procured the contravention ..."

28 *Yorke v Lucas* (1985) 158 CLR 661 at 670 per Mason ACJ, Wilson, Deane and Dawson JJ.

29 (1993) ATPR ¶41-249.

not endorsed or approved the information in the brochure; and that it was no more than a conduit. These contentions relied on the following statement in the brochure on a page immediately before the back cover:

"The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case we have no reason to doubt its completeness or accuracy.

However, neither John G Glass Real Estate Pty Limited, its employees or its clients guarantee the information nor does it, or is it intended, to form part of any contract. Accordingly, all interested parties should make their own enquiries to verify the information as well as any additional or supporting information supplied and it is the responsibility of interested parties to satisfy themselves in all respects."

63 The Full Federal Court (Davies, Heerey and Whitlam JJ) upheld the trial judge's rejection of these contentions. Counsel for the purchasers here contended that if John G Glass there failed, with its "more ample disclaimer", going "much further than the suggested disclaimer here", the agent must fail in the present case. The case is distinguishable on two grounds.

64 The first ground of distinction is that in the brochure John G Glass held itself out as "consultants to institutional investors and to developers of major properties", and the Full Federal Court held that such an agent "would not be regarded by potential purchasers of properties as merely passing on information about the property 'for what it is worth and without any belief in its truth or falsity'."<sup>30</sup>

65 The second ground of distinction is that the Full Federal Court said that the net lettable area figure was "one of hard physical fact", and an essential matter in determining the profitability and value of the building<sup>31</sup>. The issue of whether there was a precise correspondence between the Pittwater boundary of the Rednal land and the "MHWM" line on the surveyor's diagram here, however, is not a matter of hard physical fact. What is more, there was nothing to indicate that the net lettable area figure had not been calculated by John G Glass itself: indeed, the part of the disclaimer which stated that some of the information had

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30 *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR ¶41-249 at 41,359 paraphrasing *Yorke v Lucas* (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ.

31 *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR ¶41-249 at 41,359.

been "prepared with care by" John G Glass suggested that it had, since it is the type of information an estate agent might be capable of working out for itself. It is quite different from the survey diagram, which had obviously not been prepared by the agent here. Hence Handley JA's succinct explanation of why the case was distinguishable is correct<sup>32</sup>:

"In that case the agents claimed relevant expertise, adopted the figures as their own, and put them forward without any reference to their source. In the present case the agents claimed no relevant expertise, and the diagram itself indicated that it was the work of a professional surveyor."

66 Not only is the case distinguishable, but its reasoning in one respect is questionable. The Full Federal Court said<sup>33</sup>:

"There was certainly no express disclaimer of the [estate agent's] belief in the truth of the information in the brochure – indeed there was an express assertion of such belief."

67 It does not seem quite correct to describe an estate agent which says it has no reason to doubt the accuracy of information but says it does not guarantee it, advises interested parties to make their own inquiries, and says interested parties have the responsibility of satisfying themselves in all respects, as making an "express assertion" of belief in the information.

68 Finally, contrary to what the purchasers submitted, while the disclaimer in *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* was longer, it was not "more ample", and did not go "much further", than the present disclaimers. It did not go as far, because its opening words, unlike any words in this brochure, acknowledged that the estate agent had prepared some of the information.

69 The purchasers next relied on *Waltip Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*<sup>34</sup>. In that case, Pincus J held that clauses in a deed of acknowledgment providing that no pre-contractual statements had been relied on before the parties entered a lease were of no effect if the facts were to the

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32 *Harkins v Butcher* (2002) 55 NSWLR 558 at 570 [52].

33 *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR ¶41-249 at 41,359.

34 (1989) ATPR ¶40-975.



contrary. Cases of that type concern a problem which is entirely different from the present problem, and cast no light on its solution.

70 The third case relied on was *Benlist Pty Ltd v Olivetti Australia Pty Ltd*<sup>35</sup>. An estate agent issued a brochure promoting the sale of a substantial city building. The brochure said it was suitable for strata title subdivision. In fact, two encroachments presented obstacles to strata subdivision: one encroachment by a neighbouring building on the land the subject of the sale; and another encroachment by the building being sold onto the neighbouring land. The brochure contained the following clause:

"Chesterton International (NSW) Pty Limited for themselves and the vendors of this property whose Agent they are, give notice: (i) The particulars are set out as a general outline only for guidance of intending purchasers and do not constitute an offer or contract; (ii) All descriptions, dimensions, reference to conditions and necessary permissions for use and occupation and other details are given in good faith and are believed to be correct, but any intending purchasers should not rely on them as statements or representations of fact and must satisfy themselves by inspection or otherwise as to the correctness of each of them; (iii) No person in the employ of [Chesterton] has any authority to make or give a presentation or warrant whatsoever in relation to this property."

71 A question arose about whether that clause prevented a conclusion that the purchaser relied on the representation about strata title subdivision. Burchett J held that it did not. The purchasers in the present appeal relied on the following passage<sup>36</sup>:

"It has been held on many occasions that the perpetrator of misleading conduct cannot, by resorting to such a clause, evade the operation of [the Act]. Of course, if the clause actually has the effect [of] erasing whatever is misleading in the conduct, the clause will be effective, not by any independent force of its own, but by actually modifying the conduct. However, I should think it would only be in rare cases that a formal disclaimer would have that effect."

72 Clause (i) of the disclaimer did not purport to modify the conduct. Nor did cl (iii), since, as Burchett J held, it merely prevented employees from binding

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35 (1990) ATPR ¶41-043.

36 *Benlist Pty Ltd v Olivetti Australia Pty Ltd* (1990) ATPR ¶41-043 at 51,590.

the vendor by conduct outside the brochure. Burchett J dealt with cl (ii) as a matter of fact<sup>37</sup>:

"In the present case, the suggestion of the suitability of the building for strata title conversion might continue to influence the mind of a prospective purchaser notwithstanding his awareness of the existence of a disclaimer clause, which did not single out the particular representation, but purported to apply generally to every detail stated in the investment report. If it were permissible to avoid the operation of [the Act] by such a clause, it would be all too easy to make representations in the confidence that they *would* be acted upon, and then withdraw them in the confidence (equally important for the securing of the desired business) that the withdrawal would *not* be acted upon."

The conclusions that Burchett J reached as a matter of fact in that case – the implicit conclusion that the clause had not modified the conduct, and the explicit conclusion that despite being told to make its own inquiries the purchaser relied on the representation about strata title conversion – were no doubt open to him, but different conclusions are open in other cases.

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The purchasers next referred to a case on which the Court of Appeal relied, *Argy v Blunts & Lane Cove Real Estate Pty Ltd*<sup>38</sup>, where Hill J suggested that a solicitor would not be guilty of misleading conduct in annexing to a contract for the sale of land a certificate issued by a local council under s 149 of the *Environmental Planning and Assessment Act 1979* (NSW) which wrongly described the zoning of the land, so long as the whole of the certificate was annexed. It was said to be distinguishable in that the solicitor in that case merely attached a document prepared by another, while here the agent incorporated the document as part of its brochure in conjunction with other material, particularly the photographs on the front. The purchasers' attempt to distinguish this case rested on an unsatisfactory distinction between survey diagrams included in brochures and survey diagrams annexed to brochures.

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37 *Benlist Pty Ltd v Olivetti Australia Pty Ltd* (1990) ATPR ¶41-043 at 51,590 (emphasis in original).

38 (1990) 26 FCR 112 at 131-132.

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The purchasers drew the same distinction in relation to a statement in another case on which the Court of Appeal below relied – *Dean v Allin & Watts*<sup>39</sup>:

"The greatest caution is required in treating statements made by a solicitor in the course of conveyancing transactions and the like on or in accordance with the instructions of his client as representations made by the solicitor rather than as 'conveyed' by him as (in effect) a medium of communication or messenger for his client, for this may readily be assumed to be understood to be part of his role in the transactions. The solicitor's position in such a situation is to be contrasted with his position in a situation where the solicitor makes an express unequivocal statement to a third party which is not attributable simply to performing his role as the client's adviser: for in the latter case the adviser may readily be held to have assumed responsibility to the third party, since the explanation of his acting merely as a messenger would be inapplicable."

After quoting this, the Court of Appeal said: "There is no reason why these principles should not apply to other agents as well."<sup>40</sup> If this sentence is read as stating that the "greatest caution" is required in treating statements by many agents on behalf of their principals in brochures as statements of the agents, it would be a highly questionable statement, since at least in cases under s 52, read in the light of the particular structure and goals of the Act, everything must depend on an appropriately detailed examination of the specific circumstances of the case. However, the sentence in question is not to be read in that way, because Handley JA went on to carry out an examination of this kind before concluding that the agent in the present case made no representation about the accuracy of the survey diagram. In the course of his examination, Handley JA said that if the agent had handed copies of the survey report and diagram to the purchasers, that act would not have represented that the information was accurate, and would have done no more than represent a belief that it was accurate. To supply the diagram as part of the brochure was no different<sup>41</sup>.

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The purchasers did not submit that *Argy v Blunts & Lane Cove Real Estate Pty Ltd* and *Dean v Allin & Watts* were incorrect, but said that they were

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<sup>39</sup> [2001] 2 Lloyd's Rep 249 at 257-258 [28] per Lightman J, Robert Walker and Sedley LJ concurring.

<sup>40</sup> *Harkins v Butcher* (2002) 55 NSWLR 558 at 568 [46] per Handley JA (Beazley and Hodgson JJA concurring).

<sup>41</sup> *Harkins v Butcher* (2002) 55 NSWLR 558 at 569 [47]-[48].

cases in which a solicitor did no more than present a principal's document to a plaintiff, not cases in which a principal's document was incorporated into the agent's document. The purchasers submitted that the Court of Appeal in this case had failed to understand that, and had failed to understand that the misleading quality of the conduct of the agent in this case arose not only from the inclusion of the survey diagram, but from its juxtaposition with the photographs on the front of the brochure. The distinction relied on by the purchasers has a formal character, and will not always be satisfactory. Its soundness in particular contexts must depend on the circumstances of those contexts. There could be cases where the presentation by an agent of a principal's document to a plaintiff does involve the agent in making a representation about the objective truth of the document's contents; and there could be cases where the incorporation of a principal's document into another document prepared by an agent will not involve the agent in making a representation about any matter of objective truth, whether the principal's document is considered by itself or in conjunction with other material in the agent's document. For the reasons given above, the present circumstances fall within the latter category.

76        *Appropriate level of analysis.* Finally, it is necessary to deal with a submission made by the purchasers that it was wrong to analyse the structure and language of the brochure too minutely. It is true that the level of analysis which is appropriate might vary from case to case. A more impressionistic analysis, concentrating on the immediate impact of the conduct, might be sounder where the document was only briefly looked at before a decision was made. In other cases a more detailed examination may be more appropriate. Here, the purchasers had the brochure for twelve days before the auction. They relied on it in instructing professional advisers, and they were embarking on a very serious venture. It is not inappropriate to look closely at the contents of the brochure before deciding whether the agent had made a representation.

#### Vendor's application for special leave to appeal

77        The vendor's renewed application for special leave to appeal was made against the possibility that the agent's arguments could fail in relation to the Notice of Appeal but succeed in relation to its Notice of Contention. Since the agent's arguments have not failed in relation to the Notice of Appeal, and since it has not been necessary to deal with its Notice of Contention, it is not necessary to do more with the special leave application than dismiss it.

#### Cross-appeal

78        Against the event that the appeal were to be allowed, the agent filed a Notice of Cross-Appeal relating to contribution from the vendor. Since the

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appeal is to be dismissed, it is not necessary to do more than dismiss the cross-appeal as well.

Orders

79           The appeal and cross-appeal are dismissed. The purchasers are to pay the agent's costs. The vendor's application for special leave to appeal is dismissed.

80 McHUGH J. This case is concerned with the application of a statutory text, expressed in general terms, to particular facts. It falls within a class of case that rarely warrants the grant of special leave to appeal to this Court. But behind the ultimate issue in the case are other issues that affect every person who is induced to buy real estate in Australia by statements in sales brochures distributed by real estate agents. One of those issues is the extent to which estate agents engage in misleading or deceptive conduct when they distribute sales brochures that contain untrue or misleading statements prepared by others. Another issue is the extent to which agents can escape liability by relying on disclaimers about the authenticity of false statements contained in brochures prepared by them.

81 The respondent, Lachlan Elder Realty Pty Ltd ("Lachlan Elder"), a real estate agency, prepared and handed to Mr Jeffrey Butcher and Ms Judith Radford a promotional brochure concerning the sale of a residential waterfront property, which Mr Butcher and Ms Radford subsequently bought at auction. The brochure contained a reproduction of a survey diagram of the property, which consisted of land held under freehold and land held under a permissive occupancy granted by a government department. The diagram purported to depict a swimming pool as lying wholly within the freehold of the property. In fact, the freehold boundary of the property traversed the swimming pool so that the swimming pool lay partly within the freehold and partly within the permissive occupancy. Mr Butcher and Ms Radford ("the purchasers") claimed that:

- they intended to relocate the swimming pool;
- Lachlan Elder was aware of this intention before the auction;
- they had purchased the property relying on the survey diagram in the brochure; and
- they would not have bought the property if they had known that the swimming pool did not lie entirely within the freehold.

82 The ultimate issue in the appeal is whether, by distributing the brochure, the conduct of Lachlan Elder amounted to misleading or deceptive conduct or conduct that was likely to mislead or deceive in contravention of s 52 of the *Trade Practices Act 1974* (Cth) ("the Act"). In my opinion, it did.

#### Statement of the case

83 In May 1997, the purchasers commenced proceedings in the Supreme Court of New South Wales against Mr Robert Harkins, the vendor of the property at 10 Rednal Street, Mona Vale, Sydney ("the Rednal Street property"). In February 1998, they commenced proceedings in the Federal Court against Lachlan Elder. In June 1998, the proceedings against that company were

transferred to the Supreme Court of New South Wales. Both proceedings concerned the purchase at auction of the Rednal Street property. Lachlan Elder was the agent of the vendor.

84 The purchasers sued Lachlan Elder for damages for misleading or deceptive conduct in contravention of s 52 of the Act. The s 52 claim was based on a "glossy colour brochure" issued by Lachlan Elder before the Rednal Street property was auctioned<sup>42</sup>. The claim alleged that the brochure was misleading because it misrepresented the location of the swimming pool as entirely within the freehold of the property. The purchasers also sought damages against the vendor for misrepresentation and misleading or deceptive conduct based on the incorrect survey diagram. Relying on s 55(2A) of the *Conveyancing Act 1919* (NSW), they also sought to recover the part deposit paid to the vendor.

85 In the Supreme Court, Austin J found<sup>43</sup> that the survey diagram suggested that the swimming pool was wholly within the vendor's freehold land but that the mean high water mark traversed the swimming pool with the result that the swimming pool was partly in the permissive occupancy. His Honour found<sup>44</sup> that the vendor had made a misrepresentation that the mean high water mark was located beyond the swimming pool. However, Austin J found<sup>45</sup> that Lachlan Elder had not engaged in misleading or deceptive conduct within the meaning of s 52 in distributing the brochure even though the purchasers had reasonably relied on the diagram in the brochure. His Honour held<sup>46</sup> that the class of potential purchasers of waterfront homes in a price bracket above \$1 million, independently advised by their own solicitors, would be unlikely to be misled by the brochure read as a whole, having regard, in particular, to its disclaimer provisions.

86 His Honour found<sup>47</sup> that, even if the brochure had been misleading or deceptive, Lachlan Elder had done no more than pass on the survey diagram, making it clear that it was not the source of the information. He dismissed the purchasers' action against Lachlan Elder with costs.

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42 *Butcher v Harkins* [2001] NSWSC 15 at [3] per Austin J.

43 *Butcher* [2001] NSWSC 15 at [82], [125].

44 *Butcher* [2001] NSWSC 15 at [168].

45 *Butcher* [2001] NSWSC 15 at [145].

46 *Butcher* [2001] NSWSC 15 at [170].

47 *Butcher* [2001] NSWSC 15 at [171].

87 The purchasers appealed to the New South Wales Court of Appeal, which unanimously dismissed their appeal<sup>48</sup>. Handley JA, with whom Beazley and Hodgson JJA agreed, held that, for the purposes of s 52, conduct is only misleading or deceptive if it conveys a misrepresentation<sup>49</sup>. His Honour held that the only representation conveyed by Lachlan Elder was that the survey diagram "was an accurate copy of what [Lachlan Elder] believed was a genuine and correct survey diagram."<sup>50</sup> Handley JA found<sup>51</sup> that Lachlan Elder did not make any representation as to the accuracy of the survey diagram. His Honour found<sup>52</sup> that, because Lachlan Elder claimed no expertise as surveyors and the diagram indicated that it was the work of a professional surveyor, Lachlan Elder did not assume responsibility for the accuracy of the information in the brochure. Accordingly, it did not engage in misleading or deceptive conduct by distributing the brochure to the purchasers.

88 Subsequently, this Court gave the purchasers special leave to appeal against the Court of Appeal's decision on the s 52 claim.

#### The material facts

89 In December 1996, the purchasers inquired of Lachlan Elder whether investment properties to the value of between approximately \$800,000 and \$1 million were for sale in the northern beaches area of Sydney. In February 1997, Mr Gordon Spring from Lachlan Elder contacted the purchasers to propose an inspection of the Rednal Street property. The purchasers inspected the Rednal Street property on 6 February 1997 with Mr Spring. Lachlan Elder had produced a single-sheet, four-colour brochure of the Rednal Street property for the purpose of selling the property. It had colour photographs of the property on the front side and information on the back. One of the photographs on the front page depicted a swimming pool, a fence and lawns sloping to the Pittwater. At the bottom of the front side of the brochure appeared the following text:

"Lachlan Elder Realty Pty Ltd ACN 002 332 247. All information contained herein is gathered from sources we believe to be reliable.

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48 *Harkins v Butcher* (2002) 55 NSWLR 558.

49 *Harkins* (2002) 55 NSWLR 558 at 566.

50 *Harkins* (2002) 55 NSWLR 558 at 569.

51 *Harkins* (2002) 55 NSWLR 558 at 569.

52 *Harkins* (2002) 55 NSWLR 558 at 569-570.



However we cannot guarantee it's [sic] accuracy and interested persons should rely on their own enquiries."

90 The other side of the brochure contained a narrative description of the property, "written in marketing language rather than legal language."<sup>53</sup> Adjacent to the narrative was a reproduction of a survey diagram bearing the date "4.8.80" which the vendor had given to Lachlan Elder. The survey diagram purported to show the land boundaries of the property and indicated that the property comprised both freehold and a permissive occupancy with a frontage to the Pittwater. The survey diagram showed a swimming pool wholly within the vendor's freehold. The diagram showed an irregular line running across the property between the swimming pool and the Pittwater, labelled "M.H.W.M.". The area between that line and the Pittwater was labelled "Reclaimed Area"<sup>54</sup>. The reproduction of the survey diagram did not identify the author of the diagram who was Mr F W Hannagan, a surveyor.

91 At the bottom of the page, in small print, appeared the following text:

"All information contained herein is gathered from sources we deem to be reliable.

However we cannot guarantee it's [sic] accuracy and interested persons should rely on their own enquiries. Williams Design Associates ph (02) 9905 7372"<sup>55</sup>.

92 At the inspection in early February to which I have referred, Mr Spring handed Mr Butcher a copy of the brochure. There was a dispute between the parties as to what Mr Spring said to the purchasers when he handed them the brochure. Austin J found<sup>56</sup> that the words used by Mr Spring "did not convey a representation that the brochure contained all the information that a purchaser would need before entering into a contract of purchase." His Honour said<sup>57</sup> that they conveyed no more than "that the brochure was a very helpful document which conveniently put together in a single place the answer to some questions that purchasers typically asked."

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53 *Butcher* [2001] NSWSC 15 at [19] per Austin J.

54 *Butcher* [2001] NSWSC 15 at [20] per Austin J.

55 On the first page the brochure contained the statement: "Produced by Williams Design Associates Tel: (02) 9905 7372".

56 *Butcher* [2001] NSWSC 15 at [17].

57 *Butcher* [2001] NSWSC 15 at [17].

93 The purchasers also inspected the Rednal Street property with Mr Lachlan Elder on 14 February 1997, and Mr Butcher inspected the property again the following day at an open for inspection conducted by Lachlan Elder. On 14 February, Mr Paul Gillmer, an architectural designer, accompanied the purchasers; on 15 February, Mr Scott Hindmarch, a builder, accompanied Mr Butcher. At the Rednal Street property on 14 February, Mr Butcher told Mr Elder that he planned to move the pool to run along the western side boundary in order to open up space for entertaining. Mr Elder was sceptical, saying the plan would be expensive to implement and the pool would encroach the mean high water mark. Mr Gillmer advised Mr Butcher that the idea of "moving" the pool was feasible, based on the position of the high water mark indicated by Mr Butcher, in reliance on the diagram in the brochure<sup>58</sup>. At the inspection of the Rednal Street property on 15 February, Mr Butcher showed the brochure to Mr Hindmarch. He asked Mr Hindmarch if it would be possible for the pool to be relocated to make a larger entertaining area. Mr Hindmarch said that on the basis of the survey in the brochure, it would be possible to do so because the high water mark did not affect the area to which he wanted to move the pool. Mr Hindmarch expressed his opinion solely by reference to the brochure diagram.

94 Three days later, the purchasers obtained the Rednal Street property at auction for \$1.36 million<sup>59</sup>. Following a conversation with the vendor, the purchasers commissioned a survey of the Rednal Street property. The surveyor formed the opinion that the rear freehold boundary of the property traversed the swimming pool. As a result, the purchasers did not pay the balance of the deposit, and the vendor terminated the contract of sale.

95 Upon these facts, the question arises as to whether Lachlan Elder engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 52 of the Act. The purchasers claim that it did so by distributing the brochure containing the inaccurate survey diagram and by the conduct and statements of Messrs Spring and Elder at the inspections of the property on 6 and 14 February 1997. Accordingly, it is necessary to consider the scope and application of s 52 of the Act. Lachlan Elder does not dispute that it is a corporation that was acting "in trade or commerce" at all relevant times.

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58 *Butcher* [2001] NSWSC 15 at [26] per Austin J.

59 *Butcher* [2001] NSWSC 15 at [32].

## Interpretation of s 52

### *The approach to interpreting s 52*

96 Section 52 provides:

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

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1)."

97 Section 52 – which is in Pt V of the Act – is capable of flexible application and should be construed accordingly. Such an approach gives effect to the consumer protection objectives that underpin Pt V of the Act generally and s 52 in particular<sup>60</sup>. As Lockhart and Gummow JJ pointed out in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd*<sup>61</sup>:

"[T]he evident purpose and policy underlying Pt V, which includes s 52, recommends a broad construction of its constituent provisions, the legislation being of a remedial character so that it should be construed so as to give the fullest relief which the fair meaning of its language will allow".

98 Section 52 must be construed against the background of the general law, for its intended scope cannot be fully perceived without an understanding of that background. But common law principles of liability do not govern the operation of the section. While those principles may often be relevant in determining whether a contravention of s 52 has occurred, they are not determinative<sup>62</sup> and do not always provide a safe guide to the operation of s 52<sup>63</sup>. In *Brown v Jam*

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60 Trade Practices Bill 1974 (Cth) Explanatory Memorandum, (1974) at 14-16; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 July 1974 at 225, 226, 232 per Enderby.

61 (1993) 42 FCR 470 at 503.

62 *Cassidy v Saatchi & Saatchi Australia Pty Ltd* (2004) ATPR ¶41-980 at 48,506 per Stone J. For instance, the common law of damages in respect of tort or breach of contract has been accepted as relevant to, but not determinative of, the assessment of damages under s 82 of the Act: at 48,506, citing *Henville v Walker* (2001) 206 CLR 459.

63 See, eg, Stephen J's comments in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 227 about the (Footnote continues on next page)

*Factory Pty Ltd*, Fox J said<sup>64</sup> that the words of the section "should not be qualified or ... expanded, by reference to established common law principles of liability." Courts must give effect to the natural and ordinary meaning of the section, even if to do so "may result in the imposition of liabilities and the administration of remedies which differ from those supplied by the general law"<sup>65</sup>. This is because the relevant conduct (including any representation) "falls to be judged under s 52 not, as at common law, by the state of mind or intention of the maker of the statement, but according to its effect or likely effect or impact on the person to whom it is directed"<sup>66</sup>.

*"Engage in conduct"*

99 Section 52 fastens on "conduct". It prohibits "conduct" that is misleading or deceptive or that is likely to mislead or deceive. The Act defines "conduct" and "engaging in conduct"<sup>67</sup>. These definitions apply to the entire Act including s 52<sup>68</sup>.

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guidance provided in relation to s 52 claims by the law with respect to the tort of passing off:

"In determining the meaning of 'misleading or deceptive' in s 52(1) and in applying it to particular circumstances the law which has developed around the tort of passing off, founded as that tort is upon the protection of the plaintiff's intangible property rights, may not always provide any safe guide. However the long experience of the courts in that field should not be disregarded, some principles which have been developed appear equally applicable to s 52(1)."

64 (1981) 35 ALR 79 at 86.

65 *Accounting Systems 2000 (Developments)* (1993) 42 FCR 470 at 504 per Lockhart and Gummow JJ, citing *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 198-199 per Brennan J; *Bill Acceptance Corporation Ltd v GWA Ltd* (1983) 50 ALR 242 at 246 per Lockhart J; *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546 at 564 per Lockhart J, 571 per Foster J; *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

66 *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at 148 per McPherson AJA, citing *Yorke v Lucas* (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ.

67 Section 4(2).

68 *Accounting Systems 2000 (Developments)* (1993) 42 FCR 470 at 505 per Lockhart and Gummow JJ.

100 Section 4(2)(a) of the Act provides that "a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act". Section 4(2)(b) provides that the expression "conduct", when used as a noun otherwise than as mentioned in s 4(2)(a), "shall be read as a reference to the doing of or the refusing to do any act". Section 4(2)(c) declares that a reference to "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".

101 Section 4(2) imposes one important limitation on the meaning of "conduct". Inadvertent refraining from doing an act does not constitute conduct for the purposes of s 52. Section 4(2) requires actual knowledge for a failure to disclose to be actionable.

102 There are two significant aspects to the expression "engage in conduct" for the purposes of s 52. First, "conduct" is not confined to "representations". Second, the section requires the court to examine the impugned conduct as a whole, not in isolated parts.

103 For the purposes of s 52, "conduct" is not confined to "representations", whether they be representations as to matters of present or future fact or law. As Lockhart and Gummow JJ stated in *Accounting Systems 2000 (Developments)*<sup>69</sup>, "it is necessary to keep steadily in mind when dealing with [the Act and, in particular, s 52] that 'representation' is not co-extensive with 'conduct'." In proscribing conduct that is misleading or deceptive or that is likely to mislead or deceive, s 52 operates notwithstanding that the conduct may or may not amount to a representation as the term is understood in the general law context.

104 In the Court of Appeal, Handley JA took the view that, for the purpose of s 52, conduct is not misleading or deceptive "unless it conveys a misrepresentation"<sup>70</sup>. However, the compound conception of conduct that is

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69 (1993) 42 FCR 470 at 504.

70 *Harkins* (2002) 55 NSWLR 558 at 566, citing *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202 per Deane and Fitzgerald JJ; *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 88; *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112 at 131. See also *Lego Australia Pty Ltd v Paul's (Merchants) Pty Ltd* (1982) 42 ALR 344 at 352 per Deane and Fitzgerald JJ; *Chase Manhattan Overseas Corporation v Chase Corporation Ltd* (1985) 9 FCR 129 at 139 per Wilcox J; *Chase Manhattan Overseas Corporation v Chase Corporation Ltd* (1986) 12 FCR 375 at 377 per Lockhart J, 393 per (Footnote continues on next page)

misleading or deceptive or likely to be so is not confined to conduct that involves representations. Conduct may infringe s 52 even though it may not amount to a misrepresentation. In *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd*<sup>71</sup>, Lockhart J said that "[m]isleading or deceptive conduct under s 52 generally, though not always, consists of misrepresentations." His Honour went on to say<sup>72</sup> that whether s 52 "has been contravened depends upon an analysis of the conduct of the alleged contravener viewed in the light of all the relevant circumstances constituted by acts, omissions, statements or silence." In the same case, Jackson J said<sup>73</sup> that it was not correct to treat s 52(1) "as applying only to cases where the conduct of the respondent could amount to misrepresentation under the general law."

105 Subsequently, in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)*<sup>74</sup>, Lockhart J repeated that it was "erroneous to approach s 52 on the assumption that its application is confined exclusively to circumstances which constitute some form of representation." His Honour went on to say<sup>75</sup>:

"[U]ltimately in each case it is necessary to examine the conduct, whether representational in character or not, and ask the question whether the impugned conduct of its nature constitutes misleading or deceptive conduct. This will often, but not always, be the same question, as whether the conduct is likely to mislead or deceive."

106 In *State Government Insurance Corporation v Government Insurance Office of New South Wales*<sup>76</sup>, French J held that s 52 can be infringed although the relevant conduct is not a representation. His Honour noted that judges had said in a number of cases "that to establish that conduct is misleading or

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Beaumont J; *TJM Products Pty Ltd v A & P Tyres Pty Ltd* (1987) 14 FCR 33 at 39 per Fisher J; *Gollet Holdings Pty Ltd v Kenneth Maurer Funerals Pty Ltd* (1987) ATPR ¶40-790 at 48,616-48,617 per Einfeld J; *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1987) 79 ALR 299 at 308 per Pincus J.

71 (1986) 12 FCR 477 at 504.

72 *Rhone-Poulenc Agrochimie SA* (1986) 12 FCR 477 at 504.

73 *Rhone-Poulenc Agrochimie SA* (1986) 12 FCR 477 at 508.

74 (1988) 39 FCR 546 at 555, Burchett and Foster JJ concurring.

75 *Henjo Investments* (1988) 39 FCR 546 at 555.

76 (1991) 28 FCR 511 at 561-562.

deceptive, it is necessary to show that it conveys some representation which is false."<sup>77</sup> However, his Honour said that<sup>78</sup>:

"[I]t is not logically a necessary condition for the characterisation of conduct as misleading or deceptive or likely to mislead or deceive that it convey some representation. To so require is to impose a gloss on the words of the statute".

107 In *Demagogue Pty Ltd v Ramensky*, Gummow J agreed with the above statement by French J and said<sup>79</sup> that conduct that is misleading or deceptive or is likely to mislead or deceive "may not always involve misrepresentation".

108 Section 52 applies to a wide range of conduct. Confining "conduct" in s 52 to "representations" is to ignore the ordinary meaning of "conduct". Furthermore, such a restricted reading of the section cannot be reconciled with the terms of other sections in Pt V that specifically refer to representations. Thus, s 53 of the Act is directed at "false or misleading representations" in connection with the supply, possible supply or promotion of the supply or use of goods and services. Similarly, s 53A, among other things, is directed at false or misleading representations in connection with the sale or grant, or the possible sale or grant, or the promotion of the sale or grant of an interest in land. Section 52 is not limited to conduct in relation to statements about goods or services. Nor is it limited to activity in relation to the sale or grant of interests in land (including the promotion of the sale of an interest in land). For the purposes

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77 *State Government Insurance Corporation* (1991) 28 FCR 511 at 561. His Honour referred to the statement of Deane and Fitzgerald JJ in *Taco Co of Australia* (1982) 42 ALR 177 at 202 that:

"Irrespective of whether conduct produces or is likely to produce confusion or misconception, it cannot, for the purposes of s 52, be categorised as misleading or deceptive unless it contains or conveys, in all the circumstances of the case, a misrepresentation."

French J also cited *Global Sportsman* (1984) 2 FCR 82 at 88; *10th Cantanae* (1987) 79 ALR 299; *Chase Manhattan Overseas Corporation* (1985) 9 FCR 129 at 139 per Wilcox J; and *Chase Manhattan Overseas Corporation* (1986) 12 FCR 375 at 378 per Lockhart J, 393 per Beaumont J.

78 *State Government Insurance Corporation* (1991) 28 FCR 511 at 562.

79 (1992) 39 FCR 31 at 40-41, Black CJ and Cooper J concurring. Gummow J cited *Henjo Investments* (1988) 39 FCR 546 at 555 per Lockhart J; French, "The Law of Torts and Part V of the Trade Practices Act", in Finn (ed), *Essays on Torts*, (1989) 183 at 186-188.

of s 52, "engage in conduct" extends to conduct concerning land, including conduct in connection with the promotion of the sale of interests in land<sup>80</sup>.

109 The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself<sup>81</sup>. It invites error to look at isolated parts of the corporation's conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct<sup>82</sup>. Thus, where the alleged contravention of s 52 relates primarily to a document, the effect of the document must be examined in the context of the evidence as a whole<sup>83</sup>. The court is not confined to examining the document in isolation. It must have regard to all the conduct of the corporation in relation to the document including the preparation and distribution of the document and any statement, action, silence or inaction in connection with the document.

110 The Court of Appeal erred when it found that, for the purposes of s 52, conduct is not misleading or deceptive unless it contains or conveys, in all the circumstances of the case, a misrepresentation.

*Misleading or deceptive conduct*

111 Conduct is misleading or deceptive if it induces or is capable of inducing error<sup>84</sup>. A corporation does not avoid liability for breach of s 52 because a person who has been the subject of misleading or deceptive conduct could have

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80 See s 53A(2A).

81 See *Equity Access Pty Ltd v Westpac Banking Corporation* (1990) ATPR ¶40-994 at 50,950 per Hill J; see also *Taco Co of Australia* (1982) 42 ALR 177 at 202-203 per Deane and Fitzgerald JJ.

82 See, eg, *Trade Practices Commission v Lamova Publishing Corp Pty Ltd* (1979) 28 ALR 416 at 421-422 per Lockhart J.

83 See, eg, *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535 at 541 per Sheppard J, Hill J agreeing.

84 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198 per Gibbs CJ; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at 589 per French J, Beaumont and Finkelstein JJ agreeing.



discovered the misleading or deceptive conduct by proper inquiries<sup>85</sup>. Conduct that objectively leads one into error is misleading.

112 The words "or is likely to mislead or deceive" were inserted into s 52(1) by s 29 of the *Trade Practices Amendment Act 1977* (Cth). Those words make it clear that it is unnecessary to prove that the conduct in question actually deceived or misled anyone<sup>86</sup>. The amendment expands the scope of s 52 and makes it, in the oft-quoted words of Fox J in *Brown*, "a comprehensive provision of wide impact"<sup>87</sup>. The section establishes a norm of conduct with which corporations must comply. The failure by a corporation to observe that norm of conduct has the consequences provided for in Pt VI of the Act<sup>88</sup>. It is unnecessary to show on the balance of probabilities whether the impugned conduct was misleading or deceptive. For example, in *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd*<sup>89</sup>, the Full Federal Court held that conduct is likely to mislead or deceive if there is a real and not remote chance or possibility that a person is likely to be misled or deceived. This is so even though the possibility of that occurring is less than 50 per cent.

The liability of corporations for disseminating information supplied by a third party

113 A corporation may contravene s 52 in circumstances where the corporation passes on erroneous information supplied by a third party. Both the decided cases and s 65A of the Act show that a corporation will contravene s 52 by disseminating erroneous information provided by another person if the conduct in disseminating the information may properly be regarded as misleading or deceptive or likely to mislead or deceive.

114 Section 65A, like s 52, appears in Div 1 of Pt V of the Act. It applies to "prescribed information providers" (essentially, media providers such as

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85 *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1987) 72 ALR 601; aff'd on appeal in *Henjo Investments* (1988) 39 FCR 546; *Sutton v A J Thompson Pty Ltd (in liq)* (1987) 73 ALR 233 at 240-241.

86 *Parkdale Custom Built Furniture* (1982) 149 CLR 191 at 198 per Gibbs CJ; *Taco Co of Australia* (1982) 42 ALR 177 at 189 per Deane and Fitzgerald JJ.

87 (1981) 35 ALR 79 at 86.

88 See *Brown* (1981) 35 ALR 79 at 86 per Fox J. A breach of s 52 gives rise to civil liability in damages and injunctive relief: ss 80 and 82; see now also ss 86C(2)(c), (d) and 87. Thus, injured consumers have civil remedies.

89 (1984) 2 FCR 82 at 87.

television stations and newspapers). It operates to exclude them from liability for, amongst other things, misleading or deceptive conduct within the meaning of s 52 in relation to editorial stories and news. The section was inserted following two decisions of the Federal Court in *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd*<sup>90</sup> and *Global Sportsman*<sup>91</sup>. In those cases the Court held that publication of statements in newspapers in the course of reporting the news was capable of amounting to a contravention of s 52 if the statements were misleading or deceptive or likely to mislead or deceive. The context in which s 52 appears suggests, therefore, that, in the absence of an express statutory qualification or "exclusion" from liability such as s 65A, a corporation may contravene s 52 by passing on erroneous information that is produced by a third party.

115       The decided cases also show that, by publishing erroneous information received from others, a corporation may engage in conduct that is or is likely to be misleading or deceptive. In determining whether a contravention of s 52 has occurred, two factors are important:

1.     whether the corporation assumed responsibility for or adopted (or endorsed or used its name in association with) the information so that it would be reasonable for a recipient to rely on the information; and
2.     whether the corporation disclaimed any belief in the truth or falsity of the information or disclaimed any personal responsibility for what it conveyed.

116       In *Gardam v George Wills & Co Ltd* – which concerned the prosecution of a clothing wholesaler for a breach of s 53(a) of the Act in relation to the supply by the wholesaler of children's sleepwear which bore labels that did not accord with the relevant consumer product safety standard – French J said<sup>92</sup>:

"The innocent carriage of a false representation from one person to another in circumstances where the carrier is and is seen to be a mere conduit, does not involve him in making that representation. ... When, however, a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation. It will be a question of fact in each case".

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90   (1983) 47 ALR 497.

91   (1984) 2 FCR 82.

92   (1988) 82 ALR 415 at 427.

117 His Honour held that a wholesaler who supplies goods bearing a label without attribution of authorship "can be taken in ordinary circumstances to adopt the text of those labels."<sup>93</sup> In addition, he found that "the sale of such anonymously labelled goods by a wholesaler without any disclaimer as to their content, amounts to a statement by the wholesaler to the retailer and to the ultimate consumer that the text of the labels is correct."<sup>94</sup>

118 A similar result was reached in *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd*<sup>95</sup> which concerned a real estate agent "specialising in: ... [r]eal estate investment consultants to Institutional investors and to developers of major properties". The agent had incorporated into a marketing dossier incorrect information about the lettable area of a commercial property that was under construction. After obtaining a set of incorrect calculations concerning the net lettable area of the building from a consultant, the agent prepared a document setting out the calculations. The document contained a disclaimer that stated *inter alia*:

"The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case we have no reason to doubt its completeness or accuracy."

119 The Full Federal Court (Davies, Heerey and Whitlam JJ) held that the agent had engaged in misleading or deceptive conduct. The Court thought the agent's claimed "expertise" was significant. It held that potential purchasers would not regard an agent that held itself out as "consultants to Institutional investors and to developers of major properties" as merely passing on information about the property "for what it is worth and without any belief in its truth or falsity"<sup>96</sup>. A reasonable purchaser would ordinarily expect that the agent "had no reason to doubt the completeness or accuracy of the information provided."<sup>97</sup> This was particularly so where the information concerned a matter of "hard physical fact" and was an essential factor in determining the likely profitability and, hence, the value of the building. The Full Court said<sup>98</sup> that information concerning "the net lettable area of a building, stands on a different

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93 *Gardam* (1988) 82 ALR 415 at 427.

94 *Gardam* (1988) 82 ALR 415 at 428.

95 (1993) ATPR ¶41-249.

96 *John G Glass Real Estate* (1993) ATPR ¶41-249 at 41,359, citing *Yorke* (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ.

97 *John G Glass Real Estate* (1993) ATPR ¶41-249 at 41,359.

98 *John G Glass Real Estate* (1993) ATPR ¶41-249 at 41,359.

footing from the puffery which often accompanies the sale of real property" because the matter of the size of the net lettable area of the building was "one of hard physical fact". In addition, there was no express disclaimer of any belief by the agent in the truth of the information.

120 In *Mackman v Stengold Pty Ltd*<sup>99</sup>, Spender J in the Federal Court held that a corporation had contravened s 52 by supplying to a potential purchaser of a franchise business a report containing inaccurate figures concerning profit projections for the business. The corporation had supplied the report as if the figures had been prepared by its accountants, when in fact the accountants had simply accepted the figures supplied to them by the corporation and had represented the figures as their own. The report was to be used to persuade persons to purchase franchises. His Honour held that the corporation was liable although the report contained the disclaimer from the accountants:

"We have not audited either the basic records or the statements. Accordingly we express no opinion as to whether such statements present a true and fair view of the results of the company or of financial position, no warranty of accuracy or reliability is given, and we accept no responsibility whatsoever to any person other than our clients for any loss or damage occasioned by reliance on the information contained in these statements or for any error or omissions, therein however caused."

121 Spender J held that the disclaimer disguised and distorted the corporation's involvement in the preparation of the report. In particular, the disclaimer conveyed the impression that the accountants had done more than merely reproduce the information supplied by the corporation. The disclaimer gave to the representations about the profit projections a spurious authenticity. His Honour held that the disclaimer itself was misleading or deceptive and that the conduct of the corporation was misleading or deceptive conduct within the meaning of s 52, particularly because the only purpose of the production of the report was to show it to prospective purchasers<sup>100</sup>. He stated<sup>101</sup> that the attempt to disclaim was "an ingenuous but unsuccessful attempt to absolve its authors from liability for the dissemination and no doubt inducing quality of the document, when they knew that that was the purpose for which the documents were prepared."

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99 (1991) ATPR ¶41-105.

100 His Honour found the accountants to be liable under s 75B of the Act, as being knowingly concerned in the contravention of s 52 by the corporation.

101 *Mackman* (1991) ATPR ¶41-105 at 52,632.

122 *Yorke v Ross Lucas Pty Ltd*<sup>102</sup> is another case where the trial judge found  
that a corporation that passed on information as agent for the vendor corporation  
had contravened s 52 despite its contravention being unwitting.

123 However, the courts have held that in three situations a corporation does  
*not* contravene s 52 when it passes on erroneous information. They are:

1. where the circumstances make it apparent that the corporation is not the  
source of the information and that it expressly or impliedly disclaims any  
belief in its truth or falsity and is merely passing on the information for  
what it is worth<sup>103</sup>;
2. where the corporation, while believing the information, expressly or  
impliedly disclaims personal responsibility for what it conveys, for  
example, by disclaiming personal knowledge<sup>104</sup>; and
3. where the corporation, while believing the information, ensures that its  
name is not used in association with the information<sup>105</sup>.

124 If the circumstances of the case make it apparent that the corporation is  
not the source of the information, that it disclaims any belief in its truth or falsity  
and is merely passing the information on for what it is worth, it is unlikely that  
the corporation will contravene s 52. In *Global Sportsman*<sup>106</sup>, Bowen CJ,  
Lockhart and Fitzgerald JJ said that "[s]uch a statement is essentially different in  
the meaning which it contains or conveys unless it is adopted by the publisher  
and he will not necessarily do this by merely publishing the statement." Thus, a  
corporation which acts as a "mere conduit" for information supplied by another  
will ordinarily not be taken to have engaged in misleading or deceptive conduct  
or conduct that is likely to mislead or deceive<sup>107</sup>.

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**102** (1982) 45 ALR 299 at 314 per Fisher J.

**103** See *Yorke* (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and  
Dawson JJ; *Lezam* (1992) 35 FCR 535 at 552-553 per Sheppard J, Hill J  
concurring.

**104** *Saints Gallery Pty Ltd v Plummer* (1988) 80 ALR 525 at 530-531.

**105** *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 at 257.

**106** (1984) 2 FCR 82 at 90.

**107** See, eg, *Gardam* (1988) 82 ALR 415 at 427 per French J.

*Assumption of responsibility*

125 Much of the discussion in the courts below turned on the nature of the "representation" that the purchasers allege was made by Lachlan Elder. Austin J found that a reader of the brochure who compared the survey on the back of the brochure with the photographs on the front of the brochure would conclude that the mean high water mark was approximately the line of the metal pool fence<sup>108</sup>. His Honour found further that it was open to conclude that the brochure represented more than that the swimming pool was within a fence. A reasonable person might assume from the brochure that the swimming pool lay within the freehold. Austin J held that there was a representation by the *vendor*<sup>109</sup>:

"that the mean high water mark identified by applying the registered plan measurements for [the Rednal Street property] from fixed reference points at the street boundary was located beyond the swimming pool and did not traverse it."

His Honour further found that when the agent distributed the brochure containing the survey diagram to potential purchasers, the agent "made a representation [*on behalf of the vendor*] ... that the information in the brochure was accurate and materially complete, having regard to the nature of the brochure as a marketing document."<sup>110</sup> However, the *agent itself* made no representation as to the truth or accuracy of the survey for the reasons that the reasonable potential purchaser (of waterfront properties in the price range of over \$1 million) would be likely to assume that the survey in the brochure had been taken from an identification survey report<sup>111</sup>, would not ordinarily expect an agent in the position of Lachlan Elder to be a surveyor or to be in a position to check a survey, would be expected to have access to legal advice and to retain a solicitor for such a purchase<sup>112</sup>, and would expect the contract to deal with such matters.

126 Handley JA in the Court of Appeal repeated the well-established principle that "for the purposes of s 52 and its equivalents ... a disclosed agent conveying a representation on behalf of his principal may properly be understood as

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108 *Butcher* [2001] NSWSC 15 at [20].

109 *Butcher* [2001] NSWSC 15 at [124].

110 *Butcher* [2001] NSWSC 15 at [129].

111 *Butcher* [2001] NSWSC 15 at [130] per Austin J.

112 *Butcher* [2001] NSWSC 15 at [166] per Austin J.

conveying a more limited representation in his own right."<sup>113</sup> His Honour held<sup>114</sup> that the only relevant "representation" in the brochure as to the location of the pool in relation to the title boundary "was that conveyed by the diagram reproduced on the back", namely, that "the reproduction was an accurate copy of what [the agent] believed was a genuine and correct survey diagram." He found that Lachlan Elder impliedly represented that it "had an honest, or perhaps honest and reasonable, belief that the copies were genuine and recorded the surveyor's opinion on the matters disclosed."<sup>115</sup> He also held that the agent impliedly represented its "belief that the report and diagram were accurate"<sup>116</sup>.

127       Significantly, Handley JA held that the agent made no representation as to the accuracy of the survey diagram<sup>117</sup>. He also stated that there was no good reason why the agent "would intend to represent that [the survey diagram] was in fact accurate, or why the recipients would think that the [agent was] making any such representation."<sup>118</sup> In other words, his Honour found that potential purchasers could not properly assume that the agent was representing the accuracy of the diagram.

*Lachlan Elder engaged in conduct that was misleading*

128       In my opinion, the Court of Appeal erred in finding that the conduct of Lachlan Elder was not misleading or deceptive. In the courts below, the case turned on the nature of the "representation". However, the issue is whether the conduct of Lachlan Elder was misleading or deceptive or was likely to mislead or deceive, having regard to all the circumstances of the case. They included but were not limited to the representations Lachlan Elder made, its actions (and inaction or silence) and the impression conveyed by its conduct. The phrase that best describes the relevant conduct of Lachlan Elder is "selling the Rednal Street property". In determining whether a breach of s 52 occurred, all that Lachlan Elder did in relation to the sale is relevant. Hence, the presence of and participation in the inspections of Lachlan Elder's staff, their knowledge of the

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113 *Harkins* (2002) 55 NSWLR 558 at 567.

114 *Harkins* (2002) 55 NSWLR 558 at 569.

115 *Harkins* (2002) 55 NSWLR 558 at 569, citing Spencer Bower, Turner and Handley, *Actionable Misrepresentation*, 4th ed (2000) at 13-14.

116 *Harkins* (2002) 55 NSWLR 558 at 569, citing Spencer Bower, Turner and Handley, *Actionable Misrepresentation*, 4th ed (2000) at 11-13.

117 *Harkins* (2002) 55 NSWLR 558 at 569.

118 *Harkins* (2002) 55 NSWLR 558 at 569.

purpose of the inspections and the conversations at those inspections as well as the distribution and content of the brochure must be considered. To focus on whether a representation was made and the content of the representation diverts attention from the substantive issue, that is, whether in all the circumstances Lachlan Elder engaged in misleading or deceptive conduct or conduct that was likely to mislead or deceive.

129       Accordingly, it is necessary to consider the whole conduct of Lachlan Elder in order to ascertain whether such conduct was misleading or deceptive or was likely to mislead or deceive persons in the class identified as reasonable potential purchasers of waterfront properties in the price range of over \$1 million. Potential purchasers of such a property would have access to legal advice and would retain a solicitor who would advise them about matters such as the boundary of the property. No doubt, potential purchasers within the identified class would also have been aware that it was not part of a selling agent's functions to obtain a survey plan or to verify such a plan.

130       As I have shown, an extensive body of case law has developed concerning the circumstances in which corporations will be found to have engaged in conduct that is misleading or deceptive or is likely to mislead or deceive by passing on information supplied by a third party. This case falls within the category of a corporation not being the source of the information and believing in its accuracy but not expressly or impliedly disclaiming personal responsibility for what it conveys.

131       That Lachlan Elder incorporated the survey diagram in a brochure prepared for marketing purposes is a matter of great importance. The irresistible conclusion is that Lachlan Elder did so because it would influence potential purchasers to purchase the property. The importance that Lachlan Elder gave to the survey diagram is emphasised by its place in the brochure: the top right hand side of the second page.

132       Lachlan Elder contends that potential purchasers would have known and understood that the survey diagram was a reproduction of a survey report. That is clearly so: the diagram was a reproduction of a survey identification report and bore the date "4.8.80". Moreover, the brochure indicated that Lachlan Elder was not the source of all the information contained in it. The foot of the first page contained a disclaimer in the following terms:

"Lachlan Elder Realty Pty Ltd ACN 002 332 247. All information contained herein is gathered from sources we believe to be reliable.

However we cannot guarantee it's [sic] accuracy and interested persons should rely on their own enquiries."



133 However, the reproduction of the diagram in the brochure does not identify the author of the survey diagram, an omission that suggests that Lachlan Elder had adopted the diagram as its own. At the top of the reproduction, in type so small and blurred that many people could only read it with the assistance of a magnifying glass, are the words:

LAND, MINING &  
ENGINEERING SURVEYS

17 PARKES ROAD  
DEE WHY, 2099

TELEPHONE 98 6184

134 The reproduction in the brochure omitted the words at the top of the survey diagram, which appeared above the address details and which read:

F. W. HANNAGAN  
REGISTERED SURVEYOR

135 Thus, while a potential purchaser would be likely to conclude that the diagram was a reproduction of a survey identification report and that Lachlan Elder had not prepared it, a potential purchaser could not have identified the author of the survey diagram. At the least, the omission of the identity of the surveyor in a marketing brochure prepared by Lachlan Elder was likely to induce a potential purchaser to believe that that corporation was asserting that the details of the diagram were accurately stated.

136 The survey diagram purported to show the land boundaries and indicated that the property comprised both freehold and a permissive occupancy with a frontage to the Pittwater. The survey diagram showed a swimming pool wholly within the vendor's freehold. The diagram showed an irregular line running across the property between the swimming pool and the Pittwater, labelled "M.H.W.M.". The area between that line and the Pittwater was labelled "Reclaimed Area". The front of the brochure contained a photograph of the swimming pool and the pool fence. Austin J found that a reader of the brochure who compared the survey on the back of the brochure with the photographs on the front of the brochure would conclude that the mean high water mark was approximately the line of the metal pool fence<sup>119</sup>.

137 Mr Spring gave evidence that at the inspection on 6 February 1997 he handed Mr Butcher a copy of the brochure and said: "This has the information of the boundary, land area boundary and water, Council rates and land size which is normal information." Austin J found that Mr Spring "did not convey a representation that the brochure contained all the information that a purchaser would need before entering into a contract of purchase."<sup>120</sup> Nevertheless,

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**119** *Butcher* [2001] NSWSC 15 at [20].

**120** *Butcher* [2001] NSWSC 15 at [17].

his Honour found that Mr Spring's statement "conveyed that the brochure was a very helpful document which conveniently put together in a single place the answer to some questions that purchasers typically asked."<sup>121</sup>

138       What occurred at the subsequent inspection on 14 February 1997 is of cardinal importance in evaluating the conduct of Lachlan Elder. Mr Elder was present at a conversation that showed that the purchasers were intending to move the pool and were relying on the accuracy of the survey diagram to do so. On that occasion, Mr Gillmer, the architectural designer retained by the purchasers, advised Mr Butcher that the idea of "moving" the pool was feasible, based on the position of the high water mark indicated by Mr Butcher, in reliance on the diagram in the brochure<sup>122</sup>. Mr Elder was sceptical about the proposal because he thought the plan would be expensive and that the pool would encroach on the mean high water mark. But everything he said was premised on the pool being within the boundary of the freehold land. In addition, Lachlan Elder was aware that Mr Butcher had attended the open for inspection of the Rednal Street property on 15 February 1997 with a builder and had taken advice from him.

139       The conduct of Mr Elder at the inspection on 14 February 1997 and the conduct of Lachlan Elder in distributing the brochure were significant factors in inducing the purchasers to buy the property. Lachlan Elder not only distributed a brochure containing an inaccurate survey diagram but at the inspection it did nothing to correct the misapprehension under which the purchasers laboured. It is not to the point that Lachlan Elder was unaware that the survey diagram was inaccurate. Section 52 looks at the conduct of a corporation and is concerned only with whether that conduct misled or was likely to mislead a consumer. It is not concerned with the mental state of the corporation. As Hill J observed in *Equity Access Pty Ltd v Westpac Banking Corporation*<sup>123</sup>:

"Section 52 is not confined to conduct which is intended to mislead or deceive ... and a corporation which acts honestly and reasonably may none the less engage in conduct that is likely to mislead or deceive".

140       In my opinion, the conduct that Lachlan Elder engaged in in selling the Rednal Street property was conduct that was likely to mislead the purchasers.

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**121** *Butcher* [2001] NSWSC 15 at [17].

**122** *Butcher* [2001] NSWSC 15 at [26] per Austin J.

**123** (1990) ATPR ¶40-994 at 50,951; see also *Hornsby Building Information Centre* (1978) 140 CLR 216 at 228 per Stephen J; *Parkdale Custom Built Furniture* (1982) 149 CLR 191 at 197 per Gibbs CJ; *Yorke* (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ; *Heydon* (2000) 51 NSWLR 1 at 148 per McPherson AJA.

Lachlan Elder put out a brochure containing an incorrect survey diagram in a context that suggested that it had adopted the survey diagram as its own. It knew of the purchasers' intention to relocate the swimming pool. It knew that its subsequent conduct in continuing to "endorse" the brochure was likely to induce the purchasers to buy the property because they believed that they would be able to move the pool to a location within the freehold boundary. Its conduct led the purchasers into error and was, therefore, conduct that was misleading or deceptive<sup>124</sup>.

141 Handley JA regarded *Argy v Blunts & Lane Cove Real Estate Pty Ltd*<sup>125</sup> as the case that was the "most relevant"<sup>126</sup> to the appeal. However, the purchasers correctly assert that *Argy* is distinguishable. In *Argy*, the real estate agents were found not to have contravened s 52 by distributing a contract of sale prepared by the solicitors for the vendor that omitted that part of a certificate that showed the property was the subject of zoning restrictions. In *Argy*, Hill J thought that a contravention of s 52 could not occur unless the impugned conduct amounted to a representation. For the reasons I have given, that view cannot be accepted. But in any event, the agents in *Argy* did not prepare the contract, nor did they incorporate the contract or the certificate into any of their own materials that they prepared for distribution to potential purchasers. Moreover, the agents did not hold themselves out as having any expertise in the preparation of contracts of sale. Furthermore, the contract of sale identified the solicitors as having prepared the contract. Here, Lachlan Elder incorporated the survey diagram into its own document. Lachlan Elder included it to promote the sale of the Rednal Street property. In addition, the survey diagram was accompanied by other materials in the brochure, such as a photograph of the rear of the property, which showed the swimming pool and the back fence. The survey diagram was incorporated in such a way that while the reasonable potential purchaser would have been aware that Lachlan Elder had not prepared the diagram, the reasonable potential purchaser would not have been able to identify the true author of the diagram. Significantly, there was no conduct of the agents in *Argy* comparable to that which occurred on the occasion of the inspection of the Rednal Street property on 14 February.

142 To the extent that *Argy* is also an authority for the proposition that the agents' conduct in that case was not misleading or deceptive because the agents disclaimed personal responsibility for the contents of the contract, the case applied an unduly narrow construction of s 52. In the present case, the

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124 See *Parkdale Custom Built Furniture* (1982) 149 CLR 191 at 198 per Gibbs CJ.

125 (1990) 26 FCR 112.

126 *Harkins* (2002) 55 NSWLR 558 at 567.

circumstances were such as to make it apparent that Lachlan Elder was not the source of the survey diagram. Nevertheless, the facts do not suggest that Lachlan Elder disclaimed any belief in the truth or falsity of the information contained in the survey diagram. For example, the disclaimer stated that all information contained in the brochure "is gathered from sources we believe to be reliable." It may be inferred that Lachlan Elder believed the source of the survey diagram to be a reliable source. For this reason, it is also open to conclude that Lachlan Elder did not disclaim any belief in the truth or falsity of the information in the diagram and was not merely passing on the information for what it was worth.

143 Handley JA also found that the facts in the present case were distinguishable from *John G Glass Real Estate* on the basis that<sup>127</sup>:

"the agents [in *John G Glass Real Estate*] claimed relevant expertise, adopted the figures as their own, and put them forward without any reference to their source. In the present case [Lachlan Elder] claimed no relevant expertise, and the diagram itself indicated that it was the work of a professional surveyor."

144 Lachlan Elder did not hold itself out as a professional surveyor or conveyancer or as having particular surveying or conveyancing expertise. However, it did hold itself out as a specialist for the sale of prestige properties in the Pittwater area and was in fact an experienced selling agent of properties in that area. In these circumstances potential purchasers of such properties would be unlikely to regard the agent as merely passing on information about the Rednal Street property, including the location of the swimming pool, "for what it is worth and without any belief in its truth or falsity". It is reasonable to expect potential purchasers, even potential purchasers advised by solicitors, to rely on the accuracy of a survey diagram reproduced in a promotional brochure for the sale of a property.

145 Handley JA also relied on statements by the Full Federal Court in *Saints Gallery Pty Ltd v Plummer*, where the Full Court said<sup>128</sup>:

"The reference in *Yorke v Lucas* ... to an express or implied disclaimer of belief in an instruction conveyed by an agent does not involve that an agent who *does* believe his client, and makes that fact apparent, may not at the same time impliedly disclaim personal responsibility for what he conveys." (original emphasis)

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<sup>127</sup> *Harkins* (2002) 55 NSWLR 558 at 570.

<sup>128</sup> (1988) 80 ALR 525 at 530.

146 *Saints Gallery* held that an agent may not contravene s 52 if it impliedly disclaims personal responsibility for the information that the agent conveys, notwithstanding that the agent believes the information and makes that fact apparent to the complainant. However, this proposition has limited application in the present case. As the Full Federal Court acknowledged in *Saints Gallery*, regard must be had to the facts and circumstances of each case. Indeed, *Saints Gallery* was unique in that the complainant art dealer admitted that he did not rely on the gallery's ability to judge the authenticity of the paintings that the gallery had offered to sell to the complainant. The complainant was also aware that the gallery in the ordinary course of its business did not deal in paintings of the kind offered to the complainant.

*Dean v Allin & Watts*

147 In considering whether Lachlan Elder had assumed responsibility in relation to the survey diagram in the brochure, Handley JA applied the decision of the English Court of Appeal in *Dean v Allin & Watts*<sup>129</sup>. His Honour found that the principles expressed in *Dean* concerning the role of solicitors also applied to other agents such as real estate agents<sup>130</sup>. Lightman J, who delivered the principal judgment of the Court of Appeal in *Dean*, said<sup>131</sup>:

"The greatest caution is required in treating statements made by a solicitor in the course of conveyancing transactions and the like on or in accordance with the instructions of his client as representations made by the solicitor rather than as 'conveyed' by him as (in effect) a medium of communication or messenger for his client, for this may readily be assumed to be understood to be part of his role in the transactions."

148 However, in the context of a claim brought under s 52 of the Act, *Dean* is not a persuasive authority. Whether or not the warning of Lightman J is relevant in relation to common law negligent misstatement cases (of which *Dean* was one), it is not appropriate in relation to s 52 cases. As I have indicated earlier, common law principles do not govern the operation of s 52. In the oft-quoted passage from *Brown*, Fox J said<sup>132</sup>:

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<sup>129</sup> [2001] 2 Lloyd's Rep 249.

<sup>130</sup> *Harkins* (2002) 55 NSWLR 558 at 568.

<sup>131</sup> [2001] 2 Lloyd's Rep 249 at 257.

<sup>132</sup> (1981) 35 ALR 79 at 86.

"In my view effect should be given to the ordinary meaning of the words used. They should not be qualified or (if it be possible) expanded, by reference to established common law principles of liability."

149 Thus, while common law principles may "provide useful guidance in relation to some aspects of the consumer protection provisions of the [Act]", there are "important limitations to this approach."<sup>133</sup> In *Parkdale Custom Built Furniture*, Mason J said<sup>134</sup>:

"Likewise, the operation of s 52 is not restricted by the common law principles relating to passing-off. If, as I consider, the section provides the public with wider protection from deception than the common law, it does not follow that there is a conflict between the section and the common law. The statute provides an additional remedy."

Accordingly, the Court of Appeal erred in treating the principles expressed in *Dean* as being directly applicable to the present case.

#### The disclaimer

150 Where a corporation passes on information supplied by another, one circumstance that may preclude a finding of a contravention of s 52 is where the corporation expressly or impliedly disclaims any belief in the truth or falsity of the information<sup>135</sup>. Another circumstance is where the corporation expressly or impliedly disclaims personal responsibility for what it conveys<sup>136</sup>. The presence and impact of a disclaimer are particularly relevant where the impugned conduct is alleged to have induced a particular course of conduct by the complainant. The issue arises because of the nature of the remedy sought by the complainant, which requires the complainant to show damage. The following principles apply<sup>137</sup>:

1. The complainant must rely on the representation or conduct.

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**133** *Cassidy* (2004) ATPR ¶41-980 at 48,506 per Stone J.

**134** (1982) 149 CLR 191 at 205; quoted with approval in *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at 83 [97].

**135** *Yorke* (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ.

**136** *Saints Gallery* (1988) 80 ALR 525 at 530.

**137** See *Sutton* (1987) 73 ALR 233 at 240, citing *Gould v Vaggelas* (1985) 157 CLR 215 at 236 per Wilson J; see also *Benlist Pty Ltd v Olivetti Australia Pty Ltd* (1990) ATPR ¶41-043 at 51,592 per Burchett J.

2. If a material representation is made (or if certain conduct occurs) which is calculated to induce the complainant to enter into a contract and that person in fact enters into the contract, an inference arises that the person was induced to do so by the representation or the conduct.
3. The inference may be rebutted by showing, for example, that the complainant, before entering into the contract, had actual knowledge of the true facts and knew them to be true or that the complainant did not rely on the representation or the conduct.
4. The representation or conduct need not be the sole inducement. It is sufficient that it played some part, even if only a minor part, in contributing to the formation of the contract.

151 As I have indicated, the intent of the corporation is not relevant for the purposes of s 52. As a result, a disclaimer as to the truth or otherwise of a representation does not, of itself, absolve the corporation from liability.

152 This is not to say that a disclaimer should be ignored for the purposes of assessing whether a contravention of s 52 has occurred. As Miller notes in *Miller's Annotated Trade Practices Act*<sup>138</sup>, the conduct must be considered as a whole. This requires consideration of whether the conduct in question, including any representations and the disclaimer, is misleading or deceptive or is likely to mislead or deceive. If a disclaimer clause has the effect of erasing whatever is misleading in the conduct, the clause will be effective, not by any independent force of its own, but by actually modifying the conduct. However, a formal disclaimer would have this effect only in rare cases. Thus, in *Benlist Pty Ltd v Olivetti Australia Pty Ltd*, Burchett J said<sup>139</sup>:

"It has been held on many occasions that the perpetrator of misleading conduct cannot, by resorting to [a disclaimer] clause, evade the operation of the [Act]. *Of course, if the clause actually has the effect [of] erasing whatever is misleading in the conduct, the clause will be effective, not by*

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**138** *Miller's Annotated Trade Practices Act*, 25th ed (2004) at 475. Miller states that the courts should consider "whether the representation in question, including the disclaimer or exclusion clause, is misleading or deceptive", which appears to confine the conduct to representations (at 475); however, he observes earlier that s 52 is not confined to circumstances which constitute some form of representation (at 453).

**139** (1990) ATPR ¶41-043 at 51,590. See also the similar remarks of his Honour in *Lezam* (1992) 35 FCR 535 at 557.

*any independent force of its own, but by actually modifying the conduct.* However, I should think it would only be in rare cases that a formal disclaimer would have that effect." (emphasis added)

153 Austin J thought that the disclaimer made by Lachlan Elder in the brochure formed part of the representations made by Lachlan Elder when staff of the company distributed the brochure<sup>140</sup>. His Honour found that the disclaimer contained the following propositions<sup>141</sup>:

1. the information contained in the brochure had been gathered by Lachlan Elder from sources which Lachlan Elder deemed or believed to be reliable; and
2. Lachlan Elder could not guarantee the accuracy of the information and interested persons should rely on their own inquiries.

154 His Honour thought that its effect with respect to the location of the *mean high water mark* in relation to the swimming pool was to say to prospective purchasers<sup>142</sup>:

"Here is a diagram showing that the mean high water mark is located beyond the swimming pool. It is a diagram provided to us from a source that we believe to be reliable. However, we cannot vouch for the accuracy of what is shown in the diagram, and if the matter interests you, you should rely on your own inquiries."

155 This finding led Austin J to conclude that the class of potential purchasers of waterfront homes in a price bracket above \$1 million, independently advised by their own solicitors, would be unlikely to be misled by the brochure read as a whole, including the two propositions<sup>143</sup>.

156 Handley JA did not accord the disclaimers (that appeared "in fine print at the foot of the front and back pages") "decisive significance" on the question of Lachlan Elder's liability under s 52<sup>144</sup>. Nevertheless, his Honour regarded the

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**140** *Butcher* [2001] NSWSC 15 at [169].

**141** *Butcher* [2001] NSWSC 15 at [168].

**142** *Butcher* [2001] NSWSC 15 at [169].

**143** *Butcher* [2001] NSWSC 15 at [170].

**144** *Harkins* (2002) 55 NSWLR 558 at 568-569.



disclaimers as "relevant as showing that the agents did not accept responsibility for the accuracy of the information in the brochure."<sup>145</sup>

157 This finding of Handley JA, however, is inconsistent with the accepted line of Federal Court authority that a disclaimer is only effective if it actually modifies the impugned conduct such that the conduct as a whole may be seen as not misleading, not because the disclaimer has any independent force of its own. It is also inconsistent with the finding of the Full Federal Court in *John G Glass Real Estate*. A disclaimer in a promotional brochure may purport to represent that the corporation does not accept responsibility for the accuracy of the information in that brochure, but it will only be effective if it operates to modify the corporation's conduct.

158 The case law suggests that disclaimers that appear in small print at the foot of marketing brochures are rarely effective to prevent conduct from being found to be misleading or deceptive or likely to mislead or deceive. If misleading conduct has induced a contract, that fact cannot be negated by the mere circumstance that there is a statement to the contrary<sup>146</sup>. In *Benlist*, for example, the disclaimer appeared in a footnote on the back cover of a brochure prepared in connection with the sale of a city building, and in another section of the brochure. The disclaimer stated that all descriptions, dimensions and other details "are given in good faith and are believed to be correct, but any intending purchasers should not rely on them as statements or representations of fact and must satisfy themselves by inspection or otherwise as to the correctness of each of them"<sup>147</sup>. A disclaimer in similar terms appeared at the foot of the proposed lease Schedule for the commercial premises in *Lezam Pty Ltd v Seabridge Australia Pty Ltd*<sup>148</sup>, namely that all descriptions, dimensions and other details "are given in good faith and are believed to be correct but any intending tenant/purchaser should not rely on them as statements or representations of fact but must satisfy themselves by inspection or otherwise as to the correctness of each of them". The disclaimer in the marketing dossier prepared by the real estate agents in *John G Glass Real Estate* stated<sup>149</sup>:

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145 *Harkins* (2002) 55 NSWLR 558 at 569.

146 See, eg, *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191 at 207 per Heerey J; *Burg Design Pty Ltd v Wolki* (1999) 162 ALR 639 at 648-650 per Burchett J.

147 *Benlist* (1990) ATPR ¶41-043 at 51,590.

148 (1992) 35 FCR 535 at 539.

149 (1993) ATPR ¶41-249 at 41,358.

"The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case we have no reason to doubt its completeness or accuracy.

However, neither John G Glass Real Estate Pty Limited, its employees or its clients guarantee the information nor does it, or is it intended, to form part of any contract. Accordingly, all interested parties should make their own enquiries to verify the information as well as any additional or supporting information supplied and it is the responsibility of interested parties to satisfy themselves in all respects."

159 In all three cases, the Federal Court found that the disclaimer did not operate to enable the conduct of the corporation to be seen as conduct that was not misleading or deceptive or likely to mislead or deceive.

160 The disclaimer in the present case stated that Lachlan Elder "cannot guarantee [the information's] accuracy and interested persons should rely on their own enquiries." But that disclaimer does not allow Lachlan Elder to disclaim personal responsibility for the information conveyed by the inclusion of the survey diagram. In all the circumstances of the case – the prominent display of the survey diagram in the brochure, the conduct and statements of Mr Spring when he distributed the brochure to the purchasers, the subsequent conduct and statements of Messrs Spring and Elder, and the unavailability of the contract of sale until just before the auction – the disclaimer did not operate to obliterate the effect of Lachlan Elder's misleading or deceptive conduct. Moreover, as Burchett J acknowledged in *Lezam*<sup>150</sup>, once misleading or deceptive conduct is shown, the Act prevails over the disclaimer. It would be contrary to the consumer protection objects of the statute and to public policy for disclaimers to deny a statutory remedy for offending conduct under the Act<sup>151</sup>.

#### Order in respect of the appeal

161 In my opinion, the appeal must be allowed.

#### The cross-appeal and application for special leave to appeal

162 In relation to the cross-appeal and the application by the vendor for special leave to appeal, I agree with the orders proposed by Kirby J and with his Honour's reasons.

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**150** (1992) 35 FCR 535 at 557.

**151** *Henjo Investments* (1988) 39 FCR 546 at 561 per Lockhart J, Burchett and Foster JJ concurring; *Lezam* (1992) 35 FCR 535 at 557 per Burchett J.

163 KIRBY J. The question in this appeal is whether the appellants, Mr Jeffrey Butcher and Ms Judith Radford, have established error in the approach taken by the courts below to the application of the *Trade Practices Act 1974* (Cth) ("the Act") to their dispute with the respondent, Lachlan Elder Realty Pty Limited.

164 Error has been shown. It requires correction of the orders of the Court of Appeal of the Supreme Court of New South Wales<sup>152</sup> and of the primary judge (Austin J)<sup>153</sup>. The result has consequences for a cross-appeal brought by the respondent and also for an application by Mr Robert Harkins to reopen an associated application for special leave to appeal that was earlier rejected<sup>154</sup>. Such proceedings were brought defensively in the interests of the respondent and Mr Harkins. They need to be considered in the event (as I would hold) that the appeal succeeds.

165 The appeal succeeds because of the application of the Act to the circumstances. Those circumstances involve dealings between the respondent, a real estate agent, and the appellants, would-be purchasers of real property which the agent was seeking to sell on behalf of Mr Harkins. Once again, this Court gives the Act, with its large purposes of consumer protection and regulation of corporate conduct in Australia, an unduly narrow construction<sup>155</sup>. That construction is warranted neither by the language of the Act, nor by the stated objects of the Parliament, nor by past authority.

A corporation engages in "conduct that is misleading"

166 The simple facts of this case cannot escape certain fundamental realities. The respondent prepared, and an employee of the respondent on its behalf gave to the appellants, a one-sheet promotional pamphlet depicting (amongst other things) the boundary of the valuable waterfront property that the respondent was commissioned by Mr Harkins to sell. The respondent was acting for reward. The effective boundary so shown was designated by the initials "MHWM" (mean high-water mark). As portrayed in the pamphlet, the "MHWM" line ("the

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152 *Harkins v Butcher* (2002) 55 NSWLR 558.

153 *Butcher v Harkins* [2001] NSWSC 15.

154 See the reasons of Gleeson CJ, Hayne and Heydon JJ ("joint reasons") at [77].

155 cf *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109. See also *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 79-80 [65]-[66].

boundary line") was well clear of a swimming pool erected in front of a house built on the subject land. It lay between the house and a deep waterfrontage with the Pittwater, an inland waterway north of Sydney. In the courts below it was held that, contrary to the pamphlet, the boundary line actually ran through the swimming pool.

167 The appellants had made known to the respondent the fact that the location of the boundary line was important to them because of plans they had to relocate the swimming pool, so as to afford a larger open area in the front of the house for entertainment purposes. The appellants wished to use the property as their residence; but also in connection with a business in which they were engaged. But for the misdescription of the location of the boundary line of the property, the appellants would not have bid for the land at auction. Nor would they have agreed to execute a contract as they did. They wanted to buy a residence, not a "bundle of trouble". Under that contract, a substantial deposit of \$200,000 was released to Mr Harkins<sup>156</sup>. In consequence of that fact and other proved circumstances, the appellants suffered loss and damage because of the respondent's misdescription of the property. That loss and damage flowed from the "conduct" of the respondent, a corporation, in the course of its business in preparing and distributing the pamphlet. It was conduct that was "misleading or deceptive or ... likely to mislead or deceive"<sup>157</sup>.

168 The impediments to recovery under the Act, suggested as the ground to permit the respondent to escape liability to the appellants, were disclaimers printed in tiny typeface on each side of the pamphlet, together with evidence relating to the relationship of the parties. These considerations are now held sufficient to afford the respondent an exemption from liability under the Act. I would reject that contention. For me, this is a clear case of the application of the Act. The appellants are entitled to succeed.

#### The facts, legislation and decisional history

169 *The facts and legislation:* Most of the background facts are set out in the reasons of Gleeson CJ, Hayne and Heydon JJ ("the joint reasons")<sup>158</sup> and the reasons of McHugh J<sup>159</sup>. With a few additions, to which it will be necessary to refer, and some added comments, I am content to adopt the same description of those events.

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<sup>156</sup> [2001] NSWSC 15 at [67].

<sup>157</sup> The Act, s 52(1). See joint reasons at [31].

<sup>158</sup> Joint reasons at [1]-[20].

<sup>159</sup> Reasons of McHugh J at [80]-[82], [89]-[91].

170 Contained in other reasons are references to the provisions of the Act (ss 52 and 82(1)) chiefly raised by the appeal<sup>160</sup>, together with the relevant pleading of the appellants' cause of action<sup>161</sup>, the reasons of the primary judge focussing on the printed disclaimer<sup>162</sup> and the conclusions of the Court of Appeal relevant to the same and other issues<sup>163</sup>. Also contained there are some of the authorities concerning the requirements of the Act concerning "misleading or deceptive conduct" as explained both by this Court<sup>164</sup> and by other appellate courts<sup>165</sup>. For the moment, it is sufficient to accept the foregoing. However, this brings me to the point where I differ from the majority.

171 In these reasons, I will use the same descriptions as appear in the joint reasons. Thus, I will call the appellants "the purchasers", the respondent "the agent", Mr Harkins "the vendor" and the subject land, facing the Pittwater, "the Rednal land"<sup>166</sup>.

172 *An essential difference of approach:* At the heart of the difference between my reasons and those of the majority lies a different conception of the intended operation of the provisions of the Act invoked in this case. If, in a transaction such as was entered into between the parties, liability under the Act may be escaped in circumstances such as these (and particularly by reliance on a printed disclaimer of the kind involved in this case) this Court might just as well fold up the Act and put it away so far as dealings between real estate agents and purchasers are concerned. By similar printed disclaimers, such agents and others like them will walk straight out of the operation of the Act in many and varied circumstances.

173 Neither the printed disclaimers nor the other circumstances the agent relies upon, permits it to avoid the Act. Adopting such a view of the Act would not only be contrary to its proclaimed objectives. It would also be destructive of the beneficial operation of the Act in requiring corporations, engaged in trade and

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160 Joint reasons at [31]; reasons of McHugh J at [96]-[98].

161 Joint reasons at [31]-[32].

162 Joint reasons at [23]; reasons of McHugh J at [85]-[86].

163 Joint reasons at [24]-[25]; reasons of McHugh J at [87].

164 In *Yorke v Lucas* (1985) 158 CLR 661 at 666. See joint reasons at [38].

165 See joint reasons at [61]-[76]; reasons of McHugh J at [111]-[112], [139]-[149].

166 Joint reasons at [1].

commerce in Australia, to desist from conduct that is misleading or deceptive or likely to mislead or deceive.

174 *The large purposes of the Act:* The Act is intended, relevantly, to afford recovery to persons who suffer loss or damage by conduct in contravention of Pt V. Yet, in some ways more important, s 52(1) of the Act is addressed to the impugned conduct of corporations engaged in trade or commerce. That sub-section sets standards for corporate behaviour, care and responsibility. Disclaimers there can be. But, if they are to be effective, the language of the Act, legal authority and legal principle suggest that they must be made much more clearly than those invoked here were.

175 Tiny printed disclaimers and inferences to be implied from the facts would not ordinarily have the effect of exempting a corporation from the regime established by the Act. The interpretation now adopted reduces the Act to a paltry thing of little real protection for the multitude of persons whom the Parliament intended to protect. It is inappropriate for this Court to send a signal to the industry of corporate real estate agents, and other industries, that they can avoid the requirements of the Act by the simple expedient of publishing disclaimers illegible to many eyes and easily overlooked. It is no answer to the operation of the Act that those who suffer damage by "conduct that is misleading" can be expected to get their own solicitors and surveyors to advise them. In many cases, they can. But the Act takes effect first and independently of that entitlement. It imposes duties and liabilities. In this case, those duties and liabilities applied to the agent and were contravened.

#### Response to the agent's arguments

176 *General considerations:* The foregoing distinction explains the source of the difference between the joint reasons and my own. However, my approach is reinforced by the established authority of the courts concerning the operation of ss 52(1) and 82(1) of the Act and by expert commentary on the Act.

177 From soon after the Act's enactment, this Court has emphasised that s 52, being expressed in very general terms, is designed to have a "broad reach"<sup>167</sup>. Its purpose is to protect the consuming public from identified trading practices, specifically from being misled or deceived by the conduct of corporations<sup>168</sup>. It

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<sup>167</sup> *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 225 per Stephen J; see also *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546 at 554.

<sup>168</sup> *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 186-187 per Bowen CJ, 199-200 per Brennan J; see *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 128 per Mason J.

is not necessary for the party seeking relief under the Act to establish an intent to mislead or deceive on the part of the impugned corporation. Such an intent is not an essential element to establish contravention of s 52(1) of the Act<sup>169</sup>. It was not suggested in the present case that the agent set out deliberately to mislead or deceive the purchasers. Fraudulent misrepresentation was initially alleged against the vendor. It was not established. That failure, properly, had consequences for the costs order substituted by the Court of Appeal for that made at trial<sup>170</sup>.

178        However, the absence of a suggestion of deliberate deception is in no way fatal, or ultimately even relevant, to the case brought by the purchasers against the agent. The language of the Act is expressed in the alternative ("conduct that is misleading *or* deceptive"). It was therefore enough for the purchasers to demonstrate that the agent's conduct was "misleading".

179        In his reasons<sup>171</sup>, McHugh J demonstrates, by reference to a line of decided cases, that, for the purposes of s 52, "conduct" is not limited to "representations", and that representations as understood in the general law need not be proved to have been made for a claim under s 52 to succeed. So much is also accepted by the majority in their joint reasons<sup>172</sup>. "Conduct" is a broader word, deliberately chosen. It is deployed in the Act, a consumer protection statute, to give it a wide application to activities that are likely to mislead or deceive consumers.

180        Even if, however, the purchasers were confined in their claim to "conduct" constituted by the "representations" made by the agent<sup>173</sup>, that conduct was, in my view, unarguably "misleading". It involved the preparation and distribution of a pamphlet that identified the boundary of the subject land by reference to the MHWL line, well outside the swimming pool on the Pittwater side of the property. As this was found to be incorrect<sup>174</sup>, subject to the disclaimers and the

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169 *Hornsby Building Information Centre* (1978) 140 CLR 216 at 228.

170 (2002) 55 NSWLR 558 at 576 [96], applying *Parker v McKenna* (1874) LR 10 Ch App 96 at 123 per Lord Cairns LC.

171 Reasons of McHugh J at [102]-[110].

172 Joint reasons at [32].

173 Joint reasons at [32]; cf *Henjo* (1988) 39 FCR 546 at 555.

174 The primary judge found that the mean high-water mark traversed the swimming pool on the subject land: [2001] NSWSC 15 at [80]-[82]. This was contrary to the appearance of the location of the mean high-water mark indicated in the published diagram.

other supposed grounds of exemption, the case of "conduct that is misleading" was made out. The provisions of the Act for the protection of the purchasers were therefore engaged. Under s 82(1) of the Act, the purchasers thus became entitled to recover the "loss or damage [caused] by [that] conduct ... by action against that other person", that is, the agent.

181        *The supposed contextual exemptions:* So what are the reasons relied on by the agent to escape what seems to be a fairly clear case of a corporation engaging in "misleading" conduct? Various arguments have found favour with the majority. They do not convince me.

182        First, it is suggested that the agent did no more than to convey representations to the purchasers concerning the Rednal land that were being made by the vendor. I cannot accept this interpretation of the facts. It would impermissibly erode the operation of the Act which, by its terms, applies to corporations for their *own* conduct. The agent chose to convey the representations that it did. For that conduct, it must accept accountability measured against the requirements of the Act. Others may indeed be liable, either under the Act or by virtue of other legal breaches. But the Act is addressed to the "conduct" of corporations. Corporations must conform to its requirements. If *they* engage in "misleading" conduct, it is no excuse that *others* may have done so too. The primary judge specifically found that the agent's pamphlet conveyed a representation as to the location of the pool wholly within the freehold<sup>175</sup> and that the vendor's conduct in that respect was misleading or deceptive<sup>176</sup>.

183        This was not a case where the agent was merely passing on information supplied by another within the words used by this Court in *Yorke v Lucas*<sup>177</sup>. Nor was it a case where the agent was simply passing on the information "for what it is worth". Nor was it an instance where information was incorporated by a course of past dealings between the parties<sup>178</sup>. Here, in a unique dealing, the agent was performing the corporation's precise function, namely promoting the sale of the subject land to purchasers and describing that land. The agent did not have to include in its pamphlet the diagram showing the boundary line designated by the mean high-water mark. Having done so, it was obliged to accept the legal consequences. Clearly, its conduct occurred in the performance of its professional activity as a corporate real estate agent. Moreover, it acted as

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<sup>175</sup> [2001] NSWSC 15 at [115], [128]-[130].

<sup>176</sup> [2001] NSWSC 15 at [144].

<sup>177</sup> (1985) 158 CLR 661 at 666.

<sup>178</sup> cf *D J Hill & Co Pty Ltd v Walter H Wright Pty Ltd* [1971] VR 749; *McCutcheon v David Macbrayne Ltd* [1964] 1 WLR 125; [1964] 1 All ER 430.



it did for its own economic advantage. It stood to gain the agent's fee for the sale of the property. The more attractive it could make the property seem, the more likely was it to succeed in effecting a sale.

184 Self-evidently the agent would have known that the position of the boundary line of the land abutting the Pittwater was likely to be important to a purchaser. The property had advantages. These were shown to excellent effect in the pamphlet prepared by the agent. The large photograph of the deep waterfrontage of the land, viewed from the water, was the dominant image of the pamphlet, and understandably so. That was the property's chief selling point. However, the property also had an obvious defect. This was the very high development-to-land ratio. Most of the subject land was taken up by the three developments shown in the diagram. They were an extremely large garage, the "brick house" residence and the swimming pool. This left a relatively small area between the "brick house" and the Pittwater available for use by a purchaser for living and entertainment purposes. The limits of the availability of the land for such purposes were fixed by the line shown on the deposited plan constituted by the mean high-water mark. As the agent would well have known, that line was therefore of great significance to potential buyers. It indicated the extremity of the land available for redevelopment by a purchaser.

185 Moreover, whereas the boundary line indicated in the diagram would have been of importance to virtually every purchaser, it was (as the agent knew) of special importance to the appellants. Mr Butcher made clear the importance of securing a larger open space for entertainment and that a redesign of the position of the pool would be necessary. He did this in a conversation with Mr Elder, a director and principal of the agent. The primary judge accepted what Mr Butcher said in this regard. It was not relevantly the subject of much contest.

186 The only available inference therefore is that Mr Elder, for the agent, affirmed the correctness of the survey diagram by his response to Mr Butcher's plans to reposition the swimming pool<sup>179</sup>. Certainly, he said nothing to indicate any doubts concerning the description in the diagram of the position of the mean high-water mark and the boundary that it apparently signified.

187 It follows that this was not a case of immaterial "puffery" about a property for sale by a real estate agent, as might sometimes appear innocently enough in a promotional pamphlet. It was a representation of a very important detail concerning the subject property. Important for virtually every purchaser of such a valuable piece of land. Specially important for the appellants because they had made that fact known to the agent.

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179 See [2001] NSWSC 15 at [16]-[17], [22], [26].

188 Secondly, I cannot agree that personal characteristics of the parties<sup>180</sup> in some way exempted the agent from the obligations imposed by the Act to avoid "misleading" conduct in its pamphlet. For example, the facts that Mr Butcher had at one stage enjoyed a high profile as a former professional football player, was a successful businessman, had decided with Ms Radford to engage in a venture of prudent investment in real estate or was intelligent, shrewd and self-reliant are all ultimately irrelevant considerations. It may be true that the Act is vigilant to protect the weak, the impressionable and the vulnerable. But there is nothing in its language, or purpose, to exclude from its protection, in a proper case, domestic partners who rely on the printed material of a real estate agent when proceeding to purchase a significant parcel of land.

189 Throughout Australia it is not at all uncommon for individuals and couples to endeavour to improve their economic position by acquiring, and ultimately reselling, valuable parcels of real property. To exclude from the protections of the Act those who do so, because they are investors or shrewd and so forth is as irrelevant to the language and purpose of the Act as to exclude them because they were once professional footballers. The Act is a law of general application. It focuses on the conduct of corporations. None of the personal considerations nominated in this case, to exclude the purchasers from the Act's protection, is in the slightest convincing.

190 Thirdly, it is true that land title can sometimes give rise to complex questions of law and fact<sup>181</sup>. I would accept that, especially in the purchase of a valuable allotment of land, purchasers will ordinarily be expected to obtain competent legal advice of their own. However, that consideration is extraneous to the issue of whether a corporation, dealing with the purchaser, has breached its own anterior and separate legal obligation not to engage in "conduct that is misleading" under the Act.

191 In a particular case, an issue might be presented as to whether the chain of causation of the purchaser's loss or damage (signified by the preposition "by" in s 82(1) of the Act) has been snapped. However, in the present case, it would not have been in the least unreasonable, given the exigencies of the sale of the land by auction, for any detailed examination of the line marking the waterfront boundary of the property to be conducted by the solicitors *after* the purchasers had agreed to acquire the land at the notified auction on 18 February 1997. That is what the purchasers did. It was at the auction that the purchasers suffered their damage. They did so because they then took steps that included the acceptance of legal liability to the vendor. That liability was incurred because of the factual

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180 Joint reasons at [41].

181 Joint reasons at [43].

misrepresentation (as it was found) that the boundary line of the acquired land was clear of the swimming pool on the waterfront side of the Pittwater.

192 Assuming that it was ever the inclination of the purchasers to become involved in a contest over disputed title, and before there was time to conduct and resolve title investigations, the agent's pamphlet made a representation to the purchasers of the whereabouts of the boundary line to the land offered for sale. It was a representation of significance. On the face of the pamphlet, there was nothing to suggest that it was anything but a representation of an undisputed fact, namely where the boundary line lay.

193 Lawyers know that title boundaries, particularly where fixed by reference to mean high-water mark, can sometimes present complex questions<sup>182</sup>. However, the Act is not concerned with the classification of what conduct is "misleading" to lawyers. It is sufficient that it should be "conduct", as the preparation and supply of the agent's pamphlet certainly were. The Act protects people such as the purchasers. As a former footballer engaged in a business of carpet cleaning, Mr Butcher and his partner could scarcely be expected to have a familiarity with the nuances of land law. But they could be expected to observe the pamphlet provided to them on behalf of the vendor and to see the boundary line clearly shown in the diagram reproduced there. The only inference available from that diagram was that the mean high-water mark boundary line was well clear of the swimming pool. And, as found, that was incorrect and "misleading".

194 Fourthly, it matters not whether the agent or someone else was the original source of the information in the pamphlet<sup>183</sup>. It was by the conduct of the agent that the pamphlet was prepared and distributed in support of its corporate activity undertaken for its own profit. Under the Act, the agent was liable for that conduct. At least it was liable unless it made it plain that it was not the source of the information or that it was merely passing the information on "for what it is worth". That was not the proper characterisation of the agent's pamphlet and the diagram that the agent included in it.

195 The significance of the information, its importance to potential buyers, and specifically to the purchasers, was clear. The size of the agent's commission is not determinative<sup>184</sup>. But the fact that this was "conduct" of a corporation engaged in trade or commerce was conclusive of the application of the Act to

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**182** *Lanyon Pty Ltd v Canberra Washed Sand Pty Ltd* (1966) 115 CLR 342; cf Moore, "Land by the Water", (1968) 41 *Australian Law Journal* 532.

**183** Joint reasons at [53]; reasons of McHugh J at [113]-[124].

**184** Joint reasons at [57].

such "conduct". Prima facie, once the conduct was shown to be "misleading", as the misdescribed boundary line was found to be, that was enough. The purchasers were entitled to invoke the Act to recover the amount of loss or damage occasioned to them by such misleading conduct.

196 To classify the pamphlet as the vendor's document would be to ignore its markings, nature and purpose. The business identity of the agent appears prominently on both sides of the pamphlet. The pamphlet originated in the agent's office. It was designed for the agent to achieve the sale that the agent was seeking to effect on behalf of the vendor. It contained promotional photographs and statements inferentially prepared by or for the agent. As befitted such a valuable property (inevitably involving a substantial agent's fee) the document is attractive and seemingly accurate<sup>185</sup>. But in an important respect, it was found to have been inaccurate. The appearance, impression, character and object of the document deny any suggestion that it was someone else's document. It was the agent's production. Save in the one critical particular, it was a professional job, intended to perform the agent's function as such. For its contents, the Act required the agent, as a corporation, to accept responsibility for any misleading or deceptive conduct.

197 The allegedly "extreme consequences" considered during the hearing of this appeal, and now repeated by the joint reasons<sup>186</sup>, of liability for other possible representations conveyed in pamphlets such as the agent's are not relevant to (and should not distract this Court from) the question whether the representation *actually* made by the agent in this case contravened s 52. Whether, for example, a pamphlet advertising land for sale amounts to a representation by a pamphlet's author that the vendor has a good title to the land<sup>187</sup> is not a question requiring resolution in this case; I would reserve comment on such a question to a case that squarely raises the point. However, what the agent's pamphlet *did* expressly indicate was the location of the boundary line in the survey diagram. That indication put the representation distinctly within the purview of the Act. This Court's function is to resolve questions before it. We are deflected when we needlessly resort to hypotheticals not relevant to the question in issue.

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185 The pamphlet included specific and precise information as to the land area (890 square metres) and as to current rates (council rates \$2,931.75 per annum, water rates \$87.90 per quarter (plus usage) and a permissive occupancy fee ("\$900 approx")).

186 Joint reasons at [59].

187 See joint reasons at [59].

The written disclaimers are ineffective

198        *Disclaimers in the context of the Act:* The foregoing analysis brings me to the core of the agent's claim for exemption from the operation of the Act. Its argument was advanced even if otherwise the Act was found to apply by reason of misleading conduct on the part of the agent.

199        The agent relied on the two printed disclaimers appearing on each side of the agent's pamphlet. The terms of the disclaimers are set out below<sup>188</sup>. Neither of them, nor both of them together, has the consequence urged by the agent. With respect, I do not agree that the disclaimers should be read in the way suggested by the primary judge<sup>189</sup>, upheld by the Court of Appeal<sup>190</sup> and now by the majority of this Court.

200        *The disclaimers' tiny typeface:* As a matter of evaluation of the facts, it is misleading to read the disclaimers as if they appeared with equal prominence along with other details, as might be inferred from the reproduction of their text in judicial reasons. A number of larger typefaces are used in the document. The disclaimers, however, appear in a typeface that can only be described as tiny. That on the rear of the pamphlet is even smaller than that on its face. The only print appearing in the document that is smaller comprises some of the handwritten details of the surveyor's diagram, inferentially photo-reduced and reproduced on the reverse of the pamphlet.

201        A youth with 20/20 vision could possibly read the disclaimers without undue difficulty. But I doubt that any ordinary adult could do so without some form of magnification. I reproduce in these reasons both the disclaimers in the typeface in which they each appear in the agent's pamphlet and, for purposes of comparison, the typefaces appearing immediately next to them on the pamphlet page<sup>191</sup>:

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188 These reasons at [201].

189 *Butcher* [2001] NSWSC 15 at [169].

190 *Harkins* (2002) 55 NSWLR 558 at 566-570 [37]-[52].

191 Necessarily, appearing as they do here in judicial reasons that focus on their legal significance, and positioned at a different place on the page, the disclaimers attract an attention in these reasons that they do not enjoy in the agent's pamphlet.

Side 1:

## "NORTH EAST FACING DEEP WATERFRONT"

"Lachlan Elder Realty Pty Ltd ACN 002 332 247. All information contained herein is gathered from sources we believe to be reliable. However we cannot guarantee it's [sic] accuracy and interested persons should rely on their own enquiries."

Side 2:

## "L.J. HOOKER Mona Vale" "nobody does it better"<sup>TM</sup>

" All information contained herein is gathered from sources we deem to be reliable. However we cannot guarantee it's [sic] accuracy and interested persons should rely on their own enquiries. Williams Design Associates ph ..."

202        *Viewing disclaimers in context:* Disclaimers of such a kind must be considered as they appear in a pamphlet designed to communicate information to the recipient. The cover comprises a large and arresting photograph of the property with inserted smaller photographs, also attractive. The print size of most of the text is large and clear to read, much of it without the need for magnification. The diagram on the reverse is also clear enough. At least, this is so as it shows the boundary line, the subject of the present dispute.

203        In such a context, the typeface used for the printed disclaimers suggests (and I think was intended to suggest) that the ordinary person reading the pamphlet did not need to bother with information so insignificant that it could be reproduced in such a typeface. In the agent's document of attractive photographs and bold assertions, clearly and sharply displayed (such as "North East Facing Deep Waterfront" on both sides and with the inscription "L J Hooker, Mona Vale, Nobody Does it Better"), who would bother to read written disclaimers presented in such tiny print?

204        *Presentation of the disclaimers:* This impression is reinforced by the position in which the disclaimers appear on the document. Both appear below the line. That is to say, the one on the front appears below the attractive photographs that capture and hold the eye. On the reverse side, the disclaimer appears in even smaller typeface: below a dark line that crosses the entire page.

205        Presentationally, these disclaimers do not appear as true communications to the readers of the pamphlet. They are placed symbolically outside the sphere of such communication. It is as if the agent (or the designer on behalf of the agent) is telling the reader of the pamphlet in its layout: "You don't need to

worry about this. If it had been important, we would not have put it where it is and printed it in such an unfriendly size."

206 Such a presentation of the disclaimers can be likened to the minuscule notes, published in obscure places in official reports, which, examined with a magnifying glass, typically disclose insignificant information, such as the identity of the government printer, the designer or some other data immaterial to the majority of readers. To suggest that such subscriptions constitute a communication of meaningful information is to defy common experience and half a century of legal efforts to discourage such ploys by denying them legal effectiveness<sup>192</sup>.

207 *No oral reinforcement of disclaimers:* Mr Butcher (for the purchasers) asserted that he had not read the disclaimers before the contract to buy the Rednal land was executed. He did, however, see and rely on the mean high-water mark boundary line appearing in the diagram reproduced in the pamphlet. The finding by the primary judge that the purchasers would not have acquired the land had they known that the mean high-water mark traversed the swimming pool, indicates an acceptance that the written disclaimers had not entered into the purchasers' conscious evaluation of the communications in the pamphlet. Having regard to the totality of the circumstances and the appearance of that document, this conclusion is unsurprising.

208 An employee of the agent initially gave the pamphlet to Mr Butcher. That employee did so on behalf of the agent which, as a corporation, could only act through its officers and employees. According to Mr Butcher, at the time he was given the multicoloured pamphlet the employee said<sup>193</sup>:

"These are all the details for the property. You have a full coloured brochure on the front and all the council outgoings land survey etc on the rear. That is everything you need to know."

209 Save for the printed disclaimer, neither the employee nor Mr Elder, for the agent, indicated any doubt or question concerning the boundary line obliging prior investigation. In particular, the agent took no steps to ensure that its name

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**192** *The Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379 at 390 per O'Connor J, affd *Robertson v Balmain New Ferry Co Ltd* [1910] AC 295 (PC); *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 at 169; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400 at 415; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 204-205, 229; *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1991) 22 NSWLR 1 at 8-9, 24-25 (CA).

**193** [2001] NSWSC 15 at [16]-[17].

was neither associated with, nor supported the accuracy of, that part of its pamphlet that included the survey diagram<sup>194</sup>.

210 It was accepted on behalf of the purchasers that, by clear disclaimers, corporations such as the agent could exempt themselves from liability for "conduct that is misleading". They could do so by clearly drawing to notice specific matters that should first be checked by the consumer. Alternatively, by clear communication, written or oral, they could indicate that the corporation is merely passing on information supplied by others "for what it is worth". In the agent's pamphlet, there were no such clear indications in writing or print. Nor were they ever offered orally, or separately in writing, by Mr Elder or anyone else on behalf of the agent.

211 By holding that the printed disclaimer in this pamphlet was effective to exclude liability under the Act, this Court, in my respectful view, strikes a blow at the Act's intended operation. Henceforth, in effect, the Act may not operate to protect the ordinary recipient of the representations of corporations engaged in trade or commerce. Many such corporations will be encouraged by this decision to believe that they can avoid the burdens of the Act by the simple expedient of tucking away in an obscure place in minuscule typeface a disclaimer such as now proves effective. This approach is contrary to the language and purpose of the Parliament.

212 *The trend of authority on disclaimers:* The approach that I favour is consistent with the way that intermediate courts have considered disclaimers when relied on by corporations that are otherwise in default of the Act. Of course, each case depends on its own facts and on the terms, size, prominence and context of the disclaimer in question. Also relevant is whether, on the particular question, the parties had the advantage of legal advice<sup>195</sup>. However, I could find no case where an Australian court has upheld a printed exemption with an equivalent lack of prominence, content and communicative force to that now upheld<sup>196</sup>. A similar unwillingness is observable in the courts of other

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194 *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 at 257.

195 *H W Thompson Building Pty Ltd v Allen Property Services Pty Ltd* (1983) 48 ALR 667 at 673-674.

196 cf *Petera Pty Ltd v EAJ Pty Ltd* (1985) 7 FCR 375 at 378; *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715; *Bateman v Slatyer* (1987) 71 ALR 553; *Clark Equipment Australia Ltd v Covcat Pty Ltd* (1987) 71 ALR 367 at 371; *Phillip & Anton Homes Pty Ltd v The Commonwealth* (1988) ATPR ¶40-838; *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1989) 67 LGRA 238; *Netaf Pty Ltd v Bikane Pty Ltd* (1990) 26 FCR 305; *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535.



countries<sup>197</sup>, reluctant to allow claims to rescind land sale contracts for misrepresentation to be defeated by contractual exemptions.

213 The pattern of past Australian decisions on this topic is unsurprising. The Act generally sets its face against contractual exemptions<sup>198</sup>. Yet this, in effect, is what a printed disclaimer seeks to secure. To treat the disclaimers in the present case as effective is difficult to reconcile with the high national and economic purposes of the Act. At the very least, if a disclaimer is propounded to exempt a corporation engaged in trade or commerce in Australia from the important obligations of the Act, it is reasonable to demand that this be done clearly, emphatically and so as reasonably to impinge on the consciousness of persons who thereby lose protections enacted by the Parliament for their benefit<sup>199</sup>.

214 The disclaimer in the present case is neither as detailed nor as prominent as that described in *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd*<sup>200</sup>. It is true that the real estate agents involved in *John G Glass* promoted themselves as investment consultants. However, the present was hardly a case where the agent was selling an ordinary suburban bungalow. Self-evidently, this was a substantial transaction for vendor, agent and purchasers alike. And the boundary line was included in the pamphlet because it could reasonably be anticipated that it might be relevant to potential purchasers, as in fact it was to these purchasers. For the lay recipient, the pamphlet communicated the location of the waterfront boundary. It did so by the actions of the agent in including the surveyor's diagram in its publication as it did<sup>201</sup>.

215 The disclaimer that succeeds in this case is also neither as ample nor as prominent as that used by the real estate agent in *Benlist Pty Ltd v Olivetti*

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**197** *Walker v Boyle* [1982] 1 WLR 495; [1982] 1 All ER 634, cited by Pincus J in *Byers* (1986) 69 ALR 715 at 724-725; see also *Laurence v Lexcourt Holdings Ltd* [1978] 1 WLR 1128; [1978] 2 All ER 810.

**198** The Act, s 68. See also s 68A; cf *Indico Holdings Pty Ltd v TNT Australia Pty Ltd* (1990) 41 NSWLR 281 at 285-286. The position under the *Unfair Contract Terms Act 1977* (UK) appears to be similar: Furmston (ed), *The Law of Contract*, 2nd ed (2003) at 611 [3.67].

**199** Davis and Seddon, *The Laws of Australia: Contract*, (2003) at 466-467 [85].

**200** (1993) ATPR ¶41-249. The terms of that disclaimer appear in the joint reasons at [62].

**201** Reasons of McHugh J at [131]-[136]; cf joint reasons at [50]-[51].

*Australia Pty Ltd*<sup>202</sup>. In that case, Burchett J said, correctly, that courts must be on their guard against perpetrators of misleading conduct resorting to such disclaimer clauses to "evade the operation of the *Trade Practices Act*"<sup>203</sup>. The decision in the present case rewards illegible disclaimers and promises that, in the future, documents including them stand a real chance of avoiding the operation of the Act. With all respect, that is not the message that I believe this Court should give to real estate agents or any other corporate group. It is contrary to the purposes of the Act.

216        *Disclaimers and commercial reality:* In its nature, self-interest often inclines parties to attempt to limit proper warnings and to seduce consumers with attractive communications, unembarrassed by messages of restraint. Where the Act would otherwise attach, it is important for this Court, like virtually all intermediate courts before this case, to insist that, to be effective, written disclaimers must be clear, detailed and prominent. None of those adjectives applies to the two disclaimers in this case. So far as the written disclaimer on the reverse side of the pamphlet is concerned, a quick reading would suggest (as the joint reasons acknowledge<sup>204</sup>) that it is aimed to let the designer off the hook, saying nothing at all about the agent.

217        For centuries, lawyers have lamented the disinclination of their clients to read the fine print of documents. For a long time they have realised that it usually takes binding obligations of professional duty, a peculiar turn of mind and strong spectacles to combine in that result<sup>205</sup>. Whatever they should do in theory, ordinary people cannot be converted to reading hidden messages contained in tiny print. It requires a large measure of judicial self-deception to say that the purchasers *should* have read the written disclaimers invoked here. The decisions of the judges below in this case are out of line with the general

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202 (1990) ATPR ¶41-043. The terms of that disclaimer appear in the joint reasons at [36]-[37].

203 (1990) ATPR ¶41-043 at 51,590.

204 Joint reasons at [49].

205 Ordinary readers are commonly preoccupied by other considerations and do not have the patience let alone the understanding to read such terms without having them specifically drawn to notice either orally or by some printed or written emphasis: *Sydney Corporation v West* (1965) 114 CLR 481; *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125 at 136-137; *China Ocean Shipping Co Ltd v P S Chellaram & Co Ltd* (1990) 28 NSWLR 354; Davis and Seddon (eds), *The Laws of Australia: Contract*, (2003) at 466-467 [85].

approach of intermediate courts with larger experience in the application of the Act.

218 *Expert commentary reinforces the conclusion:* The approaches adopted by intermediate courts have not only been described by expert commentators. They have been strongly endorsed by them with reference to applicable considerations of legal principle and policy.

219 Thus, Professor Davis and Dr Seddon in their new compilation *The Laws of Australia: Contract*<sup>206</sup>, drawing on a painstaking analysis of all the cases, say:

"The courts have been very consistent in ruling that attempts to exclude liability for breach of s 52 of the *Trade Practices Act* 1974 (Cth), or its *Fair Trading Act* equivalents, will be unsuccessful. It is, of course, possible to qualify a statement so that it will not be misleading, but *this must be done as part of the statement and not in some separate contractual clause.*"

In short, the qualification must make any exemption very obvious to those unfamiliar with it. The more harsh the exemption, the stricter has been the approach of the courts to the duty of the party that seeks to rely upon it to draw it to specific notice<sup>207</sup>. The finer the "fine print", the more readily will a court draw a conclusion that insufficient notice has been given, so as to take the provision outside the operation of an effective exemption.

220 In the Australian edition of *Cheshire and Fifoot's Law of Contract*<sup>208</sup>, Dr Seddon and Professor Ellinghaus reinforce these conclusions:

"[T]he courts have consistently argued that an exemption or exclusion clause in no way diminishes the stark reality of a breach of s 52 or its equivalents, namely, that the representee was misled ...

It may be possible for an exclusion clause to remove the misleading effect of earlier conduct but the chances of a court being persuaded of this are very small indeed ...

The presence of such a clause may in fact exacerbate the misleading nature of the impugned conduct ...

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**206** (2003) at 485 [99] (emphasis added, footnotes omitted).

**207** *Oceanic Sun Line* (1988) 165 CLR 197 at 229.

**208** 8th Aust ed (2002) at 591-592 [11.133] (footnotes omitted).

In the face of this failure of exemption clauses, ingenious arguments have been employed to try to persuade courts to give effect to such clauses ... But to no avail."

221 Similar conclusions have been reached by commentators in other countries<sup>209</sup>. The language of the Act, as well as legal authority, principle and policy suggest that this Court should not waver on this point. I dissent from the conclusion that we should do so in this case.

#### Appeal, cross-appeal and application

222 *The appeal should be allowed:* The result is that the purchasers have shown error on the part of the Court of Appeal. That Court should have corrected the erroneous approach to the disclaimers adopted by the primary judge. This conclusion requires that the appeal be allowed.

223 Because this is a minority view, I will deal more briefly with the consequences of my conclusion for the remaining proceedings before this Court.

224 *The cross-appeal should succeed:* First, the agent cross-appealed defensively to assert an entitlement to contribution from the vendor, in the event that it was held liable under the Act. During the hearing, the agent was given leave to file a cross-appeal against the orders of the Court of Appeal dismissing, as unnecessary, the claim to contribution from the vendor. The vendor was present in court, by his counsel, when that leave was granted.

225 The agent did not seek to argue the cross-appeal. It asked simply that there be a remitter to the Supreme Court to decide the consequential claim for contribution from the vendor. As the agent wishes to contend that any error in the diagram, reproduced in the pamphlet, is that of the surveyor's drawing provided to it by or for the vendor, it is obviously just that it should have the opportunity of advancing its case for such relief. I would so order.

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209 Phang, *Cheshire, Fifoot and Furmston's Law of Contract*, 2nd Singapore and Malaysian ed (1998) at 291 ff. In Furmston (ed), *The Law of Contract*, 2nd ed (2003) at 34 [1.48], the authors point out that such controversies are to be viewed in the context of a large debate in contract law that followed the attempt in the middle of the twentieth century to use disclaimers and exemption clauses in standard form consumer contracts. Provisions such as s 52 of the Act must be read against this background (referring to *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361; and Kessler, "Contracts of Adhesion – Some Thoughts About Freedom of Contract", (1943) 43 *Columbia Law Review* 629).

226        *The vendor's case should not be reopened:* Secondly, and also defensively, the vendor appeared at the hearing of the appeal to support a motion to reopen his application for special leave to appeal. Special leave had earlier been denied to the vendor. He wished to advance arguments similar to those raised by the agent in a notice of contention.

227        The vendor and the agent sought to argue that the boundary of the Rednal land had changed by accretion because of the shifting contours inherent in the definition of the land by reference to "the mean high-water mark"<sup>210</sup>. Amongst other things, these arguments sought to contend that the consequence of changes in the mean high-water mark at the Pittwater was that the boundary line of the Rednal land, fixed by reference to that identification, did not in fact pass through the swimming pool on the land. On the contrary, it was on the Pittwater side of the swimming pool. If this could be shown, by a mixture of law, chance and tidal movements over decades, the result might be that the surveyor's diagram, reproduced in the agent's pamphlet, could (contrary to the assumptions or findings of the courts below) prove to be accurate. The "MHWM" line might then appear roughly where shown in the diagram and not traverse the swimming pool at all.

228        It is enough to explain the nature of the contest which the vendor (and by its notice of contention, the agent) wished to advance in this Court to reveal why these proceedings represent an unsuitable vehicle to permit that course. The proposed issue arises upon a question substantially affected by the way the parties litigated their contest. It raises potential disputes of fact that may not have been explored, or fully explored, at the trial or in the Court of Appeal. The issue of law presented is potentially a difficult one. Theoretically, it could be important for the title of all tidal waterfront land. It is undesirable that such a question should arise for decision by this Court at such a stage and solely in proceedings, otherwise concluded, that are filed defensively.

229        It seems to me that the true location of the Pittwater boundary of the Rednal land was an issue upon which the vendor and the agent bore the forensic onus of establishing, if they so wished, that the mean high-water mark was at a different place, however slight, from that shown in the diagram reproduced in the agent's pamphlet. Particularly would this be so if the propounded propositions created a boundary to the subject land different from that suggested by the location indicated in the deposited plan, when the land was surveyed in 1919 for the purposes of the *Real Property Act* 1900 (NSW).

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210 The issue is explained in the joint reasons at [26]-[30].

230 The Court of Appeal found that there had been no accretion to the Rednal land in consequence of the movement of the mean high-water mark<sup>211</sup>. It found that the boundary of the property to the Pittwater was fixed in time at the 1919 high-water mark line, at least by the Crown grant of the first permissive occupancy in 1964<sup>212</sup>. At this late stage, and in these proceedings, I would not reopen this Court's earlier decision to refuse the vendor special leave to challenge that finding. Nor would I uphold the agent's argument on the point in its notice of contention, filed in answer to the purchasers' claim under the Act presented in the appeal.

### Orders

231 It follows that the appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside. In place of those orders, it should be ordered that the appeal to the Court of Appeal be allowed with costs. The judgment of the primary judge in the proceedings between the appellants and the respondent, Lachlan Elder Realty Pty Limited, should be set aside. In place thereof, judgment at trial should be entered in favour of the appellants. The proceedings should be remitted to the primary judge to find the damages and to decide the costs to which the appellants are entitled against Lachlan Elder Realty Pty Limited, conformably with these reasons.

232 The cross-appeal of Lachlan Elder Realty Pty Limited to the Court of Appeal should be upheld with costs. There should be remitted to the primary judge the determination of the entitlement, if any, of the cross-claimant, Lachlan Elder Realty Pty Limited, to indemnity from the cross-respondent, Robert Harkins, in conformity with these reasons. The costs of such proceedings should be determined by the primary judge in light of their outcome.

233 Leave should be granted to Mr Robert Harkins to file his motion to reopen his application for special leave to appeal. However, that application should be dismissed with costs.

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**211** (2002) 55 NSWLR 558 at 563 [15].

**212** (2002) 55 NSWLR 558 at 562 [12], 565 [28].