HIGH COURT OF AUSTRALIA

FRENCH CJ
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

DOUGLAS RONALD CAMPBELL AND ANOR APPELLANTS

AND

BACKOFFICE INVESTMENTS PTY LTD
AND ANOR RESPONDENTS

Campbell v Backoffice Investments Pty Ltd
[2009] HCA 25
29 July 2009
S435/2008

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 3 and 4 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 19 May 2008.*

3. *Respondents' application of 4 February 2009 for leave to further amend notice of contention refused.*

4. *Special leave to cross-appeal refused.*

5. *Remit the matter to the Court of Appeal of the Supreme Court of New South Wales for further hearing and determination in accordance with the reasons of this Court.*

6. *Appellants to file and serve written submissions as to costs within 14 days of the date of this order. Respondents to file and serve written submissions in reply within 7 days of the service of the Appellants' submissions.*

On appeal from the Supreme Court of New South Wales

Representation

A J L Bannon SC with J T G Gibson for the appellants (instructed by Rodd Peters Commercial, Media and European Lawyers)

J T Gleeson SC with T L Wong for the respondents (instructed by Watson Mangioni Solicitors)

CATCHWORDS

Campbell v Backoffice Investments Pty Ltd

Trade Practices – Misleading or deceptive conduct – Where vendor of share in company provided documents prior to making of share sale agreement that did not accurately state company's past financial performance, failed to correct some estimates of company's expected performance when vendor knew or ought reasonably to have known, prior to making of agreement, that estimated performance not achieved, and incorporated some statements of financial performance in share sale agreement with various warranties as to their accuracy – Whether conduct misleading or deceptive – Whether representations pleaded actually made – Relevance of whole course of conduct between parties – Relevance of character of some statements as estimates.

Trade Practices – Misleading or deceptive conduct – Whether purchaser suffered loss or damage "by conduct of" vendor – Causation and reliance – General principles – Relevance of contractual warranty by purchaser that purchaser had not relied on warranties other than those given in agreement.

Corporations – Oppression – Where *Corporations Act* 2001 (Cth), s 233(1) empowered court, if one or more grounds set out in s 232 satisfied, to make any order it considered appropriate in relation to company, including order for purchase of any shares by any member – Where grounds in s 232 included circumstance that conduct of company's affairs "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity of in any other capacity" – Whether vendor's conduct "oppressive to, unfairly prejudicial to, or unfairly discriminatory against", purchaser – Relevance of circumstance that conduct not continuing at time order made – Whether order for repurchase of share in company could or should be made in circumstances where, at time of making order, provisional liquidator had sold business and assets of company, proceeds had been disbursed and shares in company were worthless.

Contracts – Breach of warranties – Whether vendor breached warranties in share sale agreement.

Contracts – Implied terms – Implied duty to co-operate – Scope of duty contended for.

Words and phrases – "by conduct of another person", "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member".

Fair Trading Act 1987 (NSW), ss 42, 68.
Corporations Act 2001 (Cth), Pt 2F.1.

FRENCH CJ.

Introduction

1 On 24 January 2005, Backoffice Investments Pty Ltd ("Backoffice"), a company controlled by Timothy Weeks, entered into a share sale agreement ("SSA") with Douglas Campbell and his companies, Healthy Water (NSW) Pty Ltd ("Healthy Water") and Sentinel Construction Managers Pty Ltd ("Sentinel"), to purchase, for $850,000, one of the two issued shares in Healthy Water. Under agreements between the three companies (together referred to as the "service agreements"), the two men were to work as joint managing directors of Healthy Water. By April 2005, they had fallen out. Backoffice and Mr Weeks sued Mr Campbell and Sentinel in the Supreme Court of New South Wales. They alleged oppression. They sought an order that Mr Campbell buy back the share[1]. They also claimed damages for breach of contractual warranty, breach of an implied duty to cooperate, and for misleading or deceptive conduct based, inter alia, on pre-contractual representations[2]. The facts giving rise to the claims and details of the relevant contractual documents are set out in the joint judgment[3].

2 The primary judge found for Backoffice and Mr Weeks on the oppression claim and ordered that Mr Campbell repurchase the share in Healthy Water for $853,000[4]. Healthy Water by this time was an empty shell, its assets having been disposed of by a provisional liquidator appointed by the parties. Her Honour held that the claim for misleading or deceptive conduct failed, as Backoffice and Mr Weeks did not establish that they had relied upon the alleged misrepresentations[5]. She also held that Mr Campbell had breached contractual warranties[6] and an implied contractual duty to cooperate, but held it inappropriate to award any damages given the buy-back order[7].

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1 Pursuant to the *Corporations Act* 2001 (Cth), ss 232 and 233. Hereinafter referred to as a "buy-back order".

2 In contravention of s 42 of the *Fair Trading Act* 1987 (NSW).

3 Reasons of Gummow, Hayne, Heydon and Kiefel JJ at [76]-[87] and [103]-[130].

4 *Backoffice Investments Pty Ltd v Campbell* (2007) 61 ACSR 144.

5 (2007) 61 ACSR 144 at 235 [271].

6 (2007) 61 ACSR 144 at 215 [219].

7 (2007) 61 ACSR 144 at 192 [147], 215 [220] and 218 [231].

3 The Court of Appeal of the Supreme Court of New South Wales set aside the buy-back order but found Mr Campbell liable for misleading or deceptive conduct and awarded $850,000 damages[8]. Having been granted special leave[9], Mr Campbell and Sentinel then appealed to this Court.

4 For the reasons that follow, the appeal should be allowed. Special leave to cross-appeal should be refused. Unresolved aspects of the claims for misleading or deceptive conduct and for breach of warranty should be remitted to the Court of Appeal of the Supreme Court of New South Wales for determination. I agree with the orders proposed in the joint judgment[10].

The pleading of the misleading or deceptive conduct case

5 Factual bases for the causes of action in misleading and deceptive conduct were set out in a commercial list statement incorporated in the further amended summons in the original proceedings in the Supreme Court of New South Wales.

6 In relation to a document produced to Mr Weeks pre-contractually and referred to as the "add-backs document", it was alleged:

> "44. On or before 11 December 2004, Campbell, by his agent Horn, provided to Backoffice:
>
> (a) a document entitled 'Healthy Water Operating Results: Non-recurring expenses' for the period July to November 2004 (the '**2004 Add-Backs**');
>
> (b) a document entitled 'Healthy Water Operating Results' that stated the operating results, inter alia, for the 5 months to 30 November 2004 (the '**30 November 2004 Results**').
>
> 45. By providing Backoffice with the 2004 Add-Backs and the 30 November 2004 Results, Campbell represented to Backoffice that:
>
> (a) the Company incurred non-recurring expenses of $96,100.00 for the five months ending 30 November 2004 (the '**Add-Backs Representation**');

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8 *Campbell v Backoffice Investments Pty Ltd* (2008) 66 ACSR 359 at 453-454 [599] per Giles JA, Basten JA and Young CJ in Eq.

9 [2008] HCATrans 310.

10 Reasons of Gummow, Hayne, Heydon and Kiefel JJ at [184]-[185]**.**

(b) the Company had an EBIT (after adjustment for the Add-backs) for the 5 months to 30 November 2004 of $163,590 (the '**EBIT Representation**')."

The representations were said to have been false, misleading and deceptive or likely to mislead and deceive, in contravention of s 42 of the *Fair Trading Act* 1987 (NSW), on the basis that the 2004 add-backs overstated the amount of non-recurring expenses of the company.

7 It was further pleaded that on or before 11 December 2004 Mr Campbell, by his agent Mr Horn, provided a document entitled "Healthy Water Operating Results: Sales Revenue" (the "sales revenue report") to Backoffice[11]. The sales revenue report was said to have contained estimates that[12]:

"(a) the Company's sales revenue for December 2004 would be $100,000;

(b) the Company's EBIT for December 2004 would be $37,500;

(c) the Company's sales revenue for the financial year ended 30 June 2005 would be $1,289,582."

8 By providing the sales revenue report to Backoffice, Mr Campbell was said to have represented "the December 2004 Estimates" to Backoffice. Those representations were designated as the "Express Representations"[13]. "Implied Representations", arising out of the circumstances in which the sales revenue report was provided to Backoffice, were also set out[14]. They were:

"(a) the December 2004 Estimates were a reliable prediction of the sales revenue and profit that would be achieved by the Company;

(b) the December 2004 Estimates were suitable to be used for the purpose of estimating the value of the Company;

(c) there was no information known to Campbell which was material to the accuracy of the December 2004 Estimates, and which tended

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11 Commercial List Statement [51].

12 Commercial List Statement [52].

13 Commercial List Statement [53].

14 Commercial List Statement [54].

to show or showed that the December 2004 Estimates were false, misleading or deceptive;

(d) the December 2004 Estimates represented Campbell's belief as to the likely sales revenue and EBIT that would be achieved by the Company and that there was a reasonable basis for such belief."

The Express and Implied Representations were said to have been continuing from on or about 11 December 2004 to 24 January 2005[15]. The December 2004 Estimates allegedly overstated the company's sales revenue by $7,147 and its EBIT by approximately $25,000.

9 Backoffice and Mr Weeks pleaded that by making the Express and Implied Representations, Mr Campbell engaged in conduct in trade or commerce which was misleading and deceptive in contravention of s 42 of the *Fair Trading Act* for the following reasons, as particularised[16]:

"The December 2004 Estimates were representations as to future matters within the meaning of section 41 of the Fair Trading Act 1987. Contrary to the estimates:

(i) the actual sales revenue of the Company for December 2004 was $92,853 rather than $100,000; and

(ii) the EBIT of the Company for December 2004 was $12,438 rather than $37,500.

These matters were or ought reasonably to have been known to Campbell prior to 24 January 2004[17]. The December 2004 Estimates were never revised by Campbell. Nor did he advise that the estimates would, might not be achieved or had not been achieved."

10 Backoffice and Mr Weeks relied upon the inclusion of Schedule 3 to the SSA as an element of misleading or deceptive conduct by Mr Campbell. They pleaded that:

"38. On or about 24 January 2005, Campbell represented to Backoffice the contents of Schedule 3 of the Share Sale Agreement."

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15 Commercial List Statement [55].

16 Commercial List Statement [57].

17 This should have been a reference to 24 January 2005.

They alleged that by reason of Schedule 3 Deficiencies (a defined term[18]), Mr Campbell's conduct in providing Schedule 3 to Backoffice and/or failing to correct or qualify it was misleading or deceptive and constituted a contravention of s 42 of the *Fair Trading Act*[19]. The pleaded Deficiencies were[20]:

> "Schedule 3 to the Share Sale Agreement:
>
> (a) in making the Add-Backs, overstated the non-recurring expenses of the Company for the five months ended 30 November 2004:
>
> (i) including Obsolete Inventories ($2,600);
>
> (ii) including General Expense Allowance ($4,167);
>
> (iii) including Business Expense Allowance ($25,000);
>
> (iv) including Credit Card Re-imbursement ($27,083) a significant proportion of which related to business expenses of the Company;
>
> (b) failed to disclose that the miscellaneous income of $14,500 related to the sale/trade of a Daewoo and a Toyota motor vehicle (the '**Non-Recurring Income**') and, as such, did not represent income reflective of the true operating performance of the Company and/or failed to deduct such income to derive the net profit or adjusted operating profit;
>
> (c) overstated the adjusted operating profit of the Company for the five months ended 30 November 2004 by:
>
> (i) the inclusion within the calculation of the Add-Backs of the matters referred to in (a);
>
> (ii) the inclusion within the calculation of the adjusted operating profit of the income referred to in (b) (the '**Profit Overstatement**');
>
> (d) understated the amounts owing to trade creditors of the Company as at 30 November 2004 by $12,360;

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18 The Schedule 3 Deficiencies were defined in [35], read with [34].

19 Commercial List Statement [39].

20 Commercial List Statement [35].

(e) stated that the liability identified on the Balance Sheet as 'Doug Campbell loan to HW' had a balance of negative $74,507.24 instead of positive $3,760; and

(f) overstated the adjusted net assets of the Company as at 30 November 2004 (being the net assets less accrued employee entitlements) by:

(i) the inclusion within the calculation of the understatement of the trade creditors referred to in (d) above;

(ii) the inclusion within the calculation of the incorrect amount for the liability identified in the Balance Sheet as 'Doug Campbell loan to HW' referred to in (e) above (the '**Assets Overstatement**');

all of which failures will be referred to in this Summons as the '**Schedule 3 Deficiencies**'."

Backoffice alleged that it relied upon Schedule 3 and was induced by it to enter into the SSA, the shareholders agreement and the service agreements, and to pay $850,000 to Mr Campbell in consideration for the transfer of one of his shares in Healthy Water to Backoffice[21]. It was further pleaded that, but for this misleading or deceptive conduct, Backoffice would not have entered into the SSA, the shareholders agreement or the service agreements, nor paid the sum of $850,000.

The Court of Appeal's reasoning on the misleading or deceptive conduct claims

11 It is useful to set out the steps in the reasoning of the majority in the Court of Appeal on the misleading or deceptive conduct claims. The reasons of Giles JA in this respect can be summarised as follows:

1. The statutory test of causation in s 68 of the *Fair Trading Act* is embodied in the word "by". The essential question is one of causation which is "ultimately a matter of common sense"[22].

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21 Commercial List Statement [40]. The pleaded representations dependent on Schedule 3 to the SSA will be referred to as the "Schedule 3 Representations".

22 (2008) 66 ACSR 359 at 369 [37] and [39], referring to *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 515; [1991] HCA 12; and *Fitzgerald v Penn* (1954) 91 CLR 268 at 277-278; [1954] HCA 74.

2. Mr Weeks' concern about the estimates did not mean they played no part in his decision to purchase the share. They were part of the process of arriving at a view as to profitability and an EBIT figure[23].

3. The primary judge was incorrect in so far as she found that Mr Weeks' reliance upon the add-backs, EBIT or December 2004 estimate representations was inconsistent with his reliance upon the warranties[24].

4. The protection provided by the performance bonus payable to Sentinel if performance exceeded forecast profitability did not negative reliance and left the representations causally operative[25].

5. The representations were made and remained causally operative at settlement. Backoffice was paying for a share in the company, not for a cause of action for breach of warranty. Other than at a pleading level, the characterisation of the add-backs and the EBIT figure as estimates did not negate either their misleading or deceptive nature, or Mr Weeks' reliance on them[26].

6. On the primary judge's findings, the figures provided to Mr Weeks were incorrect in relation to obsolete inventories and credit card reimbursement, but not as to the general expense or business expense allowances. There was misleading or deceptive conduct. The obsolete inventories figure was not a non-recurring expense and the figure for credit card reimbursement was excessive well beyond an allowance for estimation[27].

7. To the primary judge's findings should be added a finding that the figures provided were incorrect in relation to the general expense allowance of $10,000. The total misrepresentation was of the order of $52,000 for the five month period, or $37,500 if account be taken of $14,500 arising out of the sale of a motor vehicle[28].

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23 (2008) 66 ACSR 359 at 371 [45].

24 (2008) 66 ACSR 359 at 371 [45].

25 (2008) 66 ACSR 359 at 371 [46].

26 (2008) 66 ACSR 359 at 372 [51].

27 (2008) 66 ACSR 359 at 375 [62].

28 (2008) 66 ACSR 359 at 376 [68].

8. The EBIT representation was misleading in the same manner as the add-backs representation[29].

9. The December 2004 representations continued when left uncorrected by Mr Campbell, although he knew that the actual revenue result was less than the estimate. There was misleading or deceptive conduct in this respect[30].

10. Mr Weeks was not cross-examined on his assertions that, had he known of the true position, Backoffice would not have purchased its share in Healthy Water. Nor was any critique of that evidence presented to the Court of Appeal[31].

11. Backoffice would not have purchased the share in Healthy Water if Mr Weeks had known the true position[32].

12. Therefore, if loss or damage was suffered by Backoffice by reason of its purchase of the share, then it was suffered by conduct of Mr Campbell in contravention of s 42 of the *Fair Trading Act*[33].

13. As to the Schedule 3 representation, the repetition in Schedule 3 of the add-back and EBIT representations did not detract from the effect of the misleading or deceptive conduct. It confirmed the material upon which Mr Weeks was already relying. The repetition of the Schedule 3 representation was not necessary to establish a contravention of s 42 of the *Fair Trading Act,* even if it equally gave rise to contravening conduct. It did not add to Backoffice's position in the cross-appeal[34].

14. Further misleading or deceptive conduct because of other matters said to be breaches of warranties in the SSA, namely the remainder of the Schedule 3 Deficiencies, would not add to Backoffice's position in the cross-appeal[35].

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29 (2008) 66 ACSR 359 at 376 [69].

30 (2008) 66 ACSR 359 at 376 [72].

31 (2008) 66 ACSR 359 at 377 [75].

32 (2008) 66 ACSR 359 at 377 [76].

33 (2008) 66 ACSR 359 at 377 [76].

34 (2008) 66 ACSR 359 at 380 [88].

35 (2008) 66 ACSR 359 at 380 [89].

15. No order should be made under s 72 of the *Fair Trading Act* avoiding the contracts and returning the consideration paid[36].

16. The measure of damages under s 68 of the *Fair Trading Act* is not confined to the tortious measure[37].

17. As a matter of causation rather than fault, the breakdown in relationship between Messrs Campbell and Weeks, and the consequences of that breakdown on the value of Backoffice's share, had such a connection with the misleading or deceptive conduct that the resulting loss or damage extended to them. Backoffice's loss or damage was the $850,000 it had paid for the share[38].

12 Basten JA agreed with the reasons of Giles JA on the misleading or deceptive conduct claims[39]. He also concluded that if he were wrong in upholding the primary judge's order for repurchase of the share, he would adopt the approach of Giles JA with respect to damages for breach of s 42 of the *Fair Trading Act*, and give judgment for Backoffice for $850,000[40].

13 Young CJ in Eq, in dealing with the cause of action in misleading or deceptive conduct, focussed on the question of reliance. He dealt with that question on the hypothesis that the pleaded representations were made and that they were false and misleading[41]. He referred to cl 7.4(b) of the SSA and a submission that Mr Weeks had carried out extensive due diligence with the assistance of his accountant[42]. His Honour noted also that Mr Weeks had the assistance of a solicitor, Mr McClure, from whom he sought advice in relation to the agreements[43]. He pointed to the findings of the primary judge that Mr Weeks was a sophisticated businessman with the capacity to review financial records

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36 (2008) 66 ACSR 359 at 384 [109].

37 (2008) 66 ACSR 359 at 393-394 [151]-[153].

38 (2008) 66 ACSR 359 at 394 [156]-[157].

39 (2008) 66 ACSR 359 at 408 [223].

40 (2008) 66 ACSR 359 at 408 [222].

41 (2008) 66 ACSR 359 at 443-444 [491]-[492].

42 (2008) 66 ACSR 359 at 444 [494].

43 (2008) 66 ACSR 359 at 444 [495].

and make judgments about the prospects of a business using his commercial commonsense to his own advantage, which is what he did in making his offer to purchase the share in Healthy Water[44]. He referred to her Honour's satisfaction that the evidence established that Mr Weeks did not rely upon the estimated sales figure in the sales revenue report and that this was reflected by the protection built into cl 6.2 of the Sentinel service agreement providing for a performance bonus based on the company's profitability of up to $300,000. His Honour could not discern any error in the primary judge's approach and found that she was entitled to reach the conclusion she did on the matter of reliance which he characterised as an issue of fact[45]. It followed that no factual matter could affect the result[46].

The appeal to this Court

14 The appeal by Mr Campbell and Sentinel challenges the finding by the Court of Appeal of liability for misleading or deceptive conduct. It does so on the basis that Mr Weeks and Backoffice were legally advised and had the benefit of contractual warranties. There was no misleading or deceptive conduct and, in any event, there was no reliance. A challenge is also raised to the measure of damages found by the Court of Appeal on the basis that damages were allowed unrelated to the subject matter of the alleged misrepresentations. Further, the Court of Appeal made a simple error of calculation of the extent of the alleged misrepresentations, with the consequence that its reasoning did not, on its face, support a conclusion of causative reliance on either representation.

15 By summons filed on 17 October 2008, Backoffice and Mr Weeks sought orders that the time for filing a notice of cross-appeal and notice of contention be extended and that they be granted leave to file such notices. Draft notices were filed with the summons. Proposed amended notices of cross-appeal and contention were filed with their written submissions.

The notice of contention

16 In their proposed notice of contention filed on 4 February 2009, Mr Weeks and Backoffice said that the decision of the Court of Appeal should be affirmed "but on the ground that the Court below erroneously decided or failed to decide some matter of fact or law".

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44 (2008) 66 ACSR 359 at 444 [496].

45 (2008) 66 ACSR 359 at 444 [499].

46 (2008) 66 ACSR 359 at 444 [500].

17 Their first ground was that the Court of Appeal erred in failing to find misleading or deceptive conduct in relation to misrepresentations in the Schedule 3 balance sheet as to trade creditors, the loan liability to Mr Campbell and the adjusted net assets of the company. They asserted that the Court of Appeal erred in failing to assess damages for the Schedule 3 representations in the amount of $850,000 or an amount to be assessed by the Court.

18 On the second day of the hearing of the appeal counsel for Backoffice and Mr Weeks sought leave to amend the notice by including in it an additional ground in the following terms:

> "2. Their Honours erred in failing to find that Campbell engaged in misleading and deceptive conduct in contravention of s 42 of the *Fair Trading Act 1987* (NSW) by representing to Backoffice that, to the best of Campbell's knowledge, all information given by or on behalf of the Company or its advisers to Backoffice material to the sale of the Shares and the Assets was substantially accurate and complete and not misleading (the "**Clause 10.1 Warranty representation**"), in circumstances where it was known to Campbell from 11 January 2005 that sales revenue and adjusted EBIT for December 2004 in the Sales Revenue Report were overstated."

For the reasons given in the joint judgment[47], I agree that leave to amend the notice of contention in this way should be refused.

19 Mr Weeks and Backoffice also asserted error in the failure of the Court of Appeal to find a breach of the warranties in cl 3.1(a) of Schedule 1 to the SSA arising out of the understatement of trade creditors and the misdescription of Mr Campbell's loan position. The Court should also have found a breach of the warranties given in cll 10.1 and 10.2 arising out of the understatement of trade creditors, and a breach of the warranty in cl 10.2 arising out of the overstatement of the adjusted net assets. It was said to have erred in failing to assess damages in the amount of $440,000 for breach of these warranties.

20 The notice of contention also complained that the Court of Appeal erred in failing to hold that Mr Campbell breached an implied duty to cooperate under the shareholders agreement and the SSA. It was contended that their Honours should have awarded damages for that breach in the amount of $410,000.

21 The proposed notice of contention asserted an entitlement to contractual remedies which differed in character from the statutory relief ordered by the

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47 Reasons of Gummow, Hayne, Heydon and Kiefel JJ at [152].

Court of Appeal by way of damages for misleading or deceptive conduct. Rule 42.08.5 of the High Court Rules 2004 provides:

> "Where a respondent does not seek a discharge or variation of a part of the judgment actually pronounced or made, but contends that the judgment ought to be upheld on the ground that the court below has erroneously decided, or has failed to decide, some matter of fact or law, it is not necessary to give a notice of cross-appeal, but that respondent shall file and serve, within the time limited by rule 42.08.1, a notice of that contention in Form 27."

To the extent that it asserted an entitlement to contractual remedies, the notice of contention did not comply with the requirements of the Rules. By that assertion Backoffice and Mr Weeks did not seek to uphold the judgment of the Court of Appeal, but rather sought alternative relief. In the event the claims for relief for breach of warranty and implied duty to cooperate under the shareholders agreement were properly raised in the cross-appeal.

The grounds of cross-appeal

22 Subject to the grant of special leave and an extension of time, Mr Weeks and Backoffice also filed a cross-appeal, the grounds of which were, in substance, that the Court of Appeal erred in:

1. setting aside the buy-back order made by the primary judge;

2. failing to find breaches of the warranties contained in the SSA; and

3. failing to hold that Mr Campbell had breached his implied duty to cooperate under the shareholders agreement and the SSA.

In respect of the breaches of warranty and the implied duty to cooperate, it was asserted that the Court ought to have assessed damages in the amount of $440,000.

Statutory framework – misleading or deceptive conduct

23 The cause of action for misleading or deceptive conduct invoked by Mr Weeks and Backoffice is created by ss 42 and 68 of the *Fair Trading Act* read together. They correspond with ss 52 and 82 of the *Trade Practices Act* 1974 (Cth). In the relevant parts they provide:

> "42(1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> …

> 68(1) A person who suffers loss or damage by conduct of another person that is in contravention of a provision of Part 3, 4, 5 (section 43 excepted), 5A, 5B, 5C, 5D, 5E or 5F may recover the amount of the loss or damage by action against the other person or against any person involved in the contravention."

Section 72 of the *Fair Trading Act*, which corresponds with s 87 of the *Trade Practices Act* provides for a range of other remedies in relation to contraventions or apprehended contraventions.

The characterisation of conduct as misleading or deceptive

24 The question whether conduct is misleading or deceptive or likely to mislead or deceive within the meaning of s 42 of the *Fair Trading Act* is logically anterior to the question whether a person has suffered loss or damage thereby for the purposes of s 68. The distinction between characterisation of the conduct and determination of the causation of the claimed loss said to result from it must be maintained. In so saying, it is necessary to acknowledge that there may be practical overlaps in the resolution of these logically distinct questions. The characterisation of conduct may involve assessment of its notional effects, judged by reference to its context. The same contextual factors may play a role in determining causation.

25 Characterisation is a task that generally requires consideration of whether the impugned conduct viewed as a whole has a tendency to lead a person into error[48]. It may be undertaken by reference to the public or a relevant section of the public. In cases of misleading or deceptive conduct analogous to passing off and involving reputational issues, the relevant section of the public may be defined, according to the nature of the conduct, by geographical distribution, age or some other common attribute or interest. On the other hand, characterisation may be undertaken in the context of commercial negotiations between individuals. In either case it involves consideration of a notional cause and effect relationship between the conduct and the state of mind of the relevant person or class of persons. The test is necessarily objective[49].

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48 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198-199 per Gibbs CJ; [1982] HCA 44, and see Lockhart, *The Law of Misleading or Deceptive Conduct*, 2nd ed (2003) at 60-61 [3.2]-[3.3] and authorities cited therein.

49 Consistently with the words "likely to mislead or deceive" which indicate that it is unnecessary to show that any person was actually misled or deceived – *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198.

26 This Court has drawn a practical distinction between the approach to characterisation of conduct as misleading or deceptive when the public is involved, on the one hand, and where the conduct occurs in dealings between individuals on the other. In the former case, the sufficiency of the connection between the conduct and the misleading or deception of prospective purchasers[50]:

> "is to be approached at a level of abstraction not present where the case is one involving an express untrue representation allegedly made only to identified individuals".

Where the conduct is directed to members of a class in a general sense, then the characterisation enquiry is to be made with respect to a hypothetical individual "isolate[d] by some criterion" as a "representative member of that class"[51]. In the case of an individual it is not necessary that he or she be reconstructed into a hypothetical, "ordinary" person. Characterisation may proceed by reference to the circumstances and context of the questioned conduct. The state of knowledge of the person to whom the conduct is directed may be relevant, at least in so far as it relates to the content and circumstances of the conduct.

27 In *Butcher v Lachlan Elder Realty Pty Ltd*[52] the approach to characterisation of conduct directed to identified individuals was set out in the joint judgment of the majority as follows[53]:

> "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 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."

Although this passage begins by referring to the need to establish a causal link between the impugned conduct and the claimed loss, it is clear that thereafter their Honours were addressing the task of characterisation.

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50 *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 85 [101]; [2000] HCA 12.

51 (2000) 202 CLR 45 at 85 [103].

52 (2004) 218 CLR 592; [2004] HCA 60.

53 (2004) 218 CLR 592 at 604-605 [37] per Gleeson CJ, Hayne and Heydon JJ.

28 Determination of the causation of loss or damage may require account to be taken of subjective factors relating to a particular person's reaction to conduct found to be misleading or deceptive or likely to mislead or deceive. A misstatement of fact may be misleading or deceptive in the sense that it would have a tendency to lead anyone into error. However, it may be disbelieved by its addressee. In that event the misstatement would not ordinarily be causative of any loss or damage flowing from the subsequent conduct of the addressee.

29 A person accused of engaging in misleading or deceptive conduct may claim that its effects were negated by a contemporaneous disclaimer by that person, or a subsequent disclaimer of reliance by the person allegedly affected by the conduct. The contemporaneous disclaimer by the person engaging in the impugned conduct is likely to go to the characterisation of the conduct. A subsequent declaration of non-reliance by a person said to have been affected by the conduct is more likely to be relevant to the question of causation[54].

30 The first situation was discussed in *Yorke v Lucas*[55]. Speaking of an example in which a corporation merely passes on false information provided by another, Mason ACJ, Wilson, Deane and Dawson JJ said[56]:

> "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."

Commenting on this passage, the majority in *Butcher v Lachlan Elder Realty Pty Ltd* said[57]:

> "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."

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54 See the discussion in Heydon, *Trade Practices Law*, (2008) vol 2 at [11.720]-[11.730].

55 (1985) 158 CLR 661; [1985] HCA 65.

56 (1985) 158 CLR 661 at 666.

57 (2004) 218 CLR 592 at 605 [39].

31 Where the impugned conduct comprises allegedly misleading pre-contractual representations, a contractual disclaimer of reliance will ordinarily be considered in relation to the question of causation. For if a person expressly declares in a contractual document that he or she did not rely upon pre-contractual representations, that declaration may, according to the circumstances, be evidence of non-reliance and of the want of a causal link between the impugned conduct and the loss or damage flowing from entry into the contract[58]. In many cases, such a provision will not be taken to evidence a break in the causal link between misleading or deceptive conduct and loss[59]. The person making the declaration may nevertheless be found to have been actuated by the misrepresentations into entering the contract. The question is not one of law, but of fact.

32 It is important in considering whether conduct is misleading or deceptive to identify clearly the conduct to be characterised[60]. If the conduct is said to consist of a statement made orally or in writing, the first question to be asked is what kind of statement was made. Was it a statement of historic or present fact made on the basis that its truth was known to its maker? Was it a statement of opinion? That is to say was it a statement of "judgment or belief of something as probable, though not certain or established"[61]? The term "estimate" itself, used as a verb, means the "act of valuing or appraising" or an "approximate judgement of the number, quantity, position, etc, of something"[62].

33 A statement of opinion may be a statement with respect to a future matter[63]. It may take the form of a prediction. A forward estimate relating to the financial results of a business is a class of prediction. In strict logic there may be some category overlap between opinions and statements of fact. Opinions may carry with them one or more implied representations according to the

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58 Heydon, *Trade Practices Law*, (2008) vol 2 at [11.720].

59 This is not to say that "reliance" is the only mechanism by which causation may be established in relation to loss said to have flowed from misleading and deceptive conduct.

60 The definition of "conduct" appears in s 4(4) of the *Fair Trading Act*.

61 Brown (ed), *The New Oxford English Dictionary*, (1993) vol 2 at 2007.

62 Brown (ed), *The New Oxford English Dictionary*, (1993) vol 1 at 854 and see references to the meaning of "estimate" in *J J Savage & Sons Pty Ltd v Blakney* (1970) 119 CLR 435 at 441-442; [1970] HCA 6.

63 It is not necessary here to consider the effect of s 41 of the *Fair Trading Act* and the corresponding provision in s 51A of the *Trade Practices Act*.

circumstances of the case. There will ordinarily be an implied representation that the person offering the opinion actually holds it. Other implied representations may be that the opinion is based upon reasonable grounds, which may include the representation that it was formed on the basis of reasonable enquiries. In the case of a person professing expertise or particular skill or experience the opinion may carry the implied representation that it is based upon his or her expertise, skill or experience.

Contractual statements as misleading or deceptive conduct

34 As appears from the notice of contention, a head of misleading or deceptive conduct asserted but not decided by the primary judge or the Court of Appeal was the alleged representation by Mr Campbell to Backoffice of the contents of Schedule 3 to the SSA. This raises the question whether statements contained in a contractual document, including those the subject of a warranty, can constitute misleading or deceptive conduct.

35 The term "conduct which is misleading or deceptive or likely to mislead or deceive" is apt to cover a large variety of possible circumstances in which the conduct of one has a tendency to lead another into error. There is no reason in principle why the fact that a false statement is contained in a contractual document thereby takes the use of that statement in the document out of the scope of "misleading or deceptive conduct". Whether the proffering of a contractual document containing a false statement amounts to a misrepresentation or to misleading or deceptive conduct, is a matter of fact to be determined by reference to all the circumstances. The circumstance that such a representation is the subject of a contractual warranty does not, as a matter of law, exclude the making of it from the purview of the statutory prohibition. This is consistent with the observation by Lockhart and Gummow JJ in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd*[64]:

> "the making of a statement as to a presently existing state of affairs, if false, may be the engaging in misleading or deceptive conduct, where the statement is embodied as a provision of a contract."

36 The question whether the giving of a warranty about the accuracy of a statement of present fact or a forecast of performance is misleading or deceptive raises slightly different considerations. The giving of a warranty embodying a false statement of present fact may be characterised as misleading or deceptive conduct simply because it involves the making of that false statement. A warranty as to a forecast of performance may fall within the category of, or involve the making of, a statement as to a future matter. Such a statement can be

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64 (1993) 42 FCR 470 at 505.

characterised as misleading or deceptive or likely to mislead or deceive according to whether there were reasonable grounds for making it or whether any other implied representations which it conveyed were true.

The alleged misleading or deceptive conduct

37 The conduct said to be misleading or deceptive or likely to mislead or deceive in this case was the making of representations flowing from:

(1) the provision by Mr Campbell to Backoffice of the 2004 add-backs and the 30 November 2004 results;

(2) the provision of the sales revenue report for December 2004; and

(3) the inclusion of Schedule 3 in the SSA.

The add-backs and November 2004 results representations

38 These representations, as pleaded, were in the nature of statements of opinion. Central to them was the characterisation of the expenses set out in the add-backs document as "non-recurring". That was a statement of opinion as to whether such expenses would necessarily have to be incurred in the ordinary running of the business in the future.

39 The nature of the representations as a matter of opinion was reinforced by the primary judge's reliance upon expert accounting evidence in reaching her characterisation of the add-backs as recurring or otherwise[65]. Her primary findings in respect of the add-backs were made in the context of a consideration of the breach of warranty claim arising out of their incorporation by reference into the warranted profit and loss statement in Schedule 3[66]. In the context of the claim for misleading or deceptive conduct the primary judge said of the add-backs statement that the evidence clearly established that at the time of the delivery of the document and subsequently, Mr Weeks was advised by Mr Horn that its contents were Mr Campbell's estimates. Her Honour then said[67]:

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65 (2007) 61 ACSR 144 at 208 [197] referring to evidence from expert witnesses Gower and Russell re obsolete inventories; at 210 [201]-[202] re general expenses; at 211-212 [207]-[208] re business expenses allowance; and at 212 [210] re credit card reimbursements.

66 (2007) 61 ACSR 144 at 204-206 [185]-[189].

67 (2007) 61 ACSR 144 at 219 [234].

> "The representation as pleaded is not in terms of an estimation of this kind but rather of a firm statement of incursion of that specific amount."

Her Honour was therefore not satisfied that the representation as pleaded was made. However, even though the representation as pleaded in relation to the add-backs statement and in the 30 November 2004 results did not use the word "estimates", it related to the quantum of "non-recurring expenses". Its content, as pleaded, conveyed its character as an opinion. The fact that figures designated in the statement as "non-recurring" were, upon expert evidence, properly characterised as recurring did not render the opinion that they were non-recurring misleading or deceptive. The Court of Appeal therefore erred in finding that there was misleading or deceptive conduct in relation to the add-backs representation. The EBIT representation also incorporated the add-backs, for it was adjusted to take account of them. On its face, therefore, it depended for its correctness upon the opinion that the add-backs were expenses which would not recur. It was a statement of opinion. It should not have been characterised as misleading or deceptive.

The Schedule 3 profit and loss representation

40 The warranted profit and loss statement in Schedule 3 also invoked the add-back expenses in the following terms[68]:

> "Add, Proprietor's estimate of
> non-recurring expenses for the
> 5 months ended 30/11/04 96,100"

The claim of misleading or deceptive conduct in relation to Schedule 3 was therefore not made out to the extent that it relied upon the add-back representations in the warranted profit and loss statement. The Court of Appeal did not express any concluded view of the Schedule 3 deficiencies other than to say that they did not add to the position of Backoffice in its cross-appeal. This was no doubt a result of the success of Backoffice under the other heads of its misleading or deceptive conduct claims.

The Schedule 3 balance sheet representation

41 In their notice of contention, Backoffice and Mr Weeks sought to uphold the decision of the Court of Appeal by reference to the following Schedule 3 representations contained in the warranted balance sheet, namely:

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68 (2007) 61 ACSR 144 at 205 [185].

(a) that as at 30 November 2004 Healthy Water had trade creditors of $51,388.27, which was $12,360[69] less than the actual liability of $63,625.75;

(b) that as at 30 November 2004 the balance of Mr Campbell's loan to Healthy Water was negative $74,507.24, instead of a liability of $3,760; and

(c) that as at 30 November 2004, Healthy Water had adjusted net assets of $210,856.89, which was approximately $50,000 more than the actual balance of $148,326.10.

In their written submissions Backoffice and Mr Weeks relied upon the plea, maintained at the hearing before the primary judge, that by providing Schedule 3 to the SSA to Mr Weeks, Mr Campbell "represented to Backoffice the contents of the schedule". The claim was maintained by the notice of contention in reliance upon those representations in Schedule 3 which had been found by the primary judge to be false and material and to demonstrate breaches of warranty.

42 It was submitted that the giving of contractual warranties can constitute misleading or deceptive conduct. Reference was made to *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd*[70]. But the pleading, so far as it related to Schedule 3, alleged in effect representations comprising the statements in the Schedule. It was not linked to the giving of any contractual warranty in relation to them. On the other hand, as discussed earlier in these reasons and contrary to the submissions made on behalf of Mr Campbell, it is not an answer to a plea of misleading or deceptive conduct based on misrepresentation to assert that the misrepresentation is contained in a contractual document.

43 In the context of the breach of warranty claim the primary judge found, relevantly to the Schedule 3 representations raised in the notice of contention, that:

(a) the entry of $51,388.27 in the warranted balance sheet in Schedule 3 was $12,360 less than the actual liability of $63,625.75. The additional liability was "a matter of moment or significance and thus material"[71];

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69 This appears to be an error in the trial judgment – the difference between the two figures is $12,237.48.

70 (1993) 42 FCR 470 at 503-506.

71 (2007) 61 ACSR 144 at 195 [157]. As noted above, it appears that the primary judge miscalculated the precise difference between the entry in the warranted

(Footnote continues on next page)

(b) the entry in Schedule 3 in relation to Mr Campbell's loan account should have shown a positive figure of $3,759.76 instead of the negative figure of $74,507.24 which was shown. However this was technical rather than a matter of real substance as Mr Weeks knew that Mr Campbell's leave entitlements would probably be set off against the loan and that those figures were included in the balance sheet[72];

(c) the adjusted net assets shown in the Schedule 3 balance sheet at $210,856.89 had been overstated, the correct figure being $148,326.10 shown in an adjusted balance sheet for 13 January 2005 prepared by the bookkeeper, Mr Eustace. The inaccuracy was material[73].

The pleading did not in terms set out precisely how Mr Campbell represented Schedule 3 to Backoffice. The representation is said to have been made on or about 24 January 2005, so it is reasonable to infer that it was alleged to have been closely connected in time with the execution of the contract and the payment by Backoffice of $850,000 for its share in Healthy Water. It may be that Mr Weeks perused the documents, including Schedule 3, before executing the SSA. If the primary judge's findings as to the falsity and materiality of two of the statements in the warranted balance sheet were to stand, it would not be difficult to conclude that the proffering of the document including those statements amounted to misleading or deceptive conduct. However, neither the primary judge nor the Court of Appeal dealt with the question. Nor did either Court deal with the question whether Mr Weeks relied upon the two Schedule 3 representations found to have been false and material. Characterisation of Mr Campbell's conduct in this respect and whether it caused the claimed loss cannot be determined on this appeal absent the critical findings of fact necessary to determine those questions. I agree, for the reasons given in the joint judgment[74], that this aspect of the claim must be remitted for consideration by the Court of Appeal.

The December 2004 representations

44 The remaining element of the misleading or deceptive conduct claims concerns the failure by Mr Campbell to advise Mr Weeks prior to

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balance sheet and the actual liability. The error, however, is not so significant as to affect her Honour's finding that the additional liability was material.

72 (2007) 61 ACSR 144 at 196-197 [164]-[165].

73 (2007) 61 ACSR 144 at 198 [168].

74 Reasons of Gummow, Hayne, Heydon and Kiefel JJ at [153]-[157] and [160].

24 January 2005 that the forecast Healthy Water sales revenue and EBIT set out in the December 2004 estimates had not materialised and that there was a discrepancy of $7,147 in relation to the first and a discrepancy of about $25,000 in relation to the second.

45 The characterisation of the express and implied representations derived from the December 2004 estimates depended upon their continuing operation and the failure by Mr Campbell to correct them when it became known that they were false after the actual sales revenue figures for December came in. The pleading of the December 2004 estimates alleged that they were "representations as to future matters within the meaning of section 41 of the Fair Trading Act 1987". That pleading did not seem relevant to the remainder of the plea of misleading or deceptive conduct in relation to these estimates or to the substantive argument advanced on this issue. The pleading turned upon Mr Campbell's failure to revise the estimates and to advise that they would not be, or had not been, achieved. Although there may be more than one way of looking at the question of characterisation in this case, the substance of the pleading seems to have been based upon non-disclosure or circumstantial silence amounting to misleading or deceptive conduct[75].

46 In his affidavit of 13 September 2006, which was in evidence at the trial, Mr Weeks said that he was unaware, at the time of entering into the SSA, of the overstatements of sales revenue and EBIT for December 2004. He said that if he had been aware of those matters he would not have entered into the SSA. The actual profit in December of $12,438 represented a 62% reduction on the average profit during the preceding five months. This would have reduced the annualised profit of the company and therefore his assessment of its value based on its EBIT. He would not have offered to purchase the share for $850,000. In addition, a $25,000 reduction in the December profit would have reduced Healthy Water's annualised profit and cash flow to a level that it would not have been able to meet its liabilities.

47 The primary judge said of this evidence[76]:

> "Although Weeks claims in his affidavit … that he would not have entered into the share sale agreement if he had known that the operating results for

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75 See *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 41; *Warner v Elders Rural Finance Ltd* (1993) 41 FCR 399 at 401-402; *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 at 44-45; *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452 at 465. And see generally Lockhart, *The Law of Misleading or Deceptive Conduct*, 2nd ed (2003) at 140-150 [5.16]-[5.27].

76 (2007) 61 ACSR 144 at 233 [264].

> December 2004 were different from the actual results (by overstating sales by $7147 and EBIT by the range referred to earlier), the real question for determination is whether he relied on the December estimates in entering into the share sale agreement and the alleged representation."

48 When Mr Weeks received the financial documentation in December 2004, including the sales revenue report containing the estimated sales figure of $100,000 for that month, he estimated an annual result, which he himself characterised as "somewhat conservative". He also took account of the fact that he would be able to make a positive contribution and would have the capacity to "enhance the profitability" of the company. He had structured his offer to purchase the share in a way that recognised that he and Mr Campbell had a different view of the value of the company.

49 Her Honour referred to Mr Weeks' proposal for a performance bonus of up to $300,000 to be paid to Mr Campbell if net profitability to 31 December 2005 exceeded a specific threshold. Mr Weeks had the assistance of a solicitor from whom he sought advice in relation to the agreements. The solicitor had sent him an email dated 11 January 2005 which he forwarded to Mr Horn on 12 January 2005 and which included the solicitor's notation of Mr Weeks' "reliance on your own investigations, relying on your background over many years in corporate management and the due diligence conducted in respect to [Healthy Water] carried out over some time by you and your accountant". Mr Weeks confirmed in cross-examination that he had informed the solicitor of this reliance[77]. Her Honour concluded[78]:

> "Weeks is a sophisticated businessman with the capacity to review financial records and make judgments about the prospects of a business, using his commercial common sense to his own advantage. That is what he did in making his offer to purchase the share in the company. I am satisfied that the evidence extracted above establishes that Weeks did not rely upon the estimated sales figures in the sales revenue report. Rather, it establishes that Weeks doubted those figures to the point that he built in a protection for himself if the figures were not achieved."

50 The Court of Appeal found that misleading or deceptive conduct was made out in relation to the December 2004 estimates. Giles JA said that they were plainly enough estimates because of the use of round numbers. Nevertheless it remained that they were put forward as estimates for which there was a sound basis[79]. In my opinion however, the question whether the estimates

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77 (2007) 61 ACSR 144 at 234 [268].

78 (2007) 61 ACSR 144 at 234 [269].

79 (2008) 66 ACSR 359 at 376 [71].

had "a sound basis" might go to an implied representation that they were based on reasonable grounds or reasonable inquiry. The fact that they were falsified by events which became known to Mr Campbell raised a different issue.

51 Giles JA referred to the primary judge's findings that by 24 January 2005 Mr Campbell knew that the actual results had fallen short of the estimates. He said[80]:

> "Leaving the estimated sales revenue for December 2004 uncorrected, knowing that Mr Weeks did not know that the actual sales revenue was less, would leave Mr Weeks with an incorrect understanding of the company's trading. The difference of about $8000 when extended beyond the 1 month was not trivial. In my opinion, there was misleading or deceptive conduct in this respect in providing the documents and leaving them to stand as estimates."

This was in substance a finding of misleading or deceptive conduct by non-disclosure in circumstances in which there would have been a reasonable expectation on Mr Weeks' part that, if the estimates were materially falsified by actual results, those results would have been disclosed. Here there could be an example of a degree of practical overlap between characterisation of the conduct and the assessment of causation via reliance. However, the question of reliance was not considered by the Court of Appeal in light of this approach to characterisation.

52 In relation to the issue of reliance on the December 2004 estimates, Giles JA referred to Mr Weeks' affidavit evidence outlined above. Mr Weeks, he noted, was not cross-examined to any extent on that aspect of it. And "[n]either Mr Campbell nor Backoffice presented on appeal a critique of this evidence"[81]. The reference to Backoffice was plainly intended to be a reference to Sentinel. Giles JA concluded[82]:

> "The evidence included that Mr Weeks would not have purchased the share if add-backs of approximately $20,000 or more were erroneous, and that he would not have purchased the share if he had known that the estimated December 2004 sales revenue and EBIT were overstated as in substance they were. I have departed from the trial judge's finding as to reliance and, consider that I can pay regard to this evidence; I should say that having so departed, I do not see in the trial judge's reasons occasion

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80 (2008) 66 ACSR 359 at 377 [73].

81 (2008) 66 ACSR 359 at 377 [75].

82 (2008) 66 ACSR 359 at 377 [76].

> for the appellate deference to credibility-based findings considered in cases such as *Fox v Percy*[83] and *CSR Ltd v Della Maddalena*[84]. In my opinion, there was causation in the misleading or deceptive conduct thus far considered in that the share would not have been purchased at all if Mr Weeks had known the true position. If Backoffice suffered loss or damage in its purchase of the share, the loss or damage was suffered by conduct of Mr Campbell in contravention of s 42 of the Fair Trading Act."

53 Counsel for Mr Campbell pointed out that the primary judge made no finding in relation to Mr Campbell's knowledge of the falsity of the projected EBIT of $37,500 before the SSA was executed. The only specific figure ever put to Mr Campbell as to his knowledge of a shortfall was $8,000 by way of sales revenue. Nothing was put to him to suggest that he knew that the EBIT had a shortfall of $25,000. The submission made was, in substance, that no finding of Mr Campbell's knowledge of the falsity of the December 2004 EBIT figure could be made when that allegation, which amounted to an allegation of fraud, had never been put to him. Mr Weeks' evidence as to reliance upon the December estimates was to the effect that if he had known of the $8,000 shortfall in revenue and the $25,000 shortfall in EBIT, he would not have entered the transaction. There was no evidence that he would not have entered into the transaction had he known only of the $8,000 revenue shortfall. That was the only shortfall in respect of which a finding of knowledge could be made against Mr Campbell.

54 The experts, Messrs Gower and Russell, as the primary judge found, had agreed that the EBIT of the company to December 2004 was overstated in the range of $15,318 to $20,022[85]. The EBIT stated in the sales revenue report was $37,500. It was submitted for Mr Weeks and Backoffice that this level of misstatement was substantial on any view and that it was open to the Court of Appeal to infer that if Mr Weeks had been provided with this information he would not have proceeded with the transaction.

55 In my respectful opinion, however, it was not open to Giles JA in the Court of Appeal to depart, as he did, from the primary judge's finding as to reliance so far as the December 2004 estimates were concerned. The dissenting reasoning of Young CJ in Eq on this question was correct. There was, as counsel for Mr Campbell submitted, no exploration at trial of whether Mr Weeks would have withdrawn from the transaction had he known only of the shortfall in sales revenue figures. His caution about the figures with which he was provided would indicate that something more than a somewhat speculative inference was

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83 (2003) 214 CLR 118; [2003] HCA 22.

84 (2006) 80 ALJR 458; 224 ALR 1; [2006] HCA 1.

85 (2007) 61 ACSR 144 at 194 [152].

necessary to establish the reliance that would forge the link between the misleading or deceptive conduct in relation to the December 2004 estimates and the loss which he claimed.

Breach of warranty claims

56 For the reasons set out in the joint judgment[86], I agree that the outstanding claims for breach of warranties raised by the appeal and the cross-appeal to the Court of Appeal should be remitted for consideration by that Court.

Implied duty to cooperate

57 I agree, for the reasons set out in the joint judgment[87], that special leave to advance this ground on the cross-appeal should be refused.

Oppression and unfairly prejudicial conduct

58 The order made by the primary judge that Mr Campbell buy back from Backoffice its share in Healthy Water was made under ss 232 and 233 of the *Corporations Act* 2001 (Cth). The relevant parts of those sections are quoted in the joint judgment[88]. The order made by the primary judge was made pursuant to s 233(1)(d).

59 The text of s 232 sets out broadly expressed conditions which must be satisfied before the power to make orders under s 233 can be enlivened. As a matter of language the "unfairly prejudicial" conduct of a company's affairs which may enliven the powers under s 233 would appear to subsume oppressive conduct. The claim by Backoffice relied upon the three heads of oppressive, unfairly prejudicial and unfairly discriminatory conduct. The primary judge's findings adverse to Mr Campbell on this claim were all expressed in terms of oppressive conduct[89].

60 For the reasons which appear below, I am of the opinion that special leave to appeal should be refused on the cross-appeal. It has no prospect of success. Before turning to the reasons for that conclusion, it is helpful to refer briefly to the legislative ancestry of ss 232 and 233.

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86 Reasons of Gummow, Hayne, Heydon and Kiefel JJ at [156]-[159].

87 Reasons of Gummow, Hayne, Heydon and Kiefel JJ at [165]-[171].

88 Reasons of Gummow, Hayne, Heydon and Kiefel JJ at [173]-[174]

89 (2007) 61 ACSR 144 at 184-185 [110], 186 [116], 187 [121] and [124].

61 The history giving rise to ss 232 and 233 commenced with the Cohen Committee which, in 1945, recommended amendments to the *Companies Act* 1929 (UK). The Committee proposed powers for the court so that, if satisfied that a minority of shareholders was being oppressed and that a winding up order would not do justice to them, it could make orders including an order for the purchase by the majority of the shares of the minority[90]. The Committee contemplated a very broad power[91].

62 The Cohen Committee's recommendation was reflected in s 210 of the *Companies Act* 1948 (UK). Similar provisions were adopted in a number of Australian States[92]. Section 86 of the *Uniform Companies Act* 1961 was based on s 210, albeit the wording was not identical.

63 Uncertainty developed about whether "oppressive conduct" under s 210 required proof of a course of conduct and of illegality and invasion of rights[93]. In its report on the *Companies Act* in 1962, the Jenkins Committee expressed the opinion that the intention underlying s 210 was to enable orders to be made when the affairs of the company were being conducted in a manner unfairly prejudicial to the interests of some members[94].

64 The Jenkins Committee recommended amendment and its recommendation was given effect by the enactment of s 75 of the *Companies Act* 1980 (UK). Australia followed suit. In 1983, s 320 of the Companies Codes,

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90 United Kingdom, Board of Trade, *Report of the Committee on Company Law Amendment*, (1945) Cmd 6659 at 95, Recommendation II.

91 United Kingdom, Board of Trade, *Report of the Committee on Company Law Amendment*, (1945) Cmd 6659 at 30 [60] in which the Committee recommended that the discretion be unfettered as it would be impossible to lay down a general guide to the solution of essentially individual cases.

92 *Companies Act* 1958 (Vic), s 94, *Companies Act* 1931 (Q), s 379A, *Companies Act* 1959 (Tas), s 128.

93 The latter uncertainty appears to have been generated by the definition of "oppressive" as "burdensome, harsh and wrongful" in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 at 342 per Viscount Simonds. See United Kingdom, Board of Trade, *Report of the Company Law Committee*, (1962) Cmnd 1749 (the "Jenkins Committee") at [203].

94 United Kingdom, Board of Trade, *Report of the Company Law Committee*, (1962) Cmnd 1749 at [204], invoking and agreeing with a "fair dealing" and "fair play" statement enunciated by Lord Cooper in *Elder v Elder & Watson Ltd* (1952) SC 49 at 55.

established under the Cooperative Scheme set up in 1981, was amended to expand the powers of the court in cases of oppression to conduct "unfairly prejudicial to, or unfairly discriminatory against" a shareholder or shareholders. Section 320 later became s 260, then s 246AA of the Corporations Law under the 1989 Cooperative Scheme[95].

65 The Corporations Law provisions were split and renumbered as ss 232-235 by the *Corporate Law Economic Reform Program Act* 1999 (Cth). In the Explanatory Memorandum to that Act it was said that the oppression remedy was to be rewritten without making any significant change. One of the three "minor" changes was to make it clear that the court would be able to make orders even if the act, omission or conduct complained of had yet to occur or had ceased[96].

The oppression cross-appeal

66 The primary judge made the following findings relevant to the satisfaction of the conditions in s 232:

1. Backoffice, through the provision of Mr Weeks as a joint managing director of Healthy Water, was entitled to share jointly in the management of the company[97].

2. There was an expectation of continuing participation in the management of the company[98].

3. Mr Campbell's conduct was oppressive to Backoffice in the following respects:

    3.1 his refusal to pay Backoffice's invoices unless Mr Weeks agreed to unreasonable demands, set out in a letter from Mr Campbell of 6 February 2005, requiring that he accept a reduction in the

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95 The history and operation of s 320 were briefly discussed by Brennan J in *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459 at 470-471; [1985] HCA 68. The need for caution in the section's application, in order to avoid unwarranted assumption of management responsibilities, was mentioned by Mason ACJ, Wilson, Deane and Dawson JJ at 467.

96 Australia, House of Representatives, Corporate Law Economic Reform Program Bill 1998, Explanatory Memorandum at [6.132].

97 (2007) 61 ACSR 144 at 178 [98].

98 (2007) 61 ACSR 144 at 179 [100].

consulting fees agreed to only two weeks before and a reallocation of his duties as a director[99];

3.2 Mr Campbell's conduct in changing a password to deny access by Mr Weeks to Healthy Water's MYOB software[100];

3.3 Mr Campbell's refusal to attend a board meeting with Mr Weeks, which was part of a plan to keep Mr Weeks, and thus Backoffice, from having any true management involvement with the company[101].

67 In making her order that Mr Campbell buy back the Healthy Water share purchased by Backoffice, the primary judge held that neither the appointment of a provisional liquidator to the company nor the sale of the business and assets would preclude such an order[102]. She adopted 24 January 2005 as the date at which she should value the share[103]. She accepted a value of $853,000 for the share based on expert evidence from the witness, Mr Russell[104].

68 Giles JA in the Court of Appeal referred to the legislative history of ss 232 and 233. He did not consider that the sections required that the conduct complained of be continuing at the time that the Court considered making an order. Claimed relief founded on conduct which was no longer continuing might, but need not necessarily be refused in the exercise of discretion[105]. He held nevertheless that the buy-back order was not appropriate. The inability of the company to function as a jointly owned and managed entity was due to more than the conduct found to be oppressive. A breakdown in a relationship in a 50/50 entity was not the same as oppression. The sale of the company's business and assets had been consensual. The agreement between the parties made a buy-back order unnecessary to bring the oppression to an end[106]. In the circumstances

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99 (2007) 61 ACSR 144 at 184-185 [110].

100 (2007) 61 ACSR 144 at 186 [116].

101 (2007) 61 ACSR 144 at 187 [121].

102 (2007) 61 ACSR 144 at 190 [131].

103 (2007) 61 ACSR 144 at 192 [145].

104 (2007) 61 ACSR 144 at 192 [145]-[146].

105 (2008) 66 ACSR 359 at 389 [132].

106 (2008) 66 ACSR 359 at 390 [137].

it would not be just to require Mr Campbell to purchase Backoffice's worthless share[107].

69 Giles JA held that the primary judge's discretion had miscarried because she had failed to have regard to the appointment of the provisional liquidator, and the sale of the business and assets of the company as matters going to discretion[108]. He necessarily implied that the primary judge had considered them as matters going to her power to make the order. In my opinion that characterisation of her Honour's approach was correct.

70 Young CJ in Eq held that, in order to obtain relief under ss 232 and 233, the conduct said to be oppressive or unfairly prejudicial must be taking place at the time of the hearing unless the complaint related to the present effects of past conduct[109]. On that basis he also considered that no order ought to have been made[110]. He considered that "the vice in what happened below was not in the exercise of any discretion, but in the making of any order under the section"[111]. His Honour summed up his conclusions as follows[112]:

> "It follows from what I have said above that the claim for oppression must fail for a number of reasons. It fails on the merits. If it had not failed on the merits it would fail on discretionary grounds. In particular, it fails because there has not been oppression because any act of nastiness by Campbell towards Weeks was a personal act not a corporate act, the nastiness has come to an end, the company must be wound up, there is no point in any buyout and there is no ground for ordering rescission even if it were available as a remedy."

His Honour appears therefore to have been, at least contingently, on common ground with Giles JA. It seems that he would have held, even were the buy-back order not otherwise precluded, that it should not have been made as a matter of discretion.

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107 (2008) 66 ACSR 359 at 390 [138].

108 (2008) 66 ACSR 359 at 392 [144] and [147].

109 (2008) 66 ACSR 359 at 432 [382].

110 (2008) 66 ACSR 359 at 439 [449].

111 (2008) 66 ACSR 359 at 439 [456].

112 (2008) 66 ACSR 359 at 443 [487].

71 Backoffice and Mr Weeks sought special leave to cross-appeal against the decision of the Court of Appeal setting aside the buy-back order made by the primary judge. The notice of cross-appeal was uninformative, simply asserting as its ground that the Court of Appeal erred in failing to order that Mr Campbell purchase Backoffice's share in Healthy Water for the amount of $853,000 or, in the alternative, at a value to be determined by the Court.

72 In my opinion, it is not necessary to deal with the full range of contentions advanced in relation to the cross-appeal. It is neither necessary nor desirable to explore, in the light of the rather diverse approaches taken below, the propounded limitations on the circumstances in which the remedies for oppression or unfairly prejudicial conduct of a company's affairs can be granted. Their language and history indicate that ss 232 and 233 are to be read broadly. The imposition of judge-made limitations on their scope is to be approached with caution. It is sufficient to say, as submitted for Mr Campbell and Sentinel, that Giles JA was correct in concluding that the learned primary judge did not inform the exercise of her discretion by reference to the critically important factors of the appointment of the provisional liquidator and the consensual sale of the business and assets of Healthy Water.

73 The substituted exercise of the discretion as proposed by Giles JA was appropriate and seems to have been supported by Young CJ in Eq even though he would have allowed the appeal against the buy-back order on other grounds.

74 For these reasons I agree that special leave to cross-appeal in relation to the buy-back order should be refused.

Conclusion

75 I agree with the orders proposed in the joint judgment.

76 GUMMOW, HAYNE, HEYDON AND KIEFEL JJ. In 1993, Mr Douglas Campbell, the first appellant, established a business that was later conducted by Healthy Water (NSW) Pty Ltd ("Healthy Water"), a company of which Mr Campbell was the sole director and shareholder. By 2004, Healthy Water had an established business supplying and maintaining filtered water systems. Mr Campbell sought to sell part or all of the company or its business. Towards the end of 2004, Mr Timothy Weeks, the second respondent, became interested in the possibility of buying an interest in the company or its business.

77 For a time there was talk of establishing a joint venture between interests associated with each of Mr Campbell and Mr Weeks. The suggestion was that a new company, in which each side would have a 50 per cent interest, would buy Healthy Water's business. This approach was later abandoned in favour of a sale of one of the two issued shares in Healthy Water.

78 In late 2004, Mr Weeks was given documents describing some aspects of the financial affairs of Healthy Water. On 14 December 2004, Mr Weeks offered $850,000 as the price for a 50 per cent share in Healthy Water.

79 During the latter part of December 2004 and the first weeks of January 2005, lawyers for the parties negotiated about both the structure of the transaction and the terms of the agreements that were to be made to effect it. On 24 January 2005, the parties executed four agreements:

(a) A share sale agreement between Mr Campbell, a company controlled by Mr Campbell (Sentinel Construction Managers Pty Ltd ("Sentinel") – the second appellant), Healthy Water, and a company Mr Weeks controlled (Backoffice Investments Pty Ltd ("Backoffice") – the first respondent) by which Backoffice agreed to buy one of the two issued shares in Healthy Water for $850,000.

(b) A shareholders agreement between Healthy Water, Mr Campbell, Backoffice and Mr Weeks.

(c) Two services agreements, one between Healthy Water, Backoffice and Mr Weeks and the other between Healthy Water, Sentinel and Mr Campbell.

Sale of the share was completed on the same day.

80 Three aspects of these agreements should be noticed immediately. First, the share sale agreement contained warranties by the vendor, including a warranty that to the best of Mr Campbell's knowledge, all information given by

or on behalf of Healthy Water or its advisers to Backoffice or its advisers material to the sale was "substantially accurate and complete and not misleading". Secondly, the services agreements provided, in effect, for Backoffice and Sentinel to make available to Healthy Water the services of Mr Weeks and Mr Campbell respectively as joint managing directors. Thirdly, while the shareholders agreement regulated the rights and obligations of the shareholders, neither that agreement, nor the constitution of Healthy Water, provided any truly effective mechanism for resolving disagreements between the Weeks and the Campbell interests.

81 Within days, the relationship between Mr Weeks and Mr Campbell broke down. There were acrimonious exchanges. Mr Campbell remained in effective control of the affairs of Healthy Water, at least for the most part, but it is evident that neither man had confidence in the other. Litigation soon followed.

82 On 1 April 2005, Backoffice and Mr Weeks began proceedings in the Commercial List of the Equity Division of the Supreme Court of New South Wales. By those proceedings, Backoffice and Mr Weeks sought an order for the winding-up of Healthy Water and appointment of a provisional liquidator. Alternatively, they sought various other forms of relief, including orders for the compulsory acquisition of the share held by Backoffice either by the Campbell interests or by Healthy Water itself.

83 The claims for winding-up and for compulsory acquisition of Backoffice's share in Healthy Water were founded on allegations that Mr Campbell had conducted the affairs of Healthy Water "in a manner contrary to the interests of the members as a whole and in an oppressive and unfairly prejudicial and discriminatory manner, by excluding Backoffice and Weeks from the management of [Healthy Water] and by making payments from [Healthy Water's] funds to meet Campbell's private expenses, not related to [Healthy Water's] business". Backoffice and Mr Weeks did not allege the existence of a deadlock in the affairs of Healthy Water. On the contrary, the case sought to be made was that Mr Campbell controlled what happened in the company and that what he had done fell within the provisions of s 232 of the *Corporations Act* 2001 (Cth) ("the Corporations Act") dealing with "oppression".

84 Backoffice and Mr Weeks made a number of other claims. It is convenient to summarise the relevant claims in four categories:

(a) a claim that Healthy Water had breached its obligations under the services agreement with Backoffice by not paying amounts due under the agreement;

(b) claims that Mr Campbell had breached warranties relating to Healthy Water's financial performance given in the share sale agreement;

(c) a claim that Mr Campbell had breached terms to be implied in both the shareholders agreement and the share sale agreement that he would do all things necessary on his part to enable Backoffice to have the benefit of those agreements and would do nothing calculated to deprive Backoffice of those benefits; and

(d) claims that Mr Campbell had contravened s 42 of the *Fair Trading Act* 1987 (NSW) ("the Fair Trading Act") in three ways:

(i) by providing documents before the agreements were made that did not accurately state Healthy Water's past financial performance;

(ii) by not correcting some estimates of Healthy Water's expected performance for December 2004 when Mr Campbell knew, or ought reasonably to have known, before the share sale agreement was made, that the estimated performance had not been achieved; and

(iii) by representing "the contents of" financial statements contained in Sched 3 to the share sale agreement when those financial statements were inaccurate in a number of ways.

85 In this Court, Backoffice and Mr Weeks submitted that Mr Campbell had contravened the Fair Trading Act in a fourth way: by including in the share sale agreement a warranty that, to the best of Mr Campbell's knowledge, all information provided material to the sale was substantially accurate and complete and not misleading, in circumstances where Mr Campbell knew from 11 January 2005 that certain estimates of Healthy Water's performance for December 2004 had not been achieved. The appellants denied that this claim had been distinctly pleaded or argued in the courts below and submitted that it was too late to make it in this Court. These reasons will show that this fourth way of Backoffice and Mr Weeks putting their case of contravention of the Fair Trading Act is not open.

86 Soon after the proceedings were instituted the parties joined in obtaining an order appointing a provisional liquidator to Healthy Water. Almost two months later (on 31 May 2005), again with the agreement of the parties, the provisional liquidator sold all of the assets of the company to a company controlled by Mr Campbell. Although it was only about four months earlier that Backoffice had agreed to buy one of the two issued shares in the company for $850,000, the business and assets of Healthy Water were sold for $196,815. The

whole of that sum was disbursed in payment of some creditors and the provisional liquidator's remuneration and expenses.

87 All its assets having been sold and the proceeds of sale spent, Healthy Water was an empty shell. Yet the claim under the oppression provisions of the Corporations Act for compulsory purchase of the share held by Backoffice in Healthy Water was not only prosecuted to trial and judgment, it was the chief form of relief sought and obtained at trial. By contrast, recognising that Healthy Water was an empty shell, the claim against it for breach of the services agreement was not pressed at trial. Instead, Backoffice and Mr Weeks claimed recovery from Mr Campbell of the amount not paid under the services agreement as damages for breach of an implied duty to co-operate. The claims against Mr Campbell for breach of express warranties in the share sale agreement, and for misleading or deceptive conduct, were also pressed.

88 The trial judge (Bergin J) concluded[113] that an order should be made under the oppression provisions of the Corporations Act requiring Mr Campbell to buy Backoffice's share. The price was fixed[114] as the value the share had at the date of its original acquisition (24 January 2005). On the basis that, when the share was bought in January 2005, the company had "good potential for growth and success" the trial judge fixed[115] the purchase price of the share at $853,000.

89 The trial judge also found[116] that Mr Campbell had breached express warranties in the share sale agreement in some but not all of the respects alleged. Her Honour concluded, however, that because Mr Campbell should be ordered to buy Backoffice's share, and pay Backoffice $853,000 for it, no relief should be granted for the breaches of warranties[117] or for any breach of an implied duty to co-operate that had deprived Backoffice of its entitlements under its services agreement[118]. Finally, in relation to the Fair Trading Act claims, the trial judge

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113 *Backoffice Investments Pty Ltd v Campbell* (2007) 61 ACSR 144 at 192 [145]-[146]; 25 ACLC 302 at 346.

114 (2007) 61 ACSR 144 at 192 [145]; 25 ACLC 302 at 346.

115 (2007) 61 ACSR 144 at 192 [145]-[146]; 25 ACLC 302 at 346.

116 (2007) 61 ACSR 144 at 215 [219]; 25 ACLC 302 at 366.

117 (2007) 61 ACSR 144 at 192 [147]; 25 ACLC 302 at 346.

118 (2007) 61 ACSR 144 at 218 [233]; 25 ACLC 302 at 369.

expressed[119] some doubts about whether the representations alleged by Backoffice and Mr Weeks had been made but, in any event, concluded[120] that the claims should fail because her Honour was "satisfied that Weeks and/or Backoffice did not rely upon the representations".

90 Mr Campbell and Sentinel appealed to the Court of Appeal of New South Wales and Backoffice and Mr Weeks cross-appealed. The Court (Giles and Basten JJA and Young CJ in Eq) divided in opinion[121]. The Court ordered that the appeal should be allowed and the cross-appeal allowed in part and that there be judgment for Backoffice against Mr Campbell for $850,000.

91 On appeal to the Court of Appeal, much attention was directed in argument to the claims of oppression that had succeeded at trial. Two members of the Court of Appeal (Giles JA and Young CJ in Eq) held[122] that no order should have been made for compulsory purchase of Backoffice's share in Healthy Water. Giles JA concluded[123], however, that Backoffice should have judgment against Mr Campbell for the sum it had paid for the share ($850,000) as damages for misleading or deceptive conduct. Basten JA also concluded[124] that Backoffice should have judgment against Mr Campbell for that sum but held that the sum should be allowed partly as consideration fixed under an order that he repurchase the share sold to Backoffice, and partly as damages for misleading or deceptive conduct. The third member of the Court, Young CJ in Eq, held[125] that Backoffice and Mr Weeks should have no relief because, in his Honour's opinion, there was no continuing oppression and Mr Weeks had not shown "that his losses were caused by anything else than his own misjudgment of the value of the share he purchased".

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119 (2007) 61 ACSR 144 at 218-219 [234], 232 [260]; 25 ACLC 302 at 369, 382.

120 (2007) 61 ACSR 144 at 235 [271]; 25 ACLC 302 at 385.

121 *Campbell v Backoffice Investments Pty Ltd* (2008) 66 ACSR 359; 26 ACLC 537.

122 (2008) 66 ACSR 359 at 392 [147] per Giles JA, 432-433 [382]-[386], 439 [449] per Young CJ in Eq; 26 ACLC 537 at 564, 597-598, 602.

123 (2008) 66 ACSR 359 at 394 [157]; 26 ACLC 537 at 566.

124 (2008) 66 ACSR 359 at 407-408 [219]-[222]; 26 ACLC 537 at 576-577.

125 (2008) 66 ACSR 359 at 453 [593]; 26 ACLC 537 at 613.

92 As will be elaborated later, neither Giles JA nor Basten JA decided whether there had been any breach of contractual warranties. Young CJ in Eq held[126] that the trial judge had not been shown to err in her findings that there had been certain breaches of warranties but concluded that the damages flowing from the breaches were only nominal.

Proceedings in this Court

93 In their appeal to this Court the appellants (the Campbell interests) advanced only two grounds of appeal. The first ground was directed to the proposition, accepted by Giles JA and Basten JA in the Court of Appeal, that Mr Campbell had engaged in misleading or deceptive conduct as a consequence of which Backoffice agreed to buy the share in Healthy Water. The first and main thrust of the ground was an allegation, in effect, that Backoffice relied only on the contractually stipulated warranties, not upon any pre-contractual representations. Success on this ground was alleged to warrant setting aside the judgment ordered by the Court of Appeal in favour of Backoffice and, assuming that the oppression claims failed (as two members of the Court of Appeal had held they should), dismissal of all remaining claims against the appellants except the claims for breach of contractual warranties.

94 The appellants also alleged under this first ground of appeal that Giles JA (with whose reasons in this respect Basten JA agreed) had made a mathematical error which falsified a critical step in his reasoning to a finding that Backoffice would not have bought the share if the pre-contractual documents recording Healthy Water's financial position had reflected the true position. The reasoning depended upon identifying the extent of the difference between the financial position indicated in the documents and the true position of the company. It was said that the difference was miscalculated. The respondents did not dispute that there was a mathematical error of the kind identified by the appellants but challenged both the extent of the error and what followed from it. This further aspect of the first ground of appeal need be considered only if the question of causation, namely whether Backoffice suffered loss by any misleading or deceptive conduct, remains an issue for determination.

95 The second ground advanced by the appellants in this Court was that the Court of Appeal erred "in holding that the damages for misrepresentation extended to losses attributable to the cessation of the business of [Healthy Water] ... when such losses were not related to the subject matter of the alleged

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126 (2008) 66 ACSR 359 at 450 [549]-[550]; 26 ACLC 537 at 611.

misrepresentations". Because the members of the Court of Appeal adopted markedly different paths of reasoning, there may be a question about whether the appellants are right to conflate the separate reasons of the Court in this way. It is not necessary, however, to explore that question here.

96 The appellants submitted that, if they succeeded only on their second ground, the issue of damages should be remitted to the Court of Appeal. The appellants further submitted that, if they succeeded on their first ground of appeal to this Court, concerning misleading or deceptive conduct, so much of the appeal and the cross-appeal to the Court of Appeal as related to the claims for breach of contractual warranties remained undecided by that Court and thus had to be remitted to the Court of Appeal for its further consideration.

97 During the course of the hearing of the appeal in this Court, the respondents, Backoffice and Mr Weeks, sought special leave to cross-appeal to restore the success they had had at trial in obtaining relief under the oppression provisions of the Corporations Act. They further sought to cross-appeal to argue that Mr Campbell had breached warranties he had given in the share sale agreement and to argue that Mr Campbell had breached the shareholders agreement and the share sale agreement by not doing what was necessary to enable Backoffice to have the benefit of those agreements and by acting in a manner calculated to deprive Backoffice of those benefits. By notice of contention they alleged that the orders made by the Court of Appeal should be upheld on the grounds that Mr Campbell had engaged in misleading or deceptive conduct in respects additional to those found by Giles JA and Basten JA, and that the inclusion in the share sale agreement of a warranty providing that, to the best of Mr Campbell's knowledge, all information material to the sale was substantially accurate and complete and not misleading, was itself misleading or deceptive conduct.

The Fair Trading Act claims

98 It is convenient to deal first with the claims that Mr Campbell contravened the Fair Trading Act. In this Court, attention focused only upon Backoffice's claims for damages under s 68 of the Act. (Backoffice had made a claim under s 72 for orders rescinding the share sale agreement but that claim was not further pressed in this Court.)

99 It will be recalled that Backoffice and Mr Weeks alleged that Mr Campbell had contravened the Fair Trading Act in three ways. The first concerned the provision, before the agreements were made, of documents said to state inaccurately Healthy Water's *past* financial performance (for the five months to 30 November 2004). The second related to the provision, before the

agreements were made, of some estimates of the company's *expected* performance for December 2004. It was alleged that, before the share sale agreement was made in January 2005, Mr Campbell knew, or ought reasonably to have known, that the estimated sales revenue and earnings before interest and tax, or EBIT, for December 2004 had not been achieved. The third way in which the Fair Trading Act contraventions were put, that Mr Campbell had represented "the contents of" the financial statements contained in Sched 3 to the share sale agreement, raised issues that overlapped to a very considerable extent with the claims of breach of contractual warranties. It is convenient to leave this third claim to one side for the moment and focus only upon the first two claims.

100 As to the first claim, these reasons will demonstrate that the particular contraventions alleged by Backoffice and Mr Weeks in relation to the *past* financial performance of Healthy Water (to 30 November 2004) were not made out. As to the second claim, these reasons will show that, although Backoffice and Mr Weeks demonstrated that there was a contravention of the Fair Trading Act relating to the estimate of the expected sales revenue of Healthy Water for December 2004, Backoffice and Mr Weeks did not prove that by that contravention Backoffice suffered the loss and damage it claimed.

The Fair Trading Act

101 Section 42 of the Fair Trading Act provides that "[a] person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". Section 68 provides that "[a] person who suffers loss or damage by conduct of another person that is in contravention of [certain provisions of the Act] may recover the amount of the loss or damage by action against the other person or against any person involved in the contravention". Section 72 provides for the making of any of several forms of order in cases where it is found that a person has sustained, or is likely to sustain, loss or damage by conduct of another that contravenes certain provisions of the Act. Both ss 68 and 72 can be engaged in respect of a variety of contraventions of the Fair Trading Act, including s 42.

102 Using tools of analysis drawn from the common law of deceit (misrepresentation and reliance) within the statutory framework provided by ss 42 and 68 of the Fair Trading Act may sometimes be helpful in identifying contravening conduct and deciding whether loss or damage was suffered by the contravention. But as McHugh J correctly pointed out in *Butcher v Lachlan Elder Realty Pty Ltd*[127], the "conduct" with which s 52 of the *Trade Practices Act*

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127 (2004) 218 CLR 592 at 623 [103]; [2004] HCA 60.

1974 (Cth) ("the Trade Practices Act") deals is not confined to "'representations', whether they be representations as to matters of present or future fact or law"[128]. This proposition applies with equal force to s 42 of the Fair Trading Act. References to misrepresentation or reliance must not be permitted to obscure the need to identify contravening conduct (here, misleading or deceptive conduct) and a causal connection (denoted by the word "by") between that conduct and the loss and damage allegedly suffered. As McHugh J also pointed out in *Butcher*[129], with particular reference to s 52 of the Trade Practices Act, but with equal application to s 42 of the Fair Trading Act:

> "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*[130]. *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*[131]. 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[132]. 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

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128 McHugh J dissented in the result of the particular case but not as to these questions of principle.

129 (2004) 218 CLR 592 at 625 [109]. See also the judgment of the Court in *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 84 [200]; [2000] HCA 12.

130 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 v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202-203 per Deane and Fitzgerald JJ.

131 See, eg, *Trade Practices Commission v Lamova Publishing Corporation Pty Ltd* (1979) 42 FLR 60 at 65-66; 28 ALR 416 at 421-422 per Lockhart J.

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

any statement, action, silence or inaction in connection with the document." (emphasis added)

The pre-contractual documents

103 Two pre-contractual documents were alleged to contain misrepresentations. On 9 December 2004, Mr Weeks was given these two documents along with management accounts of Healthy Water for the five months ended 30 November 2004 that showed its operating results for that period.

104 The two documents supplemented the information given in the management accounts. One set out a list of "[n]on-recurring expenses". The other set out Healthy Water's operating results and sales revenue for the five months ended 30 November 2004, and projections of that revenue for certain other periods (the month of December 2004, the six months ended 31 December 2004, the six months ended 30 June 2005, and the 12 months ended 30 June 2005). The operating results document recorded the EBIT of Healthy Water "as per Management Accounts" as being $67,490 for the five months ended 30 November 2004. To that figure was then added the various non-recurring expenses, identified in the other document provided at this time, to yield an "EBIT (Adjusted)" of $163,590. The non-recurring expenses (the "add-backs") were added back to EBIT in order to give a better indication of the level of Healthy Water's profitability. Estimates of the EBIT as adjusted in this way were given for each of the four future periods mentioned above.

105 The list of non-recurring expenses provided to Mr Weeks on 9 December 2004 was divided into three categories of expense: obsolete inventories ($2,600), consulting fees ($16,000) and items referable to Mr Campbell ($271,000). The items referable to Mr Campbell were recorded as follows:

"Current annual salary	120,000
Motor vehicle allowance	16,000
General expense allowance	10,000
'Business' expense allowance	60,000
Credit card reimbursement	
($5,000/6,500 pmth)	65,000
(All of the above are paid monthly)	271,000"

Against the items referable to Mr Campbell (totalling $271,000) was set off an item described as "[e]stimated salary for general manager/$1 million turnover business" of $85,000 and the balance after that set off was given as $186,000 and described as "[e]xcess per annum". Five-twelfths of that amount of $186,000 ($77,500) was recorded against the period "5 months to 30/11/04".

106 The total for the five months ended 30 November 2004 of the three categories of non-recurring expenses (obsolete inventories, consulting fees and items referable to Mr Campbell, net of the allowance for the estimated salary for a general manager) was not recorded on the document but was $96,100.

Argument in this Court

107 Argument in this Court and in the courts below about the application of the Fair Trading Act proceeded for the most part by reference to whether there was a misrepresentation and whether there was reliance on the truth of what was represented. In particular, each side in this appeal staked out its position by reference to concepts of misrepresentation and reliance.

108 The appellants' central argument was that negotiation for and inclusion in the share sale agreement of express contractual warranties either showed that Backoffice did not rely on the pre-contractual statements or showed that the pre-contractual statements were not representations that continued to the point at which the agreements were made. Rather, so the appellants submitted, the pre-contractual documents set out *estimates* of non-recurring expenses that Mr Weeks recognised were no more than estimates and for which he sought an assurance of substantial accuracy to the best of the vendor's knowledge by obtaining contractual warranties to that effect.

109 By contrast, the respondents submitted that the critical point was whether, at the time of making the agreements, Mr Weeks continued to rely on, in the sense of believe in the accuracy of, what he had been told in the pre-contractual statements. If he did, and the respondents pointed out that his continued belief in these facts was not challenged at trial, the making of what were objectively untrue representations about the financial position of the company was said to be still operative and a cause of Backoffice agreeing to buy the share.

110 In their amended summons, Backoffice and Mr Weeks alleged that:

> "By providing Backoffice with the [two impugned 9 December documents] Campbell represented to Backoffice that:

(a) [Healthy Water] incurred non-recurring expenses of $96,100 for the five months ending 30 November 2004 ...

(b) [Healthy Water] had an EBIT (after adjustment for the Add-backs) for the 5 months to 30 November 2004 of $163,590".

It will be convenient to refer to these claims together as claims about add-backs and EBIT to November 2004.

111 Secondly, Backoffice and Mr Weeks alleged that, by providing the operating results document, Mr Campbell represented (among other things) that Healthy Water's sales revenue for December 2004 would be $100,000 and its EBIT for December 2004 would be $37,500. Backoffice and Mr Weeks further alleged that these representations were representations which continued until the share sale agreement was made; that by the time the share sale agreement was made, Mr Campbell knew, or ought to have known, that the estimates set out in the operating results document of the projected sales revenue and EBIT had not been achieved; and that Mr Campbell did not tell Mr Weeks before the share sale agreement was made that the projections had not been realised. These claims will be referred to as claims about sales revenue and EBIT for December 2004.

Add-backs and EBIT to November 2004

112 The case which Backoffice and Mr Weeks alleged and sought to make at trial in relation to add-backs and EBIT to November 2004 was that by providing the 9 December documents Mr Campbell represented to Backoffice that Healthy Water had incurred non-recurring expenses of a *particular* amount ($96,100) during the five months ended 30 November 2004 and that the company had an EBIT (adjusted) for that period of a *particular* amount ($163,590). Backoffice and Mr Weeks submitted that EBIT, as adjusted by adding back non-recurring expenses, was important to Mr Weeks because he calculated the price he offered for a share in Healthy Water as a multiple of the estimated EBIT for 2004-2005.

113 The trial judge concluded[133] that the sums recorded in the list of non-recurring expenses were not all accurate. The non-recurring expenses in fact incurred were less than the amount shown on the 9 December documents. Because the figures given for non-recurring expenses in the 9 December documents were not accurate, the EBIT (adjusted) recorded in those documents was also inaccurate. It was too high because the amount added back for non-recurring expenses (the "add-backs") was too high.

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133 (2007) 61 ACSR 144 at 208 [198], 212 [210]; 25 ACLC 302 at 360, 364.

114 Finding that the figures were not accurate does not, of itself, conclude the inquiry into whether there was misleading or deceptive conduct. For the reasons given earlier, in deciding whether there was misleading or deceptive conduct, it is necessary to examine the relevant course of conduct as a whole and not look at parts or particular aspects of conduct in isolation. In the present case, the 9 December documents were given to Mr Weeks in the course of investigations or negotiations that took place over a period of weeks, features of which were stated unwillingness or inability on the part of Mr Campbell to substantiate the figures provided and, in consequence, a decision by Mr Weeks to accept contractual warranties in the form ultimately agreed in the share sale agreement.

115 The relevant course of conduct is described below. It shows that, in the circumstances, the provision of estimates of add-backs and EBIT to November 2004 was not a representation (as Backoffice and Mr Weeks alleged) that the add-backs or the EBIT were *in fact* the amount stated. Further, looking at the relevant course of conduct as a whole, the conduct of Mr Campbell had two features: first, that Mr Campbell provided to Mr Weeks what were estimates of add-backs and EBIT to November 2004 and second, that the estimates he provided were conveyed as being only *his* estimates which he believed to be true, but which, as expressly indicated, would not be otherwise substantiated. Because it was not shown at trial that Mr Campbell did not believe his estimates to be true, Mr Campbell's conduct was not shown to have been misleading or deceptive.

Investigations and negotiations

116 When considering whether to buy an interest in Healthy Water or its business, Mr Weeks sought to make his own investigations about the financial affairs of Healthy Water. He was not given access to all of the company's accounts. Rather, as explained earlier, he was given the management accounts to 30 November 2004 with the 9 December documents supplementing the management accounts.

117 What did the 9 December documents convey to a recipient? It is first important to recognise that one of the items taken into account in the calculation of non-recurring expenses (the allowance for the "[e]stimated salary for general manager") was expressly described as an estimate, and the other items (particularly the items related to Mr Campbell for general expense allowance, "business" expense allowance and credit card reimbursement) bore every indication of being estimates rather than sums recorded in the books of account of the company as having been incurred. In the case of the credit card reimbursement of $65,000, the relevant monthly amount was said to be between

$5,000 and $6,500. To the extent to which the items of non-recurring expenses were estimates, the total amounts stated in the 9 December documents as non-recurring expenses incurred for the five months ended on 30 November 2004 (and the total of $96,100 derived from the documents) also had to be understood as a product of estimation rather than record.

118 Because the total amounts given for non-recurring expenses depended upon estimates that were made for at least some items, and the EBIT was calculated by adding back the non-recurring expenses, the amount given for EBIT (adjusted) depended upon those same estimates. It follows that what the documents represented to a reader was that someone (whose identity was not apparent from the face of the documents) *estimated* the non-recurring expenses to be in the amounts stated and, on that basis, *estimated* the EBIT (adjusted) to be in the amount stated.

119 Events that followed confirmed that the figures given in the 9 December documents were estimates[134]. Because Mr Weeks recognised that at least some of the figures given for non-recurring expenses referable to Mr Campbell were estimates, he asked for substantiation of the amounts recorded as non-recurring expenses. Substantiation was not provided. Indeed, the adviser acting for Mr Campbell (Mr Horn) told Mr Weeks that he had tried to obtain details of the credit card charges that had been reimbursed by the company but were not properly attributable to the company's business and that he had not been able to do so. Mr Horn also told Mr Weeks that, although an amount was recorded in Healthy Water's books as owed by Mr Campbell on loan account with the company, Mr Campbell disputed that he owed any sum and maintained that the documents given to Mr Weeks on 9 December were deficient because they did not record any liability to him for long service leave and accrued annual leave.

120 Mr Weeks told Mr Campbell's adviser (Mr Horn) that if he could not substantiate the figures given in the 9 December documents he needed "some kind of ... support, confidence that they are correct". Mr Horn suggested that Mr Weeks seek warranties in the purchase agreement and Mr Weeks decided not to press his requests for substantiation further but instead to take warranties. Despite the uncertainties about what was set out in the 9 December documents that have been described earlier, and despite Mr Weeks not being given the verification he had sought of the items set out in those documents, Mr Weeks made an offer on 14 December 2004 to buy a half interest in the enterprise for $850,000. Those terms were repeated in a revised offer of 16 December 2004,

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134 (2007) 61 ACSR 144 at 148-149 [10]-[11]; 25 ACLC 302 at 306-307.

which was expressed as being based on the documents he had been given "which form part of this offer and any subsequent agreement to purchase".

121 As noted earlier in these reasons, negotiations between the parties and their lawyers continued after the making of the offer and revised offer. The share sale agreement of 24 January 2005 contained several provisions relevant to the issues that now fall for consideration.

Express warranties and an entire agreement clause

122 First, the share sale agreement provided (by cl 10.1 in Sched 1 to the agreement) that the vendor warranted that, to the best of its knowledge (which is to say Mr Campbell's knowledge), *all* information given by or on behalf of Healthy Water or its advisers to Backoffice or its advisers material to the sale was "substantially accurate and complete and not misleading".

123 Secondly, Sched 3 to the agreement reproduced the management accounts to 30 November 2004 that had been given to Mr Weeks, together with a balance sheet for Healthy Water as at 30 November 2004 and a profit and loss statement for the five months ended 30 November 2004. The profit and loss statement recorded the operating profit of the company for the five months "as per attached Company management accounts" as $66,978.99. It added what it described as "Proprietor's estimate of non-recurring expenses for the 5 months ended 30/11/04" of $96,100 to yield an "Adjusted Operating Profit" of $163,078.99.

124 The vendor further warranted (by cl 10.2 in Sched 1) that, to the best of its knowledge, the information in the schedules to the agreement was "materially accurate and complete and not misleading". The vendor also warranted (but without any qualification that the warranty was to the best of its knowledge) that: (a) Healthy Water had no liabilities other than those disclosed in Sched 3 and another schedule to the agreement, and was not a party to any contract or arrangement not disclosed to the purchaser; (b) Healthy Water had not experienced any extraordinary expense since the Balance Sheet Date (30 November 2004) and the business of the company had been operated in the ordinary course and in good faith since that date; and (c) the profits or losses shown in the Balance Sheet had not, to a material extent, been affected (except as disclosed) by any extraordinary or exceptional event or circumstance, or by any other factor rendering them unusually high or low. Some other warranties were mentioned in the pleadings but need not now be noticed.

125 Reference should also be made to some other provisions of the share sale agreement. First, the agreement provided for a particular meaning to be given to a reference in a warranty to "the knowledge, information and belief" of the

vendor, treating that expression or words to that effect as including an additional warranty that the vendor had made due and careful inquiry as to the matter. This additional warranty was not specifically pleaded and the trial judge refused[135] an application to amend the summons to rely on it. It was not considered by the Court of Appeal and no reliance was placed upon it in this Court. It may be put aside from further consideration.

126 Secondly, the share sale agreement provided that, notwithstanding any other provision of the agreement:

> "the Vendor shall have no liability in respect of any claim under the Warranties [set out in the agreement] unless the amount of such claim exceeds the sum of $15,000 for any one event or $25,000 in aggregate".

127 Thirdly, the share sale agreement contained an entire agreement clause and a provision denying that the purchaser relied on any warranty made by or on behalf of the vendor, except those set out in the agreement. Clauses of these kinds have been held[136] effective answers to claims to set up collateral agreements but no claim of that kind is at issue in this matter.

128 It would appear that, although mentioned in the pleadings filed on behalf of Mr Campbell and Sentinel, little, if any, emphasis was given to the entire agreement clause at the trial of the proceeding or in the appeal to the Court of Appeal. In this Court, the appellants referred to the clause as supporting submissions they made to the effect that even if Mr Campbell did engage in misleading or deceptive conduct, that conduct was not a cause of the loss or damage allegedly suffered. Backoffice and Mr Weeks submitted that it was now too late for the appellants to rely on the entire agreement clause in this way.

129 It will not be necessary to resolve that question because these reasons will demonstrate that the claims under the Fair Trading Act fail for other reasons.

130 It is as well to add, however, that, of itself, neither the inclusion of an entire agreement clause in an agreement nor the inclusion of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent the provision of misleading information before a contract was made constituting a contravention of the prohibition against misleading or deceptive

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135 (2007) 61 ACSR 144 at 203-204 [182]; 25 ACLC 302 at 356.

136 See, for example, *L'Estrange v Graucob Ltd* [1934] 2 KB 394.

conduct by which loss or damage was sustained. As pointed out earlier, by reference to the reasons of McHugh J in *Butcher*[137], whether conduct is misleading or deceptive is a question of fact to be decided by reference to all of the relevant circumstances, of which the terms of the contract are but one.

Contravening conduct?

131 Viewed in context, as they must be, the 9 December documents conveyed to a reader no more than that certain estimates of Healthy Water's financial performance had been made. Nothing that was said or done after provision of the 9 December documents alters the conclusion that those documents conveyed no more to a reader than that add-backs and EBIT to November 2004 were *estimated* to be the amounts that were stated. The conversations Mr Weeks had with Mr Horn, soon after the 9 December documents were provided, confirmed that the documents recorded estimates that had been made, and revealed that it was Mr Campbell who had made at least some of them. The conversations further confirmed that no substantiation or verification of those estimates would be provided and that, in the case of the credit card charges, an attempt had been made to obtain substantiation but had failed. Mr Horn's invitation to seek warranties, in lieu of substantiation, was ultimately translated into the contractual warranties earlier described.

132 No doubt there are circumstances in which the provision of an estimate of a company's financial performance may mislead or deceive every bit as much as providing a report that purports to be an accurate record of performance. In this case, however, the conduct of Mr Campbell taken as a whole was to proffer estimates of the add-backs and EBIT to November 2004 which he was to be understood as asserting that he believed to be true. This was not the conduct which Backoffice and Mr Weeks had alleged. And although the trial judge concluded that the estimates incorporated in the calculation of the add-backs had been made by Mr Campbell "in a less than disciplined manner", her Honour concluded that Mr Campbell did not know that those estimates were inaccurate or incomplete or misleading[138]. And Backoffice and Mr Weeks never sought to make a case that Mr Campbell had no sufficient basis on which to make the estimates.

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137 (2004) 218 CLR 592 at 625 [109].

138 (2007) 61 ACSR 144 at 214 [218]; 25 ACLC 302 at 366.

133 In the circumstances, Mr Campbell was not shown to have engaged in misleading or deceptive conduct in relation to add-backs and EBIT to November 2004, and the contraventions of the Fair Trading Act alleged by Backoffice and Mr Weeks in relation to those matters were not established.

134 It is necessary to deal now with the claims about the projections of sales revenue and EBIT for December 2004 which were also given in the 9 December documents.

Sales revenue and EBIT for December 2004

135 Because the share sale agreement was not made until 24 January 2005, Healthy Water's actual sales revenue for the month of December 2004 was recorded in its management accounts before the agreement was made. The actual sales revenue achieved was $92,853. This was $7,147 (or about eight per cent) less than had been estimated ($100,000). Because the actual sales revenue for December 2004 was less than the estimate, the actual EBIT for the same period was likely to have been affected and, of course, the difference between estimated and actual sales revenue may well have had consequential effects on other projected figures given in the document. But the figure given for EBIT was an estimate and no actual figure for EBIT was recorded in the December management accounts. The consequences of a variation in sales revenue on EBIT were not explored with Mr Weeks at trial. Further, it was not put to Mr Campbell in cross-examination that he knew that the EBIT for December 2004 was less than the amount estimated or that he knew, as was alleged, that the shortfall was $25,000. It would not be right, in these circumstances, now to find for the first time that when the share sale agreement was made Mr Campbell knew or ought to have known that the estimate of EBIT was false.

136 The trial judge rejected Mr Campbell's evidence that he discussed the December 2004 management accounts, or what they recorded about sales revenue, with Mr Weeks before the share sale agreement was made[139]. Because the trial judge found[140] that Mr Weeks did not rely upon the estimate of projected sales revenue for December 2004, her Honour made no finding about whether the representation made about that revenue in the operating results document continued until the share sale agreement was made on 24 January 2005.

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139 (2007) 61 ACSR 144 at 232 [258]; 25 ACLC 302 at 382.

140 (2007) 61 ACSR 144 at 232-234 [261]-[269]; 25 ACLC 302 at 382-384.

137 In the Court of Appeal, Giles JA held[141] that for Mr Campbell to leave the estimate of sales revenue for December 2004 uncorrected (when he knew it was greater than actual sales revenue) was misleading or deceptive conduct. Basten JA agreed[142] with Giles JA on this point.

138 In this Court, the appellants made two submissions about the estimate of sales revenue for December 2004. First, they submitted that the representation was not a continuing representation because "Mr Weeks did not require that those figures be the subject of any relevant [express] warranty" in the share sale agreement. Secondly, they submitted that the evidence did not support a conclusion that a difference of $7,147 in sales revenue would have caused Mr Weeks not to proceed with the sale. The appellants submitted that, viewed objectively, the difference had no significant effect on Healthy Water's annual EBIT for 2004-2005, if EBIT were to be calculated as twice that achieved for the six months ended 31 December 2004.

139 The first of these submissions of the appellants should be rejected. It will be recalled that the share sale agreement provided that the vendor warranted that, to the best of its knowledge, *all* information given by or on behalf of Healthy Water or its advisers to Backoffice or its advisers material to the sale of the share was "substantially accurate and complete and not misleading". This is reason enough to reject the submission. Secondly, and more fundamentally, neither the negotiation for, nor the agreement upon, contractual warranties concludes the issue of whether there was misleading or deceptive conduct or the issue of whether conduct of that kind was a cause of the loss or damage alleged in this case.

140 The second of the appellants' submissions was to the effect that it was not shown that Mr Weeks would have acted any differently if he had known the actual sales revenue for December 2004. The trial judge concluded[143] that Mr Weeks did not rely upon the estimate of sales revenue. Rather, her Honour found[144] that Mr Weeks "doubted those figures to the point that he built in a protection for himself if the figures were not achieved". The "protection" was said to be found in the services agreement made between Healthy Water,

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141 (2008) 66 ACSR 359 at 376-377 [72]-[73]; 26 ACLC 537 at 550.

142 (2008) 66 ACSR 359 at 407 [218], 408 [222]-[223]; 26 ACLC 537 at 576, 577.

143 (2007) 61 ACSR 144 at 234 [269]; 25 ACLC 302 at 384.

144 (2007) 61 ACSR 144 at 234 [269]; 25 ACLC 302 at 384.

Mr Campbell's company (Sentinel) and Mr Campbell. By that services agreement Sentinel would be entitled to a performance bonus of up to $300,000 if the available profit of Healthy Water permitted its payment. Available profit was to be determined after payment of all expenses of Healthy Water including, of course, amounts otherwise due under the two services agreements.

141 As Giles JA rightly pointed out[145], the services agreement with Sentinel gave no protection to Mr Weeks against the possibility that the sales revenue may be *less* than forecast; the services agreement with Sentinel dealt only with what was to happen if Healthy Water proved to be *more* profitable than was forecast. The trial judge thus erred in concluding that negotiation of this aspect of the services agreement showed that Mr Weeks did not rely on the estimate of sales revenue.

142 The appellants nevertheless submitted that Giles JA was wrong to hold, as he did[146], that Mr Weeks relied on the accuracy of the estimates of future sales revenue and the estimates of future profitability derived from those estimates of revenue. The conclusion which Giles JA reached[147] was founded upon the premise that "[i]f a material representation is made which is calculated to induce the representee to enter into a contract and that person in fact enters into the contract there arises a fair inference of fact that he was induced to do so by the representation"[148].

143 Three points may be made about this proposition. First, it is a proposition expressed in relation to the law of deceit, *not* the operation of statutory provisions for the award of damages suffered by contravention of consumer protection provisions proscribing misleading or deceptive conduct. Secondly, the proposition carries within it a number of subsidiary questions, such as what is a "material" representation, and when is a material representation "calculated" to induce entry into a contract. Thirdly, because the proposition is directed to the drawing of inferences, consideration of its application must always attend closely to all of the evidence that is adduced that bears upon the question being examined. With considerations of these kinds in mind, Giles JA was right to

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145 (2008) 66 ACSR 359 at 371-372 [46]; 26 ACLC 537 at 546.

146 (2008) 66 ACSR 359 at 372 [48]; 26 ACLC 537 at 546.

147 (2008) 66 ACSR 359 at 370 [41]; 26 ACLC 537 at 545.

148 *Gould v Vaggelas* (1984) 157 CLR 215 at 236 per Wilson J; [1985] HCA 85.

point out[149] that reliance is *not* a substitute in the context of the Fair Trading Act for the essential question of causation. Moreover, it is also right to observe, as Giles JA said[150], that "[i]t may be artificial to speak of reliance in determining what action or inaction would have occurred if the true position had been known".

144 In the present matter, the significance which Mr Weeks attached to the estimate of sales revenue for December 2004 was dealt with only briefly in evidence. Not only was most attention given at trial to questions of oppression, the chief focus of the claims under the Fair Trading Act seems to have been upon the add-backs and EBIT to November 2004.

145 In an affidavit which Mr Weeks swore in September 2006, shortly before the trial began in November 2006, he deposed to what he would have done if he had known of the inaccuracies in the financial information given to him in December 2004. That evidence dealt separately with three aspects of the financial information. First, it dealt with the non-recurring expenses or add-backs. Mr Weeks said:

> "If any annualised add-back (or combination of add-backs) of approximately $20,000 or greater was found to be erroneous, that is, if the profit for the five month period from 1 July 2004 to 30 November [2004] was approximately $8,000 inaccurate, then this would mean that the profit would not be sufficient to meet Healthy Water's obligations. I would not have entered into the Share Sale Agreement in these circumstances."

He then dealt with two other issues not yet touched on in these reasons: an alleged misstatement of amounts owing to trade creditors and an alleged misstatement of the balance of Mr Campbell's loan account with the company. Of these two matters he said that, had he been aware "of *either* of these matters or *both* of them together" (emphasis added), he would not have entered into the share sale agreement, and he stated his reasons for that conclusion. The last aspect of the financial information dealt with in the affidavit of Mr Weeks concerned the overstatement of the sales revenue for December by $7,147 and an allegation he had made that the same document had overstated the EBIT for Healthy Water for December 2004 by approximately $25,000. The latter allegation about EBIT was not made good. The affidavit continued:

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149 (2008) 66 ACSR 359 at 371 [44]; 26 ACLC 537 at 545-546.

150 (2008) 66 ACSR 359 at 371 [44]; 26 ACLC 537 at 545-546.

"Had I been aware of *these* matters, I would not have entered into the Share Purchase Agreement for the following reasons:

(a) The profit in December of $12,438 represented a 62% reduction from the average profit achieved during the preceding 5 months. This would have reduced the annualised profit of Healthy Water and therefore reduced my assessment of the value of Healthy Water based on its EBIT such that I would not have offered to purchase one share for $850,000.

(b) In addition, a $25,000 reduction in the profit for December would have reduced Healthy Water's annualised profit and therefore cash flow to a level such that it would not have been able to meet its liabilities including those discussed in paragraph 80(c), above [including liabilities under the services agreements]." (emphasis added)

The oral evidence of Mr Weeks did not add to or detract from the evidence set out in the paragraph of his affidavit last quoted.

146 It will be noted that the effect of this aspect of Mr Weeks' evidence was that if *two* matters had been known to him (overstatement of sales revenue by $7,147 *and* overstatement of EBIT by $25,000) he would not have made the share sale agreement. But as the facts were found at trial, only one of those matters, overstatement of sales revenue by $7,147, was established. The trial judge noted[151] that the accountants who gave evidence at the trial agreed that there had been an overstatement of Healthy Water's EBIT for December 2004, but only of between $15,318 and $20,022. There was no exploration at trial of what Mr Weeks' position would have been in these circumstances. There was no evidence from Mr Weeks that he would not have proceeded with the purchase if he had known only that the sales revenue for December 2004 had been $7,147 less than estimated. There was, therefore, no question of what credence was to be given to Mr Weeks' evidence of what he would have done if he had known more than he did when he made the share sale agreement. As is illustrated by *Rosenberg v Percival*[152], albeit in a different context, assessment of evidence of what *would* have been done if more information had been known may not be easy.

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151 (2007) 61 ACSR 144 at 193-194 [152]; 25 ACLC 302 at 347.

152 (2001) 205 CLR 434; [2001] HCA 18.

147 What is important in the present case is that the evidence that was given by Mr Weeks about what he would have done if he had known more than he did was expressed in a way that distinguished between cases where knowledge of *either* of two matters would have meant he would not proceed and cases where he attached significance to knowledge of *both* of two matters. This being the only direct evidence on the subject it was not open to the Court of Appeal to infer, from its own assessment of the materiality of the representation and its own assessment of whether the representation was calculated to induce entry into a contract, that Mr Weeks would not have proceeded with the share purchase.

Conclusions about Fair Trading Act claims

148 For these reasons, the claims which Backoffice and Mr Weeks made under the Fair Trading Act about add-backs and EBIT to November 2004 and about sales revenue and EBIT for December 2004 failed.

149 The claims made about add-backs and EBIT to November 2004 failed because the alleged contravention of the Act was not established. The same is true of the contravention alleged in relation to EBIT for December 2004.

150 As for the claims concerning the estimate of sales revenue for December 2004, Backoffice and Mr Weeks established at trial that Mr Campbell had in this respect engaged in conduct that was misleading or deceptive or likely to mislead or deceive. But Backoffice and Mr Weeks did not prove that, had they known the truth, they would not have proceeded with the share purchase. Because it was not shown that Backoffice and Mr Weeks would not have proceeded with the purchase, their claims that they would not have outlaid $850,000 for a share which turned out to be worthless do not arise.

151 It will be convenient to deal with the third form of claim under the Fair Trading Act (about the alleged deficiencies in Sched 3 to the share sale agreement) when dealing with the questions of breach of contractual warranties. Before dealing with those issues, however, it is necessary to say something briefly about the argument advanced in this Court that the provision of a warranty in the share sale agreement that, to the best of Mr Campbell's knowledge, all information provided material to the sale was "substantially accurate and complete and not misleading" was itself misleading or deceptive conduct.

152 As is apparent from what has been said earlier in these reasons, by their amended summons, Backoffice and Mr Weeks made various allegations of representations concerning the add-backs and EBIT to November 2004, the sales

revenue and EBIT for December 2004 and the contents of Sched 3 to the share sale agreement. The last paragraph of the contentions in the amended summons was:

> "Further, or in the alternative, by reason of the Express Representation and the Implied Representation the December 2004 Estimates were not substantially accurate complete and not misleading with the consequence that their provision was contrary to clause 10.1 of Schedule 1 and caused loss and damage to Backoffice."

That paragraph did not make a claim of the kind now advanced. We were taken to no other material which would show that this claim that the provision of the warranty described was itself misleading or deceptive was in issue between the parties at trial. It is too late[153] for Backoffice and Mr Weeks now to rely on it. On the second day of the hearing of the appeal leave was sought to amend the notice of contention to raise this argument. Leave should be refused.

Breach of contractual warranties and the Sched 3 representations

153 The trial judge concluded[154] that Mr Campbell had breached the contractual warranties provided in the share sale agreement about the financial statements of Healthy Water contained in Sched 3 to the share sale agreement in three respects, namely, that Healthy Water: (a) owed trade creditors $12,360 more than was disclosed; (b) had a liability of $3,760 to Mr Campbell that was not disclosed; and (c) had adjusted net assets of only $148,326.10, not $210,856.89 as warranted. Having regard to her conclusion that there should be a compulsory sale of the share to Mr Campbell for $853,000, the trial judge decided[155] that no damages would be allowed for these breaches.

154 In their cross-appeal to the Court of Appeal, Backoffice and Mr Weeks alleged that the trial judge erred in not assessing damages for these breaches, and further that her Honour should have found other breaches of express warranties. Mr Campbell and Sentinel contended that the trial judge should not have found there to have been any breach of the express warranties.

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153 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; [1950] HCA 35; *Coulton v Holcombe* (1986) 162 CLR 1; [1986] HCA 33.

154 (2007) 61 ACSR 144 at 215 [219]; 25 ACLC 302 at 366.

155 (2007) 61 ACSR 144 at 215 [220]; 25 ACLC 302 at 366.

155 Two members of the Court of Appeal (Giles JA and Basten JA) did not decide[156] these issues about breach of express warranties. The third member of the Court (Young CJ in Eq) concluded[157] that the trial judge had not been shown to err in her conclusion that there had been the identified breaches of warranties but rejected the argument that there had been other breaches of warranty. Although Young CJ in Eq accepted that there were the identified breaches, he concluded[158] that the matter was "of little moment as the damages flowing from the breaches were only nominal". This followed because, in his Honour's opinion, none of the breaches materially affected EBIT[159] and, if the warranties had not been breached, Backoffice would still have bought the share at the price it paid.

156 Reference has been made earlier in these reasons to the application by Backoffice and Mr Weeks seeking special leave to cross-appeal. They sought to argue that the majority of the Court of Appeal should have held that the findings of breach of contractual warranties made by the trial judge should not be disturbed. In addition, Backoffice and Mr Weeks sought to argue that it should be found that the overstatement of sales revenue and adjusted EBIT for December 2004 resulted in a breach of the express warranty that, to the best of Mr Campbell's knowledge, the information given to Backoffice or its advisers material to the sale of the share was "substantially accurate and complete and not misleading". Backoffice and Mr Weeks alleged that damages for these breaches of warranties should have been assessed at $440,000. The figure of $440,000 was arrived at by reference to expert valuation evidence given at trial that one share in Healthy Water was worth $410,000, not the sum of $850,000 paid for it. Valuation of the share at $410,000 was based on the company's *historical* earnings; both the price paid, and the competing evidence of value adduced at trial were based on the company's *future* earning capacity[160].

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156 (2008) 66 ACSR 359 at 395 [159] per Giles JA, 408 [223] per Basten JA; 26 ACLC 537 at 566, 577.

157 (2008) 66 ACSR 359 at 450 [549]; 26 ACLC 537 at 611.

158 (2008) 66 ACSR 359 at 450 [550]; 26 ACLC 537 at 611.

159 (2008) 66 ACSR 359 at 452 [585]; 26 ACLC 537 at 613.

160 cf (2007) 61 ACSR 144 at 192 [144]-[145] per Bergin J; 25 ACLC 302 at 346 and (2008) 66 ACSR 359 at 407 [216]-[217] per Basten JA; 26 ACLC 537 at 576.

157 The parties accepted that in the appeal and cross-appeal to the Court of Appeal issue was joined about whether the trial judge erred in finding the breaches of warranties that she did. Because the issues about breaches of warranties and the damages to be allowed for any such breaches were not decided by the majority in the Court of Appeal, there is evident force in the arguments of Mr Campbell and Sentinel that they are issues that should be remitted for consideration by that Court. Yet it is also important to recognise that this litigation has already been protracted and that the costs of the litigation must now be much larger than the sum which Backoffice and Mr Weeks say should be allowed as damages for the alleged breaches. Continued prosecution of these claims or their defence can be commercially sensible only if each side would be able to pay what would be due if that side lost the litigation. But those are matters for the parties to consider; this Court is not able to do that.

158 Despite the protraction of the litigation that is entailed, issues concerning the claims for breach of warranties that were raised by the appeal and the cross-appeal to the Court of Appeal should be remitted for consideration by that Court. The written submissions to the Court of Appeal may have been broader than those presented by the notice of cross-appeal filed in the Court of Appeal. Further, it is unnecessary to decide whether the issues just mentioned, as to the whole or part, fall within the terms of that notice or are caught up by the notice of contention in this Court and are remitted on that footing to the Court of Appeal. Counsel in this Court appeared to accept that it would be for the Court of Appeal, not this Court, to determine those issues.

159 The issues are whether the trial judge erred in finding that there were breaches of contractual warranties in the three respects identified earlier (trade creditors, the liability to Mr Campbell, and adjusted net assets) and in certain other respects (amounts referable to the disposition of two motor vehicles, and add-backs and EBIT to 30 November 2004). In addition, on that remitter Backoffice and Mr Weeks should be permitted to argue that the failure to correct the overstatement of December sales revenue and the EBIT for December 2004 were breaches of the warranty in cl 10.1 of the share sale agreement, namely that, to the best of Mr Campbell's knowledge, all information provided material to the sale of the share was substantially accurate and complete and not misleading.

160 These allegations about the Sched 3 deficiencies also give rise to claims under the Fair Trading Act. This being so, and the dispute in the Court of Appeal about the trial judge's finding that there were these alleged deficiencies having not yet been decided, those claims must also be remitted for further consideration by the Court of Appeal.

161 On the further consideration of the issues that are remitted to the Court of Appeal it will be for that Court to decide, among other things, whether, having regard to what is decided by this Court and such matters as the course of proceedings at trial, the claims remitted are maintainable.

162 In addition, questions of damages that would arise if there were found to be any of the alleged breaches of warranty that have been mentioned should also be remitted for consideration by the Court of Appeal. There is, however, one aspect of those questions of damages that should now be considered.

163 Backoffice and Mr Weeks alleged, and it may be accepted, that the share Backoffice bought was worthless by the time the proceedings came to trial. The share was rendered worthless when the provisional liquidator realised the assets of Healthy Water for a price insufficient to make any return of capital to shareholders. Mr Weeks alleged that this came about as a result of Mr Campbell's conduct of the affairs of the company and it is convenient to assume for the purposes of argument, without deciding, that this is so. If, on the remitter to the Court of Appeal, Backoffice and Mr Weeks establish that Mr Campbell breached the warranties he gave in the share sale agreement, Backoffice is entitled to such damages as would put it in the position it would have been in if the contract had been performed according to its terms. In assessing those damages it would not be right to attribute any diminution in the value of the share that was a consequence of Mr Campbell's conduct of the affairs of Healthy Water to the breach of contractual warranties about the financial position of Healthy Water. That is, the damages to be assessed for breach of the contractual warranties are not to be assessed on the footing that the share acquired was worthless or on the footing that if the company's true financial position had been known there would have been no sale and purchase of the share.

164 If there was one or more breaches of contractual warranties, there may well be questions presented by what appears to be the adoption of different bases for fixing the price of the share and for valuing the share. If the price paid by Mr Weeks was fixed by a method different from the method later used to assess the "true" value it is not self-evident that damages for breach of warranty should in this case be assessed as the difference between the price paid and the value of what was bought. This issue was not explored in argument in this Court. It is better considered on remitter to the Court of Appeal.

Implied duty to co-operate

165 Finally, it is necessary to notice and deal briefly with one further aspect of the cross-appeal which Backoffice and Mr Weeks sought special leave to

institute. Backoffice and Mr Weeks submitted that Mr Campbell had breached his implied obligations under the shareholders agreement and the share sale agreement by not doing all things necessary on his part to enable Backoffice to have the benefit of those contracts and by acting in a manner calculated to deprive Backoffice of those benefits. They submitted that by these breaches Mr Campbell rendered Backoffice's share in Healthy Water worthless, and that on this account it should have damages assessed (in effect) as so much of the purchase price as was not made good by damages for Mr Campbell's breach of the contractual warranties.

166 In their amended summons, Backoffice and Mr Weeks alleged that there were implied terms in the shareholders agreement and the share sale agreement that the parties would do all such things as are necessary on their part to enable the other to have the benefit of the agreement, and that neither would act in a manner calculated to deprive the other of the benefit of the agreement. Mr Campbell admitted the existence of the first limb of these terms but denied any breach.

167 At trial, Bergin J considered[161] these allegations in connection with the claim by Backoffice and Mr Weeks that Mr Campbell had breached the terms by causing Healthy Water not to pay what was due to Backoffice under its services agreement. In the Court of Appeal, however, Backoffice and Mr Weeks relied on the terms as supporting a broader allegation that Mr Campbell had, in effect, deprived them of the benefits of the acquisition of a half interest in the company.

168 Only Young CJ in Eq dealt with this aspect of the matter and held[162] that it was not made out. As Young CJ in Eq rightly pointed out[163], care must be exercised in identifying both the content and operation of an implied obligation to co-operate lest it be at odds with the terms upon which the parties have expressly agreed.

169 As advanced in this Court, the claim for breach of an implied obligation to co-operate was radically different from the claim that the trial judge had considered. It went far beyond a claim founded on the well-known rule in

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161 (2007) 61 ACSR 144 at 218 [231]; 25 ACLC 302 at 368-369.

162 (2008) 66 ACSR 359 at 451 [562]-[563]; 26 ACLC 537 at 612.

163 (2008) 66 ACSR 359 at 450 [557]; 26 ACLC 537 at 611.

Mackay v Dick[164]. In this Court, the claim was advanced as a reflex of the arguments that were advanced under the heading of oppression. That is, to the extent to which there was oppressive, prejudicial or discriminatory conduct it was said that such conduct constituted a breach of an implied obligation to co-operate.

170 Neither the precise content of the term nor its particular application was explored in argument in this Court. Although described as an implied term that each would co-operate with the other, the content of the duty said to be imposed by the term was, in substance and effect, to bind each of two shareholders, in contract, not to give the other grounds for relief under Pt 2F.1 of the Corporations Act. A term having content of that kind goes well beyond the particular obligations undertaken in either the shareholders agreement, the share sale agreement, or in the constituent documents of Healthy Water. It is not a term necessary to give business efficacy to the parties' agreements[165].

171 Special leave to advance this ground should be refused.

Oppression

172 As noted at the outset of these reasons, Backoffice sought special leave to cross-appeal to reinstate the success it had had at trial in its oppression claims. Those claims were founded in the provisions of Pt 2F.1 (ss 232-235) of the Corporations Act. Special leave to cross-appeal on these grounds should be refused.

173 Section 1337B(2) of the Corporations Act confers jurisdiction on the Supreme Court of each State with respect to civil matters arising under the

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164 (1881) 6 App Cas 251 at 263:

> "[A]s a general rule ... where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

See also *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607; [1979] HCA 51.

165 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346-347 per Mason J; [1982] HCA 24.

Corporations legislation[166]. One species of such matters is an application under Pt 2F.1. Section 234 identifies who can apply for an order; s 233 describes the orders that a court can make; and s 232 identifies the grounds for making an order under s 233. Section 232 provides:

> "The Court may make an order under section 233 if:
>
> (a) the conduct of a company's affairs; or
>
> (b) an actual or proposed act or omission by or on behalf of a company; or
>
> (c) a resolution, or a proposed resolution, of members or a class of members of a company;
>
> is either
>
> (d) contrary to the interests of the members as a whole; or
>
> (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.
>
> For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company."

Section 53 of the Corporations Act gives an expanded identification of the "affairs of a body corporate" for a number of provisions of the Act, including s 232. In particular, the affairs of a body corporate include "the promotion, formation, membership, control, business, trading, transactions and dealings" of the body[167] and "the internal management and proceedings of the body"[168].

174 If one or more of the grounds identified in s 232 of the Corporations Act is established, the Court is empowered by s 233(1) to "make any order under this section that it considers appropriate in relation to the company". Ten species of order are identified – ranging from an order for winding-up to an order

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166 A term defined in s 9.

167 s 53(a).

168 s 53(c).

restraining a person from engaging in specified conduct or from doing a specified act, or requiring a person to do a specified act. One particular species of order that the court may make[169] is an order "for the purchase of any shares by any member".

175 It is not necessary to embark on any detailed examination of the findings made in the courts below about the course of events that happened so soon after completion of the share sale and acquisition. The facts found at trial showed that Mr Campbell excluded Mr Weeks from participation in the management of Healthy Water despite the agreement recorded in both the shareholders agreement and each of the services agreements that he and Mr Campbell were to be joint managing directors. Under an earlier form of companies legislation dealing with oppression of members, wrongful exclusion from participation in the management of the company was held in *In re H R Harmer Ltd*[170] to be a species of oppressive conduct.

176 Section 232 should not be read more narrowly. Wrongful exclusion from management may be a form of oppression. It is not to be supposed that the only conduct of a company's affairs that is to be classified as "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member" is conduct of the company's affairs that is otherwise lawful. The fact that Mr Campbell's conduct was said to constitute breach of his or Sentinel's contractual obligations under the shareholders agreement, or the procuring of a breach by Healthy Water of its obligations under the services agreement with Backoffice, does not preclude engagement of the oppression provisions. Neither is it to be supposed that there cannot be oppression on the part of one who thinks that he or she is acting rightly[171]. It is therefore not to the point to examine Mr Campbell's motives for acting as he did.

177 There may be an issue about whether deadlock in the affairs of a company would fall within s 232 of the Corporations Act. It is not necessary to explore these questions further in the present matter. It may be noticed, however, that the facts in the present matter revealed a clear case in which it was just and equitable[172] that the company be wound up. The company as constituted after the

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169 s 233(1)(d).

170 [1959] 1 WLR 62; [1958] 3 All ER 689.

171 cf *M Dalley & Co Pty Ltd v Sims* (1968) 120 CLR 603 at 606; [1968] HCA 82.

172 s 461(1)(k).

share sale had evident similarities to a partnership and the two shareholders were at loggerheads[173].

178 The chief form of relief sought at trial was an order for compulsory purchase of Backoffice's share in Healthy Water for an amount not less than the sum paid for it. Although s 233(1)(d) gives the court power to make an order for the purchase of shares by a member, the Corporations Act is silent about the terms on which such a sale may be ordered. In particular, the Corporations Act does not identify the basis upon which the price for the shares is to be fixed if an order for compulsory purchase is made. Under earlier forms of the oppression provisions of companies legislation, orders were made for the compulsory sale of shares by one member to another at prices to be fixed according to various criteria. In some cases[174] the price has been fixed at the value the shares would have had at the commencement of the proceedings but for the effect of the oppressive conduct. In other cases[175] a date other than the date of commencement of the proceedings has been fixed. Again, there is no reason to give the present oppression provisions some narrower construction. In particular, the power given to the court by s 233(1)(d) should not be hedged about by implied limitations[176]. It is not necessary, however, to decide in this case how the power to fix a price for compulsory sale of Backoffice's share in Healthy Water could or should have been exercised. This was not a case in which there should have been an order for compulsory sale.

179 By the time this matter came to trial, a liquidator had been appointed provisionally and the liquidator had sold the whole of the undertaking of Healthy

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173 See, for example, *In re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426; *In re Westbourne Galleries* [1973] AC 360; *In re Wondoflex Textiles Pty Ltd* [1951] VLR 458.

174 For example, *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324.

175 See, for example, *In re London School of Electronics Ltd* [1986] Ch 211 at 224, referring to the order made in *In re Jermyn Street Turkish Baths Ltd* [1970] 1 WLR 1194; [1970] 3 All ER 57, where the shares were to be valued on an inquiry as at the date of the Master's certificate. See also *In re A Company* [1983] 1 WLR 927 at 937; [1983] 2 All ER 854 at 862, where consideration was given to fixing the date of valuation as the date at which the applicant had been excluded.

176 See, for example, *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; [1994] HCA 5; *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 301; [1998] HCA 20; *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 279 [17]; [2000] HCA 30.

Water. Both of those steps had been taken with the concurrence of both sides of the litigation. The amount recovered on sale of the undertaking of Healthy Water was applied in satisfaction of the costs and expenses of the provisional liquidation and some external creditors. Thus, when this matter came to trial, Healthy Water had no business and had no assets. Both shares in the company were then worthless. These considerations were of critical importance in deciding what order was to be made under Pt 2F.1 of the Corporations Act.

180 Upon appointment of a provisional liquidator, any conduct of Healthy Water's affairs[177] that was "oppressive to, unfairly prejudicial to, or unfairly discriminatory against" Backoffice (whether in its capacity as a member or in some other capacity) was brought to an end. Mr Campbell no longer controlled the affairs of the company. At or soon after the appointment of the provisional liquidator, and at least by the time of the liquidator's sale of the company's undertaking, the only affairs of Healthy Water being conducted were those undertaken by the liquidator with a view to realising Healthy Water's assets. Once those assets had been sold and the proceeds disbursed in the manner indicated, the winding-up of the company was inevitable.

181 In those circumstances, no order should have been made on the application under Pt 2F.1 of the Corporations Act except an order for the winding-up of the company.

182 It is not necessary to decide whether that conclusion follows because there was no power to make such an order in those circumstances or because the discretion to make such an order could be exercised only by refusing to do so. Because the current form of the oppression provisions in Pt 2F.1 was introduced[178] with a view to making it clear that the Court may make orders even if the act, omission or conduct complained of has yet to occur or has ceased, it may very well be that the fact that there was no continuing oppression when this case came to trial does not entail that the Court had no power to make any of the orders for which s 233 provides. But that is a point that need not be decided. Given that there was no continuing oppression, and given that Healthy Water had no business and no assets, and was but an empty shell, no order for compulsory purchase of Backoffice's share should have been made.

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177 s 232.

178 Australia, House of Representatives, Corporate Law Economic Reform Program Bill 1998 (Cth), Explanatory Memorandum at 34 [6.132].

183 For these reasons a cross-appeal to this Court seeking to reinstate the order of the trial judge for compulsory sale and purchase of the share would enjoy no prospect of success. Special leave to cross-appeal on those grounds should therefore be refused.

Conclusion and orders

184 For these reasons, the appeal should be allowed. The orders of the Court of Appeal allowing the appeal and allowing the cross-appeal to that Court in part, and the consequential orders of the Court of Appeal setting aside the trial judge's declarations and orders of 29 March 2007 and the judgment given on 13 April 2007, should both stand. The respondents' application made on 4 February 2009 for leave to amend their notice of contention should be refused. Paragraphs 3 and 4 of the orders of the Court of Appeal made on 19 May 2008 entering judgment for Backoffice for $850,000 and disposing of the costs in the Court of Appeal should be set aside. The respondents' application for special leave to cross-appeal should be refused. The further hearing and determination of the issues raised in the proceedings in the Court of Appeal, but not decided by that Court, concerning breach of contractual warranties, the quantum of any damages to be allowed for such breaches, and Fair Trading Act claims in relation to the contents of Sched 3 should be remitted to the Court of Appeal.

185 The parties should be given the opportunity sought in the course of the hearing in this Court to make such further submissions as to the costs of proceedings in this Court and in the courts below as they may be advised. The appellants should file and serve their submissions in writing about costs within 14 days of the date of this order and the respondents should file and serve their submissions in answer within seven days after the service of the appellants' submissions.