

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, KIRBY, HAYNE AND CALLINAN JJ

EFFEM FOODS PTY LIMITED trading as
UNCLE BEN'S OF AUSTRALIA

APPELLANT

AND

LAKE CUMBELINE PTY LIMITED & ORS

RESPONDENTS

Effem Foods Pty Limited v Lake Cumbeline Pty Limited (S136-1997)
[1999] HCA 15
14 April 1999

ORDER

1. *Appeal allowed with costs.*
2. *Orders of the Full Court of the Federal Court made on 24 April 1997 and 11 July 1997 be set aside, and in lieu, order that the appeal to that Court be dismissed with costs.*
3. *Respondents granted special leave to cross-appeal.*
4. *Cross-appeal dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

D F Jackson QC with R M Smith SC for the appellant (instructed by Deacons Graham & James)

J D Heydon QC with J Stoljar for the respondents (instructed by Blake Dawson Waldron)

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

CATCHWORDS

Effem Foods Pty Limited v Lake Cumbeline Pty Limited & Ors

Trade practices – Misleading or deceptive conduct – Alleged representation concerning contract for supply of fish – Falsity of representation not established – Reliance not established.

Appeal – Facts – Findings of fact by Trial Judge – Power of Appellate Court to set aside findings.

Trade Practices Act 1974 (Cth), s 52.

1 GLEESON CJ, GAUDRON, KIRBY AND HAYNE JJ. This litigation arose out of an unsuccessful investment made by the respondents in Trawl Industries of Australia Pty Ltd ("TIA"). The issues before this Court are such that it is unnecessary to distinguish between the individual investments made by the various respondents. It is convenient for most purposes to refer to them collectively. On 30 March 1987 the respondents invested \$2 million in TIA and acquired a 50 per cent interest in the company. In April 1989 TIA went into receivership. It was wound up in August 1990. The respondents suffered substantial losses.

2 The respondents sued the appellant in the Federal Court. The appellant, a subsidiary of an American corporation, is the largest pet food manufacturer in Australia. The business of TIA was that of catching or otherwise acquiring, processing and selling fish. The appellant, (referred to in the Federal Court and where appropriate hereafter as UBA), which used fish in the manufacture of pet food, was a large purchaser of TIA's products. The respondents alleged that, at or about the time of their investment in TIA, the appellant engaged in misleading and deceptive conduct in breach of s 52 of the *Trade Practices Act* 1974 (Cth) ("the Act") and claimed damages. The conduct alleged involved the making of a number of representations, some of which were said to have been fraudulent. A common law claim for damages for fraudulent misrepresentation was also made, but the case proceeded upon the assumptions that the claim under the Act, if established, would result in relief at least as extensive as that available at common law and, if not established, that there would be no liability at common law. Consequently, the alleged contraventions of the Act were the focus of the judgments in the courts below, and of the argument in this Court.

3 The essence of the respondents' case against the appellant, as originally formulated, may be summarised as follows. The appellant, it was said, had an interest in encouraging persons to invest in TIA. Such investment would strengthen the financial position of TIA, and provide it with funds which would enhance its capacity and efficiency as a supplier. Knowing that TIA was seeking to attract investors, and knowing that potential investors would be interested in TIA's supply arrangements with the appellant, the appellant put out false or misleading material and information about those arrangements, knowing it would be relied upon by potential investors, for the purpose of making the business of TIA appear more profitable and attractive than it was. In particular, a six-month contract for the supply of fish by TIA to the appellant, entered into on 11 February 1987, identified as No W17299, was alleged to have been a sham. That contract, which was dated 11 February 1987, provided for the supply by TIA to the appellant of a total of 6,250 tonnes of fish, having a value of more than \$4 million. Additionally, certain Heads of Agreement between TIA and the appellant, signed on 26 March 1987, were said, in effect, to constitute window-dressing calculated

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to mislead and deceive persons such as the respondents as to the relationship between TIA and the appellant.

4 In all, there were 24 representations pleaded by the respondents, nine of which were said to be fraudulent, and all of which were said to be false or misleading. A number of the alleged representations were merely verbal refinements of other alleged representations. The respondents allegedly relied on the representations when they invested in TIA.

5 The individual respondents were experienced commercial people. They made investigations of the business of TIA. The appellant and TIA were at arm's length. So far as the appellant was aware, there was no limit upon the enquiries about TIA and its business which the respondents were free to make before they decided to invest. Clearly, the question of what motivation the appellant might have had to set out to mislead or deceive the respondents about TIA, or to enter into sham contracts with TIA, was a matter that required close examination.

6 The action came on for hearing before Tamberlin J. The principal witnesses were the individual respondents and Mr Lees, the officer of the appellant in charge of its dealings with TIA. The hearing lasted 33 days. The dispute was litigated at what should be, but regrettably is not, extraordinary length.

7 Tamberlin J found that the respondents' case was without merit. He held that most of the representations alleged were never made, that not one of them was shown to have been false, and that not one of them was relied upon by the respondents in making their decision to invest.

8 The respondents appealed to the Full Court of the Federal Court. They did not pursue all the issues raised at first instance, and some of the findings made by Tamberlin J were not challenged. One important respect in which the case was altered will be examined below. The appeal was partly successful. The Full Court (Beaumont, Einfeld and Foster JJ) allowed the appeal insofar as it related to three of the representations alleged, and ordered a new trial of the case in relation to those representations. The Full Court did not set aside any of the material findings made by Tamberlin J, or substitute findings of its own. Rather, it held that, in relation to his findings on the three representations in question, Tamberlin J had misdirected himself, and that the case should be sent back for a further hearing at first instance.

9 The appellant appeals against the decision of the Full Court and contends that there was no misdirection of the kind attributed to Tamberlin J. The respondents have filed a notice of contention, seeking to support the Full Court's decision that there should be a new trial in relation to the three representations the subject of the

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order on the ground that the trial judge's findings concerning those representations were erroneous or incomplete, and that a new trial is justified. In addition, the respondents seek special leave to cross-appeal against the Full Court's decision in relation to one other alleged representation, arguing that the decision of Tamberlin J on that representation was wrong, and that the Full Court failed to deal with the matter insofar as it concerned that representation.

- 10 It is proposed to consider in turn the appeal, the notice of contention, and the application for special leave to cross-appeal.

The appeal

- 11 The respondents alleged that, in relation to contract W17299, the appellant made the following four representations:

- (i) that [UBA] had entered into a binding contract with [TIA] for the supply by [TIA] to [UBA] of 6,250 tonnes of fish in 1987;
- (ii) that [UBA] intended to honour its obligations under that contract;
- (iii) that the contract was a genuine one intended to be fulfilled by the parties to it; and
- (iv) that [TIA] presently had and/or would have the ability and capacity to supply 6,250 tonnes of fish in accordance with the terms and conditions of the contract.

- 12 Representation (i) was put at the trial in the context of an allegation that contract W17299 was a sham. Tamberlin J, for reasons explained in his judgment, which necessarily involved the credit of Mr Lees, rejected that allegation. It was not pressed on appeal. The appeal was conducted on the footing that the contract was genuine and legally binding. No attempt was made to overturn Tamberlin J's finding in that respect. That, it may be observed, put a different complexion upon the respondents' case in relation to representations (ii) and (iii). In the context of an allegation that W17299 was a sham, their meaning, and their significance in relation to s 52 of the Act, is clear. Indeed, at first sight, (ii) and (iii) look like elaborations of (i). When (i) is removed from the picture, the meaning of (ii) and (iii) is not nearly so clear. As explained in argument, they seem to involve the idea that the appellant had in truth, and at arm's length, entered into a binding agreement to purchase fish from TIA, but that the appellant's attitude to the contract, formed in the light of its superior bargaining strength, was that it would only honour its obligations to the extent to which it suited its commercial purposes to do so. In those circumstances, identifying the conduct on the part of the appellant which was

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misleading or deceptive is not easy. If the contention is analysed, as it was presented, in terms of making false representations with the intention of inducing the respondents, in reliance on the representations, to invest in TIA, several difficulties appear. Once it is accepted that the contract was not a sham, at first sight all that one has is a genuine contract for the supply and purchase of fish, entered into in February 1987. How did that involve the appellant, in March 1987, making to the respondents representations, concerning the contract, of the kind alleged in (ii) and (iii)? The particulars of the making of the alleged representations were that the contract was made and the appellant knew the contract would be shown to potential investors. That does not appear to involve a representation as to the way the appellant would conduct itself in relation to the performance of its contractual obligations, or as to the intentions of the appellant in relation to the administration of its dealings with TIA.

13 Tamberlin J rejected the respondents' case in all its aspects. He found that representations (ii) and (iii) had not been made by the appellant to the respondents. He also found that, even if they had been made, they would not have been false. Finally, he found that the respondents did not rely on the alleged representations in deciding to invest in TIA.

14 Having regard to the way in which the Full Court dealt with the matter, it is necessary to refer to the structure and content of the trial judge's reasoning in coming to these conclusions.

15 After setting out the facts giving rise to the dispute, the documentary material relied upon by the parties, and the evidence of the main witnesses, and before coming to a statement of the issues to be resolved, a formulation of the relevant legal principles, and a statement of his findings, Tamberlin J expressed his views on the credit of each of the main witnesses. He introduced this part of his judgment with the following preliminary comment:

"Credit in this matter assumes a significant role because almost all of the representations alleged are specifically and categorically denied. There are four principal witnesses whose credit is squarely in issue, and I propose to comment on each of them in turn.

I should add that my final conclusion is that having regard to the seven to eight year period that has elapsed between the events and conversations raised in evidence and the hearing of the evidence before me, the only safe course is to place primary emphasis on the objective factual surrounding material and the inherent commercial probabilities, together with the documentation tendered in evidence. In circumstances where the events took place so long ago, it must be an exceptional witness whose undocumented

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testimony can be unreservedly relied on. The witnesses in this case unfortunately did not come within that exceptional class. The discussions referred to in evidence were capable of bearing quite opposed meanings depending on subtle differences of nuance and emphasis, and a proper appreciation of the significance of those matters must necessarily be considerably diminished over such a long period of time."

16 Tamberlin J then went on, assigning detailed reasons, to express his views on the reliability of the four witnesses concerned. In each case those views were based in part upon observations made, and impressions formed, concerning the demeanour of the witnesses, but they also turned in part upon reasoning as to the plausibility of certain parts of the evidence of the witnesses, considered in the light of what Tamberlin J had referred to as "the objective factual surrounding material and the inherent commercial probabilities, together with the documentation tendered in evidence." This was an orthodox and sensible approach to the matter¹.

17 Having completed that exercise, Tamberlin J set out the history of this, and related, litigation. He then referred to, and discussed, the legal principles relevant to his decision. Having done that, he then came to the matter of his findings in relation to each of the representations relied upon by the respondents.

18 The reasoning of Tamberlin J in relation to the findings concerning representations (ii) and (iii) may be summarised as follows. A substantial part of that reasoning was, naturally, directed to the assertion, made in relation to representation (i), that contract W17299 was a sham. Because the finding that W17299 was a genuine and binding contract was not questioned either in the Full Court, or this Court, it is unnecessary to consider that reasoning in detail. It is important to remember that, at the trial, representations (ii) and (iii) were being pressed in the context of representation (i). Tamberlin J said that there was never any suggestion from UBA that it was not prepared to take any of the fish contracted for under W17299 and which TIA was able to supply at the prices and on the terms set out in that contract. There was never any complaint by TIA that UBA was not honouring its commitments to take fish. In the months up to the end of May 1987, UBA had accepted about 45 per cent of the total order scheduled in the contract to be taken by UBA over the eleven-month period from January to the end of December 1987. TIA was having difficulty maintaining supply, although that was

1 As to the approach to be taken by an appellate court when reviewing a primary judge's findings of fact see *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* (1999) 73 ALJR 306; 160 ALR 588.

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not the result of UBA's attitude towards the contract or of any lack of genuineness on the part of the contract. His Honour made the following comment on the objective commercial probabilities:

"If Lees had entered into a binding contract for 6,250 tonnes with the firm expectation that [TIA] would *not* be able to supply the quantities contracted for, it was a dangerous and extraordinary 'tactic' on the part of Lees, because there was a significant danger that he would have to answer to his senior executives if the contract resulted in over-commitment or [TIA] was not able to supply. Moreover, there was the added danger that the tactic would not work because Lees must have anticipated some inquiry by the applicants or other interested parties as to the past performance record of [TIA]."

19 These findings were reasonable and supported by the evidence.

20 As was noted, if representations (ii) and (iii) are to be considered separately from representation (i), they are even more difficult to sustain than they were in the context in which Tamberlin J had to consider them. Once it is accepted that contract W17299 was a genuine and binding contract, then it is less easy to understand the basis upon which it could be said that the conduct of the appellant involved the making of any representation to the respondents of the kind alleged in (ii) and (iii).

21 Tamberlin J went on to consider what was described as the "attitude of UBA" to contract W17299. He examined in detail some of the material in evidence about the past, and likely future, performance of TIA, and about the expectations of UBA in that regard. He concluded that UBA intended to be bound by the contract, and to honour its commitments under it.

22 Later in his judgment, after having made findings in relation to each of the 24 representations relied upon by the respondents, Tamberlin J came to express his findings on the matter of reliance. He concluded that there was no reliance by the respondents on any one or more of the representations allegedly made before 30 March 1987 when the respondents came to make their investment in TIA. In that connection he referred to the background and experience of the various respondents, to the comparative brevity of their communications with UBA, to the extent of the investigations they made in relation to TIA, and to their enthusiasm for the investment. He said:

"The evidence demonstrates that [the respondents] saw their 50% investment in [TIA] in March 1987 as an extremely attractive, if not irresistible investment, with an enormous 'upside' of sustained future profits with little 'downside'. This attraction in their opinion was so great that the clear

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inference is that [the respondents] would have invested in [TIA] even if the alleged representations had not been made."

23 When Tamberlin J came to deal with representation (iv) he began by noting that, unlike representations (i) to (iii) inclusive, this representation was not alleged to be fraudulent.

24 He said:

"It is important to note that the allegations as to misrepresentation by silence in respect of the perceived incapacity of [TIA] to supply the quantity contracted for are not alleged to be fraudulent. It is hard to understand this in the circumstances of this case because the basic submission is that UBA actively and intentionally participated in a 'sham' transaction."

25 He then went on to deal with the assertion that UBA must have had strong doubts about TIA's ability to perform, or even a firm belief that TIA would not in fact be able to perform, and that it was making a misrepresentation to prospective investors to the effect that TIA would have the capacity and ability to supply 6,250 tonnes of fish contracted to the specifications of UBA. This submission was rejected for a number of reasons. Those reasons involved a close examination of the evidence concerning the performance of TIA, and the expectations of UBA, in relation to supplies of fish. For the reasons he set out, Tamberlin J first rejected the proposition that the conduct of the appellant involved the making of any representation as to the capacity of TIA to supply fish. In that connection it was pointed out that contract W17299 had its own operation and legal effect, and that the conduct of UBA in entering into the contract did not involve a representation about it to third parties. Further, for reasons which he gave, Tamberlin J concluded that the weight of evidence was to the contrary of the proposition that the appellant did not believe that TIA had the ability to supply and process the 6,250 tonnes of fish. To a large extent, those conclusions were based upon his Honour's view of the commercial probabilities as to the way in which a company in the position of the appellant might be expected to behave. The reasoning also turned upon a consideration of the facilities available to TIA, and the knowledge or belief of Mr Lees about the capacity of TIA.

26 The finding of Tamberlin J was that representation (iv) had not been made, and that in any event, it had not been shown to be untrue. The finding concerning reliance, referred to above, also applied to this alleged representation.

27 The Full Court did not reverse any of these findings. Rather, it concluded they were based upon a misdirection, and sent the matter back for a new trial.

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28 In their joint reasons for judgment, having set out the issues in the case, having referred to a substantial part of the evidence, and having outlined the competing submissions of the parties, the members of the Full Court came to deal with the claims relating to representations (ii), (iii) and (iv).

29 Their Honours said that in their view "the key, central or decisive section" of the reasoning in the judgment of Tamberlin J was that part which has been quoted earlier in this judgment, where there was set out the introductory portion of Tamberlin J's findings on the credit of the four main witnesses in the case. The Full Court elevated Tamberlin J's preliminary observations about credit to a position of importance in his process of reasoning which those observations did not have.

30 The Full Court attached particular importance to Tamberlin J's comment that the only safe course available to him was to place primary emphasis on the objective factual surrounding material and the inherent commercial probabilities together with the documentation tendered in evidence. Their Honours said:

"There are, in our view, difficulties with this reasoning, when it is sought to be applied to the written material in question, namely, the W contract, [the Heads of Agreement] and the Shareholder's Agreement, the existence of which is not disputed and the tenor of which accords with usual commercial practice. We acknowledge that such reasoning may have been appropriate in rejecting the [respondents'] case so far as it was based on the alleged oral misrepresentations; but, with all respect, we cannot see how this process of reasoning could justify rejection of the claims made in para 3 of the statement of claim when it is recalled that those claims were grounded on written material the existence of which is not disputed. To this extent, in our view, his Honour misdirected himself."

31 In essence, the Full Court reasoned that, because a substantial part of the case for the respondents was based, not upon oral misrepresentations, the existence of which might have turned upon the credibility of individual witnesses, but upon objective conduct including the existence of contracts, there was some fundamental error in the approach which Tamberlin J took towards resolving the issues concerning representations (ii), (iii) and (iv).

32 Perhaps because the members of the Full Court did not set out to make findings concerning the question of whether the representations had been made, or whether they were false, or whether they had been relied upon by the respondents, there is little examination in the judgment of the Full Court of the reasons which had been given by Tamberlin J for his conclusions on each of those matters. Rather, the introductory comments concerning the credit of individual witnesses

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were taken as demonstrating a basic error in approach, and it was said that the matter should go back for a new trial. In fact, however, an analysis of the reasons for judgment of Tamberlin J shows that they were plausible and carefully expressed, took proper account of both the findings as to the credibility of witnesses and the undisputed objective circumstances of the case, and were soundly based.

33 On any view of the matter, the credit of the witnesses was important. Representations (ii) and (iii) were alleged to have been fraudulent. A resolution of that issue necessarily involved findings concerning the credit of Mr Lees. He was alleged to have been a party to the fraud. Similarly, in relation to representation (iv), although it was not alleged to be fraudulent, the case turned in a significant measure upon the evidence given by Mr Lees as to his knowledge and belief concerning TIA's capacity to supply.

34 On the question whether the conduct of the appellant, in all the circumstances, involved the making of any representations of the kind alleged in (ii) and (iii), the reasoning of the Full Court does not answer the important point, made by Tamberlin J, that for a party in the position of the appellant to enter into a genuine and binding commercial agreement such as W17299, even coupled with an awareness that the contract would be shown to people considering making an investment in TIA, does not involve making representations to potential investors, either in or about the contract. It might be easier to reach a different conclusion if one had decided that the contract was a sham. However, once it is concluded that the contract was genuine and binding (as was accepted in the Full Court), then a conclusion that the appellant was making some kind of a representation to third parties as to its own attitude towards performance of the contract, or as to the other party's capacity to perform it, would require the existence of very unusual commercial circumstances.

35 Further, it is impossible to understand how the suggested misdirection by Tamberlin J in his introductory remarks on credit might have affected the findings he made as to the absence of reliance by the investors on any of the alleged representations, bearing in mind the reasons he gave for his conclusion in that respect. In substance, he said that the investors, who made their own investigations of TIA, satisfied themselves that it was a very attractive investment, and he did not believe they relied on anything that was done or said or represented by the appellant. As to the latter part of that conclusion, his Honour's assessment of the principal witnesses called on behalf of the respondents was an important factor in his reasoning, but that reasoning, which was explained at length, was not affected by any misdirection or error of approach.

- 36 In this Court it was argued, in support of the decision of the Full Court, that the "short point being made by the Full Court" was that the trial judge's credit-based rejection of the three principal witnesses called on behalf of the respondents translated itself into hostility as to the general credibility of their case; and that that approach was inappropriate in relation to representations (ii), (iii) and (iv) which rested on W17299. If that is the substance of the criticism being made by the Full Court of the reasoning of Tamberlin J, then we do not agree with the criticism. It does not do justice to the reasoning of the trial judge. His Honour explained carefully why he rejected every element of the respondents' case on those representations, and that explanation involved a great deal more than his views on the credit of the witnesses, although those views had a part to play.

The notice of contention

- 37 The respondents, in addition to supporting the reasoning of the Full Court, argued that there were additional reasons why the judgment of Tamberlin J in relation to representations (ii), (iii) and (iv) should be found deficient, and why a new trial on those representations should be ordered. Five such reasons were advanced.

- 38 First, it was said that Tamberlin J, in concluding that representation (iv) was not made, failed to make a finding with respect to that part of the alleged representation which related to TIA's capacity to comply with contractual requirements as to quality as distinct from quantity. This submission has not been made out. Tamberlin J gave 10 reasons for rejecting the respondents' case concerning alleged representation (iv). In introducing those reasons he referred to TIA's "capacity and ... ability to supply 6,250 tonnes of fish contracted to the specifications of UBA." The reference to specifications was clearly a reference to quality. In the reasons, he referred to the evidence concerning TIA's ability and capacity to supply and process the fish. Mr Lees gave evidence that he believed that TIA was producing product in accordance with UBA's specifications. It is true that a good deal of the trial judge's reasoning concerning representation (iv) was concerned with tonnages of fish rather than specifications, but the matter of quality as well as quantity was considered.

- 39 Secondly, the respondents submitted that the trial judge failed to make any finding as to whether TIA had the capacity to comply with product quality specifications. His Honour found :

"It has not been demonstrated that it is likely UBA was convinced that [TIA] did *not* in fact *have* the ability and capacity to supply and process the 6,250 tonnes or would not do so. The weight of the evidence is to the contrary."

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40 Leaving to one side a particular problem that occurred in the period
20-28 May 1987, which was explained in a manner discussed in the judge's
reasons, the fish supplied to UBA met the required specifications.

41 There is no substance in this criticism.

42 Thirdly, it was argued in relation to all three representations that the trial
judge failed to make a finding as to whether UBA knew that TIA was going to
show contract W17299 to potential investors.

43 The case advanced at trial was that contract W17299 was a sham, entered
into for the very purpose of being shown to, and misleading, potential investors in
TIA. The trial judge rejected this, and accepted the evidence of Mr Lees that he
regarded the contract as genuine and binding. The reasons which Tamberlin J gave
for rejecting the argument that the conduct of the appellant in relation to the
contract involved the making of representations to investors about the contract,
some of which have been referred to above, were not affected by the hypothesis
that Mr Lees knew that potential investors would, or might, see the contract. The
reasoning was no less valid on the assumption that he had such knowledge.

44 Fourthly, it was said that the trial judge should have made a finding as to
whether UBA knew or ought to have known how much, or how little, knowledge
potential investors would have about TIA.

45 His Honour made this finding:

"The evidence does not establish that Lees had any knowledge or
appreciation of the reputation or experience of [the three persons who
represented the investors in dealing with TIA]."

46 Some of the reasoning supporting the findings on the various issues in the
case made reference to the fact that UBA did not know who all the prospective
investors in TIA might be, or what kinds of investigation they might make.
Implicit in the reasoning was the consideration, which was consistent with the
evidence, that the class of possible or potential investors in TIA might have
included people of varying backgrounds, and with varying degrees of knowledge
and understanding of the industry in general, and of TIA in particular. There was
no necessity to make a specific finding of the kind referred to.

47 Fifthly, it was contended that the finding, in relation to alleged representation
(iv), that TIA could comply with the requirements of contract W17299 was wrong
and contrary to the evidence.

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48 As well as concluding that no representation of the kind asserted was made, and that in any event there was no reliance on such a representation, Tamberlin J examined in detail the evidence as to TIA's capacity, in March 1987, to supply fish, and as to UBA's information and belief about that capacity. He concluded that if such a representation had been made, there were reasonable grounds for making the representation. The arguments advanced on behalf of the respondents in support of the proposition that such a representation (which was not alleged to be fraudulent) would have been misleading, even if accepted, do not warrant a re-trial unless there is sufficient reason shown for rejecting the findings that such a representation was not made and was not relied upon. No sufficient reason has been shown.

49 The grounds set out in the notice of contention have not been made out.

The application for special leave to cross-appeal

50 In considering this application, the Court heard full argument on the merits of the proposed cross-appeal.

51 The argument concerns representation (xiii) which was alleged to be as follows:

"(xiii) That UBA would source in the first instance its requirements for fish from [TIA] except for Western Australia."

52 On 26 March 1987 UBA and TIA entered into Heads of Agreement, under which UBA agreed "to source in the first instance its requirements for fish from TIA". Mr Lees gave evidence that he did not regard the Heads of Agreement as contractually binding and took the view that a contractual obligation only came into existence when there was agreement as to price, quantity, quality, and time, of the kind contained in the W17299 contract. Tamberlin J considered that this view was reasonably open to him, although his Honour regarded the legal effect of the agreement as involving a binding obligation on UBA to first approach TIA to see whether TIA could supply fish on terms acceptable to UBA.

53 Tamberlin J's conclusions in relation to representation (xiii) were as follows:

"Moreover, for reasons given later, I do not consider that the obligation to provide an opportunity for negotiation played any part in the decision of the applicants in entering into the shareholders' agreement in March 1987. In my opinion the applicants relied on their contractual rights as set out under the Heads of Agreement coupled with the strong commercial attractions of the investment. That is why they obtained a copy as altered on 26 March 1987

to ensure that the Heads of Agreement gave them sufficient protection in its terms. They were concerned with the written obligations of UBA as opposed to an assurance that Lees would 'look at' the draft Heads of Agreement. They did not direct their attention to any representation in the Heads of Agreement that they would be approached first by UBA. There is no evidence that any of them considered the agreement did not give them the protection they sought. Nor do I consider that as events turned out it gave rise to any damages, because UBA took all the fish which [TIA] could supply, and there was no evidence that [TIA] supplied, or could have supplied, more fish than was contracted for in the 'W' or 'A' contracts in force from time to time.

Had the clause given [TIA] the right to require UBA to take additional fish at specific prices, quantity, quality and times, this would have been a most important matter, but in fact, it only gave a right to negotiate which in the face of disagreement by UBA would prove to be barren.

Accordingly, in relation to the alleged representation as to sourcing supply in the first instance I do not find that there was such a misrepresentation made in the Heads of Agreement or otherwise. In fact UBA took all the fish contracted for which [TIA] was able to supply. Supplies from other sources were over and above those which [TIA] could supply and in some instances UBA took more fish than it was required to under its contract. For example, in the case of mackerel in the first 3 months of contract W17299 it took substantially more than it was contractually bound to.

I find that there was no misrepresentation in respect of alleged representation (xiii)."

54 The Full Court dealt fairly briefly, and compendiously, with representations (xii), (xiii) and (xiv). They said the trial judge had accepted, to a limited extent, that the Heads of Agreement involved a representation that a continuing long-term relationship between UBA and TIA was contemplated, but that this involved no misrepresentation. They did not mention the findings of no reliance and no damage. They agreed with the conclusion that no misrepresentation was involved.

55 As Tamberlin J pointed out, Mr Lees was a fish buyer, not a lawyer. Even to a lawyer, however, the contractual status of the Heads of Agreement, considered against the background of the pattern of dealings between UBA and TIA, would have been a matter of some doubt. Viewed as containing, or involving, a representation by UBA as to where UBA would "source its fish", its status was equally unclear. However, there are concurrent findings by the trial judge and the Full Court that it involved no misrepresentation of the kind alleged in representation (xiii).

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56 What is fatal to the respondents, however, is the finding of absence of reliance. No reason has been shown as to why that finding should have been disturbed by the Full Court. Indeed, the case which the witnesses for the respondents sought to make at trial was that they relied upon two significantly different representations, one to the effect that UBA and TIA would have an exclusive supply agreement, and the other that supply would be on a cost-plus basis.

57 Special leave to cross-appeal should be granted, but the cross-appeal should be dismissed.

Conclusion

58 The appeal should be allowed. The orders of the Full Court of the Federal Court should be set aside, and the orders made by Tamberlin J should be restored. The respondents should have special leave to cross-appeal, but the cross-appeal should be dismissed. The respondents must pay the costs of the appellant of the proceedings in the Full Court of the Federal Court and in this Court.

59 CALLINAN J. I agree with the reasons for judgment and the orders proposed by Gleeson CJ, Gaudron, Kirby and Hayne JJ in this matter.

60 I would only wish to make these further observations about the respondents' case. On the hearing of the appeal they made several attempts to give it a different complexion but, reduced to its essentials, it inescapably involved these unlikely propositions: that if A has a contract with B and knows that C may be minded to invest in or lend money to B, A comes under an obligation to inform C of its assessment of B's capacity to perform the contract; that A is under an obligation to inform C whether, in the event of non-performance of the contract by B, A will take advantage of that non-performance by looking to its own commercial interests; and that to fail to inform C accordingly of these matters is to engage in misleading or deceptive conduct within the meaning of ss 4(2) and 52 of the *Trade Practices Act* 1974 (Cth). To give effect to propositions of these kinds in this type of case would be to distort the intention and the meaning of that Act, and the obligations which s 52 imposes, and would involve the imposition upon arm's length third parties of an oppressive obligation to protect another party against his or her own imprudence or negligence in entering into a transaction. In this case such an obligation can be seen to be even more onerous and unreasonable in light of the facts that the respondents here were sophisticated, commercial people, they undertook their own investigation into the affairs of Trawl Industries of Australia Pty Ltd, and, as the trial judge correctly held, they allowed themselves to be dazzled by the lure of almost fantastic profits of which they themselves had made their own independent projections.