HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

JAMES HOUGHTON AND ANOR APPELLANTS

AND

SIMON ARMS RESPONDENT

Houghton v Arms
[2006] HCA 59
13 December 2006
M107/2006

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

D J O'Callaghan SC with M D Rush for the appellants (instructed by Deacons)

P J Riordan SC with D W Bennett for the respondent (instructed by Middletons)

D R Williams QC with S Bhojani for the Director of Consumer Affairs of Victoria appearing as amicus (instructed by Department of Justice)

CATCHWORDS

Houghton v Arms

Trade practices − Misleading or deceptive conduct in trade or commerce – Where appellant employees of a corporation made misleading or deceptive statements to respondent in the course of their employment − Where the corporation was sued for contravention of s 52 of the *Trade Practices Act* 1974 (Cth) ("the Commonwealth Act") by reason of the conduct of the appellants − Where the appellants were also sued for contravention of s 9 of the *Fair Trading Act* 1999 (Vic) ("the State Act") − Whether each appellant was a "person" for the purposes of s 9 of the State Act − Whether conduct of each appellant was "in trade or commerce" for the purposes of s 9 of the State Act.

Statutes − Statutory construction − Construction of s 9 of the State Act − Where the Commonwealth Act and the State Act have concurrent and overlapping operation − Where the Commonwealth Act had, but the State Act did not have, provisions imposing accessorial liability upon persons "involved" in a contravention − Where the Commonwealth Act had, but the State Act did not have, provisions deeming conduct engaged in on behalf of a corporation to have been engaged in by the corporation − Whether s 9 of the State Act is to be construed so as not to apply to persons who were not engaged in trade or commerce on their own account.

Words and phrases – "in trade or commerce".

Trade Practices Act 1974 (Cth), ss 52, 75, 75B, 82, 84.
Fair Trading Act 1999 (Vic), ss 9, 159.

GLEESON CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ.

The litigation

1 The action giving rise to this appeal was instituted by the present respondent (Mr Arms) in the Federal Court of Australia. He sought declaratory relief and damages in respect of alleged misleading and deceptive conduct. It was admitted on the pleadings that each of the first appellant (Mr Houghton) and the second appellant (Mr Student) was an employee of WSA Online Limited ("WSA"). WSA was the first respondent to the action but was subject to a deed of company arrangement.

2 At the trial before Ryan J, Mr Arms recovered judgment against WSA in the sum of $58,331, but his claims against Mr Houghton and Mr Student were dismissed[1]. WSA on the one hand and Mr Houghton and Mr Student on the other had had separate representation. Mr Houghton and Mr Student thereafter have maintained their joint representation. WSA has not been a party to the subsequent steps in the litigation.

3 An appeal by Mr Arms against the dismissal of his claims against Mr Houghton and Mr Student was allowed by the Full Court (Nicholson, Mansfield and Bennett JJ)[2] essentially on the basis that an employee acting within the scope of actual authority could be liable for misleading or deceptive conduct. The orders of Ryan J were varied, with the result that judgment was entered against all three respondents. The particular order now read: "There be judgment for [Mr Arms] against [WSA, Mr Houghton and Mr Student] in the sum of $58,331.00."

4 It is against these Full Court orders that Mr Houghton and Mr Student appeal to this Court.

5 The Court received written and oral submissions by the Director, Consumer Affairs, Victoria, who administers the relevant State legislation. The submissions were presented as amicus curiae but their effect was to support the respondent, Mr Arms.

---

1 *Arms v WSA Online Limited* [2005] FCA 943.

2 *Arms v Houghton* (2006) 151 FCR 438 at 448.

The nature of the dispute

6 Mr Arms traded under the name "Australian Cellar Door" and formulated a proposal for the provision by means of an internet web site, www.auscellardoor.com.au, of a service for the direct marketing of the products of small to medium independent wineries. The expectation was that direct "cellar door" sales would attract sales tax at a much lower rate and would avoid the need for the payment by the wineries of the margin, usually in the order of 30 per cent, required by agents or distributors when sales were effected by retail outlets.

7 WSA was engaged to provide advice and services on web site design, construction and administration. Mr Student was described in the dealings with Mr Arms as "WSA Online project manager" and he introduced his fellow employee, Mr Houghton, to Mr Arms as the "guru of interactive website design and development".

8 At a meeting in late January 2000, or shortly thereafter, Mr Houghton told Mr Arms that he was aware of a financial transactions product called "ANZ e-Gate" which would be "perfect" for the requirements of Mr Arms' business. It was said that this facility would enable customers to pay by means of all major credit cards with funds clearing directly into the account of the relevant winery, in return for the payment by the winery of a small transaction fee. Thereafter, either Mr Houghton or Mr Student told Mr Arms that wineries could be added to the auscellardoor web site (incorporating the ANZ e-Gate facility) "by simply filling in a form" and paying a small set-up fee.

9 However, WSA was told by the ANZ Bank in meetings conducted by Mr Houghton that WSA should obtain an e-Gate licence from that bank and then sub-licence Australian Cellar Door or others of its clients requiring a facility of that kind. WSA was also told that each winery would be required to have an ANZ credit card merchant facility which was plugged into the ANZ e-Gate engine; each winery would be subject to an approval process consisting of a completed application form, financial data and, perhaps, a business plan. Later, in February 2000, WSA and the ANZ Bank agreed that the ANZ e-Gate licence would belong to WSA and the credit card merchant facilities would belong to the individual wineries who had signed up with auscellardoor.

10 On 23 June 2000, Mr Student told Mr Arms that Mr Houghton had made a mistake in describing the operation of the ANZ e-Gate facility and that Australian Cellar Door would have to arrange for each participating winery to become a "merchant" accredited by the ANZ Bank, and for separate merchant accreditation to be obtained of Diners Club and American Express. Mr Student

further said that to achieve that accreditation each winery would have to provide to those three entities acceptable profit and loss statements for the last two years and a business plan. At that stage, Australian Cellar Door had already enrolled about 30 wineries and its web site was to be launched within five days. In that time it was impossible for Mr Arms to arrange for the wineries to comply with the conditions necessary for them to become individual merchants.

11 To preserve the credibility and goodwill of his business with the wineries, Mr Arms converted Australian Cellar Door into a retailer with a mark-up or commission limited to the 5 per cent which Mr Arms had told the wineries they would be charged under the system which he had been forced to abandon. Sales tax was now payable at a higher rate on the transactions because the retailer was Australian Cellar Door, not the wineries. Mr Arms operated his business in this fashion at a loss for 12 months until June 2001. He then adopted a quite different business structure and moved from loss to profit-making.

12 Ryan J accepted that representations had been made to Mr Arms, the substance of which was that, in order to run his business effectively and operate the auscellardoor web site, Mr Arms was not required to obtain any documentation from the wineries other than a form, with provision for banking details; WSA had engaged in that conduct when it was incumbent upon it to alert Mr Arms to the existence of the additional requirements of the ANZ Bank, or to ascertain that there were no such additional requirements in order for a winery to become an ANZ e-Gate merchant. Ryan J found that, had Mr Arms known the true position, he would have changed the auscellardoor web site to a profitable method of trading by November 2000, not June 2001, and would not have lost the sum of $58,331 from the seven month "set back".

13 However, Ryan J also held that neither Mr Houghton nor Mr Student could be said, in any sense, to have been engaged in trade or commerce on his own account as distinct from being an employee of WSA. Because "no independent trading or commercial interest can be imputed to [Mr Student] or [Mr Houghton] in the present case"[3], it followed that the applications against them had to be dismissed.

14 On appeal, the Full Court noted that Ryan J's conclusion that Mr Houghton and Mr Student did not actually have an independent commercial interest was a finding of fact. However, the Full Court ultimately determined

---

3 [2005] FCA 943 at [109].

that Ryan J had erred in law in concluding that it was not "open to him at law" to find them liable under s 9 of the *Fair Trading Act* 1999 (Vic) ("the FT Act")[4].

15 Mr Houghton and Mr Student submit as appellants in this Court that the primary judge was correct and that the Full Court erred in its decision to the contrary. For the reasons which follow, the submissions of the appellants should be rejected and the appeal dismissed.

The structure of the litigation

16 Something more first should be said of the framework of the Federal Court action. As applicant, Mr Arms initially claimed declarations that WSA had contravened s 52 of the *Trade Practices Act* 1974 (Cth) ("the TP Act")[5] and that Mr Houghton and Mr Student were "involved" in that contravention within the meaning of s 75B(1), thereby rendering them, as well as WSA, subject to the recovery under s 82(1) of the TP Act of the amount of the loss or damage suffered by Mr Arms[6].

---

4 (2006) 151 FCR 438 at 448.

5 Section 52 states:

> "(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)."

Part V (in which s 52 appears) no longer applies to the supply of financial services within the meaning of Pt 2 Div 2 of the *Australian Securities and Investments Commission Act* 2001 (Cth) ("the ASIC Act"). Section 51AF of the TP Act provides for this excision from the TP Act. Section 12DA of the ASIC Act deals with the misleading or deceptive conduct in relation to financial services, as defined in s 12BAB thereof.

6 Section 75B(1) provides that a reference in Pt VI of the TP Act (which includes s 82) to a person involved in a contravention of a provision of Pt IV or Pt V shall be read as referring to a person who:

> "(a) has aided, abetted, counselled or procured the contravention; [or]
>
> ...

(Footnote continues on next page)

17 The particular claim under s 75B(1) was that the individual respondents had been knowingly concerned in, or parties to, the contraventions of s 52 by WSA. Pursuit of that claim would have involved proof of the mental elements indicated by *Yorke v Lucas*[7], something not required to establish the direct or primary contraventions of s 52 alleged against WSA[8].

18 The claim of accessorial liability under s 75B(1) was expressly abandoned when an amended application was filed. Instead, the trial was conducted on the pleading that the individual respondents had contravened a State law, s 9 of the FT Act.

The Victorian legislation

19 Part 2 of the FT Act (ss 7-32) is headed "Unfair Practices" and s 9 states:

> "(1) A person must 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 Part is to be taken as limiting by implication the generality of sub-section (1)."

The term "engaging in conduct", which accommodates the phrase "engage in conduct"[9], is defined in s 3 so as to include refusing to do an act and refraining (other than inadvertently) from doing an act.

20 Section 159 appears in Pt 11 of the FT Act, which is headed "Enforcement and Remedies". Section 159(1) states:

> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention".

Section 82(1) renders liable in damages not only the person whose conduct contravened a provision of Pt IV or Pt V, but also "any person involved in the contravention".

7 (1985) 158 CLR 661.

8 *Yorke v Lucas* (1985) 158 CLR 661 at 666, 675-676.

9 *Interpretation of Legislation Act* 1984 (Vic) ("the Interpretation Act"), s 39.

> "A person who suffers loss, injury or damage because of a contravention of a provision of this Act may recover the amount of the loss or damage or damages in respect of the injury by proceeding against any person involved in the contravention."

21 The FT Act replaced the *Fair Trading Act* 1985 (Vic) ("the 1985 Act"), together with the *Consumer Affairs Act* 1972 (Vic) and the *Ministry of Consumer Affairs Act* 1973 (Vic). The new legislation was designed to continue the application to individuals and partnerships, by the 1985 Act, of prohibitions upon misleading or deceptive practices that were prohibitions cast in the same terms as those in the TP Act. The TP Act had rested principally on the corporations power. The 1985 Act had been modelled upon the TP Act, partly to take advantage of the body of case law which had developed in the preceding decade and partly to implement an agreement between State and Territory Ministers to use the federal statute "as the basis upon which uniform legislation is to be developed"[10].

22 Part V of the TP Act (ss 51AF-75AS) encompasses a range of provisions dealing not only with unfair practices but also with the implication of certain conditions and warranties in consumer transactions. Section 6 gives these provisions an operation in some circumstances which does not rely upon the corporations power. Section 75, with an exception respecting offence provisions (of which s 52 is not one[11]), stated a legislative intention that Pt V not "exclude or limit the concurrent operation of any law of a State or Territory". The validity of that provision, as respects the operation of State law and the operation of s 109 of the Constitution, was upheld in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*[12].

23 The similarities between the text of s 52 of the TP Act and s 9 of the FT Act, and between s 82(1) and s 159(1) will be readily apparent. However, several points should be noted. First, s 159 differs from s 82(1) by omitting any reference to the party whose conduct contravened the statute and referring only to

---

10 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 28 May 1985 at 20. See also *Zeus & Ra Pty Ltd v Nicolaou* (2003) 6 VR 606 at 625.

11 See s 79, which creates offences in respect of certain conduct in relation to contraventions of Pt VC of the TP Act (ss 75AZA-75AZU).

12 (1977) 137 CLR 545 at 561-565 per Mason J, with whom Barwick CJ, Gibbs and Stephen JJ agreed.

those involved in the contravention[13]. The legislative assumption appears to be that involvement in a contravention includes the actor whose conduct occasioned the contravention. Secondly, at the relevant time[14], the FT Act contained no counterpart to s 75B(1) of the TP Act, so that there was no statutory exegesis of the phrase "any person involved in the contravention" appearing in the damages provision in s 159(1). The reason for this lacuna in the FT Act (covering the period 1999-2003) was not explained.

24 Thirdly, the opening words of s 9(1) are "[a] person", whilst those of s 52(1) are "[a] corporation". However, when s 52(1) is read with the additional operation given it by s 6 of the TP Act, it is apparent that, in some circumstances, s 52(1) applies immediately to individuals. On the other hand, in accordance with ordinary principles of construction, and subject to any apparent contrary intention, a body corporate may answer the description of "a person" in s 9(1) of the FT Act[15]. It is not expressly limited to "natural persons".

25 What is disclosed by the foregoing is a measure of concurrent and overlapping operation of the normative structure of the federal and State laws dealing with misleading or deceptive conduct in trade or commerce and the remedies for such contraventions. (No party suggested that this presented any constitutional question.) This concurrent and overlapping operation of the two normative structures is reflected in the jurisdictional arrangements for the courts exercising federal jurisdiction in cases such as the present.

Accrued jurisdiction

26 In respect of the individuals, Mr Houghton and Mr Student, the Federal Court had accrued jurisdiction to determine the non-federal claim made against them under the FT Act. It was this claim which Ryan J dismissed, the Full Court allowed and is now before this Court.

---

13 The earlier Victorian statute, the 1985 Act, had, in s 37(1), followed closely the terms of the federal provision.

14 Before the insertion of a new s 145 by s 58 of the *Fair Trading (Amendment) Act* 2003 (Vic) ("the 2003 Amendment Act"). The 1985 Act had included in s 31 a provision following s 75B(1).

15 Interpretation Act, s 38; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 324.

27 The expression "accrued jurisdiction" appears in authorities including *Fencott v Muller*[16] and *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*[17]. In *Edensor*, the Court saw no harm in the continued use of the term "accrued jurisdiction" provided it be borne in mind that, whilst there might be several claims made in litigation, there was but one "matter", and that jurisdiction conferred with respect to that matter is not "discretionary" and ordinarily is to be exercised by the court concerned[18].

28 The appellants were joined by the Full Court in the order for damages made against WSA but, by following a distinct and different statutory path from that followed for WSA. In particular, the appellants emphasise that the State legislation lacked an accessorial provision but was applied to fix them with liability without proof of the mental element that would have been required for proof of their accessorial liability under the federal law.

The appellants' case

29 It may be observed that (a) while on the face of things WSA was amenable to claims against it of contravention both of s 52(1) of the TP Act and of s 9 of the FT Act, only the former was relied upon and damages were sought against it under s 82(1) of the TP Act; (b) while the extended operation of s 52(1) given by s 6 of the TP Act[19] in the present circumstances was not said to apply directly to Mr Houghton and Mr Student, they may have been amenable to the combined operation of ss 52, 75B and 82 of the TP Act had the claim of accessorial liability not been dropped; and (c) Mr Houghton and Mr Student were "persons" to whom s 9(1) of the FT Act apparently was addressed directly and who suffered the liability to damages imposed by s 159 of the FT Act. Mr Houghton and Mr Student, the present appellants, challenge proposition (c).

30 The grounds upon which the appellants put their case are related and fix upon their character as individuals who acted in the course of their employment by WSA. It is said that WSA, but neither of the appellants, could answer the

---

16 (1983) 152 CLR 570.

17 (2001) 204 CLR 559.

18 (2001) 204 CLR 559 at 585-586 [52], 638-639 [218].

19 For example, by including the conduct of individuals using postal, telegraphic or telephonic services (s 6(3)).

description "a person" in s 9(1) of the FT Act, and further that the individuals were not "for themselves" acting "in" trade or commerce as required by s 9(1), as distinct from acting in the trade or commerce of the company.

31 The second submission may be dealt with forthwith and rejected. The first submission will require more detailed consideration, but also should be rejected.

"In trade or commerce"

32 The text and structure of the comparable provisions of the two laws are not identical, but, as submitted by the respondent, it may be accepted that the construction of the phrase "in trade or commerce" as it appears in s 52 of the TP Act which was given by this Court in *Concrete Constructions (NSW) Pty Ltd v Nelson*[20], applies to s 9 of the FT Act[21].

33 In *Concrete Constructions*, Mason CJ, Deane, Dawson and Gaudron JJ construed the expression "in trade or commerce" as referring only to conduct with the character of an aspect or element of trading or commercial activities or transactions[22]. The representations to the effect that in order for Mr Arms effectively to operate the auscellardoor web site, he would not be required to obtain from the wineries any documentation other than a form with provision for banking details, undoubtedly were of this nature.

34 Moreover, in his judgment in *Concrete Constructions*, Toohey J emphasised that, while in most cases, the focus would be on the nature of the business of the party making the representation, s 52 was not so limited; in particular, the section did not, in terms, refer to the trade or commerce of any particular corporation[23]. Accordingly, statements made by a person not himself or herself engaged in trade or commerce may answer the statutory expression if,

---

20 (1990) 169 CLR 594.

21 See *Prestia v Aknar* (1996) 40 NSWLR 165 at 182; *Fasold v Roberts* (1997) 70 FCR 489 at 528.

22 (1990) 169 CLR 594 at 603-604.

23 (1990) 169 CLR 594 at 613.

for example, they are designed to encourage others to invest, or to continue investments, in a particular trading entity[24].

35 Mr Arms was engaging in trade and commerce under the name "Australian Cellar Door" and by means of the auscellardoor web site. He enlisted WSA to provide services and advice for the purposes of his business. It was the business of WSA to provide such advice and services. It is not to the point that Mr Houghton and Mr Student themselves were not business proprietors or that their activities were an aspect or element of the trade or commerce of WSA (and of Australian Cellar Door) but not of "their" trade or commerce. Mr Houghton and Mr Student nevertheless engaged in conduct in the course of trade or commerce and were thus within the ambit of the FT Act.

Did s 9 of the FT Act otherwise not apply to the appellants?

36 Reference has been made earlier in these reasons to the absence from the Victorian legislation between 1999 and 2003 of an equivalent of the accessorial provision of s 75B(1) of the TP Act. There was a further curiosity of the legislation in that period, as follows.

37 Section 84(2) of the TP Act was described by Lockhart J in *Walplan Pty Ltd v Wallace*[25] as both in form and substance a deeming and enlarging provision of general application to civil and criminal proceedings under the TP Act, designed to facilitate the proof of the responsibility of a corporation. However, the FT Act, before a new s 144 was substituted in 2003[26], had a provision of this nature applying only for prosecution purposes and not for the purposes generally of the FT Act.

38 Section 84(2) states:

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

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

---

24 See *Fasold v Roberts* (1997) 70 FCR 489 at 531.

25 (1985) 8 FCR 27 at 36, 38.

26 By s 56 of the 2003 Amendment Act. The 1985 Act had included in s 39(2) a provision following s 84(2).

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;

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

The validity of s 84(2) was upheld in *Fencott v Muller* by Gibbs CJ[27].

39 The upshot of the legislative history in Victoria is that, because the critical events occurred between 1999 and 2003, s 9 of the FT Act falls for application in a context in which there is no counterpart of s 75B(1) or s 84(2) of the TP Act.

40 The appellants are fixed with the findings by the primary judge respecting the conduct in which they engaged, being certain acts and omissions. As indicated earlier in these reasons, these were "in trade or commerce". Why then are the appellants not persons who contravened the prohibition imposed by s 9 of the FT Act? As a general proposition, and as Lord Rodger of Earlsferry stressed in *Standard Chartered Bank v Pakistan Shipping Corpn (Nos 2 and 4)*[28], in the world of tort the status of an individual as an employee does not divest that person of personal liability for wrongful acts committed while an employee. There is no good reason for treating the text of s 9 any differently and, in particular, for construing the section as if it read "[a] person, as principal, must not ...".

41 The main purposes of the FT Act include (s 1(a)) the promotion and encouragement of "fair trading practices". As Bell J pointed out in *Astvilla Pty Ltd v Director of Consumer Affairs*[29], and as relied upon by the present respondent, to read down the word "person" in s 9(1) to exclude employees would not promote that object.

---

27 (1983) 152 CLR 570 at 583; cf per Mason, Murphy, Brennan and Deane JJ at 600, Dawson J at 618-619.

28 [2003] 1 AC 959 at 973-974. See also at 968 per Lord Hoffmann.

29 [2006] VSC 289 at [148].

42 It is no answer that a provision such as s 75B(1) of the TP Act, had it been found in the FT Act, could have drawn in parties who were neither officers nor employees of a principal. Further, while s 84(2) assisted the case against WSA under the TP Act, the effect of s 75 and the decision in *General Motors Acceptance Corporation*[30], is that no field of liability thereby was covered to the exclusion of any operation of s 9 of the FT Act.

43 It is unnecessary to determine whether, in addition to the appellants, WSA might have been held liable in damages under s 159 of the FT Act as well as in respect of its liability under s 82 of the TP Act, and the procedural consequences of such an outcome[31].

44 Even in the absence in the FT Act of a facilitative provision to the effect of s 84(2) of the TP Act, it may be that, had it been shown that the appellants were "an embodiment" of WSA in the sense described by Lord Reid in *Tesco Supermarkets Ltd v Nattrass*[32], liability of WSA would have been direct. No question then would have arisen respecting the applicability of tortious notions of vicarious liability to contraventions of s 9 of the FT Act. But, as the respondent stressed, there were no such allegations, findings or evidence in this case to found any application of the reasoning in *Tesco*.

45 The appellants claimed support from what had been said in *Hamilton v Whitehead*[33] by Mason CJ, Wilson and Toohey JJ. The respondent was managing director of a company which was charged with offences against s 169 of the *Companies (Western Australia) Code*. The respondent was charged as being knowingly concerned in the commission of those offences. The charges against the respondent were brought under a section imposing accessorial liability. A submission by the respondent that a person who subsumes his personality in a company cannot be guilty both as a principal offender in his corporate persona and as an accessory was rejected. The respondent was "the mind of the company" so that it was liable as principal; but that did not gainsay

---

30 (1977) 137 CLR 545.

31 See as to "double satisfaction", *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 659-661 [57]-[63].

32 [1972] AC 153 at 170; see also as to this "organic theory", *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27; *Hamilton v Whitehead* (1988) 166 CLR 121 at 127.

33 (1988) 166 CLR 121.

his liability as an accessory under the particular section providing for accessorial liability.

46 So far as the reasoning in *Hamilton* has any bearing upon the construction of s 9 of the FT Act, it assists the respondent not the appellants. Their Honours stressed[34], with reference to remarks of Bray CJ in *R v Goodall*[35], that recognition of the distinct legal identity of a corporation had the consequence that in law the act of an individual might be both a corporate act and the separate act of the actor as an individual.

47 In the present case, whether or not the acts of the appellants were also the acts in law of WSA (a matter discussed above), they were the conduct of persons which contravened the prohibition in s 9 of the FT Act.

Conclusions and orders

48 The attack on the outcome in the Full Court fails. The appeal should be dismissed and the appellants pay the costs of the respondent.

---

34 (1988) 166 CLR 121 at 128.

35 (1975) 11 SASR 94 at 100-101.