# HIGH COURT OF AUSTRALIA

FRENCH CJ,
HEYDON, CRENNAN, KIEFEL AND BELL JJ

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MILLER & ASSOCIATES INSURANCE BROKING PTY LTD — APPLICANT

AND

BMW AUSTRALIA FINANCE LIMITED — RESPONDENT

*Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*
[2010] HCA 31
*29 September 2010*
M69/2009

**ORDER**

1. *Special leave to appeal granted.*

2. *Amended draft notice of appeal dated 19 January 2010 treated as filed in the appeal, and appeal treated as instituted and heard instanter and allowed with costs.*

3. *Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 11 June 2009 and, in lieu thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of Victoria

**Representation**

J J Gleeson SC with G Crafti for the applicant (instructed by Minter Ellison)

A C Archibald QC with M A Robins for the respondent (instructed by Francis V Gallichio Lawyers)

## CATCHWORDS

**Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited**

Trade practices – Misleading or deceptive conduct – Non-disclosure – Representation by supply of certificate of insurance and/or non-disclosure of nature of insurance – Whether provision of certificate by insurance broker to experienced premium lender misrepresented cancellability of underlying policy – Whether failure of broker to inform lender in terms that policy was non-cancellable constituted misleading or deceptive conduct.

Appeal – Powers of appellate court – Review of trial judge's findings of fact – Where finding allegedly based on mistaken understanding of agreed fact and inferences arising from it – Whether finding "glaringly improbable" or contrary to "compelling inferences".

Practice and procedure – Filing of submissions – Respondent filed submissions after hearing outside terms of leave granted – Whether permissible to file supplementary written submissions after hearing without leave.

Words and phrases – "misleading or deceptive conduct".

*Trade Practices Act* 1974 (Cth), ss 4(2)(a), 4(2)(c)(i), 52.

FRENCH CJ AND KIEFEL J.

Introduction

1 On 2 October 2000, Consolidated Timber Holdings Ltd ("CTHL") made an application to a financier, BMW Australia Finance Limited ("BMW"), for an insurance premium funding loan in respect of an insurance policy. In making the application, CTHL had retained the services of an insurance broker, Miller & Associates Insurance Broking Pty Ltd ("Miller"). CTHL owned and managed plantations in Australia and overseas. The policy in respect of which it sought a premium loan was a non-cancellable cost-of-production insurance policy ("the policy") dated 7 September 1999, which had been issued by HIH Casualty and General Insurance Limited ("HIH") to Plantation Management Corporation Ltd ("PMC") and St George Bank Limited. PMC was, at the relevant time, being acquired by CTHL. After a convoluted process characterised by error and mismanagement, BMW provided the funding to CTHL in the amount of $3.975 million in December 2000. $1,264,758.40 was repaid by CTHL. The balance was not repaid and was never recovered. A detailed account of the circumstances surrounding the application for the loan and the provision of the loan is set out in the judgment of Heydon, Crennan and Bell JJ[1].

2 BMW looked to Miller for a remedy. It alleged, in proceedings against Miller in the Supreme Court of Victoria, that Miller had engaged in misleading or deceptive conduct and had been negligent in connection with documentation supplied to it in support of the loan application. The claim for misleading or deceptive conduct was based on a memorandum and a certificate of insurance ("the HIH certificate") provided to BMW by Miller which, it was said, conveyed the misrepresentation that the policy covered property and was assignable and cancellable. An alternative basis for the claim was that Miller had not disclosed the important fact that the policy was neither assignable nor cancellable and therefore of little use as security for the loan.

3 BMW was unsuccessful at first instance before Byrne J[2] but was successful in the Court of Appeal of the Supreme Court of Victoria (Ashley and Neave JJA and Robson AJA)[3]. Miller applied for special leave to appeal against

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**1** See below at [41]-[66].

**2** *BMW Australia Finance Ltd v Miller & Associates Insurance Broking Pty Ltd* [2007] VSC 379.

**3** *BMW Australia Finance Ltd v Miller & Associates Insurance Broking Pty Ltd* (2009) 15 ANZ Insurance Cases ¶61-811.

the decision of the Court of Appeal and its application was referred to this Court for argument as on an appeal.

4 We agree with the orders proposed in the judgment of Heydon, Crennan and Bell JJ and, subject to what follows, with the reasons given in that judgment. The grant of special leave is warranted on the basis that the Court of Appeal erred in interfering with the primary judge's findings of fact. It failed to apply the principles enunciated by this Court in *Fox v Percy*[4]. It so failed, at least in part, because of a misunderstanding of the basis of a critical finding of fact made by the primary judge[5]. There is one issue which we wish specifically to consider. That issue is non-disclosure as a species or element of misleading or deceptive conduct in contravention of s 52 of the *Trade Practices Act* 1974 (Cth).

The pleading of misleading or deceptive conduct

5 The cause of action for contravention of statutory prohibitions against conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive has become a staple of civil litigation in Australian courts at all levels[6]. Its frequent invocation, in cases to which it is applicable, reflects its simplicity relative to the torts of negligence, deceit and passing off. Its pleading, however, requires consideration of the words of the relevant statute and their judicial exposition since the cause of action first entered Australian law in 1974. It requires a clear identification of the conduct said to be misleading or deceptive. Where silence or non-disclosure is relied upon, the pleading should identify whether it is alleged of itself to be, in the circumstances of the case, misleading or deceptive conduct or whether it is an element of conduct, including other acts or omissions, said to be misleading or deceptive.

6 The pleading of BMW's case in misleading or deceptive conduct was not a model of clarity. In that respect it may have contributed to some conceptual difficulty in the judgment of the Court of Appeal. BMW began the relevant part of the pleading by alleging that it had a reasonable expectation that Miller would provide an accurate response in reply to its request for information about the policy and would not provide the memorandum and HIH certificate knowing, without disclosing, that the policy did not comply with BMW's security requirements. BMW also claimed to have a reasonable expectation that Miller

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**4** (2003) 214 CLR 118; [2003] HCA 22.

**5** See below at [76].

**6** For ease of reference in these reasons, the term "misleading or deceptive" will be taken to include "likely to mislead or deceive".

would disclose to it information which rendered anything initially conveyed in its response to BMW's request inaccurate, incomplete, misleading or false. BMW then asserted that Miller did not, at any relevant time, make any disclosure to it of any information about the insurance other than that contained in the memorandum and in the HIH certificate. This part of the statement of claim is only comprehensible as supportive of a claim of misleading or deceptive conduct by reference to the pleading that followed.

7 In the paragraphs of the statement of claim that followed, BMW alleged that Miller had made a number of representations to it. These were particularised by reference to circumstances and conduct. Facts falsifying the representations were pleaded. Mixed up with that pleading were allegations of the falsity of the statements in the certificate of insurance and Miller's failure to give BMW accurate, complete or truthful information about the insurance. Further, and (it seems) superfluously, BMW alleged that Miller did not disclose to it any of the falsifying facts, the falsity of the statement in the HIH certificate or Miller's own failure to give accurate, complete or truthful information to BMW. As to that, failure to confess a misrepresentation is not a necessary element of the cause of action in misleading or deceptive conduct by misrepresentation. It can raise a false issue and suggest that a case relying upon non-disclosure is being presented when it is not.

The primary judge's disposition of the case in misleading or deceptive conduct

8 The primary judge described the two limbs of BMW's case in misleading or deceptive conduct succinctly when he said[7]:

> "In essence, the complaint is that Miller & Associates represented that the underlying policy was cancellable and therefore good security for the loan or that it did not tell the lender that it was in fact a non-cancellable policy and not good security."

9 Adversely to the first limb of BMW's case, the primary judge found that "the HIH certificate, properly understood, did not convey the represented fact"[8]. The primary judge held that at best, from BMW's point of view, it created uncertainty. Neither of the relevant officers of BMW, Reynolds and Jones, subjected the certificate to a careful analysis[9]:

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**7** [2007] VSC 379 at [66].

**8** [2007] VSC 379 at [67].

**9** [2007] VSC 379 at [34].

> "they saw the word 'properties' and jumped to the erroneous conclusion that the policy concerned property. From this, they … made the further leap to the conclusion that the policy was cancellable. Neither of these conclusions was warranted by the terms of the document or by the practice of reasonable or prudent premium lenders."

His Honour also observed that, by the time the loan was made in December, BMW had received the policy[10]. Its officers could have read and understood it, or sought advice upon it, if they were so minded. BMW was "the author of its own misfortune"[11]. The primary judge's treatment of the receipt of the policy may be seen as going either to the characterisation of Miller's conduct overall or to the existence of a causal connection between that conduct and BMW's loss[12].

10 In relation to the non-disclosure case, the primary judge stated the applicable principle when he said, "[t]he question whether a failure to provide information amounts to misleading and [sic] deceptive conduct must depend upon the circumstances attending the non-disclosure"[13]. His Honour identified as relevant circumstances the experience of both Miller and BMW in their respective fields, the awareness that each of them had of the other's experience and the adverse commercial interests of BMW and CTHL. These were circumstances he treated as unfavourable to BMW's non-disclosure case. BMW could not be heard to complain, according to the primary judge, when Miller provided a copy of the policy itself on the basis that BMW would read it and make its own assessment. If the policy provided to BMW were inconsistent with earlier material, such as the HIH certificate, it was for BMW to evaluate that or to seek further information[14].

The Court of Appeal on misleading or deceptive conduct

11 In the Court of Appeal, Robson AJA, with whom Neave JA agreed, found, relevantly to the first limb of the BMW case as articulated by the primary judge, that the HIH certificate provided by Miller conveyed the representation that the

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**10** [2007[ VSC 379 at [69].

**11** [2007] VSC 379 at [67].

**12** *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 318 [24]; [2009] HCA 25.

**13** [2007] VSC 379 at [68].

**14** [2007] VSC 379 at [68].

relevant insurance was property insurance[15]. His Honour rejected the finding of the primary judge that the HIH certificate was uncertain[16]. On the premise that if the insurance policy had concerned property it would have been cancellable, Robson AJA's conclusion was sufficient to support the characterisation of the provision of the HIH certificate by Miller as misleading or deceptive. That characterisation in turn supported the first limb of BMW's case.

12 Robson AJA then relied upon Miller's "silence" to characterise its conduct at the time that the HIH certificate was supplied. That reliance was, with respect, superfluous. It reflected the superfluity in the pleading. It was not directed to the second limb of BMW's case. His Honour said[17]:

> "Accordingly, in the context, by reason of Miller's silence or omission of information requested BMW was entitled to and did assume that the details it sought were communicated in the HIH certificate. In the absence of any further information, BMW was entitled to and did conclude that the nature of the policy was property insurance."

His Honour then held that, when the memorandum and the HIH certificate were provided to BMW, Miller had engaged in conduct that was misleading or deceptive[18]. The later supply of the policy did not negative that characterisation. That was because Miller did not tell BMW that the policy included in the bundle was the policy referred to in the HIH certificate[19].

13 Ashley JA decided the appeal in favour of BMW on the non-disclosure case. His Honour held that the HIH certificate was "at least ambiguous as to the nature of the insurance or insurances in respect of which funding was sought"[20]. He also held that the HIH certificate did not convey a representation that the relevant insurance was property insurance[21]. It is important to bear in mind the sense in which his Honour used the word "ambiguous". It was used in the sense

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**15** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,554 [162]-[163].

**16** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,554-77,555 [164].

**17** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,554 [163].

**18** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,555 [165].

**19** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,555 [166]-[168].

**20** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,526 [12].

**21** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,526 [19].

of "uncertain" consistently with the finding of the primary judge. So characterised, the HIH certificate did not convey any particular meaning. In that sense its characterisation may be distinguished from ambiguity which presents more than one meaning and may be misleading, at least to some people, if one of the meanings conveyed is misleading[22]. Ashley JA held that Miller knew that the HIH certificate did not relate to cancellable property insurance and should be taken to have known that the policy was non-cancellable. In circumstances in which Miller knew the importance to a premium funder of the policy being cancellable, "it was misleading for Miller to stay silent and not communicate to [BMW] a relevant situation which the HIH certificate tended to obfuscate"[23]. In our opinion, his Honour erred in imposing a duty on Miller which exceeded the requirement to avoid a contravention of s 52.

Misleading or deceptive non-disclosure

14 In determining whether there has been a contravention of s 52 of the *Trade Practices Act*, it is necessary to determine "whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive" [24]. The term "conduct" is to be understood according to its definition in s 4(2)(a) and (b) of the *Trade Practices Act*, which includes a reference to "refusing to do any act". That, in turn, includes a reference to "refraining (otherwise than inadvertently) from doing that act"[25].

15 For conduct to be misleading or deceptive it is not necessary that it convey express or implied representations[26]. It suffices that it leads or is likely to lead

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**22** See *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 at 50; *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452 at 483.

**23** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,527 [20].

**24** *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 41.

**25** *Trade Practices Act*, s 4(2)(c)(i). As to inadvertence, no issue of unintentional or unknowing non-disclosure was agitated in this Court: see *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at 591 [66]; *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd* (2005) 215 ALR 625 at 656-657 [186]-[190].

**26** *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 603 [32], 624-625 [108], 646 [179]; [2004] HCA 60.

into error[27]. BMW's case as pleaded, when its confusing overlaps are disentangled, was based upon conduct conveying representations either by the materials supplied to it by Miller or by the non-disclosure of which it complained.

16 The circumstances in which silence or non-disclosure of information can be misleading or deceptive are various. The understanding of the place of silence or non-disclosure in the characterisation of conduct as misleading or deceptive was affected, in early decisions on s 52, by the view that the section was concerned with misrepresentations that would have been actionable under the general law[28]. That view was linked to the proposition, expressed in *Taco Co of Australia Inc v Taco Bell Pty Ltd*[29], that conduct could not be misleading or deceptive for the purposes of s 52 unless it conveyed a misrepresentation. It was also linked to the proposition that at general law "mere silence, with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operate as an injury to the party from whom it is concealed"[30]. In the early development of the law about misleading or deceptive conduct, there were rather cautiously expressed views about the role of silence, albeit the importance of the statutory words was acknowledged[31].

17 The 1992 decision of the Full Court of the Federal Court in *Demagogue Pty Ltd v Ramensky*[32] represented what has been described accurately as "an emphatic acknowledgement … of the unique nature of the statutory prohibition"[33]. The Full Court upheld the decision of the primary judge that a vendor of land had created a clear but erroneous impression in the purchasers that there was nothing unusual concerning access to the land and, in particular, had

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**27** *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at 589 [63].

**28** See, generally, Lockhart, *The Law of Misleading or Deceptive Conduct*, 2nd ed (2003) at 135-139.

**29** (1982) 42 ALR 177 at 202.

**30** Story, *A Treatise on the Law of Contracts*, 4th ed (1856), vol 1 at 632-633, quoted in *Smith v Hughes* (1871) LR 6 QB 597 at 604 and, in turn, referred to in this context in *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 at 44.

**31** *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477 at 489-491, 504; cf 508.

**32** (1992) 39 FCR 31.

**33** Lockhart, *The Law of Misleading or Deceptive Conduct*, 2nd ed (2003) at 140.

been silent as to the necessity of a grant of a licence by a statutory authority to enable such access.

18 Gummow J, who wrote the leading judgment and with whom Black CJ and Cooper J agreed, said[34]:

> "it should be no inhibition to giving effect to what, on its proper construction, is provided for in the legislation, that the result may be to achieve consequences and administer remedies which differ from those otherwise obtaining under the general law".

Silence, as Black CJ said in his concurring judgment, was to be assessed as a circumstance like any other[35]:

> "the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive."

Gummow J referred to the limitation that "unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist"[36].

19 The language of reasonable expectation is not statutory. It indicates an approach which can be taken to the characterisation, for the purposes of s 52, of conduct consisting of, or including, non-disclosure of information. That approach may differ in its application according to whether the conduct is said to be misleading or deceptive to members of the public, or whether it arises between entities in commercial negotiations[37]. An example in the former category is non-disclosure of material facts in a prospectus[38].

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**34** (1992) 39 FCR 31 at 38.

**35** (1992) 39 FCR 31 at 32.

**36** (1992) 39 FCR 31 at 41, quoting *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) ATPR (Digest) ¶46-054 at 53,195.

**37** *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 84-85 [101], 85 [103]; [2000] HCA 12; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 319 [26].

**38** *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452 at 467; see also *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at 591-592 [67].

20 In commercial dealings between individuals or individual entities, characterisation of conduct will be undertaken by reference to its circumstances and context. Silence may be a circumstance to be considered[39]. The knowledge of the person to whom the conduct is directed may be relevant. Also relevant, as in the present case, may be the existence of common assumptions and practices established between the parties or prevailing in the particular profession, trade or industry in which they carry on business. The judgment which looks to a reasonable expectation of disclosure as an aid to characterising non-disclosure as misleading or deceptive is objective. It is a practical approach to the application of the prohibition in s 52[40].

21 To invoke the existence of a reasonable expectation that if a fact exists it will be disclosed is to do no more than direct attention to the effect or likely effect of non-disclosure unmediated by antecedent erroneous assumptions or beliefs or high moral expectations held by one person of another which exceed the requirements of the general law and the prohibition imposed by the statute. In that connection, Robson AJA in the Court of Appeal spoke of s 52 as making parties "strictly responsible to ensure they did not mislead or deceive their customer or trading partners"[41]. Such language, while no doubt intended to distinguish the necessary elements of misleading or deceptive conduct from those of torts such as deceit, negligence and passing off, may take on a life of its own. It may lead to the imposition of a requirement to volunteer information which travels beyond the statutory duty "to act in a way which does not mislead or deceive"[42]. Cicero, in his famous essay *On Duties*, seems to have contemplated such a standard when he wrote[43]:

> "Holding things back does not always amount to concealment; but it does when you want people, for your own profit, to be kept in the dark about something which *you* know and would be useful for *them* to know."

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**39** *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 at 44.

**40** cf the criticism that the "reasonable expectation" approach lacks underlying principle: De Wilde, "The Less Said – The Worse: Silence as Misleading and Deceptive Conduct", (2007) 15 *Trade Practices Law Journal* 7 at 10.

**41** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,537 [62].

**42** *Inderby Pty Ltd v Qinert* (1995) ATPR (Digest) ¶46-141 at 53,115.

**43** Cicero, *De Officiis*, bk 3, ch 57, as translated by Grant in "A Practical Code of Behaviour", in *Cicero: Selected Works*, rev ed (1971) 157 at 180.

It would no doubt be regarded as an unrealistic expectation, inconsistent with the protection of that "superior smartness in dealing" of which Barton J wrote in *W Scott, Fell & Co Ltd v Lloyd*[44], that people who hold things back for their own profit are to be regarded as engaging in misleading or deceptive conduct. As Burchett J observed in *Poseidon Ltd v Adelaide Petroleum NL*[45], s 52 does not strike at the traditional secretiveness and obliquity of the bargaining process. But his Honour went on to remark that the bargaining process is not to be seen as a licence to deceive, and gave the example of a bargainer who had no intention of contracting on the terms discussed and whose silence was to achieve some undisclosed and ulterior purpose harmful to a competitor.

22 However, as a general proposition, s 52 does not require a party to commercial negotiations to volunteer information which will be of assistance to the decision-making of the other party. A fortiori it does not impose on a party an obligation to volunteer information in order to avoid the consequences of the careless disregard, for its own interests, of another party of equal bargaining power and competence. Yet that appears to have been, in practical effect, the character of the obligation said to have rested upon Miller in this case.

23 Reasonable expectation analysis is unnecessary in the case of a false representation where the undisclosed fact is the falsity of the representation. A party to precontractual negotiations who provides to another party a document containing a false representation which is not disclaimed will, in all probability, have engaged in misleading or deceptive conduct. When a document contains a statement that is true, non-disclosure of an important qualifying fact will be misleading or deceptive if the recipient would be misled, absent such disclosure, into believing that the statement was complete. In some cases it might not be necessary to invoke non-disclosure at all where a statement which is literally true, but incomplete in some material respect, conveys a false representation that it is complete.

Conclusions

24 On the approach taken by Neave JA and Robson AJA, the HIH certificate conveyed a misrepresentation about the character of the policy. On that premise, Miller's failure to provide information about the nature of the policy was not necessary for their Honours' characterisation of its conduct in supplying the HIH

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**44** (1906) 4 CLR 572 at 580; [1906] HCA 79.

**45** (1991) 105 ALR 25 at 26.

certificate. In any event the premise was wrong for the reasons set out in the judgment of Heydon, Crennan and Bell JJ[46].

25 If, as Ashley JA held, the HIH certificate did not convey a representation, the question then is what did Miller's "silence" add? Ashley JA said of the HIH certificate[47]:

> "It was ambiguous. It neither plainly identified the insurance as ordinary property insurance, nor plainly identified the contrary. Miller knew that it did not relate to ordinary property insurance, and should be taken to have known that the insurance was non-cancellable. It knew the importance of insurance being cancellable to a premium funder. Those circumstances meant, in my opinion, that it was misleading for Miller to stay silent and not communicate to [BMW] a relevant situation which the HIH certificate tended to obfuscate. It cannot be said, for the reasons which I have stated, that provision of the copy policy satisfied the requirement that the uncertainty be cleared up."

26 As already explained, the preceding was not a statement that the HIH certificate was ambiguous in the sense that it was capable of being read as conveying, inter alia, a representation that the policy was a cancellable property insurance policy. Such a proposition could not sit with his Honour's rejection of the view of the other members of the Court of Appeal that the HIH certificate conveyed that representation. Given that the HIH certificate could not be read that way, the provision of further information would not have excluded a misleading construction. But his Honour having found, in the sense that the primary judge found, uncertainty in the meaning of the HIH certificate, he effectively found Miller was subject to a "requirement that the uncertainty be cleared up"[48]. Like the "strict responsibility" of which Robson AJA spoke, that duty travelled beyond the limits of the statutory prohibition. In our opinion, in the circumstances of the case, the alleged failure of Miller to volunteer information about the policy could not be said to have constituted misleading or deceptive conduct. In the event, a copy of the policy was put in the hands of BMW, who simply did not read it.

27 For these reasons and the reasons set out in the judgment of Heydon, Crennan and Bell JJ, we agree that the appeal should be allowed.

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**46** See below at [85]-[87].

**47** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,527 [20].

**48** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,527 [20].

HEYDON, CRENNAN AND BELL JJ.

Introduction

28 This application arises from the desire of a would-be borrower for a loan. It engaged a broker to find a lender. The lender eventually lent the money. The borrower defaulted and the loan was not repaid. The lender then sought satisfaction against the broker.

29 In late 2000, the applicant, Miller & Associates Insurance Broking Pty Ltd ("Miller"), negotiated a $3.975 million insurance premium funding loan ("premium loan") with the respondent, BMW Australia Finance Limited ("BMW"), on behalf of its client, Consolidated Timber Holdings Ltd ("Consolidated Timber"). The policy for which the loan was sought was a "cost of production" policy insuring the holders against certain credit risks. It was not a cancellable policy. Cancellable policies may provide a form of security for a premium loan since the lender can require the borrower to assign its rights, including of cancellation, under the policy. In the event of default, the lender may cancel the policy and recover the unused premium.

30 Consolidated Timber defaulted under its loan agreement and BMW's endeavours to recover the balance of the loan monies from it and from two of its directors under personal guarantees were fruitless.

The procedural history

31 BMW commenced proceedings against Miller in the Supreme Court of Victoria claiming (among other common law and equitable claims) damages for misleading or deceptive conduct[49]. Its case was that Miller had incorrectly represented that the policy for which the loan was sought was cancellable and thus suitable to provide BMW with security for its loan. The representation was said to have been conveyed by the insurance certificate ("the HIH certificate") which Miller provided to BMW in response to BMW's request for details of the insurance. The HIH certificate contained an endorsement which referred to a number of properties and ascribed monetary limits to each. Policies insuring against loss or damage to property ("property polices") are commonly cancellable. Alternatively, BMW claimed that Miller's conduct was misleading by its omission to disclose that the insurance to be funded was not cancellable.

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

32 The primary judge (Byrne J) found that the HIH certificate did not convey the misrepresentation claimed. He also found that, taking into account the nature of the parties and the history of the transaction, Miller's non-disclosure was not misleading[50]. He dismissed the statutory claim and the related claims in negligence, in contract and for breach of fiduciary duty.

33 BMW appealed to the Court of Appeal (Ashley and Neave JJA and Robson AJA)[51]. Their Honours found that Miller's conduct was misleading although they differed in their reasons for this conclusion. They were divided on the question of whether Miller's misleading conduct was a cause of BMW's loss. Neave JA and Robson AJA found that it was. The majority also upheld BMW's appeal against the dismissal of its claim in negligence. Their Honours found that BMW was guilty of contributory negligence which they assessed at 40 per cent.

34 The Court of Appeal made orders allowing the appeal, setting aside the orders of the primary judge, giving judgment for BMW and, in lieu of the orders below, ordering Miller to pay BMW damages of $2,797,691.55 and interest of $1,865,922.77 together with consequential costs orders.

The special leave application

35 Miller applied for special leave to appeal from the whole of the judgment of the Court of Appeal. On 11 December 2009, its application was referred by Kiefel and Bell JJ into the Full Court on the understanding that the draft grounds would be refined to take into account the matters that were raised in the course of the hearing. One of these matters was the obscurity of ground eight. It complained of the failure "to address the law in relation to representations which are ambiguous". Senior counsel for Miller explained this ground as raising an issue concerning reliance in the context of the majority's finding that Miller's conduct was a cause of BMW's loss. He disavowed an intention to disturb the Court of Appeal's unanimous finding that Miller had engaged in misleading conduct.

36 Miller's amended draft notice of appeal contains four grounds. Ground one squarely challenges the finding that Miller engaged in misleading conduct. Ground two challenges the majority's rejection of the primary judge's factual

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**50** *BMW Australia Finance Ltd v Miller & Associates Insurance Broking Pty Ltd* [2007] VSC 379 at [67]-[68].

**51** *BMW Australia Finance Ltd v Miller & Associates Insurance Broking Pty Ltd* (2009) 15 ANZ Insurance Cases ¶61-811 at 77,520.

findings. Grounds three and four raise discrete challenges to two aspects of Neave JA's reasons to which it is not necessary to return.

37 BMW objected to Miller being permitted to rely on ground one because it expands the ambit of the earlier ground and departs from the position that Miller adopted at the hearing on 11 December 2009.

38 The amended draft notice of appeal was filed on 19 January 2010. There was no prejudice to BMW in dealing with ground one. In the circumstances, Miller should not be confined by the manner in which it put its case on 11 December 2009 before its application was referred into the Full Court.

39 The application was argued as if on appeal. After the hearing, the parties were invited to address a question concerning the significance of the majority's finding on BMW's negligence claim. It will be necessary to return to this. However, for the reasons that follow, special leave to appeal should be granted, the appeal allowed and the orders claimed by Miller in its amended draft notice of appeal should be made.

40 It is difficult to state the way in which BMW's claim was put without providing some detail about the factual background.

The factual background

41 In 2000, BMW's premium funding department comprised Mr Reynolds, National Insurance Manager, Mr Jones, Manager, Insurance Products, Ms Warnecke, a junior trainee, and an insurance consultant. Its annual turnover was around $300 million and involved the making of loans in amounts ranging from $1500 to $60 million. Most of these loans were made to fund premiums for cancellable policies. It does not appear to have been BMW's practice to obtain additional security when lending with respect to cancellable policies. Approximately 25 per cent of all loans were for non-cancellable policies of which most were workers' compensation policies. When lending with respect to non-cancellable policies, BMW protected itself against loss under its credit risk insurance which was underwritten by HIH Casualty and General Insurance Limited ("HIH").

42 There was evidence of BMW's practice in assessing premium loan applications. BMW would submit a quotation to the borrower's broker. If the quotation was acceptable to the client, BMW sent a loan application and direct debit authority to the broker for execution by the client. BMW required the return of the executed application and authority, together with a copy of the policy or the policy schedule or an invoice in order to show the underlying policy, before it carried out credit and corporate inquiries. If the answers to these

inquiries were satisfactory, BMW would approve the loan and remit the loan funds to the broker. BMW required the first instalment payment in advance of the draw-down of the loan funds.

43 In August 2000, Miller was acting as broker for Plantation Management Corporation Limited ("Plantation Management"), a company which Consolidated Timber was then in the process of acquiring. Miller was retained to obtain a premium loan in respect of a cost of production policy between HIH, St George Bank Limited ("St George") and Plantation Management. The policy insured Plantation Management against the insolvency of its growers and St George against Plantation Management's insolvency.

44 The initial overture to BMW in connection with the proposed loan was made by Mr Merton, Managing Director of Insurance Finance Australia Pty Ltd ("IFA"), which firm was working in conjunction with Miller. Mr Merton and Mr Reynolds were friends and they shared a long-standing professional association. Mr Merton had introduced a large number of clients to BMW. His dealings with BMW in respect of this loan proposal were conducted as agent for Miller.

45 Mr Merton telephoned Mr Reynolds seeking a quotation for a premium loan of $3.975 million for Consolidated Timber. The proposal was for the loan to be drawn down in three payments in October of 2000, 2001 and 2002 and to be repaid in 30 monthly instalments. Mr Merton explained that Miller, a company which he described as being well-established overseas but fairly newly established in Australia, was Consolidated Timber's broker.

46 After this discussion, Mr Reynolds sent Miller a quotation for the loan. The quotation was dated 20 September 2000 and it was expressed to be subject to approval and "receipt of completed contract and full policy information". On 25 September, Mr Jones sent Miller a letter setting out the details of the proposed loan and enclosing a loan application and direct debit authority. The letter did not contain a request for information about the policy to be funded.

47 For reasons that were not explained, the proposal was varied. On 26 September 2000, Mr Jones sent a second quotation to Miller. Under this quotation the amount of the loan remained $3.975 million but the loan was differently structured. It was to be drawn down on two, not three, occasions. The effective rate of interest was increased and Miller's commission was doubled. The second quotation was also expressed to be subject to "full policy information". On the same day, Mr Jones sent a further letter to Miller enclosing a loan application and direct debit authority. Again, there was no request for information about the policy.

48 On 2 October 2000, in response to the second quotation, Consolidated Timber sent the completed loan application direct to BMW by facsimile. The coversheet, which was signed by Mr Norton-Smith of Consolidated Timber, requested that the memorandum of acceptance be provided as soon as practicable and contained an offer to supply any further particulars that BMW required. The loan application made provision for the inclusion of "insurance details". This section of the application was completed with the advice "as per schedule". There was no schedule forming part of the application.

49 On 2 October 2000, Ms Warnecke had a telephone discussion with Mr Norton-Smith. Following this she sent Consolidated Timber a standard form letter, described as a "welcome letter", by facsimile. This contained the advice that "your contract has been accepted by our office on 30 September 2000 under the agreed payment schedule". The welcome letter was sent as the result of what BMW described as an "administrative error". The application had not been investigated or approved. Mr Reynolds's authority to approve loans was limited to $500,000 with respect to cancellable policies and to $300,000 with respect to non-cancellable policies. A loan exceeding $1 million involving a non-cancellable policy required the approval of Mr Kolo, BMW's managing director, and Mr Crookes, one of its directors.

50 Mr Jones was on leave on 2 October 2000 and neither he nor Mr Reynolds was aware that the welcome letter had been sent. On Mr Jones' return to work on 4 October, he learned of this development and he informed Mr Reynolds. The primary judge found that the two men appreciated that they had a problem. They chose not to inform their superiors about the matter. They did not take steps to extricate BMW from the consequences flowing from the sending of the welcome letter. Indeed, BMW subsequently sent the original of the welcome letter to Consolidated Timber by registered post[52].

51 On 4 October 2000, Consolidated Timber sent a copy of the welcome letter to Miller. On the same day, it paid BMW the first instalment under the loan. BMW banked the payment into a suspense account.

52 Mr Reynolds and Mr Jones commenced to make the inquiries concerning Consolidated Timber's creditworthiness that they would usually have carried out before the loan was approved. The results of these inquiries did not reveal any adverse matters. Contact was also made with BMW's broker, National Credit Insurance Brokers Ltd ("NCI"), which handled its credit risk insurance. Mr Reynolds knew that coverage under this policy was confined to loans for non-

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**52** [2007] VSC 379 at [19]-[24].

cancellable policies. Mr Jones's understanding was that the policy extended to loans for cancellable policies but that it was not BMW's practice to apply for coverage under the policy for them.

53 On 5 October 2000, Mr Jones sent NCI an application seeking approval of cover for a loan to Consolidated Timber of $3.8 million. On the same day, he had a telephone conversation with Mr Merton in which he asked for details of the insurance. Mr Merton passed on the request to Miller.

54 Miller responded to the request on 9 October 2000. It sent BMW a copy of the HIH certificate by facsimile under cover of a memorandum stating that it related to "the insurance". The HIH certificate contained a number of particulars to which it is necessary to refer. It related to a policy that was issued on 30 September 1999 and which provided insurance for a period of five years dating from 16 September 1999. One printed box was headed "Profession". The particulars in this box were given as "Miscellaneous" and the limit of indemnity was stated as $12 million. Another printed box was headed "Endorsement Details". The particulars in this box, relevantly, were given as:

"PROPERTIES INSURED AND LIMITS

| | |
|---|---|
| COROWA | – 600 HTRS @ $12,000,000 |
| DALBY | – 500 HTRS @ $10,000,000 |
| COFFS HARBOUR | – 60 HTRS @ $1,000,000 |
| LITTLE BILLABONG | – 100 HTRS @ $2,000,000" |

The HIH certificate was signed on behalf of HIH (Professional Indemnity) Pty Limited.

55 The memorandum that accompanied the HIH certificate was signed by Mr Hanning of Miller and it referred to the conversation between Mr Jones and Mr Merton. Mr Hanning advised that Plantation Management was then in the course of being acquired by Consolidated Timber. He offered to provide a copy of the heads of agreement or any further information that BMW required. BMW did not take up either invitation.

56 On 12 October 2000, Mr Jones had a discussion with Ms Meth of NCI. She asked for details of the underlying insurance. Mr Jones said that he was not sure, but that he had an invoice or a certificate and that the policy "could be for

four properties"[53]. The next day Ms Meth told Mr Jones that she had not been able to locate the policy and she asked for further information about it. Mr Jones said that he would forward something to her in writing but he did not do so.

57 On 19 October 2000, NCI advised BMW that HIH had declined to cover the proposed loan because it considered that it was fully exposed to Consolidated Timber.

58 In late October 2000, Mr Jones and Mr Reynolds decided that BMW should not proceed with the loan. Mr Jones spoke with Mr Merton and so advised him. The reasons that he gave for the decision were that BMW was not happy with the term of the loan, there had been changes to the original quotation, and Consolidated Timber was newly established. Mr Jones suggested that Mr Merton should try to place the loan elsewhere. BMW refunded the instalment payment that Consolidated Timber had made in advance of the loan.

59 Consolidated Timber made attempts to obtain funding from other lenders. When these failed, Mr Merton again made contact with Mr Reynolds in November 2000. He asked if there was a basis for renegotiating the loan. By this time, Mr Reynolds and Mr Jones were aware that Consolidated Timber had consulted its lawyers as to its rights against BMW arising out of the acceptance of the loan application of 2 October 2000. This knowledge provided an incentive to each of them to see that BMW came to a satisfactory agreement with Consolidated Timber.

60 Mr Reynolds told Mr Merton that BMW was willing to consider a further application subject to the loan being for a shorter term. He requested further information about Consolidated Timber and he inquired about the availability of personal guarantees from its directors. Following this discussion, Miller sent BMW a bundle of documents. There was no covering letter or other document explaining the contents of the bundle. The documents contained within it largely consisted of information about the financial position of Consolidated Timber and associated companies. It was information that pointed to Consolidated Timber as a borrower of substance. The bundle also contained an offer to provide directors' guarantees in support of the loan. Finally, the bundle contained two insurance documents. One was a copy of the cost of production policy.

61 The cost of production policy differed in a number of respects from the HIH certificate. The two documents had different policy numbers. The policy named St George as a co-assured. The period of indemnity was expressed to be

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**53** [2007] VSC 379 at [36].

five years from the date of the first advance under the facility agreement or the happening of another nominated event (cl 2). Curiously, the certificate attached to the policy described the period of insurance as 12 months from the date of the first advance under the facility agreement. Four "locations" identified in the certificate corresponded to the four properties identified in the HIH certificate.

62 Despite the differences between the two documents, it was an agreed fact that the cost of production policy in the bundle was the policy underlying the HIH certificate.

63 After receipt of the bundle, Mr Jones prepared a fresh quotation for a loan of $3.975 million to Consolidated Timber. The proposal was for the loan to be drawn down on one occasion and repaid in ten monthly instalments. The quotation was sent to Mr Merton. It was accepted by Consolidated Timber, which on 8 December 2000 submitted a completed loan application supported by the personal guarantees of two of its directors. On 12 December, BMW approved the application and communicated its approval to Miller.

64 The loan was drawn down on 14 December 2000. The first instalment payment was deducted from the advance. Consolidated Timber made two further instalment payments. It defaulted in March 2001, when the fourth instalment was due. In May 2001, at Consolidated Timber's request, BMW agreed to reinstate the loan agreement of 2 October 2000, which provided for 30 instalment payments of $149,893. However, Consolidated Timber failed to make any further loan repayments.

65 In October 2001, the matter was finally brought to the attention of Mr Kolo and Mr Crookes. On 17 October 2001, BMW sent a letter of demand to Consolidated Timber. It was a month or two after this that Mr Reynolds said that he had first learned that the policy was non-cancellable. At no time did BMW seek to cancel the policy and recover the unused premium. However, since it appears that Consolidated Timber's default coincided with the collapse of HIH, no significance was attached by the primary judge or the members of the Court of Appeal to this circumstance.

66 BMW's loss at 8 March 2001, including interest, was $2,797,691.55.

The oral evidence

67 Mr Reynolds and Mr Jones gave evidence in BMW's case. Each said that he had understood from reading the HIH certificate that it had been issued in respect of a cancellable policy. Both claimed that they did not understand the cost of production policy contained in the bundle to have had anything to do with the proposed loan. Each maintained that he would not have authorised the loan

had he known that the insurance was not property insurance that was capable of providing BMW with security for its loan.

68 Alistair Mitchell, a man with lengthy experience in insurance broking and premium financing, gave expert evidence in BMW's case. He said that the cancellability of insurance is a matter understood by brokers to be of critical importance to premium lenders. In Mr Mitchell's opinion, a prudent broker would not have provided the HIH certificate without informing the lender that it related to a non-cancellable cost of production policy.

69 Miller called no oral evidence in its case.

The primary judge's findings

70 The primary judge noted that the events had occurred seven years before the trial. He considered that there was a good deal of reconstruction in the evidence of Mr Reynolds and Mr Jones. He found that neither had subjected the HIH certificate to a careful analysis. They had seen the word "properties" on the certificate and leapt to the conclusion that the policy concerned property and that it was cancellable. His Honour considered that neither conclusion was conveyed by the HIH certificate but rather that they were conclusions driven by Mr Reynolds' and Mr Jones' keenness to put the loan in place and by "their generally careless attitude"[54].

71 The finding that Mr Reynolds and Mr Jones had concluded from reading the HIH certificate that the underlying insurance was cancellable was qualified by the further finding[55]:

> "In my view, had they been pressed at the time, they would have truthfully answered an inquiry as to the cancellability of the policy that the policy was an unusual one and that they could not be sure and, further, that it was probably cancellable."

72 His Honour found that Mr Jones had been truthful when he told Ms Meth that he was not sure about the underlying insurance but that he had an invoice or a certificate and that the policy "could be for four properties"[56]. It will be

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**54** [2007] VSC 379 at [34].

**55** [2007] VSC 379 at [34].

**56** [2007] VSC 379 at [36].

recalled that this conversation took place after Mr Jones had read the HIH certificate.

73 The primary judge rejected the evidence of Mr Reynolds and Mr Jones that they had not understood that the cost of production policy was connected to the proposed loan[57]. Robson AJA (with whose reasons in this respect Neave JA agreed) overturned this finding. His Honour did so because he accepted BMW's submission that the finding was based on a mistaken understanding of an agreed fact and the inferences arising from it[58]. The agreed fact was that the copy of the policy contained in the bundle was the policy underlying the HIH certificate. It was an agreement that said nothing about the state of mind of BMW's officers.

74 BMW's submission was misconceived. Nothing in the primary judge's reasons suggests that he entertained any misapprehension as to the scope of the parties' agreement. The primary judge rejected Mr Reynolds' evidence on this topic because it was inconsistent with Mr Reynolds' acknowledgment that when he read the cost of production policy he understood that St George, as co-assured, would stand ahead of BMW in the event of default[59]. The primary judge said that Mr Jones appeared to have derived the same impression from the document[60].

75 BMW submitted that the majority in the Court of Appeal was correct to accept the evidence of Mr Reynolds and Mr Jones that they had not connected the policy to the loan application. BMW based that submission on the proposition that the objective evidence of the differences between the policy and the HIH certificate strongly supported that acceptance.

76 The submission cannot be accepted. The primary judge rejected the evidence of Mr Reynolds and Mr Jones that each had noted the difference in the policy numbers (or in other respects) between the cost of production policy and the HIH certificate. The submission overlooks that. It also overlooks the weight that the primary judge attached to Mr Reynolds' evidence that he had seen that St George was a co-assured[61]. Mr Reynolds and Mr Jones were each cross-

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**57** [2007] VSC 379 at [55]-[56].

**58** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,555 [168].

**59** [2007] VSC 379 at [55].

**60** [2007] VSC 379 at [55].

**61** [2007] VSC 379 at [55]-[56].

examined at length in a trial that occupied several days. Judgment was delivered promptly eight days after it was reserved. The primary judge was critical of material aspects of the evidence of both men. His finding was neither "glaringly improbable", nor was it contrary to "compelling inferences"[62]. Robson AJA's mistaken understanding of the basis of the finding made it unnecessary for him to apply the principles that he had stated earlier in his reasons governing appellate review of fact finding[63]. This omission involved legal error. As the above summary shows, there was no basis for overturning the primary judge's finding in this case.

77 BMW submits that the restoration of the primary judge's finding is not determinative of its claim for damages for misleading conduct. It contends that the supply of the policy unaccompanied by advice that it did not contain a cancellation clause was not the supply of "full policy information" and, in the context of the relationship between broker and premium lender, it was an omission that had the character of being misleading. It is not apparent that this was the way in which BMW's case of non-disclosure was put below[64]. For the reasons to be explained, it is a contention that should not be upheld in any event.

The characterisation of Miller's conduct

78 BMW's statutory claim for damages[65] alleged contraventions of ss 52 and 53 of the *Trade Practices Act* 1974 (Cth). The focus at trial was on the claim under s 52. That section provides that "[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". "Engag[ing] in conduct" refers to doing or refusing to do

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**62** *Fox v Percy* (2003) 214 CLR 118 at 128 [29] per Gleeson CJ, Gummow and Kirby JJ; [2003] HCA 22, citing *Brunskill v Sovereign Marine & General Insurance Co Pty Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57; *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.

**63** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,537 [64]. See generally *Fox v Percy* (2003) 214 CLR 118 at 125-128 [23]-[29] per Gleeson CJ, Gummow and Kirby JJ.

**64** Ashley JA raised the question but his Honour did not find it necessary to decide it given the issues in the Court of Appeal: (2009) 15 ANZ Insurance Cases ¶61-811 at 77,525 [4], 77,527 [21].

**65** *Trade Practices Act* 1974 (Cth), s 82.

any act[66]. "Refusing to do an act" includes refraining (otherwise than inadvertently) from doing that act[67].

79 BMW put its case in two ways.

80 The first was that Miller's conduct in supplying the HIH certificate in response to BMW's request for details of the insurance was misleading. This case depends upon finding that the HIH certificate misrepresented that the underlying policy was a cancellable property policy that was capable of providing security for the proposed loan.

81 The second, wider, way in which the claim of misleading conduct was put arises from Miller's failure to inform BMW, in terms, that the policy for which funding was sought was not cancellable. This was characterised in the Court of Appeal as the "contextual silence" case. It was rejected by the primary judge, but it is the basis upon which each of the members of the Court of Appeal concluded that Miller had engaged in misleading conduct.

82 BMW's pleaded contextual silence case was that Miller knew or ought to have known that the policy was non-cancellable and that this was capable of giving its conduct in failing to disclose that fact the quality of being misleading. In this Court, it was not in issue that Miller knew at all material times that the policy underlying the HIH certificate was a non-cancellable cost of production policy. BMW's pleaded case was that it had a reasonable expectation that Miller would not supply it with the HIH certificate in response to its request for details of the insurance without disclosing that the underlying policy was non-cancellable. This case does not depend upon acceptance of BMW's primary case that the HIH certificate misrepresented that the underlying policy was a cancellable property policy. As indicated earlier, this second and wider case is the one upon which each of the members of the Court of Appeal found that Miller had engaged in misleading conduct.

83 It is convenient to commence with the first way BMW put its case. The question is whether the conclusion of the majority in the Court of Appeal that the HIH certificate conveyed a misrepresentation was correct.

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**66** *Trade Practices Act* 1974 (Cth), s 4(2)(a).

**67** *Trade Practices Act* 1974 (Cth), s 4(2)(c)(i).

BMW's first case: the HIH Certificate

84 Neave JA and Robson AJA found that the endorsement on the HIH certificate, naming four properties and ascribing monetary limits to each, conveyed that it had been issued in respect of a policy of property insurance[68]. Their Honours did not determine whether it conveyed the further representation that the underlying policy was cancellable, although such a conclusion may be implicit in the finding. Robson AJA assumed that the primary judge had treated cancellable and property insurance as being one and the same in the circumstances. It would seem that Robson AJA approached the issue on this basis[69].

85 BMW's claim that the HIH certificate misrepresented that it had been issued in respect of a cancellable property policy would fail unless BMW was in fact misled. The anterior question is whether objectively the HIH certificate conveyed to its intended audience, BMW, a company known by Miller to be an experienced premium lender[70], that it had been issued in respect of a cancellable property policy. Miller submitted that Robson AJA's conclusion, that the certificate conveyed that it had been issued in respect of property insurance, was tainted because his Honour had taken into account the evidence of Mr Reynolds and Mr Jones that they had read it in that way. Miller's complaint arises from a passage in his Honour's discussion of the contextual silence case[71]. It is not clear that his Honour's earlier conclusion was affected by the claimed error. Nonetheless it is a conclusion that should be rejected.

86 Several features of the HIH certificate should be noted. First, it was issued by HIH's Professional Indemnity Division and it provided for the statement of a "Profession". Secondly, Mr Mitchell acknowledged that a term of five years is "highly unusual" for a property policy. He agreed that a "prudent broker" noting these two features of the HIH certificate and without more information would not have assumed that it related to a property policy. Thirdly, the premium was $3.75 million and the limit of indemnity was $12 million.

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**68** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,535 [40] per Neave JA, 77,554 [159] per Robson AJA.

**69** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,554 [164].

**70** [2007] VSC 379 at [68].

**71** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,554 [162]. The second reference to "BMW" in the sentence appears to be a typographical error and should be read as "Miller".

Mr Reynolds said that this was an unusually high premium for a standard property policy. Mr Mitchell described the premium as "large". However, he did not draw any inference from that circumstance. His reticence arose from a fourth feature that is to be noted: the HIH certificate said nothing about the nature of the risks insured. The inference was open that "standard" property policies are cancellable. However, there was evidence that some property policies are not cancellable[72]. Even if the endorsement on the HIH certificate was capable of conveying that the policy was one insuring against loss or damage to property, it cannot be said to have conveyed that it was a "standard" property policy and therefore cancellable. To the contrary, the HIH certificate had features that suggested that the policy was an unusual one.

87 BMW's claim was that Miller's conduct was misleading. The claim was based on the ground that the HIH certificate conveyed a representation that the underlying insurance was a cancellable property policy. It did not convey that representation. Hence the primary judge and Ashley JA were right to reject that ground for concluding that Miller's conduct was misleading. The majority's conclusion that Miller's conduct was misleading is ultimately dependent upon their Honour's acceptance of the contextual silence case.

BMW's second case: silence

88 Ashley JA upheld BMW's second case. That case is based on the supply of an "ambiguous" insurance certificate in circumstances in which Miller knew "that it was important to [BMW] that a policy which was to be funded was cancellable" and Miller failed, between October and early December 2000, to inform BMW that the policy was non-cancellable[73]. His Honour said that any misleading impression created by the HIH certificate had not been overcome by the later supply of the policy, since there was no evident connection between the two[74]. The reasoning of Neave JA and Robson AJA was to the same effect[75].

89 The ambiguity in the HIH certificate that Ashley JA identified was that it "neither plainly identified the insurance as ordinary property insurance, nor

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**72** [2007] VSC 379 at [8].

**73** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,526 [18].

**74** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,527 [19].

**75** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,535 [41] per Neave JA, 77,553-77,554 [158]-[164] per Robson AJA.

plainly identified the contrary"[76]. In circumstances in which the HIH certificate was the only document in BMW's hands that unequivocally related to the insurance, his Honour said that it was misleading for Miller to stay silent and not communicate to BMW that the policy was not cancellable, a matter which his Honour said that the HIH certificate "tended to obfuscate"[77]. The ambiguity to which his Honour referred was not that the HIH certificate was susceptible of differing interpretations and that one interpretation was that it related to a cancellable property policy. As his Honour found, the HIH certificate did not convey the latter representation. One way of describing the ambiguity is that the HIH certificate may, or may not, have been issued in respect of a cancellable property policy.

90 Putting to one side the primary judge's finding that Mr Reynolds and Mr Jones understood that the policy in the bundle was the policy underlying the HIH certificate, the differences between the two documents were capable of causing BMW not to appreciate that it was in possession of the policy to be funded. This would, as Ashley JA observed, leave BMW with the HIH certificate as the only document relating to the insurance[78].

91 Was Miller's conduct in failing to inform BMW, in terms, that the policy to be funded was not cancellable, or that the policy in the bundle was the policy to be funded, misleading? That question requires close analysis of all of the circumstances of the transaction[79]. The parties were commercially sophisticated. They were experienced in their respective fields. The transaction involved the assessment by BMW of an application to lend Miller's client $3.975 million. The only document that Miller supplied in support of the application which appeared to relate to the policy to be funded did not disclose the nature of the risks insured. But it did put BMW on notice that the underlying policy may be an unusual one. BMW made no further inquiry. BMW's failure to make reasonable inquiries would not automatically defeat its statutory claim for damages for misleading conduct. However, given the history of this transaction, it is a circumstance that is relevant to whether Miller's conduct in failing to disclose its knowledge of the policy is correctly characterised as misleading.

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**76** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,527 [20].

**77** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,527 [20].

**78** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,527 [20].

**79** *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 604 [37] per Gleeson CJ, Hayne and Heydon JJ; [2004] HCA 60.

92 At the time BMW requested details of the insurance, Miller knew that BMW had been in direct contact with Consolidated Timber. Miller had been informed that the Consolidated Timber's loan application had been approved. Mr Reynolds agreed with the characterisation of BMW's request for details of the insurance as involving "tidying up" the paperwork. He agreed that it was a request for "some policy, a certification or some information, an invoice"[80]. BMW did not inform Miller that the application had not been investigated and that the welcome letter had been sent as the result, supposedly, of administrative error.

93 Miller knew that the cancellability of insurance was important to a premium lender's determination of a loan application. That was not in issue. However, given that Consolidated Timber's application had been approved by the lender, it is to be inferred that cancellability was not critical to the determination of this application. Mr Mitchell acknowledged, as inevitably he must have done, that where the broker understands that the lender (BMW) has approved the loan, as Miller did on 4 October 2000, it is to be inferred that "obviously up to a point the premium funder has been satisfied".

94 In late October 2000, when Mr Jones of BMW spoke with Mr Merton, agent for Miller, and advised him that BMW would not be proceeding with the loan, he said nothing to put Miller on notice that BMW was under a misapprehension that the policy was cancellable. It will be recalled that when the negotiations for the loan were renewed, Mr Reynolds asked Mr Merton about the availability of directors' guarantees to support the loan. It was not BMW's practice to seek security when lending for cancellable policies. Mr Mitchell acknowledged that recourse to directors' guarantees was a means adopted by premium lenders when funding non-cancellable policies.

95 The December 2000 loan application related to the same insurance as the earlier application which BMW had approved. It was for the same amount. There was nothing in the conduct of the parties between November 2000 (when Mr Merton contacted Mr Reynolds and negotiations were resumed) and 12 December 2000 (when the application was approved) to convey that cancellability was important to the determination of this later application. The request for directors' guarantees suggested that it was not. There was no foundation for the conclusion that the known importance of cancellability gave rise to a reasonable expectation, in the circumstances of this transaction, that Miller would not supply the HIH certificate in response to BMW's request without disclosing at that time or later that the policy was not cancellable.

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**80** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,540 [79].

96 The requirement of the provision of "full policy information", contained in BMW's quotation dated 8 December 2000, did not make Miller's failure to advise BMW that the policy was not a cancellable property policy misleading. Miller had supplied BMW with a copy of the policy. BMW was an experienced premium lender. The policy was not a lengthy document. It was apparent that it did not insure the holders against loss or damage to property. It did not contain a cancellation clause. Miller's failure to draw to BMW's attention a circumstance that the document itself disclosed was not misleading or deceptive.

97 The finding that Miller engaged in misleading conduct cannot be sustained.

The negligence verdict

98 Miller's application has at all times been for special leave to appeal from the whole of the judgment of the Court of Appeal and for orders setting aside the orders made by the Court of Appeal and substituting an order dismissing the appeal to that Court.

99 The amended notice of appeal does not include a ground of appeal that challenges the majority's finding upholding BMW's claim in negligence. There was no reference to the negligence claim in the course of the hearing of the application. Consistently with the manner in which the litigation was conducted below, the focus was on the statutory claim. This is unsurprising. Proof of the statutory claim will almost invariably be less onerous for a plaintiff than proof of negligence on the same facts. Liability for misleading conduct under the statute is strict and it follows that a corporation may act reasonably and yet engage in conduct that is misleading or deceptive[81]. The conclusion that Miller's conduct was not misleading or deceptive does not sit with the conclusion that it was nonetheless negligent.

100 Following the hearing, the Registrar of the Court wrote to the parties inviting them to address the question:

> "[I]s the Court to approach the determination of the proceeding upon the basis that the verdict on the negligence claim cannot stand in the event

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**81** *Hornsby Building Information Centre Pty Ltd v Sydney Building Centre Ltd* (1978) 140 CLR 216 at 228 per Stephen J; [1978] HCA 11; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197 per Gibbs CJ; [1978] HCA 44.

that the applicant's conduct is found not to have been misleading or deceptive?"

101 The orders made by the Court of Appeal are noted at [34] above. It was not correct to refer to the "verdict" on the negligence claim. However, this is not addressed in the parties' responses to the question and it is unnecessary to say more about it.

102 BMW submitted the answer to the question is "no". In its submissions that were filed pursuant to the terms of the Registrar's letter, BMW referred to the history of the application noting that Miller had not challenged the negligence verdict in its draft notice of appeal or summary of argument that were filed on 31 July 2009. BMW pointed out that Miller made no submissions addressing the negligence finding at the hearing before Kiefel and Bell JJ on 11 December 2009. These submissions, addressed to the conduct of the application before Miller sought to put in issue the finding that it had engaged in misleading conduct, do not address the question. BMW went on to contend that a successful challenge to the verdict on the statutory claim would not remove "the factual and legal basis for the negligence verdict".

103 It is convenient at this point to turn to the factual and legal basis of the claim and the reasons of the majority for upholding it.

104 The duty of care is pleaded in two ways: to exercise due care and skill as an insurance broker (i) in Miller's dealings with BMW and, in the alternative, (ii) in responding to BMW's request for details of the insurance.

105 The primary judge dealt with the negligence claim briefly. He described it as being subsidiary to the trade practices claim and as meeting the same fate for similar reasons[82]. His Honour found that there was no vulnerability in BMW's dealings with Miller and that the relationship between the two did not give rise to a duty on Miller's part to exercise care and skill in its dealings with BMW as a broker. His Honour did not address the alternative pleading of the duty.

106 Robson AJA (with whose reasons in this respect Neave JA agreed) found that BMW had established that Miller owed it a duty of care "in responding to BMW's request for details of the insurance"[83]. This was a finding of the alternative, more confined, duty that BMW pleaded.

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**82** [2007] VSC 379 at [71].

**83** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,537 [58] per Neave JA, 77,559 [187] per Robson AJA.

107 His Honour's findings on breach were that Miller failed to provide details of the insurance when it put the proposal to BMW and when it was specifically asked for details of the insurance[84]. The former does not appear to have been relied upon in the way in which the case was conducted. In any event, it is not a breach of the duty having the scope of that found. His Honour went on to say that the policy was an unusual one of which neither Mr Reynolds nor Mr Jones had experience. His Honour's finding was that Miller's failure to inform BMW that the policy was a cost of production policy, in circumstances in which it had given BMW the HIH certificate, which communicated that it was property insurance, was negligent[85].

108 BMW's submissions summarised Mr Mitchell's evidence in support of the assertion that "[o]n any view, the applicant failed to properly inform the respondent about the nature of the cost of production policy". The submission is no more than a repetition of the matters that BMW relied upon in support of its statutory claim.

109 This application does not provide the occasion to consider the correctness of the conclusion that Miller owed BMW a duty of care having the scope identified. It is sufficient to observe that the majority's reasons for finding that Miller was in breach of the duty stated are the same matters as those which, wrongly, were found to amount to misleading conduct.

110 The common factual basis of the statutory and negligence claims is fatal to BMW's endeavour to support the latter despite the collapse of the former.

111 BMW filed a further submission in purported reply to Miller's response to the Registrar's letter. The terms of the letter did not provide for submissions in reply. The observations in *Carr v Finance Corporation of Australia Ltd [No 1]*[86], which are critical of the filing of submissions without leave after hearing, have equal force when applied to submissions that travel outside the terms of any leave[87]. There was no warrant for the filing of BMW's reply

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**84** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,560 [194].

**85** (2009) 15 ANZ Insurance Cases ¶61-811 at 77,560 [194].

**86** (1981) 147 CLR 246 at 258 per Mason J; [1981] HCA 20.

**87** In this respect, see *Bull v Lee (No 2)* [2009] NSWCA 362 at [9] per Allsop P, Campbell and Young JJA.

submissions. They have not been taken into account in determining the application.

112 BMW's submission, that it is unfair to permit Miller to challenge the negligence verdict at this late stage in the proceedings, should be rejected. By its amended notice of appeal, Miller made clear that it was challenging the finding that it had engaged in misleading conduct. BMW dealt with that issue fully in the written submissions filed in support of the application before the Full Court. The amended notice of appeal claimed orders setting aside those of the Court of Appeal and dismissing the appeal to that Court. If Miller's conduct in seeking these orders is said to have been productive of unfairness it might have been expected that senior counsel for BMW would have drawn that circumstance to the Court's attention at the hearing.

Orders

113 For the reasons given, special leave to appeal should be granted, the appeal allowed, the orders of the Court of Appeal set aside and in lieu thereof the appeal to that Court should be dismissed. Accordingly, we would make the following orders:

1. Special leave to appeal granted.

2. Amended draft notice of appeal dated 19 January 2010 treated as filed in the appeal, and appeal treated as instituted and heard instanter and allowed with costs.

3. Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 11 June 2009 and, in lieu thereof, order that the appeal to that Court be dismissed with costs.

*Heydon J*
*Crennan J*
*Bell J*

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