Freely Pte Ltd *v* Ong Kaili and Others
[2010] SGHC 60

Case Number : Small Claims Tribunal Appeal No 3 of 2009

Decision Date : 19 February 2010

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Giam Chin Toon, SC (instructed), Daniel John, Kevin Lim and Ruth Zhu (Goodwins Law Corporation) for the appellant; Oliver Quek (Oliver Quek & Associates) for the respondents.

Parties : Freely Pte Ltd — Ong Kaili and Others

Commercial Transactions – Sale of services – Consumer protection

19 February 2010

Woo Bih Li J:

1 This was a small claims appeal against the decision of the referee (the "Referee") of a Small Claims Tribunal ("SCT"). The grounds of decision of the Referee ("the GD") are found in *Tan Cheh Hiang @ Esther Tan Cheh Hiang & Others v Freely Pte Ltd* in Claim No SCT/9162/2008 & Others.

The parties

2 The appellant, Freely Pte Ltd ("Freely"), the respondent in the SCT below, is a private limited company in the business of running a private school. The 48 respondents (the "Claimants") were the claimants in the SCT below and are persons with diverse backgrounds which, *inter alia*, include working adults, professionals and retirees. The Claimants had all enrolled in a three-day options trading course (the "Course") conducted by Dr Clemen Chiang ("Dr Chiang"), who was, at all material times, Freely's director, shareholder and the conductor of the Course. Although there were initially 51 claims before the SCT, three claimants were absent from the proceedings below. The present proceedings before me involved an appeal against the decision of the Referee *vis-à-vis* 48 claims, *ie*, the claims of the Claimants who were present before the SCT. All 48 claims were filed in the SCT between 29 October 2008 and 3 November 2008 [note: 1].

3 In essence, the Claimants had each made individual claims against Freely for the repayment of the full price paid for:

(a) the Course (for which course fees of between S$3,495 to S$3,995 were paid [note: 2]);

(b) a software programme (the "Software", for which an amount of S$960 was paid [note: 3]); and

(c) a web-seminar package (the "Webinar", for which an amount of S$1,888 was paid [note: 4]).

Background facts

Conduct of the proceedings below

4 With regard to the conduct of the hearing in the SCT (which was held on 12 March 2009), the Referee first noted (see [5] of the GD) that "the strict rules of evidence and procedure do not apply in the [SCT]", and that "the Referee conducts a SCT hearing in accordance with the principle of *ex aequo et bono* (which is by principles of what is fair and just in the circumstances". As support for these propositions, the Referee referred to ss 28 and 30 of the Small Claims Tribunal Act (Cap 308, 1998 Rev Ed) (the "SCTA"). Section 28 of the SCTA reads:

> **Evidence**
>
> **28**. —(1) *A tribunal shall not be bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit*.
>
> (2) Evidence tendered to a tribunal by or on behalf of a party to any proceedings need not be given on oath but the tribunal may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
>
> (3) A tribunal may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it thinks fit.
>
> (4) All evidence and information received and ascertained by the tribunal under subsection (3) shall be disclosed to every party.
>
> (5) For the purposes of subsection (2), a Referee of a tribunal is empowered to administer an oath.
>
> (6) A Referee may require any written evidence given in the proceedings before a tribunal to be verified by statutory declaration.
>
> (7) A Referee is not required to keep a record of the evidence given in any proceedings before a tribunal but shall make —
>
> (a) a summary for the purposes of section 13 (2); and
>
> (b) notes of the proceedings.
>
> [emphasis added]

while s 30 of the SCTA reads as follows:

> **Control of procedure**
>
> **30**. Subject to this Act and to the rules, *a tribunal shall have control of its own procedure in the hearing of claims* and, in the exercise of that control, shall have regard to the principles of natural justice. [emphasis added]

5 At this juncture, it bears mention however that the informality in the proceedings of the SCT does *not* mean that the SCT may ignore substantive legal principles. As noted by Louis D'Souza in "An

Experiment in Informal Justice: The Small Claims Tribunal of Singapore" [1991] 3 SAcLJ 264 ("D'Souza's Article") at p 266:

> **(c) Simplicity**
>
> The small claims process strives for simplicity. In most jurisdictions, there were no rigid and complex rules governing the procedures of the courts. "Only the general outlines of procedure were specified and the details were left to the discretion of the judge. In particular, judges were not to be bound by formal rules of evidence, *though a decision were to be reached on the basis of substantive law*." The classic example of this is found in section 12 (4) of the Singapore Small Claims Tribunals Act5 which provides:
>
> A tribunal shall determine the dispute according to the substantial merits and justice of the case and in doing so *shall have regard to the law but shall not be bound to give effect to strict legal forms or technicalities*.
>
> [emphasis added]

6 To my mind, the above view (*viz*, that although an SCT is not bound to give effect to strict legal forms or technicalities, it must nonetheless determine disputes according to substantive legal principles) is implicitly buttressed by s 38(1)(*a*) of the SCTA which gives an aggrieved party, who has obtained from the District Court leave to appeal (see s 38(1B) of the SCTA), an opportunity to appeal against an order of the SCT "on any ground involving a question of law" .

7 The Referee then explained how the proceedings before the hearing proper and at the hearing itself (which was on 12 March 2009) were actually conducted:

> 6. The proceedings were regulated in the following manner:
>
> (a) In respect of the pre-hearing procedure, I introduced these steps to save time and costs for all parties concerned:
>
> (i) Around 2-3 weeks before the hearing, I directed the SCT to record written statement of facts from the Claimants and the Respondent. This was a necessary departure from the usual SCT convention where parties orally relate their facts to the Referee at the hearing itself. If the convention was followed, the hearing would have taken an inordinately long time simply to elicit the parties' respective version of events.
>
> (ii) The SCT first took statement from the Claimants. They recounted common facts as they were all course-mates present at the same talks given by Dr. Chiang. They also relied on the same Straits Times reports as evidence of their case. For this reason, I did not think it necessary to inconvenience the Respondent to tender 51 written statements in answer to each of the Claimant's statement. Instead, I prepared a brief chronology of the Claimants' facts (Summary of Claimants' Statement of Facts) and directed the Respondent to submit their written response thereto (Respondent's Statement of Facts).
>
> (b) On the day of the hearing, I started by explaining my role as a Referee, the procedures in conducting the hearing, and the reasons behind the use of the statements. I then secured the parties' consent to proceed.
>
> (i) The first witness called was Esther Tan Cheh Hiang (the Claimant in SCT 9162/2008)

who led evidence for the Claimants. Esther Tan was selected because she gave testimony in Mandarin. This enabled the Mandarin-only speaking Claimants to understand and follow the proceedings. Moreover, Esther Tan was also a party to all 3 Contracts [*ie*, the Course, the Software and the Webinar] with the Respondent. Hence her evidence would be relevant to all the issues covered in this case.

(ii) To begin, I read to Esther Tan the Summary of the Claimants' Statement of Facts and recorded her affirmation on the contents therein. Thereafter, I obtained confirmation from the rest of the Claimants that they similarly adopt the same chronology of facts appearing in the Summary of Claimants' Statement of Facts. In the course of the hearing, I also allowed several other Claimants to testify on matters not mentioned in the said Summary.

(iii) After the Claimants' turn, I called Dr. Chiang to lead evidence for the Respondent. I read to him the Respondent's Statement of Facts and likewise recorded his affirmation on its contents.

(iv) In the course of the hearing, and in exercise of my inquisitorial fact finding role as a Referee, I also administered questions to the parties and recorded answers.

…

8 At this stage, it would be useful to reproduce the Summary of Claimants' Statement of Facts and Freely's Statement of Facts referred to above.

Summary of Claimants' Statement of Facts

9 The Summary of Claimants' Statement of Facts, which as stated above, had been prepared by the Referee and which was affirmed by all of the Claimants, reads as follows:

Introduction

1. The Claimants were students of the Respondent (Freely Pte Ltd) and parties to at least one of 3 contracts with the Respondent[:]

(a) The 1st contract was an options trading course known as the "*Live Freely Seminar*"[*ie*, the Course] conducted by [Dr Chiang], a director of the Respondent… One group of Claimants attended the Course from 10-12 May 2008; and another group from 21-23 June 2008.

(b) The 2nd contract involved the sale and purchase of an options trading software programme known as '*Once In A Blue Moon*' [*ie*, the Software].

(c) The 3rd contract involved the sale and purchase of a series of online web-seminar courses known as "Kick Start and Protégé" [*ie*, the Webinar].

2. The Claimants now claim from the Respondent a refund of monies paid [for the Course, the Software and/or the Webinar] respectively. All the Claimants rely on a common set of facts with immaterial variations in date and time (depending on whether they attended the Course in May 2008 or June 2008).

Chronology of relevant facts

3. Between January to May 2008, the Respondent advertised [the Course] in its website, brochure and the local newspapers (e.g. My Paper, LianHe ZhaoBao). In particular, the Respondents represented that [Dr Chiang] possessed a Ph.D in Finance with a thesis titled "Options Trading as an Income Strategy for Financial Freedom: An Action Research Approach."

4. Between April 2008 to June 2008, [Dr Chiang] conducted introductory talks called "Live Freely Preview" to promote the Course ("the Preview"). At this Preview, [Dr Chiang] made the following representations:

(a) In 2004, he earned a Ph.D in Finance with his thesis titled "*Options Trading as an Income Strategy for Financial Freedom: An Action Research Approach*".

(b) His Ph.D was from a 'prestigious university'.

(c) As part of his Ph.D thesis, he developed the 'FREELY Method' (or Freely Dynamic Strategy) of options trading.

(d) His FREELY Method of options trading was very easy to learn as one does not need any computer or stock trading background knowledge.

(e) It was very easy to make money from trading options if one uses the FREELY method 20 minutes a day.

(f) After the Course is completed, he will provide a 3-month follow up programme for the students.

(g) He would be conducting the final class for 2008 for the Course before leaving for further studies.

(h) He would grant a discount if the Preview participants signed up for the Course that evening.

5. In reliance of [Dr Chiang's] representations, and in particular the fact that he has a Ph.D in Options Trading, the Claimants signed up for the Course.

6. The Respondent Course was conducted on 10-12 May 2008 and 21-23 June 2008 over 3 full days. During the Course, the following happened:

(a) During the 1st 2 days, the Course lasted between 9.00 am till past 5 p.m. In particular, [Dr Chiang]:

- introduced the students to the use of 'Google Translator', 'Google Tools' and 'Google Earth';
- played music and screened movies unrelated to options trading (e.g. excerpt from American Idol);
- used quotes from the Bible and mentioned that he and his helpers were church goers;

- taught students to do acts of meditation;
- talking about himself and his qualifications;
- told students to go to the Rolex, diamond and fashion handbag websites and imagine becoming millionaires;
- told stories about 'Racing History';
- promoted the sale of the Software;
- getting angry at students when they asked him to teach on options trading; and
- behaved disrespectfully to the Claimants by calling them "idiots".

(b) On the 3rd day, the Course lasted from 9.00 am to 4 a.m. In particular, [Dr Chiang]

- hurried through the subject of options trading on the 'gapping' method of analysis;
- gave a short demonstration on going online into the US market;
- evaded questions from the Claimants;
- only provided less than one hour of hands on practice for the students; and
- sold the Webinar and Software to some of the Claimants at the end of a long and tiring 3 day course.

(c) In respect of the Software, [Dr Chiang] represented that:

- the Claimants could not carry out options trading successfully unless they purchase the Software;
- the total value of the software was $16,000;
- the Software…was only available at $960 [on] the day of offer and only for 60 minutes; and
- there will be Software updates provided.

(d) In respect of the Webinar, [Dr Chiang] represented that:

- the Kick Start course was for 8 sessions and the Protégé course was for 12 sessions; and
- materials on the Webinar Course will be supplied to the Claimants after the main Course;

(e) In respect of after-Course support, [Dr Chiang] represented that:

- he will organise a gathering every 3 months for Freely alumni to give support;

- there was a hotline telephone number to call for support;
- there will be a Google Group email where an instructor will advise on queries; and
- there will be life-time support for the Claimants.

7. After the Course, the following happened:

(a) In respect of [Dr Chiang's] Ph.D, the Straits Times published reports dated 29 August 2008, 5 September 2008 and 6 September 2008, that:

- [Dr Chiang] received his Ph.D from Preston University; Preston University is not accredited with any US Department of Education body;
- US media and other US education authorities allege that Preston University offered 'fraudulent or substandard degrees' and is a 'degree mill';
- Preston University lied about the number of faculty members on its staff;
- Preston University was forced to move out of the US State of Wyoming because of a crackdown on diploma mills; and
- [Dr Chiang] continues to use this Ph.D as "it helps to pave the way in business".

(b) In respect of the Software, the Claimants discovered that:

- the Software does not have a fair market value anywhere near $16,000;
- the Software was sold at $960 on other days apart from the day of offer;
- all or most information contained in the Software was freely available on the Internet as they are links to online websites;
- the online portal that contained most of the information provided was inaccurate or outdated;
- after the Straits Times reports were published, users were unable to log in to the Software platform anymore as there was no support rendered; and
- there were no Software updates provided to date.

(c) In respect of the [Webinar], the Respondents stopped sending the Claimants materials and sessions on the [Webinar] after the Straits Times reports were published.

(d) In respect of matters generally, the Respondents and/or [Dr Chiang]:

- never provided any follow up as promised;
- the discussion forum at Google Groups shut down;
- evaded queries from students;

· changed office address and office telephone numbers after the Straits Times reports were published and without informing the students;

· terminated the hotline number after the Straits Times reports were published;

· cancelled the promised gathering of ex-students;

· became un[-]contactable by phone or email;

· taught other options trading courses;

· told the Claimants that Freely School does not exist anymore;

· had actually taught the Claimants an existing trading strategy known as "spread" which was extremely risky for those new to options trading; and

· provided a course that was far inferior to other similar courses (e.g. conducted by T3B Holdings Pte Ltd).

8. On 12 September 2008, [Dr Chiang] informed one of the Claimants (Mr Ong Kai Li) the following:

(a) He was in the process of rectifying the Software.

(b) What he taught during the Course has no 'link' to his Ph.D.

(c) The matters concerning Preston University has no 'link' to him.

(d) When he was taking the Ph.D, he did not know Preston University was not accredited.

(e) He only knew that Preston University was not accredited when Straits Times published the article on 29 August 2008.

10 As summarised by the Referee, the Claimants had based their case on a statement published by Freely that Dr Chiang had a Doctor of Philosophy, *ie*, a Ph.D in options trading and had designed the Course around his Ph.D dissertation (the "representation"). On its part, Freely did not dispute making the representation as such.

Freely's Statement of Facts

11 In reply to the Summary of Claimants' Statement of Facts, Dr Chiang, on Freely's behalf, stated as follows:

1. I am Clemen Chiang Wen Yuan….[and] I am the authorized representative of the Respondent in these proceedings.

2. I am the Chief Executive Officer and Speaker of the FREELY METHOD options trading course in Freely Pte Ltd.

3. I have read the Summary of the Claimants' Statement of Facts and wish to respond as follows.

(a) I disagree with paragraph 1 of [the] Statement of Facts because:

(i) The "Once In A Blue Moon" software is also known as "The Freely Method" in the contract.

(b) I agree with paragraph 2 of [the] Statement of Facts.

(c) I agree with paragraph 3 of [the] Statement of Facts.

(d) I disagree with paragraph 4 of [the] Statement of Facts because:

(i) I did not state that the PHD was from a prestigious university;

(ii) The FREELY Method of options trading is easy to learn as long as I facilitate the teaching process;

(iii) I did not say that. I mentioned that anything to do with investment is risky and going through the programme saves time for the learning process and the application of concepts;

(iv) The contract stated clearly that the programme is only for 3 days, anything after the programme is [a] privilege between teachers and students, and not a contractual promise; and

(v) A variable discount off the seminar price is given.

(e) I disagree with paragraph 5 of [the] Statement of Facts because:

(i) The students signed up for the options trading course based on their interest in the knowledge and not because of my PHD.

(f) I disagree with paragraph 6(a) of [the] Statement of Facts because:

(i) The music and screened movies were to prepare them psychologically in the field of options trading;

(ii) I did not teach students to do acts of meditation. I played them a 20 minute CD called "Millionaire Mindset" about hypnotherapy;

(iii) I did not tell stories about "racing history" and I do not know what this is referring to;

(iv) I did not get angry with students, nor behave disrespectfully to them by calling them "idiots". With respect to my conduct to the students, the students have given positive feedback such that I scored an average of 4.7 out of 5 in the feedback forms from all the claimants. They gave encouraging comments like "You are the best speaker I have seen" and "Your seminar was very motivating and informative".

(v) There is also a money back guarantee (clause 20 of the Freely contract) and a refund can be given by 6 p.m. of day one of the seminar. There have been genuine cases of students who were refunded the full amount at the end of day one.

(g) I disagree with paragraph 6(b) of the Statement of Facts because:

(i) I did not hurry through the subject of options trading. I did not evade questions but answered them until 4a.m. the next day;

(ii) I did not give a short demonstrations on going online into the US market, but a detailed one;

(iii) I did not provide less than one hour of hands on practice. This part of the seminar lasted from 9 p.m. – 1.30 a.m.;

(iv) The course ended at 12 midnight on the first two day and between 3 a.m. – 6 a.m. on the third day; and

(v) I sold the products during lunchtime or dinnertime of the third day, hence they could only purchase the [S[oftware within the 60-minute period while the administrative staff was still present.

(h) I disagree with paragraph 6(c) of [the] Statement of Facts because:

(i) I did not say that [the] claimants could not carry out options trading successfully without the [S]oftware, only that it would take lots of time to analyze the method. The [S]oftware will reduce the time to 20 minutes, as it was aggregated data from many websites to make it convenient for students to analyze the [S[oftware.

(i) I agree with paragraph 6(d) of [the] Statement of Facts.

(j) I disagree with paragraph 6(e) of [the] Statement of Facts because:

(i) I did not promise a gathering every three months as I would be going away for studies, as stated in paragraph 4(g) of [the] Statement of Facts; and

(ii) The Google group is a privilege, from a student-teacher relationship and not [a] contractual guarantee stated in the contract.

(k) I disagree with paragraph 7(a) of [the] Statement of Facts because:

(i) The matter is between the U.S. Universities and the relevant authorities. I have produced the announcement from Preston University in response to the allegations regarding Preston University in [the] Straits Times.

(l) I disagree with paragraph 7(b) of [the] Statement of Facts because:

(i) The [S]oftware has a market value of S$16,000.00 as money had to be paid for data feeding of the information online to the [S]oftware;

(ii) The online portal contained accurate and up-to-date information.

(iii) Users of the [S]oftware have been able to log in to the [S]oftware until now. This is reflected in the login history we have; and

(iv) There have been regular software updates.

(m) I disagree with paragraph 7(c) of [the] Statement of Facts because:

(i) This "Kick Start and Protégé" web-seminar course is conducted via a "Web Ex platform", which allows the students to view the video at home. Due to copyright issues, the viewing sessions are limited to three views.

(n) I disagree with paragraph 7(d) of [the] Statement of Facts because:

(i) The Google Groups discussion forum is still around;

(ii) I did not evade genuine queries from students about options trading;

(iii) I did not deliberately change the office address and telephone numbers. Our tenancy expired in end of August 2008 and we had to downsize to a smaller premise[s]. The change in address and telephone number is available on our website;

(iv) I did not cancel as I never promised to hold a gathering in the first place;

(v) I did not teach other options trading course[s];

(vi) I did not tell the claimants that Freely School does not exist anymore; and

(vii) Freely School does not provide a course that was far inferior to similar courses and this opinion is also in direct contradiction to the feedback forms. One of the claimants stated, "You are the best speaker I have seen".

(o) I disagree with paragraph 8 of [the] Statement of Facts because:

(i) I did not say that the Course has no "link" to my PHD; I said that our standing in society has no relation to our educational degree; and

(ii) The Preston University saga affected everyone, including hundred of Preston University graduates in Singapore like myself.

4. I would like to rely on the following documents/witnesses to support my case at the hearing: -

(a) A statement of my academic credentials;

(b) An Announcement issued by Preston University in [the] Straits Times;

(c) Set of transcripts from Preston University including my Preston University degree certificate Official Transcript from Preston University;

(d) The Freely Business School Seminar contract;

(e) A statement of [the] Terms and Conditions for the seminar;

(f) Screenshots from the Freely website about the Freely method "Once in a blue moon" disclaimer and terms and conditions that are included in each software;

(g) Certificate of Financial Mastery awarded to participants at the end of the seminar;

(h) A set of testimonials from professionals from various companies;

(i) A set of testimonials from international students and professionals; and

(j) Individual contracts, mug shots, graduation photographs and feedback forms from each claimant.

The Referee's decision

12 After hearing evidence from the respective parties, the Referee concluded that "[Freely] should bear liability [under s 4(*a*) of the Consumer Protection (Fair Trading) Act (Cap 52A, 2004 Rev Ed) (the "CPFTA")] for the unfair practice of misleading the [Claimants]" (see [25] of the GD) and made the following orders (see [26] of the GD):

(a) in respect of the Course, Freely was to pay to each Claimant a sum equivalent to the price paid *less* S$885.00, the latter amount being how much a pared-down version of Freely's curriculum was worth in the market (see [23(b)-(c)] of the GD);

(b) in respect of the Software and the Webinar, Freely was to refund to each Claimant the *full* price paid (see [23(b) of the GD);

(c) Freely to pay each Claimant disbursements fixed at S$10.

Freely's arguments on appeal

13 Before me, Freely argued that:

(a) the Referee had erred in his conclusion of the limitation period under s 5(3)(*b*) SCTA;

(b) the Referee had applied the wrong test for "unfair practice" under s 4(*a*) read with s 5(3)(*a*) of the CPFTA;

(c) there were breaches of natural justice in the manner in which the SCT hearing was conducted;

(d) the Referee had applied the wrong test in determining whether there was a price advantage in respect of the Software;

(e) the Referee had breached s 28(4) of the SCTA in producing his own evidence of a two-day course on options trading conducted by the Nanyang Technological University without giving Freely an opportunity to address such evidence; and

(f) damages for the Software contract should be nominal.

14 After hearing the parties' oral submissions and considering their written submissions, I dismissed Freely's appeal. While I agreed with the final decision of the Referee, I would like to make some observations on certain aspects of this case to provide some guidance.

The SCTA and CPFTA

15 At the second reading in Parliament of the Small Claims Tribunal Bill (Act 27 of 1984), the Minister for Labour and Second Minister for Law and Home Affairs, Professor S. Jayakumar, elaborated

on the rationale behind the SCTA (see *Singapore Parliamentary Debates, Official Report* (24 August 1984) vol 44 at cols 1999-2002:

> **The Minister for Labour and Second Minister for Law and Home Affairs (Prof. S. Jayakumar)**: Mr Deputy Speaker, Sir, on behalf of the Minister for Law, I beg to move, "That the Bill be now read a Second time." The primary purpose of this Bill is to *provide for a speedy and inexpensive machinery to handle small claims arising from disputes between consumers and suppliers*. The Bill seeks to do this by authorizing the setting up of one or more Small Claims Tribunals to deal with the settlement and adjudication of these claims. The Small Claims Tribunal will be constituted as part of the Subordinate Courts but will not be bound by strict rules of evidence or by normal court procedures. To ensure that costs are kept to a minimum and that a litigant will not be at a disadvantage because he is unable to afford legal representation, the Bill provides that the parties to the proceedings must present their own case and excludes representation by an advocate and solicitor.
>
> Although this Bill is being introduced by the Ministry of Law, it has its origin in the Ministry of Trade and Industry, whose *objective for the Bill is to create a new institution to help consumers to protect themselves*. Before touching on specific aspects of the Bill, I would like to *briefly restate Government's basic thinking on consumer protection. The Government believes that the consumers are best protected through free trade and competition in a free market. Competition not only ensures that prices are the lowest possible but also ensures good quality and service. However, this does not mean that the consumer can make his purchases blindly. In order to get the most out of the free market, the consumer has to be vigilant and must shop around to compare prices, quality and services. He must also be aware of his rights as a party to a contract*.
>
> *Sir, our better informed consumers are now becoming more conscious of their rights as consumers and are more ready to assert their rights. Unfortunately, the market place is never always a perfect one nor operated entirely by honest traders. Consumers who have purchased defective products or have been given shoddy services sometimes encounter recalcitrant traders or workmen whenever they seek redress. Those who are confronted with this problem now have two courses of action open to them*. They can seek the help of the Consumers Association of Singapore…
>
> The second course is for consumers to seek their redress and remedies in the courts. However, proceedings in the courts are often expensive, time-consuming and subject to technical and procedural complexities. The recovery of small claims, that is claims below $2,000, may therefore be hardly worth the effort. Cost is involved and is prohibitive and may well exceed the amount which the successful litigant could recover.
>
> There is, therefore, *a clear need for a cheaper and less formal forum to deal with such small claims*. As the decisions of the Small Claims Tribunal become widely known, it will also help consumers to become more aware of their rights. Sir, this Bill attempts to assist a consumer who has a claim of up to $2,000 relating to the sale of defective goods or to the provision of shoddy or unsatisfactory workmanship to pursue such a claim in a Small Claims Tribunal. Claims above $2,000 will be dealt with by the normal civil courts. *Through the tribunals, it is hoped that such small claims can be [solved] quickly to the satisfaction of the parties concerned*…
>
> …The informality of the tribunal and its *simplified procedure* should enable any layman to present his own case.

…

This Bill represents an important milestone in the field of consumer protection, and I hope that Members will whole-heartedly support it.

[emphasis added]

16 As is clear from the foregoing excerpt, the SCTA was to provide a simple, informal and inexpensive way for a complaint involving a small claim to be heard (see also D'Souza's Article at p 269).

17 I now come to the CPFTA.

18 Given that all 48 of the present claims were filed in the SCT between 29 October 2008 and 3 November 2008, references to the CPFTA are to the 2004 Revised Edition of this statute and *not* to the 2009 Revised Edition (*ie*, Consumer Protection (Fair Trading) Act (Cap 52A, 2009 Rev Ed) which incorporated amendments to the CPFTA (see Consumer Protection (Fair Trading) (Amendment) Act 2008 (No 15 of 2008)) which only took effect from 15 April 2009 (*ie*, after the claims in the present instance were filed).

19 The CPFTA was passed on 11 March 2003 and came into effect on 1 March 2004. Professor Ravi Chandran ("Chandran"), in what appears to be the only local commentary on the CPFTA thus far, *viz*, "Consumer Protection (Fair Trading) Act)" [2004] S.J.L.S. 192 , has noted at p 192 that:

The *CPFTA* is to a large extent based on the Saskatchewan *Consumer Protection Act*. However, the *CPFTA* also bears some resemblance to the Australian *Trade Practices Act*, the *Alberta Fair Trading Act*, the *British Columbia Trade Practices Act*, and the *New Zealand Fair Trading Act*… [emphasis added]

20 I should stress however, that although the drafting of the CPFTA appears to have been inspired by equivalent legislation in various jurisdictions, it would be inappropriate to import, *carte blanche*, *all* principles applicable to the interpretation of the equivalent legislation in other jurisdictions, unless these principles accord with the wording of our CPFTA and Parliament's intention in enacting the CPFTA in Singapore, the latter of which I will now come to.

21 At the second reading in Parliament of the Consumer Protection (Fair Trading) Bill (Act 27 of 2003), the Minister of State for Trade and Industry, Mr Raymond Lim Siang Keat, elaborated on the rationale behind the introduction of the CPFTA, some of its key provisions, and the need to balance the interests of consumers and traders in its application (see *Singapore Parliamentary Debates, Official Report* (10 November 2003) vol 76 at cols 3352-3355:

CONSUMER PROTECTION (FAIR TRADING) BILL

…

The Minister of State for Trade and Industry (Mr Raymond Lim Siang Keat): Mr Speaker, Sir, I beg to move, "That the Bill be now read a Second time."

Sir, for some years now, the Consumers Association of Singapore (CASE), as well as several Members of this House, have advocated the enactment of a fair trading law. *This is because while some particularly offensive practices like cheating or intimidation are prohibited under our*

criminal laws, many errant sales tactics, such as bait advertising, misrepresentation, and hard selling, are not clearly covered by any of our existing laws. In 2001, a joint private and public taskforce, co-led by CASE and MTI, was formed to study this issue. In 2002, the Government accepted the recommendation of the taskforce to enact a Fair Trading Act.

…

Key Provisions of the Bill

The Bill now before the House is *principally designed to accord better protection to consumers by allowing them to seek civil redress against traders engaging in unfair practices. The primary focus is on small consumers who lack the expertise and resources to fend for themselves against unfair practices*.

Clause 4 of the Bill defines what constitutes an unfair practice, and 20 such examples are listed in the Second Schedule. The trader must not mislead the consumer. He should provide the consumer with all relevant and material information in order that the consumer can make an informed decision.

Clause 6 of the Bill allows consumers aggrieved by unfair practices to obtain civil remedies from the trader before the court. They can do so within one year of the discovery of the unfair practice. As the Act is intended primarily to protect small consumers, the claim amount will be capped at $20,000. We expect most claims to be filed in the Small Claims Tribunal.

In determining whether or not the trader has engaged in an unfair practice, the court will consider the reasonableness of the trader's actions in the circumstances surrounding the unfair practice. The court shall also have regard to whether or not the consumer made a reasonable effort to resolve the dispute with the trader, and to minimise any loss or damage resulting from the unfair practice. These provisions are in clauses 5 and 7 of the Bill.

…

Balance between consumers and traders

Sir, in drafting this Bill, we are *mindful of the need to balance the interests of the consumers and traders. On the one hand, the Act must provide adequate safeguards for consumers and allow them legal recourse to claim against unfair practices. On the other hand, we do not want to over-regulate and add to business costs*. Amongst traders, those who engage in unfair practices are a minority. It will be unfair to impose undue regulatory costs on the majority who conduct business ethically. This would also be bad for consumers, for such costs will in the end be passed back to them.

We have also chosen not to criminalise unfair practices. This is because the more serious offences are already covered by existing legislation. There are no criminal sanctions in our proposed legislation. Instead *the Bill will hold traders accountable for unfair practices by making them liable for civil restitution*. This will empower consumers to seek civil remedies against errant traders, without having to rely on or wait for the Government to take action. Besides allowing for quick redress, this approach of self reliance will encourage greater consumer responsibility and pro-activity.

…

[emphasis added]

22 In his closing remarks at the conclusion of the second reading, the Minister also elaborated on the underlying philosophy behind the enactment of the CPFTA (see *Singapore Parliamentary Debates, Official Report* (11 November 2003) vol 76 at cols 3455-3457:

> **The Minister of State for Trade and Industry (Mr Raymond Lim Siang Keat)**: Mr Speaker, Sir, I am very pleased that this particular Bill has generated such interest among Members. I think it bodes well for the Bill, as a key thrust of the Bill is to raise awareness of the issues involved in consumer protection. I have listened very carefully to all the suggestions. In particular, I would like to thank Members for the support that they have given to the Bill.
>
> *But let me just put things in perspective to begin with. What is the underlying philosophy when we drafted this Bill? Basically two*.
>
> *One is that the principle of caveat emptor remains. That is the operating paradigm. What does it mean when we say "buyers beware"? It means that, as a society, we believe that the individual should take responsibility for his or her own action when he or she enters into a transaction*.
>
> *Two, we must all be aware that it is not just one interest here, but two interests to balance off. On the one hand, yes, we would like to give adequate protection for the small consumer not to be taken advantage of and enter into an unfair transaction. On the other hand, it is businesses and traders. There should be business certainty and not undue costs in complying with this proposed Act. So, let us bear that in mind, because this informs the Act and the drafting of the Act*.
>
> …
>
> … So, the context is quite different. What we have done here - and as Mr Yeo Guat Kwang said in his speech - is *really to enable the consumer to seek civil redress, if there has been an unfair practice*. Criminal offences are already in the books for the more serious offences, such as cheating, touting, false labelling. *So, the Bill is really quite similar to the other consumer protection legislations that we have in Singapore today such as the Misrepresentation Act, Unfair Contract Terms Act, Hire Purchase Act*. In none of these consumer protection Acts have we created a body to police these Acts. And the fact that there has been no agency created for these has not affected the effectiveness of the Act. The intent and purpose of the Act have been fulfilled.
>
> …
>
> [emphasis added]

23 The cruz of the legislation on consumer protection lies in ss 4 and 6(1) CPFTA. They state:

> **4**. It is an unfair practice for a supplier, in relation to a consumer transaction —
>
> (*a*) to do or say anything, or omit to do or say anything, if as a result a consumer might reasonably be deceived or misled;
>
> (*b*) to make a false claim;

(*c*) to take advantage of a consumer if the supplier knows or ought reasonably to know that the consumer —

(i) is not in a position to protect his own interests; or

(ii) is not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction; or

(*d*) without limiting the generality of paragraphs (*a*), (*b*) and (*c*), to do anything specified in the Second Schedule.

...

6.—(1) A consumer who has entered a consumer transaction involving an unfair practice may commence an action in a court of competent jurisdiction against the supplier.

24 The interplay between the SCTA and the CPFTA can be found in s 7(1) CPFTA which states:

7. —(1) Subject to the provisions of the Small Claims Tribunals Act (Cap. 308), a Small Claims Tribunal shall have jurisdiction to hear and determine any action under —

(*a*) section 6 (1) insofar as the action relates to an unfair practice involving a contract for the sale of goods or for the provision of services within the meaning of the Small Claims Tribunals Act (referred to in this subsection as a relevant contract);

(*b*) section 8 (6), (7) or (8) insofar as the action relates to an undertaking in respect of an unfair practice involving a relevant contract; or

(*c*) any regulations made under section 11 insofar as the action relates to a relevant contract.

The above provision in the CPFTA referring to the SCTA is significant because the SCTA itself does not expressly refer to the CPFTA.

Limitation period

25 Having touched upon the legislative framework surrounding the respective enactments of the SCTA and the CPFTA, this would be a convenient juncture to refer to the relevant limitation period as this point was raised by Freely.

26 Section 12(1) of the CPFTA states:

12. —(1) No action under section 6 shall be commenced later than one year from —

(*a*) the date of the occurrence of the last material event on which the action is based; or

(*b*) the earliest date on which the consumer had knowledge that the supplier had engaged in the unfair practice to which the action relates, including —

(i) in the case of an unfair practice referred to in section 4(*a*) or (*b*) or involving any representation, act or omission that is false, deceptive or misleading, knowledge that the representation, act or omission is false, deceptive or misleading; and

(ii) in the case of an unfair practice referred to in section 4(*c*) or involving taking advantage of the consumer, knowledge that the supplier had taken advantage of him,

whichever occurs later.

27 The applicable provision is s 12(1)(*b*)(i) CPFTA. On the other hand, s 5(3) SCTA states:

5. —(3) Except where this Act expressly provides otherwise, the jurisdiction of a tribunal shall not extend to a claim —

(*a*) which exceeds the prescribed limit; or

(*b*) after the expiration of one year from the date on which the cause of action accrued.

28 The Referee applied s 12(1)(*b*)(i) to the Claimants' claims. He was of the view that the date of accrual of their cause of action for the purpose of the SCTA was the date they had knowledge that Freely's representation was misleading. This was the date of publication of the article in the Straits Times of 29 August 2008.

29 While I accept that s 5(3) SCTA should logically incorporate the knowledge provision of s 12(1)(*b*) CPFTA, it does not. In other words, the terms of s 5(3) SCTA do not explicitly state that the date of the cause of action is the date the consumer had knowledge that the supplier had engaged in the unfair practice in question.

30 Accordingly, it is arguable that the Referee was not correct when he effectively applied s 12(1)(*b*) CPFTA to s 5(3) SCTA. However, although counsel for Freely invited me to make a ruling on the point as it was likely to be relevant for the other pending claims, I declined to do so for the time being. Counsel for the Claimants had declined to present any argument on the point since it was irrelevant to the Claimants he represented as they did not face an issue of limitation unlike the other claimants.

Class action

31 In the present instance, the Referee had invoked s 26 of the SCTA, which reads as follows:

Claims may be heard together

26. —(1) Where 2 or more claims are file[d] and it appears to a tribunal that —

(a) a common question of fact or law arises in both or all of them;

(b) the claims arose out of the same cause of action; or

(c) it would be in the interests of justice,

the tribunal may order that such claims be heard at the same time.

(2) The power conferred by this secton may be exercised by a tribunal notwithstanding that he hearing of one or more the claims has begun.

for *all* 51 (which, as mentioned above, was the original number of claims supposed to be heard) claims to be heard together in a single sitting because "it would have been highly impractical and

uneconomical for the SCT to host 51 separate hearings especially since the claims involve common question[s] of law and fact" (see [5] of the GD). The Referee had also likened the present proceedings to a "class action" (see [2] of the GD).

32 I am not entirely convinced that a class action should be dealt with by an SCT under s 26 of the SCTA, which is *in pari materia* with s 20 of the Hong Kong Small Claims Tribunal Ordinance. Indeed, the Class Actions Sub-committee of The Law Reform Commission of Hong Kong ("Hong Kong Law Reform Commission"), in its recent Consultation Paper on Class Actions [note: 5] published on 5 November 2009, recommended at p 243, that an SCT should *not* be empowered to hear class action proceedings. It noted at p 242, [9.36] that:

> 9.36 The *function of the Small Claims Tribunal is to enable individuals to enforce small claims by way of an uncomplicated procedure. For this reason, it is suggested that the Tribunal should not be empowered to hear class actions*. [emphasis added]

33 Given that the SCTA was established to provide, *inter alia*, a *simple* way for a complaint involving a small claim to be heard, the view of the Hong Kong Law Reform Commission may be said to apply with equal force in the Singapore context. In addition, the total quantum of claims in a class action may exceed the monetary limit for any one of such claims (*ie*, $10,000 at the material time) by a large margin, as was the case before me. Be that as it may however, given that:

(a) the view of the Hong Kong Law Reform Commission was *only* a *recommendation*; and

(b) section 26 of the SCTA, as presently worded, is sufficiently wide, on a literal reading, to encompass the class action in the present instance,

it seems that an SCT may hear a class action.

34 However, Parliament may wish to review whether the machinery of an SCT is indeed intended, and well equipped, to deal with class actions especially where they involve allegations of misrepresentation. Such actions may become more prevalent in the future. As already mentioned, there are more than 400 claims pending against Freely before an SCT. Parliament may also want to consider whether the machinery of an SCT should apply to class actions where the total quantum of claims exceeds the monetary limit of any one of such claims.

Section 4(a) of the CPFTA

35 I now move on to examine what constitutes an "unfair practice" under the CPFTA.

36 The material provision which underpinned the Referee's decision *vis-à-vis* the Course was s 4(*a*) of the CPFTA (see [23] above).

37 Section 4(*a*) of the CPFTA closely resembles s 5(*a*) of the Saskatchewan Consumer Protection Act (S.S. 1996, c. C-30.1) [note: 6] ("SCPA") which reads as follows:

> **Unfair practices**
>
> 5 It is an unfair practice for a supplier, in a transaction or proposed transaction involving goods or services, to:
>
> (a) do or say anything, or fail to do or say anything, if as a result a consumer might

reasonably be deceived or misled…

38 As to how s 4(*a*) of the CPFTA should be interpreted, Chandran concludes at pp 201-203 that "whether…conduct has been misleading or deceptive has to be tested against the standard of a reasonable man", *ie*, objectively:

> Section 52 of the Australian *Trade Practices Act* 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". In this regard, *several Australian cases* [*per* Gibbs C.H. in *Parkdale v PUXU* (1982) 42 ALR 1 at 6 and *per* Northrop J. in *Annand & Thompson v TPC* (1979) 25 ALR 91 at 111. See also the New Zealand Case of *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502] *have held that whether the conduct has been misleading or deceptive has to be tested against the standard of a reasonable man even though the term "reasonable" does not appear in the Australian statute. A fortiori, since the Singapore statute specifically refers to reasonableness, clearly the test is objective*.
>
> *In addition Australian cases have held that intention to mislead is not a necessary ingredient*. For instance, in *Parkdale v. P.U.X.U.* [(1982) 41 ALR 1 at 5], Gibbs C.J. stated:
>
> > There is nothing in the section that would confine it to conduct which was engaged in as a result of a failure to take reasonable care. *A corporation which has acted honestly and reasonably may therefore nonetheless be rendered liable…The liability imposed by s 52 . . . is thus quite unrelated to fault*.
>
> Similarly, in *Global Sportsman v. Mirror* [(1984) 55 ALR 25 at 30], the court stated,
>
> > *Whether or not s 52(1) is contravened does not depend upon the corporation's intention or its belief concerning the accuracy of such statement*, but upon whether the statement in fact contains or conveys a meaning which is false, that is to say whether the statement contains or conveys a misrepresentation.
>
> This also appears to be the position in Canada [referring to *Findlay v Couldwell and Beywood Motors* (1976) 5 W.W.R. 340 at 345 and *Mikulus v Milo European Cars Specialists Ltd* (1993) CPR (3d) 1 at 10] and New Zealand [referring to *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 at 508]. Thus, it is likely that Singapore courts would also adopt this stand in relation to conduct which is misleading. In fact this position in Canada, Australia and New Zealand, is not only in respect of civil liability but also criminal liability. In Singapore there is only civil liability and no direct criminal liability for the breach of any of the provisions of the *CPFTA*. Thus *a fortiori*, *the lack or presence of intention should be irrelevant*. This view is further fortified by the fact that in Singapore, some of the specific provisions under Second Schedule [such as clauses 4, 5, 13, 17 and 18] require… knowledge or intention in order to give rise to liability. This suggests that where there is no express reference to knowledge or intention in the section or where the words themselves do not by implication raise the need for intention or knowledge, which is clearly the case with section 4(a) in so far as it deals with misleading conduct, knowledge or intention should be irrelevant.
>
> However, in relation to the word "deceived", there is some suggestion in Australia that that may involve some element of fault. For instance in *Henjo Investments Pty. Ltd. v. Collins Marrickville Pty. Ltd* [(1989) 79 ALR 83 at 92]]., Lockhart J. stated:
>
> > "misleading" and "deceptive", are plainly not synonymous . . . . "Mislead" does not

> necessarily involve an element of intent and it is a word of wider reach than "deceive". However, it is difficult, in my opinion, to read the word "deceive" in s 52 other than as involving some degree of moral turpitude as it does in ordinary English usage. Trickery, craft and guile . . . are typically at the heart of this second element of the statutory provision directed to the protection of the public from unfair trading practices.

This can be contrasted with *the position in Canada where cases have held that an action can be deceptive even without any intent to deceive on the part of the supplier* [referring to *Director of Trade Practices v Van City Construction Ltd*, 1999 B.C.T.C. LEXIS 1918 and *Findlay v Couldwell and Beywood Motors* (1976) 5 W.W.R. 340] . As stated by Ruttan J. in the British Columbia Supreme Court decision of *Findlay v Couldwell and Beywood Motors* (1976) 5 W.W.R. 340]

> *. . .* a deceptive act does not necessarily involve deliberate intention to deceive. Deception need only have the capability of deceiving or misleading and it may be inadvertent yet still sufficient to void the transaction under the statute, which is directed to the welfare of the consumer, not the punishment of the vendor.

Of the two views, it is suggested that the position in Canada is to be preferred. The emphasis in section 4(a), too, seems to be on the effect on a reasonable consumer rather than on the intent of the supplier. However, even if the Australian view as stated above is adopted, it may not really make much of a practical difference. This is so because even if deception cannot be established because of a lack of intention, the conduct is likely to be misleading nonetheless and hence the supplier may still be liable.

[emphasis added]

39 In commenting on the SCPA, Tamara M. Buckwold in "Statutory Regulation of Unfair Business Practices in Saskatchewan: Possibilities and Pitfalls" (1999) 62(1) Sask.L.Rev. 45 ("Buckwold"), notes at p 53:

B. DECEPTIVE OR MISLEADING CONDUCT – THE QUESTION OF KNOWLEDGE

Most of the case authority addressing the interpretation and application of the comparable provisions of unfair business practices legislation emanates from British Columbia. The British Columbia equivalent of s.5(a) [of the SCPA] provides:

> 3(1) For the purposes of this Act, a deceptive act or practice includes
>
> (a) an oral, written, visual, descriptive or other representation, including a failure to disclose, and
>
> (b) any conduct having the capability, tendency or effect of deceiving or misleading a person.

It is clear that, in British Columbia, a deceptive act or practice under s.3 can occur notwithstanding the absence of an intention on the part of a supplier to deceive or mislead a consumer. In *Findlay* v. *Couldwell* [(1976(, 69 D.L.R. (3d) 320], Ruttan J. of the British Columbia Supreme Court said, in an *obiter* passage quoted in a number of more recent cases, that:

> [A] deceptive act does not necessarily involve deliberate intention to deceive. Deception need only have the capability of deceiving or misleading and it may be inadvertent yet still

sufficient to void the transaction under the statute, which is directed to the welfare of the consumer, not the punishment of the vendor.

Similarly, in *Mikulas* v. *Milo European Cars Specialists Ltd*.[(1993), 52 CPR (3d) 1 at 10, aff'd (1995), 60 CPR (3d) 457 (BCCA)], the British Columbia Supreme Court said that *a car dealer would have been liable under the Act for making false statements about a car sold to the plaintiff even if he had honestly believed the representations he made*.

The view that the supplier's state of mind or knowledge of the facts is irrelevant to the commission of an unfair practice under s.5(a) is consistent with the objective quality of the wording that both the British Columbia and Saskatchewan legislation employ… However, the doctrinal waters on this point are muddled by the vaguely worded s.7(5) [of the SCPA] [which is in pari materia with s 5(3)(a) of the CPFTA], which provides that, "In determining whether or not a person has committed an unfair practice, the reasonableness of the actions of that person in those circumstances is to be considered."

There is no equivalent of s.7(5) in British Columbia or elsewhere. In provinces other than Saskatchewan, a supplier is apparently not excused by acting reasonably if his or her conduct is misleading or deceptive. …

The implication of the statutory qualification found in s.7(5) [of the SCPA] is unclear. While it appears that a supplier is exonerated of responsibility for deceptive or misleading conduct if he or she acted reasonably, the Act offers no guidance [as in the CPFTA] as to what is or is not reasonable, nor how reasonableness relates to state of mind. Is a supplier who honestly believes a misrepresentation about her product to be true, but could by making inquiries have determined its falsity, liable under s.5(a)? Is a supplier whose conduct is consistent with ordinary business practices excused, even though that conduct might reasonably mislead a consumer? Has a supplier committed an unfair practice if she believes that a particular consumer is not being misled, though the conduct in question has the capacity to mislead a reasonable consumer? The unique problems presented by this provision require careful consideration on the part of those charged with its interpretation and application. Although s.7(5) offers some comfort to suppliers faced with the challenges of the new legislation, the ambiguity it creates exacerbates the already difficult task of determining whether a particular incident or course of conduct does or does not constitute an unfair practice.

…

[emphasis added]

40 A similar, albeit, general view, which did not involve a consideration of the effect of a provision similar to s 5(3)(*a*) of the CPFTA (which provides that "In determining whether or not a person has committed an unfair practice, the reasonableness of the actions of that person in those circumstances is to be considered"), has also been endorsed by Colin Lockhart in *The Law of Misleading or Deceptive Conduct* (Lexis-Nexis Butterworths, 2nd Ed, 2003) ("*Lockhart*") in the context of s 52 of the Australian Trade Practices Act 1974 at pp 65-67:

3 INTENTION AND FAULT

(a) Intention

The general rule

[**3.9**] The [Trade Practices Act]…[is] silent as to whether a person must have intended to mislead or deceive in order to contravene s 52…but, in view of the question's importance, it arose in the very early misleading conduct case law. In its first major analysis of s 52, the High Court [of Australia in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228; 18 ALR 639 at 647 *per* Stephen J (Jacobs J agreeing), CLR 234; ALR 651 *per* Murphy J] *rejected the argument that an intention to mislead is a necessary element of conduct having the proscribed character. In the words of Stephen J, the prohibition is concerned with consequences as giving to particular conduct a particular colour" and hence in claims based on s 52, 'nothing turns…upon the intent' of the defendant. Like the tort of passing off, it was said, s 52 is designed to ensure that 'trading must not only be honest but must not even unintentionally be unfair'*.

The absence of an intention requirement does, however, give s 52 a significantly wider ambit than other analogous general law causes of action. Fraud, for example, requires proof of a misrepresentation made with knowledge of, or recklessness as to, its falsity, and proof of malice is also required to establish injurious falsehood at general law.

Exceptional cases

[**3.10**] *While the general principle that intent need not be proved in order to establish a contravention of s 52 has received subsequent High Court endorsement* [in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197, 198; 42 ALR 1 at 5, 6 *per* Gibbs J, CLR 216; ALR 20 *per* Brennan J; *Yorke v Lucas* (1985) 158 CLR 661 at 666, 61 ALR 307 at 309 *per* Mason ACJ, Wilson, Deane and Dawson JJ, CLR 765 675; ALR 316 *per* Brennan J], i*t has also become apparent that the defendant's knowledge or belief will not always be irrelevant in the breach inquiry*. In *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd*, the Full Federal Court noted that *the essential characteristic of misleading or deceptive conduct is that it 'contains or conveys a meaning which is false' and that where the impugned conduct consists of a 'statement of past or present fact', the speaker's 'state of mind is immaterial' to whether the conduct embodied such a meaning. Nevertheless, the court commented, '[m]any statements, for example, promises, predictions and opinions, do involve the state of mind of the maker of the statement at the time [it] was made'. A decision as to whether such conduct conveyed a false meaning will therefore necessarily involve consideration of whether 'the maker of the statement had a particular state of mind when the statement was made'*.

[**3.11**] The relevance of intention in such cases has been widely acknowledged. In *Bridge Stockbrokers Ltd v Bridges* [(1984) 4 FCR 460 at 474; 57 ALR 401 at 415 (Full Fed Ct)], though, Lockhart J suggested that some further 'refinement' may be necessary, concerning 'the intent of the alleged offender…in determining whether conduct is misleading or deceptive'. While acknowledging that intent was 'not an essential element in the notion of misleading or deceptive conduct', his Honour expressed the view that 'deceptive' in s 52 could bear the meaning of 'cheating, ensnaring or deliberately misleading' and envisaged circumstances 'where there will be deceptive conduct only where the intention of the [defendant] is established'. Lockhart J gave the example of conduct which is intentionally designed to create mere confusion in order to avoid contravening the prohibition. The ramifications of these dicta have not been explored in subsequent case law, however, suggesting that the circumstances in which such dishonesty may convert what would otherwise not be misleading conduct into a breach of s 52 will be unusual.

Evidentiary significance of proof of intention

[**3.12**] Although a misleading or deceptive conduct plaintiff will usually not be required to prove

intention or dishonesty on the part of the person who engaged in the impugned activity, a separate question arises as to the significance of a finding to that effect. Indeed, it is in relation to the latter issue that Lockhart J's comments in [*Bridge Stockbrokers Ltd v Bridges* [(1984) 4 FCR 460 at 474; 57 ALR 401 at 415 (Full Fed Ct)] regarding intention appear to have provoked a response in the form of subsequent acceptance that proof of intention to mislead may have probative value in establishing that the prohibition has been breached.

The high point to date of that recognition was the Full Federal Court's decision in *Telmak Teleproducts (Aust) Pty Ltd v Coles Myer Ltd* [(1989) 89 ALR 48], in which it was accepted that proof of an intention to deceive, whilst not of itself establishing that conduct was misleading or deceptive, was 'of powerful evidentiary value' in the finely balanced factual matrix of the case, tipping the scales in favour of a holding that s 52 had been breached. To date, however, the persuasive worth of such proof has been explored principally in relation to [Australian Trade Practices Act] claims resembling passing off actions at common law, and accordingly the matter will be explored further in that context below.

(b) Fault

No necessity to prove fault

[**3.13**] It was previously noted that s *52…differ from fraudulent misrepresentation in relation to the need to prove intention. The prohibition can also be distinguished from another general law analogue, that of negligent misrepresentation, in so far as the fault of the defendant is concerned. While liability under the general law action is founded upon the defendant's negligence, questions as to the level of care taken by the defendant to avoid causing the proscribed effect have generally been ignored in the determination of whether s 52 has been contravened*. In [*Parkdale v PUXU* (1982) 42 ALR 1], for example, Gibbs CJ, in a comment that has never been doubted, noted that *there was 'nothing in [s 52] which would confine it to conduct which was engaged in as a result of a failure to take reasonable care. Further, neither knowledge of the misleading character of the conduct nor a lack of good faith are necessary for the prohibition to be breached*.

The significance of proof of fault

[**3.14**] In contrast to the developments regarding intention which were discussed in the preceding paragraphs, the courts have rarely acknowledged that proof of a lack of care by the person who allegedly engaged in misleading conduct can have evidentiary significance in the determination of whether the prohibition has been contravened. The proposition that 'carelessness on the part of the respondent is not a necessary element of a s 52' claim [as stated in *Neilsen v Hempston Holdings Pty Ltd* (1986) 65 ALR 302 at 309 *per* Pincus J (Fed Ct)] seems to have been so dominant that there have been only occasional hints that proof of carelessness may be of assistance in establishing a breach of the prohibition.

In *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* [(1986) 12 FCR 477 at 487; 68 ALR 82 at 82 (Full Fed Ct)], for instance, Bowen CJ noted that a defendant's awareness of the risk associated with its product was a relevant but not decisive consideration as to whether a failure to disclose was conduct of the proscribed character. In view of the paucity of reference to the issue in the case law to date, however, the role that evidence of carelessness might play in a court's decision as to whether conduct is misleading or deceptive, or likely to have that effect, remains to be explored.

[emphasis added]

41 Reference can also be made to the following observations by Corones and Clarke in *Consumer Protection and Product Liability Law: Commentary and Materials* (Lawbook Co, 2nd Ed, 2002) ("*Corones & Clarke*") at p 95 where the learned authors recognise that s 52 of the Australian Trade Practices Act 1974 is *wider* than the common law of negligent or fraudulent misrepresentation, both of which require the plaintiff to establish that the defendant was guilty of some form of fault:

> **Fault, or the failure to exercise reasonable care**
>
> *Where the applicant complains of positive conduct on the part of the respondent, fault is not an ingredient of liability. Consequently, s 52 can be contravened even though, when engaging in the conduct in question, the respondent had no intention of misleading or deceiving the audience to whom it was directed and had taken all reasonable steps to prevent this happening. In this sense, s 52 imposes strict liability. For this reason, the section is likely to provide the victims of misrepresentation with a means of redress that is easier to invoke than the common law of negligent or fraudulent misrepresentation, both of which require the plaintiff to establish that the defendant was guilty of some form of fault*. [emphasis added]

42 It would also be useful to refer to the position in New Zealand under its Fair Trading Act 1986, where s 9, the relevant provision, reads as follows:

> **Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

43 In commenting on this provision , Hill and Jones in *Fair Trading in New Zealand – The Fair Trading Act 1986* (Butterworths, 1989) ("*Hill & Jones*") make the following pertinent observations at pp 5-6:

> The central provision of the Fair Trading Act in s 9 which provides that:
>
> > "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."
>
> This section is based on s 52(1) of the Trade Practices Act 1974 (Aust) which provides:
>
> > "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."
>
> The Australian prohibition is in turn based upon [s 45] of the Federal Trade Commission Act (US) which prohibits:
>
> > "unfair or deceptive acts or practices in or affecting commerce…" and, "unfair methods of competition".
>
> …
>
> Over and above the existing common regulation for business conduct, and legislation affecting the buying and selling of goods and services and the conduct of commerce, s 9 of the Fair

Trading Act is a general statutory tort which creates a duty of care in favour of the public at large. The public interest being protected is the maintenance of the effectiveness of markets. The important features of this prohibition are:

- it is unnecessary to prove intention or purpose on the part of the person engaging in the conduct under scrutiny, although parties to the contravention must be aware of the material facts constituting the contravention;

- it is unnecessary that any person be actually misled or deceived;

- there is no requirement that a "representation" be made, and conduct includes omitting to do things;

- …

- the standard of "misleading" or "deceptive" conduct recognises that the audience on the receiving end of conduct directed at the public will include the less astute and the gullible and the inexperienced and poorly educated.

…

44 *Hill & Jones* elaborate further at pp 26-29 on the scope of s 9 of the New Zealand Fair Trading Act 1986:

> **9.2** ***Scope of section: some judicial notes*** – The scope and application of [the] equivalent Australian section was summarised by Mr Justice Fox in [*Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340 at 348]:
>
> > "[s.9] is a comprehensive provision of wide impact, which does not adopt the language of any common law action. It does not purport to create liability; rather it creates a norm of conduct, failure to observe which has consequences provided elsewhere in the same statute or under general law. In my view effect should be given to the ordinary meaning of the words used. They should not be qualified or (if it be possible) expanded by reference to establish common law principles of liability. At the same time, known concepts such as those concerning the torts of deceit and passing off and the analyses made of them over the years, may prove useful in deciding a case under [s.9]…Intention is not a necessary ingredient…The tort is more objective, but [it] is not precisely correct to apply the concept of the hypothetical reasonable man. One looks to the audience, of the relevant parts of it, and absurdities aside, ask whether the conduct complained of was to them misleading or deceptive, but the question is not simply whether they (or he) were (or was) mislead. Whether the conduct was misleading or deceptive is a matter for the court…Doubtless the audience to be considered can be classified as "consumers". Conduct will not mislead or deceive a person having a conscious awareness of the true facts of the correct information."

Section 9 is the central provision of the Fair Trading Act. There has been a marked reluctance in Australia to read down the words of the equivalent section (s.52 of the Trade Practices Act 1974 (Aust)). What is misleading or deceptive is a matter of fact to be resolved in the circumstances and context of each case. The trend in Australia is that the prohibition is being applied in an ever widening range of circumstances. It has generally superseded the torts of deceit and passing off and is being used more frequently in contractual misrepresentation situations.

…

Cases under s.52 [in Australia] are legion…Many turn on their own facts. The principles which have been distilled, however may well be regarded as a convenient starting point in interpreting the New Zealand s.9. In the context of a "similar name" case certain of those principles recently have been gathered conveniently by Wilcox J. in *Chase Manhattan Overseas Corp v. Chase Corp* [1986] ATPR 47, 328 at page 47, 336 in the following terms:

> "The legal principles relevant to the determination of the question whether the use by a corporation of a particular name amounts to conduct which [is] actually or potentially misleading or deceptive may, I think, be summarised as follows:
>
> (a) Conduct cannot, for the purposes of sec 52, be categorized as misleading or deceptive, or likely to be misleading or deceptive, unless it contains or conveys a misrepresentation: *Taco Company of Australia Inc v. Taco Bell Pty Limited* [1982] ATPR 40-303 at p 43, 751 (1982) 42 ALR 177 at p 202.
>
> (b) A statement which is literally true may nevertheless be misleading or deceptive: see *Hornsby Building Information Centre Pty Limited v. Sydney Building Information Centre Pty Limited* [1978] ATPR 40-067 at p 17, 690; (1978) CLR 216 at p. 227. This will occur, for example, where the statement also conveys a second meaning which is untrue: *World Series Cricket Pty Limited v. Parish* [1977] ATPR 40-040 at p 17, 436 (1977) 16 ALR 181 at p 201.
>
> (c)…
>
> (d) The question whether conduct is, or is likely to be, misleading or deceptive is an objective one, to be determined by the Court itself, in relation to one or more identified sections of the public, the Court considering all who fall within an identified section, of the public including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations: *Taco Company* at ATPR p 43, 752, ALR, p 202. Evidence of the formation in fact of an erroneous conclusion is admiss[i]ble but not conclusive; *Global Sportsman* at ATPR p 45, 343, ALR p 30.
>
> (e) Ordinarily, mere proof of confusion or uncertainty will not suffice to prove misleading or deceptive conduct: *Parkdale Custom Built Furniture Pty Limited v. Puxu Pty Limited* [1982] ATPR 40-307; (1982) 149 CLR 191. However, where confusion is proved, the Court should investigate the cause; so that it may determine whether this is because of misleading of deceptive conduct on the part of the respondent: *Taco* at ATPR p 43, 752; ALR p. 203."

45 Given the foregoing, this would now be an appropriate juncture to summarise, what in my view are *some* (*ie*, non-exhaustive) principles applicable to s 4(*a*) of the CPFTA, bearing in mind the differences in wording between this provision, s 52 of the Australian Trade Practices Act 1974, s 9 of the New Zealand Fair Trading Act 1986 and any similarity with the SCPA:

(a) whether conduct has been misleading or deceptive under s 4(*a*) of the CPFTA, which specifically refers to the word "reasonable", has to be tested objectively, in relation to one or more identified sections of the public, the Court considering all who fall within an identified section of the public, including the astute and the gullible, the intelligent and the not so

intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations;

(b) it would appear, from a plain reading of s 4(*a*) of the CPFTA which makes no express reference to knowledge or intention, that an intention or knowledge to mislead or deceive (*ie*, a fault element) is not a necessary ingredient. The emphasis in s 4(*a*) of the CPFTA is on the effect on a reasonable consumer rather than on the state of mind or knowledge of the supplier. In this case, the absence of a state of mind requirement gives s 4(*a*) of the CPFTA a wider ambit than other analogous common law causes of action, *viz*, fraudulent and negligent misrepresentation, which are founded on the fault of the defendant. That said, while the supplier's state of mind is not an essential element in the notion of misleading or deceptive conduct, a decision as to whether the supplier's conduct conveyed a misleading or deceitful meaning may involve consideration of whether the maker of the statement had a particular state of mind when the statement was made (*ie*, it is probative in establishing whether s 4(*a*) of the CPFTA has been breached).

(c) That the emphasis in s 4(*a*) of the CPFTA is on the effect on a reasonable consumer is consistent with Parliament's underlying philosophy behind the enactment of the CPFTA (see [25] above), *viz*, that there should be a balancing of the interests of consumers against that of businesses and traders. If the emphasis in s 4(*a*) of the CPFTA was on the effect on *any* consumer, not only would this be inimical to the principle of *caveat emptor* emphasised by Parliament, this would also be contrary to its intention in ensuring that "[t]here should be business certainty and not undue costs in complying with [the CPFTA]".

(d) Pursuant to s 5(3)(*a*) of the CPFTA, it would appear that a supplier who has engaged in an unfair practice may be excused by acting reasonably although the CPFTA offers no guidance as to what is or is not reasonable.

46 The Referee said (at [10] of the GD) that the representation mentioned that Preston University had awarded Dr Chiang the Ph.D in 2004 on his dissertation on options trading. The representation also indicated that the taught method of options trading was designed around his doctorate dissertation. He said (at [11] of the GD) that:

> 11 Against these assumptions, it is my finding that a reasonable consumer would read the representation to mean "*Buy our options trading goods and services because Dr. Chiang is an academic expert in options trading;*" One would therefore think that Dr. Chiang is an academic expert by reason of him possessing a credible PhD from a credible university. Conversely without a credible PhD, Dr. Chiang cannot claim to be an academic expert. Hence, the credibility of his PhD comes into issue.
>
> **Respondent**: I stand as Respondent and teacher. My credentials is the key issue. I believe that I went through the PhD programme. I never withheld the fact that my PhD is from Preston.
>
> [emphasis in original]

47 The Referee found (at [12a] of the GD) that a reasonable consumer with the belief that Dr Chiang is an academic expert on options trading would be materially influenced by the representation. He also found (at [13] of the GD) that the representation was misleading. He concluded there was unfair practice on the part of Freely (see [17] of the GD) and, in doing so, he

said he considered (at [17] of the GD) whether Freely's actions were reasonable in the circumstances but did not think that they were.

48 Yet, Freely submitted that the Referee had erred in law. Freely's ground was that the test was the reasonableness of its action. While Freely elaborated as to why its conduct was reasonable, this was a question of fact and the Referee did have valid reasons for his conclusion. Therefore, I rejected this ground of appeal.

Breaches of natural justice

49 Freely also alleged various breaches of natural justice by the Referee.

50 First, Freely alleged that it had very little time to respond to the claims. On the other hand, the Claimants pointed to a schedule of Freely's attendances to dispute this. Dr Chiang had attended on three dates of consultation for the claims, *ie*, 10, 11 and 13 November 2008. Subsequently, a Notice of Hearing dated 26 February 2009 was issued. The Notice stated the hearing to be on 12 March 2009. It was clear to me that given that Dr Chiang had already attended consultation sessions since early November 2008, he had enough time to respond to the claims by 12 March 2009. Moreover, it was undisputed that Freely did not ask for the hearing date to be postponed. The first allegation was without merit.

51 The second allegation of breach of natural justice was that the Referee had contravened s 28(4) SCTA when he decided not to give copies of the individual statement of evidence from each Claimant to Freely and instead prepared a summary. Section 28(4) SCTA must be read together with s 28(3) SCTA. They state:

> **28**. —(3) A tribunal may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it thinks fit.
>
> (4) All evidence and information received and ascertained by the tribunal under subsection (3) shall be disclosed to every party.

52 As can be seen, s 28(4) was not applicable because it refers to s 28(3) which in turn refers to evidence which an SCT receives from its own initiative.

53 As for the making of a summary, I was of the view that the Referee was entitled to have one prepared and forwarded to the other side under the informal and expeditious process envisaged under the SCTA so long as the summary was an accurate one and Freely knew what it had to respond to. There was no suggestion that it was either an inaccurate summary or a vague one.

54 The third allegation of a breach of natural justice was that the Referee was biased or that there was an appearance of bias when he stated the following in a sarcastic manner:

1. "You're a celebrity"

2. "Your students must have liked you very much"

3. "Come on Clemen, you must be smart enough to know…(that Preston University is not accredited)"

4. "Wah…you scored straight As in your PhD transcript"

5. addressed to the Respondents present – "so, you just treat this $880 as paid for a lesson on motivation, entertainment, (pause), and options trading"

55 There was no verbatim record of the proceedings before the SCTA. However, even if the alleged remarks had been made and had been made sarcastically, which was not necessarily the case, I was of the view that they did not demonstrate bias or gave an impression of bias, even though they would have been inappropriate.

56 The next allegation about bias was that the Referee appeared to have made up his mind even before the hearing was concluded as he had a prepared text of his decision thereafter which took him about two hours to read (with translation into Mandarin). Yet, Freely's counsel accepted that it was not uncommon for a tribunal to prepare a draft text of the decision and amend it, if needs be, as a hearing progresses in the interest of efficiency. That would explain how a tribunal is able to come up with a prepared text soon after a hearing. However, he submitted that this point should not be seen in isolation and, considered together with the other allegations about breaches of natural justice, it demonstrated bias on the part of the Referee. I did not agree.

57 Having considered all the allegations of such breaches, I was of the view that they were not made out and that there was no bias, apparent or otherwise.

Relief under the CPFTA and the SCTA

58 Section 7(4) CPFTA states:

> (4) Without prejudice to any other powers of the court to grant relief, a court (other than a Small Claims Tribunal) may in any proceedings where the court finds that a supplier has engaged in an unfair practice —
>
> *(a) order restitution of any money, property or other consideration given or furnished by the consumer;*
>
> *(b) award the consumer damages in the amount of any loss or damage suffered by the consumer as a result of the unfair practice;*
>
> (c) make an order of specific performance against the supplier;
>
> (d) make an order directing the supplier to repair goods or provide parts for goods; or
>
> (e) make an order varying the contract between the supplier and the consumer.
>
> [emphasis added]

59 The orders that an SCT can make pursuant to the provisions of the SCTA are laid out in s 35 of the SCTA, of which s 35(1)(a) is the most relevant in the present proceedings given that the Claimants were seeking a *full* repayment of the price paid for the Course, the Software and the Webinar . This section reads as follows:

> **35**. —(1) A tribunal may, as regards any claim within its jurisdiction, make one or more of the following orders and may include therein such stipulations and conditions (whether as to the time for, or mode of, compliance or otherwise) as it thinks fit:

(a) the tribunal may order a party to the proceedings to pay money to another party;

…

[emphasis added]

60 However, while a tribunal may order a party to the proceedings to pay money (which, as the Referee recognised at [22] of the GD, can represent damages, debt or even restitution of sums paid in part or in full) to another party, the more interesting question, in the context of damages, is what exactly is the measure of these damages? Should a tortious or contractual measure of loss or damages be adopted? Also, must the unfair practice be the *sole* cause of the loss or damage suffered and must there be reliance on the unfair practice?

61 In the context of s 7(4)(*b*) of the CPFTA, Chandran first observed at p 205 and at p 218 respectively, that:

> … Likewise it has been held that, *similar to the position in common law, the fact that the misleading or deceptive statement was only one of the reasons for entering into the contract, and not the sole reason, does not absolve the supplier of liability. These stands too are likely to be adopted in Singapore*.
>
> …
>
> … In relation to relief [pursuant to s 7(4)(*b*) of the CPFTA,] it may also be noted that *only a consumer who "suffers a loss as a result of an unfair practice" has a right to institute an action. This suggests that the unfair practice must have "caused" the loss* [referring to *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15], *though it would appear that the unfair practice need not be the sole cause of the loss* [referring to *Elna Australia Pty. Ltd. v International Computers Pty. Ltd*. (1987) 75 ALR 271]. *It would also appear that in order to establish causation, the consumer must have placed reliance on it* [referring to *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1989) 79 ALR 83] and the onus of proving this lies on the consumer [referring to *Gould v Vaggelas* (1985) 157 CLR 215]. …
>
> [emphasis added]

and then as follows as p 219:

> Further, in relation to relief [pursuant to s 7(4)(*b*) of the CPFTA,] in determining the amount of damages, it is *not clear whether the tort or contract measure of damages would apply in determining such losses. The tort measure of damages would aim to place the plaintiff in a position that he would have been had the tort not been committed* [referring to *Livingstone v Rawyards Coal Co* (1880) App Cas 25). *The contract measure of damages would aim to put the plaintiff in a position he would have been had the contract been properly performed* [referring to *Robinson v Harman* (1848) 1 Ex 850]. *The fact that many of the provisions of the CPFTA deal with false representations may suggest that the tort measure should apply. On the other hand, parts 11, 12 and 20 of the Second Schedule which do not deal with misrepresentations may suggest that the contract measure should apply. However, parts 11, 12 and 20 do not deal with breach of contract as such. Rather they relate to "unfair practices" and hence the tortious measure may be more appropriate. In addition, Australian* [referring to *Gates v City Mutual Life*

Assurance Society Ltd (1986) 63 ALR 600 and *Neilsen v Hempston Holdings Pty Ltd* (1986) 65 ALR 302) *and New Zealand cases* [referring to *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 and *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213] *have held that the correct measure to be adopted is generally the tort measure*.

In relation to the Small Claims Tribunal, it is provided that it shall make orders pursuant to the provisions of the [SCTA] [referring to s 7(5) of the SCTA]. The relevant section in the [SCTA] is section 35. While matters such as [s 7(4)(*b*) of the CPFTA] may be covered under the [s 35(1)(*a*) of the SCTA] to some extent, the others do not appear to be. …

[emphasis added]

62 In relation to the first portion of the above observation on causation (*viz*, that the unfair practice need not be the sole cause of the loss) Chandran notes further, at p 218, footnote 176 that:

[w]hile it is clear that [unfair practice] does not have to be the sole cause [of the loss or damage suffered by the consumer], it is not clear whether it has to be a substantial cause. Lockhart J. in *Henjo Investments Pty. Ltd. v. Collins Marrickville Pty. Ltd*. (1989) 79 ALR 83 at 96 (citing Wilson J. in *Gould v. Vaggelas* [(1985) 157 CLR 215] seems to suggest this need not be so, but see *Elna Australia Pty. Ltd. v International Computers Pty. Ltd*. [(1987) 75 ALR 271] [which] seems to suggest otherwise.

[emphasis added]

63 As noted by *Lockhart* at pp 292-293:

Causation in deceit and negligent misstatement

[**10.3**] … For the purpose of discussing causation in misleading or deceptive conduct law, it is sufficient to consider briefly the manner in which [the matter has been] approached in analogous common law causes of action, particular deceit and negligent misstatement. *Where a number of acts or events have contributed to the loss claimed, the defendant's fraud or negligence need not be the sole cause of the loss claimed in order for it to be identified as a 'legal cause from the mass of necessary conditions'. Instead, the relevant question is whether the defendant's act was a cause of the plaintiff's loss. Hence, although a plaintiff in deceit or negligent misstatement must prove that 'he was induced [by the misrepresentation]…to alter his position in a manner affecting his material, temporal or physical interests' to establish causation, proof that the fraud or negligence was the only reason for that alteration of position is not necessary for that purpose*.

[emphasis added]

64 In relation to the second portion of the above observation on causation (*viz*, in order to establish causation, the consumer *must* show that he had placed reliance on the unfair practice), *Lockhart* observes as follows at pp 296-297:

Causation and reliance

[**10.8**] As Burchett J has noted, 'the language of s 52 [of the Australian Trade Practices Act] evokes the question: misled or deceived into what?' The section proscribes conduct having a particular effect upon the mind of its victim, which does not in itself constitute loss or damage.

Rather, damage will be suffered by action or inaction under the influence of the error induced by the breach. Hence, in *Wardley Australia Ltd v WA* [(1992) 175 CLR 514], Mason CJ, Dawson, Gaudron and McHugh JJ commented that where misleading conduct consists of a misrepresentation, 'as at common law, acts done by the representee in reliance on the misrepresentation constitute a sufficient connexion to satisfy the concept of causation' for s 82 [of the Australian Trade Practices Act] purposes.

Clearly, then, establishing reliance is a means of proof of causation in the [Australian Trade Practices Act] setting. Nevertheless, some doubt remains as to whether reliance must be proved to establish causation under the [Australian Trade Practices Act]. There are no reported misleading conduct decisions in which causation has been established without proof of reliance, but there seems to be no objection in principle to the proposition that reliance, although 'plainly sufficient to support the necessary causal connexion between conduct and loss…is not…a necessary element' of causation under the [Australian Trade Practices Act]. The issue awaits further consideration by the courts in novel fact settings. It is also noteworthy that immediately after the statement quoted above from Wardley, their Honours remarked that if acts of reliance 'result in economic loss…that economic loss will ordinarily be recoverable under s 82(1) [of the Australian Trade Practices Act]', which suggests that proof of reliance alone will not establish causation in that setting. The court must also be satisfied that the loss or damage claimed resulted from the acts done in reliance on the conduct.

…

2 RELIANCE

Forms of reliance

[10.10] While a breach of s 52 [of the Australian Trade Practices Act]…may induce a 'wide variety of actions', the most commonly alleged act of reliance in the misleading conduct case law to date is entry into a contract which would not otherwise have been made.

…

[emphasis added]

65 Subsequent cases suggest that reliance is a pre-requisite to a claim for damages under Australian legislation.

66 In *Ford Motor Company of Australia Ltd v Arrowcrest Group Pty Ltd* [2003] 134 FCR 522, Lander J (delivering the judgment of the Federal Court of Australia) rejected, at [123] of the plaintiff's submission that causation can be established in a misrepresentation case without proof that the misrepresentations were relied upon. He stated, at [107]-[109], that *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 ("*Wardley Australia*") is not authority for the proposition that a plaintiff does not need to establish reliance in a claim for damages and that the High Court in *Wardley Australia* confirmed that causation in cases where the plaintiff had entered into a transaction because of the defendant's misrepresentations would be established by proof of reliance.

67 In *Digi-Tech (Aust) Ltd v Brand* (2004) LexisNexis BC200401385 (23 March 2004, Unreported Judgment), the Court of Appeal of New South Wales stated at [159] that:

We accept … that, whatever might be the position in other contexts, in cases of this kind

(misrepresentation inducing a transaction) *the courts have required reliance by or on behalf of the plaintiff on the misrepresentation as being essential to the proof of causation as required by s 82(1) of the Trade Practices Act 1974*. Persons who claim damages under s 82(1) on the ground that they entered into transactions induced by the misrepresentations of other persons must prove that they relied on such misrepresentations and, therefore "by" that conduct, they suffered loss or damage… *were it otherwise, representees could succeed even though they knew the truth, or were indifferent to the subject matter of the representation*. [emphasis added]

68 I come now to the position under the New Zealand Fair Trading Act 1986. As already noted above at [43], *Hill and Jones* states that "it is unnecessary that any person be actually misled or deceived".

69 However, the position in New Zealand may not be as clear as suggested above.

70 In *McVicker v Vodafone (NZ) & ors* (HC AK CIV 2005-404-180 3 April 2006), Judge Abbott said at [62]:

The Court has a discretion as to whether or not to grant relief. However, to qualify for an award of damages under s 43(1) and (2) [of the New Zealand Fair Trading Act 1986] the plaintiffs must show that the loss or damage claimed was caused by Connell Wagner's misconduct. This causal link between conduct and loss is often found where a plaintiff has acted in reliance on a representation made to the plaintiff by the defendant. However, in *Commerce Commission v Bennett and Associates Ltd* (1995) 6 TCLR 691 ["*Bennett*'] the Court of Appeal held that while reliance will satisfy the need for a causal link, absence of reliance does not necessarily mean a link does not exits. In delivering the judgment the Court of Appeal, McKay J stated at (a p 694):

> There must be a causal link between the conduct and the loss. Where the conduct alleged is a misleading representation or misleading or deceptive conduct, the need for a causal link would obviously be satisfied if a person to whom the representation was made relied upon it and suffered loss in consequence. The Judge found that this was not alleged in the present case. With respect, however, it does not follow that the representation could not, as such, have caused the loss.
>
> …

71 In Reference No MVD 31/07 [2007] NZMVDT 40 (19 March 2007), the Motor Vehicles Dispute Tribunal was concerned with a claim by a car purchaser who alleged that the seller had misrepresented the mileage of the car she purchased. The tribunal referred to, *inter alia*, *Bennett* and held at [19] that as the purchaser did not rely on the seller's misleading conduct, there was no damage flowing from it.

72 In the recent decision of *David v TFAC Ltd* [2009] 3 NZLR 239 , the New Zealand Court of Appeal considered the elements required to establish that the conduct in question was "misleading or deceptive" under s 9 of the New Zealand Fair Trading Act 1986 and stated at [40]-[41] that the critical question was whether there was misleading or deceptive conduct that caused the loss suffered by the plaintiff. It cited *AMP Finance New Zealand Ltd v Heaven* (1997) 8 TCLR 144 at 152 where the Court of Appeal stated that whether there was such conduct should be determined by asking whether:

(a) the conduct at issue was capable of being misleading;

(b) the plaintiff was in fact misled; and

(c) it was reasonable for the plaintiff to have been misled.

73 What then is the position in Singapore? I accepted that the unfair practice need not be the sole cause of the loss or damage. As for reliance, s 6 SCTA is worded differently from s 82(1) of the Australian Trade Practices Act 1974. The latter provides that, "A person who suffers loss or damage by conduct of another person that was done in contravention … may recover the amount of the loss or damage by action…". Section 6 SCTA does not refer to loss or damage "by conduct of another person". It simply states and I reiterate, "A consumer who has entered a consumer transaction involving an unfair practice may commence an action …". From a literal interpretation, there is no suggestion that the consumer needs to establish that the unfair practice caused him to enter into the transaction. Section 35(1) SCTA which is the provision on the orders which an SCT may make does not take the matter further. The Referee said (at [8(e)] of the GD) that Chandran suggests that reliance is only relevant in so far as it forms part of the court's inquiry under the objective test at the liability stage (*ie*, the question being whether a reasonable consumer would have relied on the representation to make the contract). The Referee concluded (at [20(a)] of the GD) as follows:

(a) The Respondent says that the Claimants signed up for the Course based on their interest in the subject and not because of the PhD. As the law stands, this is not a defence. In any event, I have already decided that the Claimants were in fact influenced by the representation to enter into the Contracts.

74 The situations under which a claim may be made under the SCTA are diverse. Nevertheless, I was of the view that, generally speaking, it is not sufficient to show that a reasonable consumer would have relied on the representation. A claimant must also show that he did rely on the representation. For example, he cannot claim relief under s 6 CPFTA if he was not even aware of the representation or thought nothing of it. Otherwise the balance would tilt too much in favour of consumers. Accordingly, I am of the view that the Referee erred when he said that it was not a defence to say that the Claimants did not sign up for the Course because of the Ph.D. Nevertheless, this was not a ground of appeal, presumably because he nevertheless concluded that the Claimants were in fact influenced by the representation.

75 I pause here to caution that this is one aspect of a class action that requires attention. An SCT should be careful and consider whether each and every claimant relied on a representation. While this may make an SCT hearing more tedious, it is a route that must be travelled. This may well be part of the reasons why an SCT is not suited to hear a class action, especially of one involving allegations of misrepresentation, but I need not say more for now.

76 While Freely did not raise the absence of reliance as a ground of appeal, one of its other grounds was that the Referee was incorrect in concluding that there was no price benefit to the Claimants in purchasing the Software. Freely submitted that the correct test was whether the Software was worth more than the price at which it was sold, *ie*, $960 and not whether the software was worth the $16,000 that Dr Chiang had mentioned the usual price of the Software to be. I did not agree with Freely. Dr Chiang had suggested that the usual price for the Software was $16,000. This was shown to be untrue. This was an unfair practice (see also para 7 of the Second Schedule of the CPFTA).

77 I now move on to examine the appropriate measure of damages to be awarded where there is an unfair practice and reliance.

78 Chandran suggests, pointing to Australian and New Zealand decisions in support, that the correct measure to be adopted is the tortious measure of damages. That this is the appropriate measure of damages under the CPFTA was also accepted by the Referee (see [8(f)-(g)] of the GD).

79 In this vein, *Lockhart* makes the following observations, at pp 333-335, on the tortious measure of damages (footnotes omitted):

> **3 'THE AMOUNT OF LOSS OR DAMAGE'**
>
> **A general measure?**
>
> [**11.17**] The only express reference in s 82 [of the Australian Trade Practices Act]…to the quantum of damages recoverable by a victim of misleading conduct is that the award must be for the 'amount of loss or damage' suffered by the proscribed conduct. Consequently, whilst emphasising that the assessment of [Australian Trade Practices Act] damages is essentially a question of statutory construction which is not necessarily confined by general law rules, *the courts have generally turned to analogous causes of action in tort for guidance regarding the quantification of loss in claims based on misleading conduct. The analogy which has been most commonly invoked for that purpose is the measure of damages where deceit has induced entry into a contract which remains on foot. In that context, a rule of practice operates by which the difference between the value of what has been purchased and what was paid is awarded and the rule has also been said to operate in similar claims based on misleading conduct*. The rule seemingly also applies where the breach has induced the sale of an asset at below market value. *Similarly, it has been suggested that where a breach has induced entry by a developer into a building contract the price paid less the value obtained is the ordinary measure of damages. In [Australian Trade Practices Act] law, as in deceit, however, the rule is a 'starting point but not necessarily the finishing point] of the assessment and does not preclude the recovery of other losses that 'flowed directly' from the wrongful conduct…*
>
> **[11.18]** …*Persons who are induced to do something other than enter a contract by misleading conduct will generally have received no benefit from the contravention. Accordingly, the loss of damage suffered in such cases will usually be measured by simply quantifying the loss which flowed from the victim's reliance*…
>
> [emphasis added]

80 In a similar vein, *Corones & Clarke* note at p 510:

> **Measure of damage**
>
> *The tortious measure of loss is normal under s 82 [of the Australian Trade Practices Act]* (see *Gates v City Mutual Life Assurance Society* (1986) 160 CLR 1; see also *Zoneff v Elcom Credit Union Ltd* (1990) ATPR 41-009; on appeal, (1990) ATPR 41-058) *but it is not appropriate in every case*: see *Elna Australia Pty Ltd v International Computers (Australia) Pty Ltd* (1987) ATPR 40-795 at 48, 678-9; *Munchies Management Pty Ltd v Belperio* (1989) ATPR 40-926; and *Western Australia v Wardley (Australia) Ltd* (1992) 175 CLR 514 at 526, *The tortious measure of damage attempts to place the plaintiff in the position the plaintiff the plaintiff would have enjoyed if the tort had not been committed*. In *Gates v City Mutual Life Assurance Society* the High Court held

(at 12) that the question to be asked in Pt V cases is "*how much worse off the plaintiff is as a result of entering into the transaction which the representation induced him to enter* than he would have been if the transaction had not taken place". According to the *Gates* test a plaintiff can recover reliance loss but not expectation loss, *Under the tort measure a plaintiff is also entitled to any consequential losses directly flowing from reliance on the conduct in contravention of the Act*. The onus is on the plaintiff to demonstrate that, but for the conduct in contravention of the Act, the plaintiff would have taken another course of action and is thus entitled to consequential damages. The immediate and direct consequential losses caused by the respondent's conduct will depend upon evidence of causation.

[emphasis added]

81 For the same reasons offered by Chandran and *Lockhart*, I accepted that the appropriate measure of damages under the CPFTA for loss or damage which arises from unfair practice is, generally, the tortious measure of damages, *viz*, the difference between the value of what has been purchased and what was paid.

The Course

82 In the present instance, the Referee calculated the measure of damages in respect of the Course in the following manner:

(1) Course Contract

(a) In the circumstances, the correct measure of damages in respect of the Course Contract would be the price paid less the price of an equivalent options trading course conducted by a credible institution (without the hypnotheraphy and motivational components).

(b) Under section 28(3) and (4) [SCTA], a tribunal may, on its own initiative, seek and receive such other evidence and make sure other investigations and inquiries as it thinks fit provided all such evidence and information received is disclosed to every party. I have therefore investigated what credible options trading courses are available in the market. The most reasonable of which is a seminar conducted by the local Nanyang Technological University (NTU). Incidentally, Dr. Chiang mentioned that this course is conduced by 2 of his ex-students who do not possess PhDs in options trading. This therefore gives me some indication as to how much a pared-down version of the Respondent's curriculum is worth in the market.

(c) The NTU course is priced at $590 for the public for 2 full days (or $295 per day). I have adopted this public rate rather than the subsidised rate enjoyed by NTU members. I would also give the Respondent an extra day's credit in recognition of their higher overhead costs in comparison to NTU. Using this guide, I hereby award damages to the Claimants at a sum equal to price paid less ($295 x 3 days at $885). This computation I think best serves the interests of justice in a Small Claims proceedings where the tribunal is not bound by strict rules of evidence and can inform itself on any matter in such manner as it thinks fit: section 28(1) [SCTA].

83 As may be seen, the method of calculation of damages adopted by the Referee, *viz*, price actually paid for the Course less the actual value of the Course accords with the tortious measure of damages.

Software and Webinar

84 The "unfair practice" in relation to the Software and Webinar was expressed by the Referee in the following terms:

> **Software and Webinar Contracts**
>
> 21. The unfair practice in respect of the PhD also provides a good ground for the claims on the Software and Webinar Contracts. Additionally, I detected the presence of another unfair practice.
>
> (a) [Freely] claimed that the Software had an original value of $16,000 but was on offer for $960. Under s 4(d) [of the CPFTA] read with paragraph 7 of the 2nd Schedule, the representation that a price benefit exists where it actually does not, constitutes an unfair practice. I asked [Freely]to explain why he [*ie*, Dr Chiang] claimed the Software was worth $16,000. His answers were vague and indeterminate, leading me to conclude that the purported value of $16,000 was fictitious.
>
> (b) He claimed to have offered the Software for sale at $16,000 to financial institutions but have never sold one at that price.
>
> ….
>
> (c) To justify the value at $16,000, he included the value of past video recordings of his Webinars at $1500 to $2000 but admitted that the [respondents] would not be able to view those past recordings even though they purchased the Software.
>
> …
>
> (d) He even ascribed a value of US$1,500 to the very instructions on how to use the Software.

85 In the present instance, the Referee had calculated the measure of damages in respect of the Software and the Webinar Contracts in the following manner:

> (2) *Software Contract and Webinar Contract*
>
> (d) In respect of these contracts, the products are still substantially intact. These are essentially licenses given to the [Respondents] to use software or web platforms. All expenses incurred by the Respondent in producing the Software and Webinar are essentially overhead costs incurred prior to the sale of those products. In other words, those expenses were business costs that the Respondent would have…expended regardless whether they sold any Software or Webinar. Although there is a CD given for the Software Contract and hardcopies of course materials furnished, I do not see any bars to a full refund.

86 In calculating the amount of damages in relation to the Software and the Webinar, the tortious measure of damages was not explicitly referred to by the Referee. Was the full refund ordered by the Referee then in accordance with the tortious measure of damages? With regard to the Software, it would appear from the respondents' evidence on record that:

(a) there was no technical support [note: 7] ;

(b) many respondents could not log on to the website [note: 8] ; and

(c) the password was only given to the students on 17 May 2008 [note: 9].

These factors, in addition to the Claimants' evidence (see [7(b)] of the Summary of Claimants' Statement of Facts at [9] above) that all or most information contained in the Software was *freely available* on the Internet as they were links to online websites (which was not disputed by Freely), all mean that the actual value of the Software, which some of the respondents had purchased for S$960, was negligible. In accordance with the tortious measure of damages, this effectively translates to a full refund of the price actually paid for the Software.

87 With regard to the Webinar, the evidence on record was that it was *only* for three views [note: 10]. It was also undisputed by Freely that after the Straits Times report was published, Freely stopped sending the Claimants (who had purchased the Webinar) materials and sessions on the Webinar (see [7(c)] of the Summary of Claimants' Statement of Facts at [9] above). In these circumstances, as with the Software, the actual value of the Webinar was negligible. In accordance with the tortious measure of damages, this effectively translates to a full refund of the price actually paid for the Webinar.

88 On the issue of damages in respect of the Course, Freely submitted that the Referee had adduced evidence of his own investigation of a 2-day course on options trading without giving Freely an opportunity to address such evidence, contrary to s 28(4) SCTA which I have set out above (see [51]). However, the notes of evidence showed that the Referee did raise such evidence with Dr Chiang. Furthermore, it was for Dr Chiang to adduce his own evidence on the issue of the quantum of damages, without prejudice to Freely's denial of liability, but he did not do so.

89 As for damages for the Software, Freely submitted that there should only be minimal damages but did not show how the Referee had erred in law in his decision to order a full refund. There was also inadequate elaboration as to why the damages should be nominal. I rejected this ground of appeal as well.

Conclusion

90 For all the foregoing reasons, I saw no reason to disturb the Referee's decision against Freely.

[note: 1] See [5]–[6] of Freely's Written Submissions

[note: 2] See [2] of Freely's Written Submissions

[note: 3] See [2] of Freely's Written Submissions

[note: 4] See p 19 of the Notes of Evidence (at p 45, Vol 1, Record of Appeal)

[note: 5] Available online at http://www.hkreform.gov.hk/en/docs/classactions_e.doc (last accessed on 18 January 2010)

[note: 6] Available online at http://www.canlii.org/en/sk/laws/stat/ss-1996-c-c-30.1/latest/ss-1996-c-c-30.1.html (last accessed on 21 December 2009)

[note: 7] See p 2 of the Notes of Evidence (at p 28 of Vol 1, Record of Appeal)

[note: 8] See p 2 of the Notes of Evidence (at p 28 of Vol 1, Record of Appeal)

[note: 9] See p 5 of the Notes of Evidence (at p 31 of Vol 1, Record of Appeal)

[note: 10] See p 19 of the Notes of Evidence (at p 45 of Vol 1, Record of Appeal)