28/06; [2006] VSC 289

SUPREME COURT OF VICTORIA

ASTVILLA v DIRECTOR of CONSUMER AFFAIRS

Bell J

17, 21, 22 February, 24 November 2005; 4 August 2006

CIVIL PROCEEDINGS – TRADE AND COMMERCE – SALE OF HOUSE AND LAND – BUYER INEXPERIENCED AND IGNORANT – PROPERTY SHOWN TO BUYER – REPRESENTATIONS MADE BY SELLER AS TO OWNERSHIP OF PROPERTY, HIGH DEMAND FOR AND REASONABLENESS OF PRICE OF LAND – SELLER DID NOT OWN PROPERTY – SELLER ORALLY AGREED TO BUY PROPERTY FROM ORIGINAL OWNER FOR $25,6000 – PROPERTY LATER SOLD TO BUYER FOR $55,000 – MATTER REFERRED TO THE DIRECTOR OF CONSUMER AFFAIRS – WHETHER REPRESENTATIONS "MISLEADING OR DECEPTIVE" AND "UNCONSCIONABLE CONDUCT" – WHETHER BUYER UNDER A SPECIAL DISABILITY – EMPLOYED GENERAL MANAGER MADE REPRESENTATIONS ON BEHALF OF SELLING COMPANY – WHETHER MANAGER LIABLE AS DEEMED CONTRAVENER – WHETHER DIRECTLY LIABLE – RESTRAINING ORDER MADE – WHETHER MAGISTRATE IN ERROR: *FAIR TRADING ACT* 1999, SS7(1), 9(1), 143(1).

Ms B. was a single mother with young children, was receiving the single parent's pension, was living in a rented house in a suburb of Melbourne and wanted to buy a cheap house in the country on vendor terms. After contacting Cellante, Ms B. drove to Horsham in north-western Victoria and met a Cellante salesperson. On that day, for $55,000.00, and for the first time in her life, she bought from Cellante a house in a nearby town – a house Cellante did not own, which it had agreed orally to buy only days earlier for $25,600.00 and which had been on the market for years. The Director of Consumer Affairs brought a test case against the Cellante property organisation alleging that, when it sold a house to Ms B. it engaged in misleading or deceptive, and unconscionable, conduct in contravention of ss7(1) and 9(1) of the *Fair Trading Act* 1999. The Director sought an order for damages for Ms B. and an order restraining Cellante from selling properties in the same way in the future. The magistrate found Cellante, on the pretext it owned the house, convinced Ms B. whom it knew to be inexperienced, to buy the house, at a price represented to be reasonable, which was false, and immediately, because the property was in high demand, which was also false. The magistrate upheld the Director's case and found Cellante had engaged in misleading or deceptive, and unconscionable, conduct in the way it sold the house to Ms Brown. The Cellante companies, Astvilla Pty Ltd and Perna Pty Ltd, and their general manager, Livio Cellante, were ordered to pay her damages and interest. To protect other buyers in the future, they were also ordered not to make representations in trade or commerce that they are the owners of properties when in fact they are not owners. Upon appeal—

HELD: Appeal dismissed.

1. The decision of the magistrate and the orders is upheld. Cellante well knew the case the Director put against it. The magistrate made no legal errors in the way he conducted the hearing or dealt with the pleading issues. The findings that Astvilla, Perna and Mr Cellante had engaged in misleading or deceptive, and unconscionable, conduct were open on the evidence. The magistrate did not misconstrue the legislation and he properly applied the correct legal tests.

2. S143(1) of the *Fair Trading Act* did not allow the magistrate to make orders against Mr Cellante, being an officer of the Cellante companies, as a deemed contravener. This provision applies only to proceedings for an offence, whereas the proceedings brought by the Director were civil in nature. The magistrate's orders against Mr Cellante were still valid. He correctly decided the prohibitions in the *Fair Trading Act* against misleading or deceptive, and unconscionable, conduct applied directly to employees who, like Mr Cellante, had engaged in such conduct in their employer's trade or commerce as something more than a mere conduit.

BELL J:

1. Kellie Brown was bringing up three young children on the sole parent's pension in rented premises in a Melbourne suburb. Hearing you could buy a house cheaply on vendor terms, she rang the Cellante property organisation and arranged to see a house in Dimboola, near Horsham in country Victoria. It was only $34,000.00, with weekly repayments less than her current rent.

2. Ms Brown made the drive to unfamiliar Horsham with her children and an elderly neighbour. When she got there, the salesperson told her the Dimboola house was gone. He showed her two others, which were in very poor condition. Then he showed her a house in nearby Warracknabeal, using keys he had to get in.

3. This house seemed ideal for Ms Brown's needs. The salesperson told her it was about $55,000.00 with low weekly repayments. He said it "was a very popular house and ... [he] could sell [it] no problem at all ... five times over." So, if she wanted it, Ms Brown would have to drive back to Horsham to pay a deposit and sign some paperwork, then return to Melbourne to sign some more paperwork in a few days time. She would not have time to look around the area.

4. Fearing she would miss out, Ms Brown drove back to Horsham, paid a deposit (by credit card) and signed a contract note to buy the house. That evening, she returned to Melbourne so she could sign the other papers.

5. The owner of the house was not Cellante but someone who had been trying to sell it for years. A few days before showing the house to Ms Brown, Cellante orally agreed to buy it for $25,600.00. Cellante had neither the keys for nor permission to enter the house. Having no more than an oral agreement to buy it for $25,600.00, Cellante sold it to Ms Brown for $55,000.00.

6. The Director of Consumer Affairs investigated the transaction. He took exception to the way Cellante sold the house and brought a test case in the Magistrates' Court of Victoria. He alleged Cellante had taken advantage of Ms Brown – a first home buyer – by pretending to own the house, misleading her about its true worth and creating a false atmosphere of urgency so she would buy it on the spot. This way of selling, the Director contended, constituted misleading or deceptive, and unconscionable, conduct in contravention of the *Fair Trading Act* 1999.

7. The Director was successful. A magistrate ordered Cellante to pay compensation to Ms Brown[1] and restrained Cellante from selling properties in this way in the future.[2]

8. The legal entities in the Cellante organisation were Astvilla Pty Ltd, Perna Pty Ltd and Livio Cellante, their general manager. The Director sued Astvilla, Perna and Mr Cellante, whom I will call together Cellante, unless I need to be specific.

9. Cellante now appeals to this Court, alleging the magistrate made these errors of law: the fact findings were not open on the pleadings or the evidence, the legislation was misconstrued and no orders could or should have been made against Mr Cellante.

WERE THE MAGISTRATE'S FINDINGS OPEN ON THE PARTICULARS OF CLAIM?
The question really is: were the issues fairly contested between the parties?

10. Section 109(1) of the *Magistrates' Court Act* confines Cellante's appeal to "a question of law." Therefore Cellante can only succeed on this ground if it is an error of law for a magistrate to make a finding of fact outside the scope of the facts alleged in the particulars of claim.

11. There is a distinction between making a finding of fact not open on the evidence, which involves a question of law, and making a finding of fact beyond the scope of the pleadings, which may or may not involve a question of law. To establish that an error of law has been made, it is not enough to establish only that the findings of fact went beyond the particulars. It may be an error of law to make findings in relation to non-particularised facts that were not fairly contested between the parties or in support of a non-pleaded cause of action or defence. But where the factual issues have been fairly contested, a party may be permitted to rely upon the proved facts to establish the pleaded cause of action or defence whether or not those facts were included in the particulars. Before doing so it is desirable, but not legally mandatory, for the particulars, by amendment, to be brought into line with the evidence.[3]

12. I have just addressed this issue from the point of view of an appeal court when hearing an appeal on the ground that the trial court made a finding of fact outside the particulars. This is the position I am in. Similar principles apply to a trial court when a party seeks to lead evidence outside the particulars. This is the position the magistrate was in. These principles were set out by Hunt J in *Douglas v John Fairfax & Sons Ltd*:[4]

> "Where a party seeks to lead evidence in support of his pleaded case which is outside the particulars which have been supplied of that case, it is for the trial judge to consider whether such evidence unfairly amounts to a case of which the other party has had insufficient warning... It is a matter within the discretion of the trial judge whether to permit the evidence (subject in some cases to amendment of the particulars, but in any event subject to terms so as to meet any prejudice to the other party)

> or to hold the party whose particulars were deficient to the issues of fact to be investigated as limited by those particulars... The exercise of that discretion must necessarily depend upon many things, including the amount of warning that the other party has had that such evidence was to the led."

13. These principles apply in the trade practices context, as is well illustrated by the decision of the Full Court of the Federal Court of Australia in *Nescor Industries Group Pty Ltd v Miba Pty Ltd.*[5] In a misleading and deceptive conduct case, the trial judge found the pleaded claim not to be proven but he found a non-pleaded claim to the proven. Because the defendant had notice that this claim was "in the ring" (the trial judge had mentioned it himself), the trial judge considered the plaintiff should succeed on this basis.[6] Davies, Tamberlin and RD Nicholson JJ dismissed the appeal. Davies J (Tamberlin J agreeing) held he was "satisfied that the ground on which his Honour gave judgment was raised and that it was litigated."[7] Therefore the trial judge was not confined to the pleadings. RD Nicholson J held the defendant had to fail on appeal because it knew the case put against it at trial but chose not to meet it.[8]

14. It can now be seen that, in the appeal before me, the question raised by this ground really is: were the issues fairly contested between the parties? In considering this question, I have to bear in mind that it was for the magistrate, in the exercise of his discretion, to manage the case so as to bring this fair contest about.

15. The following description of the conduct of the proceedings before the magistrate shows Cellante knew full-well the nature of the case it was facing and deliberately mounted a narrow defence.

16. I begin with the particulars of claim. These were detailed and gave Cellante reasonably precise particulars of the misleading or deceptive conduct and unconscionable conduct that the Director intended to prove. In other words, they gave Cellante advance notice of the case it had to meet. The Director also gave Cellante written statements containing the oral evidence he intended to lead from his witnesses. This gave Cellante further notice of the case against it.

17. The matter was fully opened by counsel for the Director. Counsel for Cellante objected that the opening went beyond the pleadings. He said Cellante would be answering the case put in the pleadings, not the case put in the opening. Counsel for the Director disputed the objections, but he applied for leave to make certain amendments to clarify the particulars of claim. Against the opposition of counsel for Cellante, the magistrate gave him that leave. In doing so, his Honour made it quite clear he would allow counsel for the Director to proceed with the case as opened.[9]

18. At this point it would have been clear beyond doubt to Cellante that the case was going forward as opened by the Director. But Cellante did not respond to the ruling. It did not modify the conduct of its case at all. It continued to do what its counsel said it would, namely answer the case put in the pleadings and not the opening. It did not try to establish before the magistrate that it was actually prejudiced by the course taken by the Director. Likewise it has not tried to establish before me that the magistrate failed properly to deal with any such prejudice. It did not ask the magistrate for an adjournment. It did not contend it was caught by surprise by the evidence the Director proposed to lead. Counsel for Cellante did not contend, before the magistrate or me, that he was unable properly to cross-examine the Director's witnesses. Nor did he contend he had evidence available to him to meet the case as opened that was different to the evidence he had come prepared to present. He elected to proceed.

19. The evidence was then given in open court in the presence of counsel for Cellante, who had every opportunity to test it by cross-examination, and to present contrary evidence, if he so chose.

20. Ms Brown gave evidence in chief orally. Counsel for Cellante cross-examined Ms Brown. He did not challenge important aspects of her evidence in relation to the sequence of events and the representations allegedly made.

21. The balance of the evidence given on behalf of the Director was mainly contained in witness statements tendered by consent, supplemented by some oral evidence. This evidence was given mostly without objection by counsel for Cellante. With limited exceptions, the cross-examination of these witnesses was directed to the clarification, rather than to the challenging of this evidence.

22. Mr Cellante gave evidence in chief on behalf of Cellante and he was cross-examined by counsel for the Director.

23. Mr Wissell gave oral evidence on behalf of Cellante. This evidence was confined to his employment by Vic Properties – the Cellante business name – and the bare details of the discussions he had concerning the purchase of the property by his employer. He was not taken in evidence in chief to the important aspects of the critical events. In particular, he was not taken to the events described in the evidence of Ms Brown. Therefore he did not contradict her account of what happened.

24. At various stages during the hearing, counsel for Cellante objected to questions or made submissions on the basis that the Director was conducting a case outside the pleadings. An example is the evidence of Ms Brown in relation to the representations made to her by Mr Wissell and Mr Cellante. These objections were, in substance, re-runs of the ones rejected by the magistrate at the start of the case. They were not based on any new foundation. No actual prejudice was demonstrated by Cellante. The objections were all rejected. Again, if he was caught by surprise by any aspect of the evidence presented on behalf of the Director, counsel for Cellante could easily have requested an adjournment. He did not do so.

25. The issues of fact raised by the evidence, as regards the alleged potential liability of the two companies, Astvilla and Perna, and Mr Cellante personally, were extensively addressed in the closing submissions made by counsel for the Director and Cellante to the magistrate, both orally and in writing. With limited exceptions that I will deal with below, the findings of the magistrate were based on the evidence given at the hearing, which was the subject of those submissions, His Honour only made findings in relation to matters that had been contested at the hearing, again, as regards the companies and Mr Cellante personally. At all times the Director kept his case to the causes of action specified in the particulars of claim, namely misleading or deceptive, and, unconscionable conduct. The magistrate made findings only in relation to those causes of action.

26. The conduct of the proceedings before the magistrate shows that the issues of fact about which the magistrate made findings were fairly contested between the parties. The magistrate properly managed the case to ensure that such a fair contest would occur.

27. For reasons which I will now give, there were in any event no significant differences between the facts pleaded and the facts found.

There were no substantial differences between the facts alleged in the particulars of claim and the findings of fact made by the magistrate.

Cellante's submissions

28. Counsel for Cellante submitted there were substantial differences between the facts alleged in the particulars of claim and the findings of fact made by the magistrate, indeed so substantial that, in effect, the magistrate upheld a claim not made by the Director.

29. A comparison of the facts alleged and the findings made reveals this submission to be incorrect. Although there are some differences between the two, they are not significant. The differences are certainly insufficient to justify the submission that the magistrate upheld a case not put.

30. The following paragraphs set out the allegations of fact in the particulars of claim and the findings of fact of the magistrate. Then the two are then compared to show that the findings sprung from the case put in the particulars.

The allegations of fact in the particulars of claim

31. The further amended complaint sets out the particulars of claim in 42 detailed paragraphs (plus a further 9 paragraphs relating to the relief claimed). The document is too long to set out here. The nature of the factual allegations emerges sufficiently from the following summary of the main paragraphs.

32. Paragraph 7 made allegations in relation to Ms Brown's personal circumstances. It alleged that Ms Brown was a single mother with three children, not working, in receipt of the sole parent's

pension, inexperienced in commercial arrangements, a first home buyer, a person with limited formal education and minimal assets and unaware of the prices of comparative properties in the Warracknabeal area.

33. Paragraph 12 alleged a conversation took place between a Cellante employee, Jeanette Porto, and Ms Brown. It alleged Ms Brown told Ms Porto she was eligible for the first home buyer's grant, was not working, was on the pension, was struggling to meet her present rent of $200.00 per week and wanted to buy a property with repayments of not more than $130.00 per week. Ms Porto told Ms Brown someone in her circumstances (being on a pension and not working) could buy a property, the grant would be taken into account in any deposit payable and that she would send a brochure and list of properties to her.

34. Paragraphs 13 – 17 made allegations in relation to the arrangements made by Ms Brown to visit Horsham to view a property. It was alleged a brochure was sent to Ms Brown, who then arranged with Cellante to meet a salesperson, Mr Wissell, at Horsham to inspect a house in Dimboola on 17 June 2001. Ms Brown again described her personal circumstances, this time to Mr Wissell. It was alleged he told her the house in Dimboola had been sold but a number of others in her repayment bracket were available for purchase on vendor terms, and he could show these to her. He did so, including the house at Warracknabeal.

35. Paragraph 19 made allegations in relation to what Mr Wissell told Ms Brown after she expressed interested in the house. The particulars of claim described these matters as the first representations and they are set out here:

> "19(a) [The] price of the property was $55,000 by vendor terms but a reduction in price to $53,000 could be obtained for an early final settlement;
> (b) the property had just come on the market and would be in demand;
> (c) the property could be purchased on vendor terms;
> (d) he could sell the property five times over at the price;
> (e) she should immediately commit to purchasing the property because it was in demand;
> (f) she would have to commit and sign up for it that day if she wanted to secure the property;
> (g) the property was in good condition;
> (h) the price of the property was fair and reasonable;
> (i) she would have to pay a deposit of $2,000.00 at the time of committing to the property;
> (j) Livio, his boss, had the last word on the sale price of the property;
> (k) Livio had the last word on the amount of weekly payments."

36. Paragraph 21 made allegations in relation to what Mr Cellante told Ms Brown by telephone before she committed to buying the house. The particulars described these matters as the second representations and they are:

> "21(a) [Mr Cellante] congratulated Brown on selecting the property;
> (b) confirmed she could buy the property on vendor terms;
> (c) advised that her repayments would –
> (i) be $125 per week for the first 6 months;
> (ii) be $135 per week for the following 6 months;
> (iii) increase each year by $10 until final settlement.
> (d) advised that the property was in good condition;
> (e) advised that the price for the property was fair and reasonable;
> (f) advised that the property was in demand;
> (g) advised that she should commit by signing immediately to buy the property otherwise she could lose the property;
> (h) advised and arranged for her to attend the first and/or second defendant's offices in Templestowe on 21 June 2001 to complete the formalities."

37. Paragraph 22 made allegations about what was implicit in the first and second representations:

> "22(a) [Vic Properties] was the owner of the property;
> (b) Vic Properties was entitled to sell the property;
> (c) Vic Properties was in a position to sell the property;
> (d) Vic Properties was the registered proprietor of the property or entitled to be registered as the proprietor of the property."

38. Paragraph 23 alleged Ms Brown was induced by these representations into signing the contract note and paying a deposit of $1000.00 on 17 June 2001.

39. Paragraph 28 alleged that the first and second representations were false and misleading because:

> "28(a) the property was not in demand;
> (b) the property had been on the market for about four years prior to the date with an asking price of $32,000.00;
>
> (c) the price paid by Brown for the property was not fair and reasonable;
>
> (d) the property was not in good condition, in that, its roof required replacement or repair and the building required restumping."

40. The particulars of claim alleged Ms Brown was deprived of the opportunity to look around the area and to acquaint herself with comparative prices (paragraph 29). It made certain allegations about the application of the provisions of s3(1)(b) of the *Sale of Land Act* 1962 in circumstances where, as here, Cellante was selling on terms a property that it did not own (paragraph 27).

41. It was alleged a further misrepresentation was made to Ms Brown, this time by Ms Porto, that the property had no easements attached to it when it did (paragraphs 32 and 33).

42. It was alleged in paragraph 33 that Ms Brown was induced into signing a terms contract for the property on 21 June 2001 by the main elements of the first and second representations, the further representation about the easement and a representation that she could take possession of the property when she had paid all of the deposit.

43. The pleading then made allegations of facts about the completion of the transaction and the loss suffered by Ms Brown.

44. That is enough description of the particulars of claim. Now let me turn to the findings of the magistrate.

The findings of fact of the magistrate

45. The findings of fact of the magistrate are in the reasons for decision dated 22 June 2004, which are lengthy. They give a detailed account of the background circumstances (paragraphs 1-87) and then set out the findings of fact and consideration of the alleged contravening conduct (see especially paragraphs 88-129).

46. These were his Honours main findings:

> "Findings of fact
> 88. It is not contested that Ms Brown, as at 17 June 2001:
> a. had a limited education
> b. had no experience in clerical matters
> c had never purchased a home previously
> d. had very limited financial resources
> e. had not consulted a solicitor or conveyancer
> f. had no knowledge of house prices in Warracknabeal
> g. had no knowledge of house prices generally.
>
> 89. No explanation was given as to why Ms Brown was not told before she visited Horsham that the Dimboola property had been sold. Ms Brown was enticed to visit Horsham by the defendant companies' employee Ms Porto, on the pretext that the Dimboola property could be sold to her.
>
> 90. No explanation was given as to why the Horsham meeting was scheduled for a Sunday. Because of the opinion I have formed of the defendant companies' conduct, the view I take is the meeting was purposefully scheduled for a Sunday so as Ms Brown could not have access to other estate agents or other relevant sources of information.
>
> 91. There was no prospect that Ms Brown would be interested in the Jeparit properties given their state of repair. The opinion I have formed of Mr Wisell's conduct is such that it is my view he showed

Ms Brown these properties for 2 reasons: to make 17 Bowman Street look more attractive price-wise and to delay getting to Warracknabeal and so frustrating any effort Ms Brown might make to look around.

92. There is no evidence before me to even suggest the defendant companies had any right at all to sell 12 Bowman Street. In fact the overwhelming evidence is to the contrary. At best there was a non-binding verbal agreement. The defendant companies were not authorised to conduct inspections. The evidence is that Mr Wissell was not provided with a key yet he found his way onto the property using his own keys.

93. On 17 June 2001 the defendant companies through Mr Wissell and Mr Cellante and Mr Cellante personally represented to Ms Brown that they were in a position to sell her the property. ...

97. By creating a climate of urgency Mr Wissell deprived Ms Brown of any opportunity to look around the Warracknabeal area before signing the contract note. Such an inspection may have given Ms Brown an opportunity to look in estate-agent's windows and see the prices of comparable homes.
98. As to Mr Cellante's role in the events of 17 June 2001, he knew the defendant companies had no legal interest in the property. He also knew the price at which one of the companies could purchase the property. His conversations with Ms Brown encouraged her to believe she had bought the property, whereas his evidence was that she had done no more than order the property. He was anxious to have her visit him to sign a contract of sale. It also appears that he needed to delay her visit to enable one of the companies to secure the property. ...

101. The most reliable guide to the value of 17 Bowman Street in June 2004 is the figure Perna Pty Ltd was prepared to pay and Mr Taylor was prepared to sell to accept viz. $25,000. Mr Taylor had been trying to sell for a long time. He may have been anxious, he was also acutely aware of the lack of interest by prospective purchasers. The valuation of the local valuer, Mr Wilson, is to be preferred to the valuation of Mr Hocking who inspected only this property in the area and based his valuation on other Cellante sales. I accept Mr Hadley's valuation of plus or minus $25.00 made on 6 June 2001. ...

107. Mr Cellante acknowledged that the sale of 17 Bowman Street by Perna Pty Ltd to Ms Brown breached section 3(1)(b) of the *Sale of Land Act* 1958. He said since he has taken the advice of his and the companies' solicitors, the companies comply with the legislation. ...

109. The manner in which Mr Cellante and Mr Wissell conducted themselves during the transaction also must be taken into account in assessing the reliability of their evidence. I refer to matters admitted or not contradicted like the Dimboola property not being available, the keys Mr Wissell used to get into the house, Mr Wissell not having any right to inspect the property, the disparity in price, the Cellante group not owning the property etc. ...

Misleading and deceptive conduct ...
113. Mr Cellante disputes that he, as an employee of the two companies, was engaged in 'trade or commerce'. It is clear that Mr Cellante was the person controlling and directing the sale to Ms Brown. He is not like Mr Wissell who, although most likely very anxious that the sale be effected, did not have the final say. Mr Cellante controlled and directed the purchase from Mr Taylor and the sale to Ms Brown. As he said in answer to Question 31 in his record of interview 'Well I prepared the contract. I was involved with the negotiations with the client. Yeah'.

114. Mr Cellante was more than a mere conduit. He was the main player.

115. Mr Cellante, on 17 June 2001, engaged in conduct, together with Mr Wissell, which resulted in Ms Brown believing that she had purchased a property which was in demand and that she would get possession of the property within a short period of time. This being a property in which none of the defendants had any proprietary right; but they knew could be purchased for $25,600 on a 180 day contract. It was misleading and deceptive for the defendants to represent that they could sell the property to Ms Brown and that she could move in on payment of the first home buyer's grant.

116. Ms Brown left the Horsham area believing that she had purchased a home for herself and her 3 children at a price that was fair and reasonable, that they would on payment of the first home buyer's grant be living in it and that her weekly rental of $200 would reduce to $130.

117. It is fair to draw the conclusion Ms Brown believed the price to be fair and reasonable. She was afforded no opportunity to make her own enquiries. She had no option but to accept Mr Cellante's representation that it was a good buy. All sellers tell would-be purchasers that they are getting a bargain. That can be puffery if it is in the nature of 'introductory comments, in the nature of puffery, made at the start of negotiations, for the purpose of attracting the interest of a possible purchaser. As such they became irrelevant or of little, if any, significance when detailed information is subsequently

given ...'. See *Pappas v Soulac Pty Ltd* [1983] FCA 3; (1983) 50 ALR 231; [1983] ATPR 40-411 Fisher J at ALR page 241.

118. The representation as to price, in this instance, goes far beyond puffery. Working on the lesser sum mentioned in the contract note of $53,000 and keeping in mind that the property can be purchased from the true owner for $25,600 and Ms Brown knows nothing of the price of houses in the area and is kept ignorant, the defendants cannot be heard to say the representation as to price is puffery. The efforts to keep Ms Brown ignorant continued on when the contract of sale was prepared with vital material excised.

119. The fact that Ms Brown, on 21 June 2004, entered into a contract of sale on different terms exacerbates the problem. It shows that the defendants never intended to honour the representations made on 17 June 2001, and recorded in the contract note, that she would have possession on payment of the first home buyer's grant. There was no evidence that Ms Brown asked for the changes.

120. Relying on the representations made on 17 June Ms Brown attended at Cellante's and left having entered into a less advantageous agreement than the one she had been promised. An agreement more favourable to the defendant companies.

121. It can be fairly said if Ms Brown had been able to acquaint herself with the truth of the matter as to the price Perna Pty Ltd paid, when it acquired the property and when it had to settle on the property, she would not have signed the contract of sale. In signing she relied on the representations of Mr Wissell, Mr Cellante and Ms Porto. ...

124 All three defendants have contravened Section 9.

Unconscionable conduct...
126 In considering the liability of the defendants under this sub-section the only additional matter I need to consider is whether Ms Brown was under a special disability or special disadvantage when she signed the contract note and the contract of sale....

128 Ms Brown was ignorant and inexperienced in real estate dealings in the Warracknabeal area and the defendants created an atmosphere that kept her that way on 17 and 21 June 2001.

129 All three defendants have contravened Section 7..."

Comparing the two

47. A comparison of the allegations of fact in the particulars of claim and the findings of fact of the magistrate reveals no significant difference between the two.

48. The particulars of claim described the alleged facts in narrative terms. In outline, the narrative was that Ms Brown arranged with Cellante to go to Horsham to inspect the Dimboola property, she met with Mr Wissell who told her it was sold, he showed her other properties including the one in Warracknabeal, she had conversations with Mr Wissell and Mr Cellante in relation to buying that property, in reliance on certain misrepresentations Ms Brown decided to buy it and she returned to Horsham to sign a contract note and to Melbourne to sign a contract. Of course this is a selection of the essential elements, but it demonstrates my point.

49. The reasons for decision of the magistrate also described the found facts in narrative terms, indeed by reference to the same outline facts alleged in the particulars of claim, some of which I have set out.

50. Cellante's complaint does not concern these outline facts but, especially, the specifics of what the particulars alleged Ms Brown was told and by whom.

51. Cellante's submissions go into microscopic detail on this subject and it is unnecessary for me to set them out here. I have examined the submissions. They point to no more than the kind of insignificant departure between the facts as particularised in the pleadings and the facts as found by a trial court on the evidence as is commonly found in such cases. The submissions do not show the magistrate upheld a case not pleaded.

52. The submissions would be on stronger ground if the substance of the case pleaded was different to the substance of the case found proven. The substance of the case pleaded against the companies and Mr Cellante was that they, on the pretext Cellante (though Vic Properties)

was the owner, convinced Ms Brown, whom they knew to be inexperienced, to buy the property, immediately, and at a price falsely represented to be fair and reasonable, otherwise she would miss out on the sale, for the property was in high demand, which was also false (see especially paragraphs 19-3, 26-29 and 33 of the particulars of claim). This was the case the magistrate found proven against them.

53. In certain limited respects the magistrate's findings went beyond the particulars of claim. For example, his Honour made adverse findings about Cellante enticing Ms Brown to visit Horsham to look at a property in Dimboola, which had been sold, and about Cellante showing her other properties, which it knew to be unsuitable.

54. These findings were legitimate responses by the magistrate to the evidence – which Cellante had the opportunity to contest – and filled in some aspects of the narrative left partly open by the particulars (see paragraphs 17-18). In these and in no other respects did the magistrate's findings go beyond the particulars to uphold a case not put.

55. This ground of the appeal must therefore be rejected.

Were the misrepresentations particularised with sufficient precision?

56. Counsel for Cellante put forward an additional basis for his submission that the Director's case, and the magistrate's findings, had gone outside the particulars of claim. He submitted that, in cases involving misleading or deceptive conduct, and unconscionable, conduct based on misrepresentation, the alleged misrepresentation has to be identified with precision. Therefore, the Director could succeed only if he proved a misrepresentation specified, with precision, in the particulars. Moreover, the magistrate could not give the Director a victory by finding Cellante had made a different misrepresentation. Since the magistrate had done exactly this, so it was submitted, he made an error of law.

57. In the present case the Director alleged Cellante engaged in misleading or deceptive, and unconscionable, conduct by making misrepresentations. In such a case the plaintiff must identify the misrepresentations with precision.[10] If this is not done, the action may be struck out for failing to disclose a cause of action.[11]

58. Where the alleged misrepresentation was made in writing, it will usually be easy, by reference to the document, to identify the misrepresentation with precision. Where the alleged misrepresentation was made orally, the precise identification of the misrepresentation may be more difficult.

59. The requirement to particularise the alleged misrepresentations with precision is an important one and the onus to do so rests upon the plaintiff. But there are degrees of precision and the degree required must surely take into account the circumstances of the given case. It would be wrong to equate the precise with the exact. Where the alleged misrepresentations were made orally, it may not ever be possible to particularise them exactly. The plaintiff has to prove their case. But Cellante's approach to the requirement for precision would reserve success in this kind of case to those with perfect recall.

60. The magistrate considered the particulars provided by the Director. He decided that anybody reading them would have a clear idea of the Director's complaint and the remedy he sought. He rejected the submissions of counsel for Cellante in this respect and, in my view, he made no error of law in doing so.

61. Counsel for Cellante submitted that, in so deciding, the magistrate misdirected himself in applying the decision of Eames J (as his Honour them was) in *Intrac (Sales) Pty Ltd v Riverside Plumbing & Gas Fitting Pty Ltd.*[12] This case decided that the Magistrates' Court is a court of pleading, although the pleading rules apply less strictly in that court than in the higher courts.[13]

62. The Magistrates' Court has rules that require a plaintiff to provide, among other things, a concise statement of the nature of, and particulars of, the claim.[14] But consistently with the summary nature of the jurisdiction of the Magistrates' Court, these rules, when compared with

the rules of the higher courts, strike a different balance between the need for procedural formality and the need for cost-effective determination of the case. As the magistrate said in the present case, if the Magistrates' Court rigidly followed the procedures of the higher courts, it would give up its ability to deal with cases summarily, and there would be little place for it in the judicial hierarchy.

63. Counsel for Cellante submitted *Intrac* was indistinguishable from the present case. This submission is incorrect.

64. In *Intrac*, the plaintiff alleged in the particulars of claim that an advertisement had incorrectly represented a second-hand machine to have worked for 2,600 hours when it had actually worked for 13,000 hours. In its defence the defendant admitted representing that the machine had worked for about 4,500 hours. In the evidence at the hearing, the plaintiff referred again to 2,600 hours and defendant referred again to about 4,500 hours. In other words, the plaintiff never conducted the case, in the particulars or in the evidence, upon the basis that the representation was about 4500 hours. Without notice to the parties, the magistrate held that the representation was about 4,500 hours; and she used expert evidence that the actual hours of work were 6000 hours as the basis of a compensation order made against the defendant. In these circumstances, Eames J held the magistrate had made an error of law by making a finding not supported by the particulars of claim.

65. As this analysis reveals, *Intrac* was a case in which the magistrate made findings in relation to matters not fairly contested between the parties.

66. In the present case, the allegations of fact in the Director's particulars of claim sufficiently encompassed the case advanced at the hearing by the Director and the findings made by the magistrate. The factual issues determined by the magistrate were also fully canvassed between the parties. As counsel for the Director submitted, the magistrate's findings did not, like the finding of 6000 actual hours of work in *Intrac*, come out of the blue.

67. The submissions of counsel for Cellante seemed to treat *Intrac* as authority for the proposition that it is an error of law for a trial court to make a finding of fact in the face of an imprecisely particularised misrepresentation. This confuses a rule that governs the pleadings with the separate rules, which I dealt with earlier, that govern the conduct of the trial. Eames J himself distinguished between the two.[15]

68. For these reasons the magistrate did not misapply the decision in *Intrac*.

WERE THE FINDINGS OF FACT OF THE MAGISTRATE OPEN ON THE EVIDENCE?
An error of fact is not necessarily an error of law

69. Cellante's submissions on this ground were made in writing and developed orally. The written submissions were made in the outline of submissions (with annexures A and B) dated 10 January 2004. These drew heavily on Cellante's outline of final submissions dated 23 April 2004, response to the Director's outline of submissions to the magistrate dated 7 May 2004 and further response dated 13 May 2004, all three to the magistrate. Annexures A and B of Cellante's outline to this Court are, respectively, a chronology and a paragraph by paragraph analysis of the factual basis of the reasons for decision of the magistrate. (In response to questions raised by the Court, Cellante also filed with the Court a supplementary outline of argument dated 22 February 2005 and further supplementary outlines of argument dated 23 February 2005, 27 February 2006 and 22 June 2006.)

70. These submissions invite me to engage in an analysis of the pleadings and the evidence presented to, and the facts found by, the magistrate. There are important constraints upon the power of the Court to do so. As I have noted, an appeal under s109(1) of the *Magistrates' Court Act* must be confined to a question of law. In such an appeal it is not part of the Court's function to determine whether a finding of fact by a magistrate was right or wrong. The function of finding the facts is performed exclusively by the magistrate. In a case where a question of law is said to be involved in a finding of fact by a magistrate, as in limited circumstances it can, the function of the Court is to determine whether there was any evidence upon which the magistrate could have made the finding, which excludes an appeal on the ground that the finding was against the evidence and the weight of the evidence.[16]

71. This point is frequently made by the Court. Yet all too often appeals are brought on questions dressed up as questions of law that are really questions of fact. This case is one of them. For the reasons I now give, and despite certain errors made by the magistrate, penetration of the dense thicket of Cellante's submissions on this ground does not reveal that an error of law was involved in the way the facts were found by the magistrate.

72. Again, it is necessary to make a comparison, this time of the evidence with the findings.

The evidence

73. The evidence, in summary, and on the main points in issue, was as follows.

74. The most important evidence for the Director was that of Ms Brown. She told the magistrate she was a single parent with three young children and received the sole parent's pension. She left school when she was fourteen and went to a home for children. She worked as a waitress in a variety of places. She did so in the United Kingdom from aged 16 until 21 and then in Australia until aged 23, when she fell pregnant with her first child.

75. Her evidence was she rang Cellante and spoke to Ms Porto about buying a property on vendor terms. She did not understand what this meant except that you had to pay the vendor back for the house. She told Ms Porto she was a single mother on the pension paying rent of $200.00 per week that was "breaking me." She said it would be great to save that money and get a house. Ms Porto asked whether she had ever received a home buyer's grant. She replied no – being on a pension, she had never bought a house. She asked Ms Porto to send her some pamphlets and some literature arrived two days later. It contained lists of properties, photographs, write-ups and repayment details.

76. Ms Brown said that she was really interested in one house in Dimboola on a one acre block for $34,000.00. She had the repayment page for that one and it looked perfect. So she telephoned Ms Porto to arrange to see it. Ms Porto arranged for her to meet Mr Wissell at Horsham at 10.00am on Sunday 17 June 2001. She drove up the day before with her children and neighbour, John Wood, who was aged about eighty-seven.

77. She deposed that they met Mr Wissell as arranged. She had to talk to him about vendor terms and this was part of their conversation. He asked her what repayment bracket she fell into and she said no more than $130.00 – $135.00 per week. She told him that she wanted to look at the house in Dimboola shown in the sheet of paper she had. He said it was gone. He crossed off that house, and others, from the list, leaving only expensive ones.

78. Mr Wissell told her there were cheaper ones she could look at. She agreed to do so and went with him to two houses in Jeparit. The first was appalling with sunken floors. It was $43,000.00 and you would not put a rat in it, she told the magistrate. (She said in cross-examination it was a "pig sty.") The second was shocking, only slightly better. The houses needed restumping and thousands of dollars spent on them.

79. Then they all went to lunch at the Jeparit Hotel. Mr Wissell paid. He was "pumping up" a third house which he said was very nice and perfect for her and the children. This was the house at 11 Bowman Street, Warracknabeal. They went to see it at about 3.45pm. When they arrived he made sure the house was empty and then invited her to inspect it. He produced a bunch of keys and opened the door. Mr Brown found it to be very nice inside and recently cleaned. (She said in cross-examination it was "immaculate in comparison.") The children were very excited. Mr Wissell told her that the house was available on vendor terms in her price bracket. He said the price was $53,000.00 - $55,000.00, which she found baffling. She was told that if the house settled within the first six months it would be $53,000.00. He told her about vendor terms and the payment schedules and whether or not she could afford it. He said that once the vendor terms went through, they would help her get finance to settle quickly with Cellante.

80. Ms Brown told the magistrate she had never been to Warracknabeal and was not aware of house prices in the area. She did not discuss "the value of the house" with Mr Wissell.

81. Mr Wissell said to hold the house would require a deposit of $2000.00. She said she did

not have it. Her evidence was that Mr Wissell then said: "[The] house was a very popular house and that he could sell that house no problems at all. He actually said that he could sell the house five times over." Ms Brown deposed that she told Mr Wissell she wanted to buy the house.

82. Then Mr Wissell rang Mr Cellante and put Ms Brown on the phone. Ms Brown told the magistrate that Mr Cellante "congratulated me, told me what a wonderful house I'd got, that it was a good house."

83. Ms Brown's evidence was she wanted to stay to make sure it was a nice town and check everything to make sure it was right. But Mr Wissell said she had to follow him back to Horsham to sign the paperwork. She followed him there, having been at the house for about half an hour. Her words to the magistrate were:

> "He wanted me to go to [Horsham] as quickly as possible and we had to sign the contract note. So we – we went back to the office...I believe that if I didn't sign this note quickly, I was led to believe that this house would be snapped up over night. So we went straight down there and did the paperwork and then it was mine. So, I ... went down there, signed it..."

84. Ms Brown said she had a second conversation with Mr Cellante while she was at Horsham with Mr Wissell. He called him on his mobile and put her on. She had to speak to Mr Cellante because only he could confirm the repayments would not exceed $130.00. Here is her testimony about that conversation:

> "[First] of all he congratulated me on purchasing the house, told me it was a good house, I'd done well, there was lots of bubbly feelings. Then he told me the repayment schedules for the first six months would be $125.00, the following six months they would be $135.00...
>
> He told me that he needed me to go down to the office very quickly, to sign the vendor terms contract. How quickly would I be back and how quickly could I get down to him ... I wanted to stay around a little while and have a bit of a look around...He wasn't too keen about that, he said that wasn't the way that they did business. That it is important for me to go down to sign this contract and to do all the formalities. So we arranged for me to go down on the following Thursday, which was the 21st..."

85. She said she signed the contract note but did not read it. She filled in only her name and telephone number. Otherwise Mr Wissell filled it out for her to sign. He told her everything was dependant on the $7000.00 home grant going through. He told her there was no problem with her moving in as soon as the grant was approved. Her evidence was that she was led to believe this was the document that bought her the house. She said nobody forced her to sign the contract note, but: "If I walked away, I would have lost the house. They would have sold it the next day." The deposit was reduced to $1000.00, which she paid by credit card.

86. She told the magistrate she went back to look at the house briefly before returning to Melbourne that evening.

87. As arranged, Ms Brown went to Cellante's Melbourne offices on Thursday 21 June 2005. She signed the contract of sale on vendor terms. This was to finalise the details of buying the house. It was a quick process with Ms Porto. She gave evidence about the price being $58,000.00. She said she paid $58,000.00 because she felt pressured. She also gave evidence about the delay in the settlement of the transaction and obtaining a bank loan.

88. In cross-examination, Ms Brown was not challenged in relation to any significant aspect of her evidence. Aspects of Mr Cellante's later evidence in chief were not consistent with Ms Brown's evidence. Counsel for Cellante must have known this evidence was coming when he cross-examined Ms Brown. Yet he did not put these inconsistencies to her.

89. The owner of the house, Warren Taylor, gave evidence on behalf of the Director, partly in a statement admitted into evidence by consent and partly in oral testimony. He said he bought the house in about 1984/1985 for $37,500.00. He had had it on the market for 10 years. He agreed to sell it to Cellante for $25,600.00.

90. Ian Wilson gave valuation evidence on behalf of the Director. His evidence was that his area of expertise was the valuation of properties in the northern part of the Western District, the

Wimmera and the Mallee, which is the area in which the Bowman Street property was situated. He valued the property at $26,000.00, excluding GST. In cross-examination he said his valuation assumed a purchaser was well informed and prudent about local market conditions. His valuation was on the basis of a purchase on normal terms and conditions, not vendor terms.

91. Mr Cellante gave evidence on behalf of Cellante. He said that although he was not a director or shareholder of Astvilla and Perna, he was involved in their business operations. His role in these companies was to handle the legal matters and buy and sell properties. He oversaw the conveyancing but was not a qualified solicitor. Mr Wissell was a Cellante employee. Ms Porto was an Astvilla employee but worked for both companies as a sales manager.

92. Mr Cellante told the magistrate in 2001 he was under the mistaken belief that if Cellante was buying a property for cash, it could sell for cash or on terms, but that if it were buying on terms, it could sell for cash but not on terms. He now appreciated that if Cellante was selling on terms, it had to be the registered proprietor or entitled to be so registered.

93. His evidence was there was a verbal agreement between Cellante and Mr Taylor to buy the Warracknabeal property for $25,600.00 on 14 June 2001. A contract note was signed on 19 June 2001. He also gave evidence in relation to the preparation of the terms contract of sale of the property to Ms Brown and her signing of that contract and about the reasons for the increase in the price to $58,000.00, which were related to her not paying a $4,000.00 deposit.

94. Ms Brown was not cross-examined about the conversations she had with Mr Cellante in 17 June 2001. Over the objection of counsel for the Director, Mr Cellante gave evidence about the first of these. He said that he explained to Ms Brown the need for a $4,000.00 deposit. He said he told her that if she paid $1000.00 now, it would take her 24 weeks at repayments of $125.00 per week to build up a deposit and she would not get possession until the full deposit and the first home buyers grant were paid, that is, not until 7 December.

95. Under cross-examination, Mr Cellante said the sequence was that Mr Wissell filled out the contract note then Ms Brown got Mr Wissell to ring him so she could speak to him because "before she signed she rang to confirm that she could buy." Then she signed the contract note. He did not know what Mr Wissell told Ms Brown because he was not present. He agreed when he first spoke to her he congratulated her on her purchase. He believed it was the first time Ms Brown had bought a home and this was a significant issue for her. Ms Porto knew that Ms Brown was a resident of Melbourne. His evidence was that Cellante did not tell Ms Brown it was not the owner of the property. There was no reason to say whether the company was registered or unregistered as the proprietor as it was selling her the property. The section 32 statement relative to Ms Brown's terms contract of sale did not disclose the date that Cellante bought the property from Mr Taylor as it was not relevant to her as the purchaser and not legally required to be disclosed. All that had to be established was Cellante's right to sell. He said he was the general manager of both Astvilla and Perna.

96. Mr Cellante deposed that he tried to bring forward the settlement date so Ms Brown could go into the property earlier. Mr Taylor refused his requests.

97. Mr Wissell gave evidence on behalf of Cellante. This evidence was confined to his employment by Vic Properties and the bare details of the discussions he had concerning the purchase of the property by Cellante from Mr Taylor. He was not taken in evidence in chief to the events of 17 June 2001, in particular to the events described in the evidence of Ms Brown. Therefore he did not contradict any of Ms Brown's evidence. Mr Wissell was cross-examined very briefly by counsel for the Director.

98. Robin Hocking gave valuation evidence on behalf of Cellante. He told the magistrate he was based in Melbourne. His main evidence was of the prices paid on vendor terms in six other Cellante sales. He deposed that, when those sales prices were considered, there was nothing unusual about the price paid by Ms Brown for Bowman Street. His evidence was the value of the property had to take into account whether vendor terms were available. Under cross-examination, he agreed all six of the Cellante purchasers came from suburban Melbourne and he did not know what information the purchasers had about local market property values.

The findings of fact of the magistrate

99. The findings of fact of the magistrate have already been set out.

100. In certain respects the findings of the magistrate are indefensible because they are patently not supported by the evidence. The critical question, however, is whether the mistaken findings concerned matters of significance such that the magistrate's ultimate decision was made in error of law.

101. There are relatively insignificant mistaken findings I can put to one side. For example, contrary to paragraphs 7 and 15 of the reasons for decision, the evidence did not establish Ms Brown accessed the Cellante website. The magistrate probably got this information from paragraph 10 of the particulars of claim, which were not proven. Although unfortunate, nothing turns on this mistake.

102. Of more significance is the attack made by counsel for Cellante on the finding of the magistrate that Mr Cellante told Ms Brown that "she had done well...[it] was a good price and the house was in good condition" (paragraph 37 or the reasons for decision) and that the house was "a good buy" (paragraph 117). There was no evidence to support findings in exactly these terms. The magistrate may have picked up this language from the particulars of claim and the Director's submissions. Ms Brown's evidence was that Mr Cellante "congratulated me, told me what a wonderful house I'd got, that it was a good house" and told her she'd "done well."

103. These findings of the magistrate were on a subject of significance. Mr Cellante was an individual defendant and the general manager of Astvilla and Perna. Mr Cellante's alleged misrepresentations in relation to the price of the house, in particular, were central to the Director's case against both Mr Cellante and the companies. The evidence in relation to this subject deserved careful consideration. Such a consideration would have revealed the findings could not have been made in the terms adopted.

104. While the magistrate was mistaken to make findings that Mr Cellante made representations in precisely the language attributed to him, I do not think this means his decision was made in error of law. On this aspect of the case, the decision, as it concerned all three defendants, was based, to a significant degree, on the finding that Mr Cellante misrepresented the house to be a good buy at the price, that is, to be reasonable in price. There was evidence to support such a finding. In the context in which Mr Cellante was speaking, to congratulate Ms Brown on her purchase, to tell her it was a wonderful house and a good house, and to tell her she had done well, was capable of carrying the implicit representation that the house was a good buy at the price, that is, reasonably priced.

105. This brings me to the related and equally important attack of counsel for Cellante on the finding of the magistrate that the companies, as well as Mr Cellante, had misrepresented the price to be fair and reasonable (paragraphs 116 -122 of the reasons for decision). This is an important point. If the magistrate erred in law in concluding that this misrepresentation had been made, the case against Cellante was much weaker, if not destroyed.

106. Counsel began his submission on this subject by pointing to paragraphs 19(d) and (h) of the particulars of claim. These alleged Mr Wissell advised Ms Brown on 17 June 2001 that "he could immediately sell the property five times over at the price" and "the price of the property was fair and reasonable" respectively. Cellante submitted these representations were not proved and none of the evidence supported a finding that the house was represented to be reasonably priced.

107. Ms Brown's uncontested evidence was Mr Wissell told her the "house was a very popular house and that he could sell that house no problems at all. He actually said that he could sell the house five times over." She left out "at the price."

108. I think it was legally open to infer from Mr Wissell's words that the house could be sold "no problems at all ... fives times over" that he was representing it could be so sold at the price Ms Brown was being offered it. The magistrate was entitled to treat this not as real estate puffery (paragraph 118 of the reasons for decision) but as a false representation as to price. We have seen Mr Cellante used similar language – Ms Brown deserved to be "congratulated"; it was a "wonderful house" she'd got; she'd "done well." This was also supportive of such an inference.

109. Some other of the magistrate's findings could only be justified as reasonable interferences, and a number of these were quite important. For example, his Honour found Cellante misrepresented the property to be in demand, so Ms Brown had to buy it immediately or lose it (paragraphs 94 and 97). He found Cellante misrepresented itself to be the owner of the property (paragraphs 93-94, 98 and 115). And he found Cellante used the Dimboola property to entice Ms Brown to Horsham, when it was not available, then showed her other properties, which were unsuitable.

110. All of these inferences were open on the evidence. Given the uncontested nature of the evidence of Ms Brown, and, indeed, that of the true owner of the property, Mr Taylor, I find it hard to see how the magistrate could have avoided drawing these inferences.

111. Counsel for Cellante submitted Cellante had an equitable interest in the property arising out of the verbal agreement to buy it from Mr Taylor. Whether or not this is correct, there was no error of law in the magistrate finding that Cellante lacked the capacity to sell with the property as its owner, which is the capacity it misrepresented it had.

112. In relation to the magistrate's findings concerning the value of the property, Cellante contended it was not open on the evidence to find a value of $25,600.00, being the amount for which the property was sold by Mr Taylor to Perna.

113. The value of the property was a matter of fact for the magistrate to find. He had the evidence of Mr Wilson – the valuer with local experience who based his valuation on local sales on ordinary terms – and Mr Hocking – the valuer from Melbourne who based his valuation on six other Cellante sales on vendor terms. It was for the magistrate to evaluate this evidence. Paragraph 101 of his reasons for decision shows he did so. His Honour was entitled to act upon the basis of Mr Wilson's evidence. He was not legally bound to accept Mr Hocking's evidence.

114. As I have already said, the findings on which the decision of the magistrate depended were, in summary, that Cellante misrepresented itself to be the owner of the property, that it knew Ms Brown to be inexperienced, that it misrepresented the property to be reasonably priced and that it misrepresented the property to be in high demand so, if Ms Brown wanted it, she would have to buy it immediately. These findings were open on the evidence.

115. The ground of appeal that the findings were not open on the evidence must be rejected.

DID THE MAGISTRATE MISCONSTRUE THE *FAIR TRADING ACT*?

116. Counsel for Cellante submitted the magistrate erred in law in finding Astvilla, Perna and Mr Cellante had contravened s7(1) of the *Fair Trading Act* by engaging in unconscionable conduct. It was submitted his Honour's findings were not open on the evidence and must have been based on a misconstruction of the meaning of "unconscionable conduct" in s7(1). He likewise submitted the findings of the magistrate of misleading or deceptive conduct must have been based on a misconstruction of s9(1).

117. It is clear from the decision of the High Court of Australia in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Limited*[17] that to make a finding of unconscionable conduct under s7(1), the magistrate had to be satisfied that Ms Brown was at a special disadvantage in her dealings with Cellante, which seriously affected her ability to make a judgement in her own interests, and of which Cellante took unconscientious advantage. Inequality of bargaining power would not of itself be enough,[18] and the findings had to be made in respect of the companies and Mr Cellante individually.

118. The magistrate specifically addressed the question whether Ms Brown was under a special disability or disadvantage (see paragraph 126 of the reasons of decision, which you will find above). He had listed Ms Brown's personal circumstances in paragraph 86 (also above). His Honour said these circumstances were not contested, which, in the appeal before me, counsel for Cellante disputed. And he submitted the real question concerned what the companies and Mr Cellante knew when they engaged in the alleged unconscionable conduct.

119. I think it was open on the evidence to justify a finding that the companies and Mr Cellante knew the matters listed in paragraph 86. But it is clear beyond argument that they knew Ms

Brown was a single mother with young children, was receiving the sole parent's pension, was a renter, was buying a house for the first time and was looking for a cheap house in the country which she could only afford on vendor terms. These facts showed for themselves that, as against Cellante, Ms Brown was in a position of special disadvantage. The magistrate found it took unconscientious advantage of Ms Brown by creating an atmosphere that kept her in a state of ignorance and inexperience, which involved a finding that Cellante knew she was in a position of special disadvantage (see paragraphs 126 and 128 of the reasons for decision). His Honour's findings of fact in this regard are legally unimpeachable.

120. His Honour's understanding of the legal meaning of "unconscionable conduct" in s7(1) may be inferred from his citation of a passage in the judgement of Dodds-Streeton J in *National Australia Bank v Walter*.[19] With respect, I endorse the passage as a correct statement of the law. There is no material difference between the law as stated in *ACCC v Berbatis* and *NAB v Walter*. The magistrate relied upon the correct legal principles and did not misconstrue "unconscionable conduct" in s7(1).

121. Counsel for Cellante submitted the magistrate had incorrectly rolled-up the misleading and deceptive conduct case and the unconscionable conduct case, which led him to fail to identify the conduct that was said to be unconscionable.

122. His Honour's reasons for decision show he appreciated the unconscionable conduct case required satisfaction of additional elements. This is why he cited *NAB v Walter* and addressed those elements.

123. On the facts found by the magistrate, there was an obvious connection between the misleading or deceptive conduct case and the unconscionable conduct case. His Honour found the companies and Mr Cellante had engaged in misleading or deceptive conduct in contravention of s9(1). Cellante has not established that the magistrate misconstrued this provision or otherwise erred in law in his approach to this question. But, on same facts, the Director also put forward a case of unconscionable conduct under s7(1). So the magistrate went on to consider whether, by engaging in the same conduct, the companies and Mr Cellante had taken unconscientious advantage of Ms Brown, knowing her position of special disadvantage. He found that they had. His Honour did not err in law in adopting this approach.

124. Counsel for Cellante made a particular submission on behalf of Mr Cellante. He submitted the magistrate did not appreciate he had to make findings on the evidence in respect of the liability of each of the companies and Mr Cellante separately, and he did not do so as regards Mr Cellante. That the magistrate did have to deal with the cases separately is undoubtedly correct. But the reasons for decision show he did consider Mr Cellante's personal liability separately (see for example paragraphs 109 and 112-115).

125. The magistrate did not misconstrue, or adopt an approach that involved the misconstruction of, ss7(1) or 9(1) or the *Fair Trading Act*. This ground of appeal is rejected.

SHOULD ORDERS HAVE BEEN MADE AGAINST MR CELLANTE?

The issues

126. Counsel for Cellante submitted orders should not have been made against Mr Cellante. He submitted, first, the case had been put under s143(1) of the *Fair Trading Act* 1999, and this section did not allow orders to be made against an officer of a company in proceedings that were not for an offence against the Act. And, second, he submitted an employee, especially not an employee like Mr Cellante, who was the embodiment of the company, could not be found directly liable under ss7(1) or 9(1) for contravening conduct engaged in on behalf of the company.

127. The further amended complaint did not make clear whether the Director put his case against Mr Cellante upon the basis that he was liable as a deemed contravener under s143(1) or upon the additional or alternative basis that he was directly liable for his own contravening conduct under ss7(1) and 9(1). Counsel for Cellante raised this at the end of the opening of counsel for the Director, who clarified the position. This is what counsel for the Director said:

> "Sir, if I might take you to s9 of the Fair Trading Act, misleading and deceptive conduct. Now, what

> the plaintiff says sir, is that a person, Mr Cellante, must not in trade or commerce – he is an officer of Astvilla and Perna – and it is their trade or their commerce and it is engaged in conduct that is misleading or is likely to mislead or deceive.
>
> If you then look at s143, and if a contravention has taken place of s9, he as an officer of the body corporate is deemed to have contravened the same provision. If he knowingly authorised or permitted that contravention."

There was then an exchange between counsel for the Director and the magistrate, the result of which was that the magistrate confirmed his understanding that the Director was relying on ss7, 9 *and* 143. The Director then proceeded with his first witness.

128. The remarks of counsel for the Director made clear he was putting the case against Mr Cellante on the basis he was liable as a deemed contravener under s143(1) and also upon the basis he was directly liable under ss7(1) or 9(1). The closing submissions of the Director put the case against Mr Cellante on both of these bases. The closing submissions made on behalf of the Cellante companies and Mr Cellante answered the submissions on both of these bases.

129. I therefore conclude the liability of Mr Cellante as a deemed contravener under s143(1), and further or alternatively as a direct contravener under ss7(1) or 9(1), was an issue before the magistrate.

130. The magistrate made orders against Mr Cellante, but did not specifically mention s143(1). Before this Court, counsel for the Director submitted his Honour's orders were supported by s143(1). This may be so, but the magistrate also mentioned a New South Wales case in which an employee was held directly liable under the fair trading legislation of that State.[20] I therefore invited the parties to make further submissions in relation to both alternative bases for the liability of Mr Cellante.

131. It was conceded by counsel for Mr Cellante that he was an officer of Astvilla and Perna for the purposes s143(1).

Liability of officers of corporations under the *Fair Trading Act*

132. This is s143 of the *Fair Trading Act*:[21]

> "**143 Offences by bodies corporate**
> (1) If a body corporate contravenes any provision of this Act, each officer of the body corporate is deemed to have contravened the same provision if the officer knowingly authorised or permitted the contravention.
>
> (2) A person may be proceeded against and convicted under a provision in accordance with sub-section (1) whether or not the body corporate has been proceeded against under that provision.
>
> (3) Nothing in this section affects any liability imposed on a body corporate for an offence committed by the body corporate against this Act."

133. Counsel for the Director submitted s143(1) deemed Mr Cellante to have contravened the Act. This brought him within the scope of s149(1) (relating to injunctions) and s158(3) (relating to compensation). This submission was based upon the generality of the language in s143(1). By this language, an officer who knowingly authorised or permitted a corporation to contravene the Act is simply deemed to have contravened the Act personally. Counsel for the Director submitted s143(1) did not itself qualify the kinds of proceedings to which this deeming applied and no qualification could be otherwise discerned.

134. The meaning of a provision is to be ascertained, in the first instance and not just to resolve any ambiguity, from its immediate context and the context of the statute as a whole,[22] including its objects.[23] It would therefore be wrong to take s143(1) out of this context and then try to interpret it on its own, which is what the submissions of counsel for the Director invite me to do.

135. Section 143 came in with the *Fair Trading Act* when it was originally enacted in 1999. It has not been amended since, although many other provisions have been. The natural context of

s143(1) is the Act in its pre-amended 1999 form. I think the later amendments to other provisions were not intended to alter the original meaning of s143(1).

136. When enacted in 1999, s143 formed part of Division 1 of Part 11, as it still does. The Part 11 heading was: "Enforcement and remedies." The Division 1 heading was: "General enforcement provisions." Division 1 contained s142 ("prosecutions of offences"), s143 ("offences by bodies corporate"), s144 ("imputing state of mind to bodies corporate") and s145 ("liability of body corporate or employer for acts of others"). Putting aside the controversy about s143(1), all of these provisions related to proceedings for an offence against the Act. This context supplies a strong pointer that the whole of Division 1, including s143(1), was intended to relate only to proceedings of this kind.

137. The Act contemplated the bringing of proceedings of several different kinds. At the greatest level of generality, s144(3), for example, referred to "any proceedings under the Act." Therefore, when the drafters wanted a provision to apply to any proceeding, they used general words of this kind. Next, s158(3) referred to proceedings under s149 (for an injunction), s150 (for an interim injunction) and s159 (for damages). Section 155(8) contained no less than four separately specified kinds of proceedings. Therefore, when the drafters wanted a provision to apply to a particular kind, or several particular kinds, of proceedings, they used appropriate words to give effect to this intention. Finally, s158(1), as well as many other provisions, including those in Division 1 of Part 11, referred to proceedings for an offence against the Act. Therefore, when the drafters wanted to limit the application of a provision to a proceeding of this kind, they did so, as they did in the provisions of Division 1, with the single exception of s143(1). Overall the drafting pattern is clear: particular provisions applied to particular proceedings and not others, or to any proceedings, depending upon the words used to describe the proceeding concerned.

138. In its original form, Part 11 of the *Fair Trading Act* 1999 did not contain accessorial provisions of the kind now found in s145. Section 31 of the *Fair Trading Act* 1985 did, but they were left out of the 1999 Act. The 1985 Act did not contain a provision like s143. I have considered whether the new s143(1) was intended to take the place of the previous s31. But s143(1) is self-evidently not a "person involved" provision in the terms commonly found in trade practices legislation, while s31 was. Section 143(1) is expressed in terms of a deeming provision. It is much narrower in scope than a civil accessorial provision, like the earlier s31 and the later s145. I cannot accept that the legislature, when it left out s31 and brought in s143(1), intended thereby significantly to reduce the scope of accessorial liability in civil cases. The differences in the terms and the context of the two provisions, and the later introduction of s145 to fill the gap left in the 1999 Act, preclude me from interpreting s143(1) as even a partial replacement for s31 in civil cases.

139. When s145 was introduced in 2003,[24] s143 was not touched. On the interpretation of the counsel for the Director, s143(1) is a deeming provision capable of applying to civil as well as to criminal proceedings. If this is right, in its operation in civil cases, s143(1) previously covered, and must therefore still cover, some of the ground now covered by s145. So interpreted, the two provisions could conceivably sit side by side - s143(1) applying to the civil liability of officers of corporations and s145 applying to the civil liability of accessories generally. However, such a construction seems highly artificial. It is far more likely that s145 was brought in because the 1999 Act in its original form omitted to make provision for accessorial liability in civil cases, in s143(1) or otherwise.

140. Under the *Fair Trading Act* 1999, until s145 was introduced in 2003, a civil action could not be brought against an accessory as there was no "person involved" provision. The Director would say there must be an exception to this general proposition - civil liability could be brought home to an officer of a corporation through s143(1). On this construction, officers of corporations formed part of a category of their own. This is an extremely unlikely construction. The more likely one is that the legislature simply failed to make provision for civil accessorial liability at all, which it corrected in 2003.

141. Each of ss142, 144 and 145(1) and (2) specifies the proceeding to which the provision relates as a prosecution for an offence against the Act. Sections 143(2) and (3) use slightly different language, namely that a person may be "proceeded against and convicted" under s143(1). Unmistakeably, this too is a reference to a proceeding for an offence against the Act. Section

143(2) assumes that s143(1) applies to a proceeding of this kind, as does s143(3). It is true that neither of these provisions expressly states s143(1) applies only to a proceeding of this kind. But the immediate context supplied by the provisions of Division 1 and the general context supplied by the Act as whole shows this was the statutory intention.

142. The objects of the *Fair Trading Act* 1999 mainly are "(a) to promote and encourage fair trading practices and a competitive and fair market; (aa) to protect consumers; [and] (b) to regulate trade practices..."[25] These objects are promoted by construing s143(1) so as to bring about deemed contravention, in the circumstances specified, for officers of companies in civil cases. They are not promoted by construing the provision so as not to apply to such officers in civil cases. Therefore, the former construction is to be preferred.[26] However, for the reasons I have given, I think this construction is not open.

143. In my view, properly interpreted, s143(1) applies only to a proceeding for an offence against the Act. Since the proceeding brought by the Director was not a proceeding of that kind, the magistrate's orders against Mr Cellante could not be supported under s143(1).

Direct liability of employees under the *Fair Trading Act*

144. Whether or not the magistrate also acted under s143(1) of the *Fair Trading Act*, it is clear from his reasons for decision that he considered Mr Cellante was directly liable for misleading or deceptive or unconscionable conduct engaged in by him as an employee on behalf of Astvilla and Perna. He applied the requirement that the employee must not have acted merely as a conduit[27] and made all the findings necessary for Mr Cellante to be directly liable.

145. It is therefore necessary to decide whether, under ss7(1) or 9(1) of the *Fair Trading Act*, an employee can be directly liable for misleading or deceptive conduct, or unconscionable, conduct engaged in for an employer.

146. In some cases the issue is whether, in the criminal law context, the contravening conduct of an employee can be attributed to a company for the purposes of shooting home liability to the company. I have recently dealt with this issue in another legislative context.[28] I there decided it was a question of construction whether the company could be so liable, and the policy of the legislation was an important consideration. The present case raises the opposite issue – the employee contends, in the civil law context, he cannot be found liable for his own contravening conduct because the company alone is so liable. I think the answer to this issue also lies in the proper construction of the legislation, taking its policy into account.

147. Sections 7(1) and 9(1) of the *Fair Trading Act* simply state that "a person must not, in trade or commerce, engage in" the proscribed conduct. A "person" here means a corporation and an individual.[29] The generality of the language strongly suggests the prohibitions were intended to apply to the conduct of any person, without qualification. Therefore, speaking generally, a person, in whatever capacity, in trade or commerce, engaging in conduct that is misleading or deceptive or unconscionable, is exposed to direct liability for the contravention.[30] The natural and ordinary meaning of the language is amply wide enough to support such a construction.

148. It has been said of s52 of the *Trade Practices Act* 1974 (Cth), and it may equally be said of ss7(1) and 9(1) of the *Fair Trading Act* 1999 (Vic), that "the nature of the prohibition imposed ...is ...governed by the terms in which it is created and the context in which it is found."[31] There is nothing in the terms of ss7(1) or 9(1) or in the context of the *Fair Trading Act* to warrant a narrow construction. To confine the operation of the provisions to non-employees, I would have to read down the word "person" to exclude employees and read in a requirement that the trade or commerce be that of the person themselves. Such a construction, quite apart from being contrary to high authority, as I will later show, would not promote the objects of the Act, the main ones of which I have already mentioned. A construction that gives effect to the generality of the language in ss7(1) and 9(1) does promote these objects and is to be preferred. As has also been said of s52(1) of the *Trade Practices Act*, the "generality of the language" of the provisions "must be afforded full weight within the framework" of the policy of the legislation.[32] The reasons that compelled me to adopt a narrow construction s143(1) may be starkly compared with the paucity of reasons for narrowly construing ss7(1) and 9(1).

149. As we have seen, Division 1 of Part 11 contains provisions for the enforcement of the *Fair Trading Act* against corporations and, under s143(1) and (2), officers who knowingly authorise or permit contravening conduct by corporations. The operation of these provisions is in no way affected if employees of corporations are directly liable for misleading or deceptive or unconscionable conduct of their own in their employer's trade or commerce. As an employee, the person is an "officer."[33] If they knowingly authorise or permit the contravention, they are liable to prosecution for an offence under s143(2). If they engage in the contravening conduct, they are directly liable, both to prosecution and civil action. The criminal or civil liability of the corporation is not affected.

150. In s145 of the *Fair Trading Act* 1999 as originally enacted[34] there were positive indications that employees could be directly liable. In summary, s145 made the conduct of an agent or employee, within the scope of their actual or apparent authority, "also" the conduct of their employer.[35] The provisions operated so that, where an agent or employee of another person or company engaged in conduct within the scope of their actual or apparent authority, the conduct was deemed "also" to have been engaged in by the other person or company. The assumption behind these provisions was that the conduct was substantively that of the agent or employee. I think ss7(1) and 9(1) operate on the same basis.

151. We know that, by the *Fair Trading (Amendment) Act* 2003, s145 was substituted with a "person involved" provision in familiar terms. It makes aiders and abetters and other specified persons liable for the conduct of the primary contravener.[36] We also know such a provision, until 2003, was absent from the *Fair Trading Act* 1999. It was therefore missing at the time the events at issue in the present case occurred. Therefore, it cannot be argued in this case that there is an inconsistency between an employee being both directly liable under ss7(1) or 9(1) and liable as an accessory under an accessorial provision like the current s145.[37]

152. If I thought this temporary lack of an accessorial provision affected the analysis, I would review my overall conclusion. I do not think it does, for the following reasons.

153. We have seen that the *Fair Trading Act* 1985 in its original form contained, in s31, a provision like the current s145. It seems to have been left out of the 1999 Act by mistake. In relation to the substantive liability of employees, the Parliament would not have intended the 1985 Act and the Act as amended in 2003 Act to operate differently to the pre-amended 1999 Act. And if we examine the direct liability of employees under s11(1)[38] of the 1985 Act and ss7(1) and 9(1) of the Act as amended in 2003, we see such direct liability does not detract from the operation of s31 of the former or s145 of the latter. Under the 1985 Act and the Act as amended in 2003, an employee, acting as something more than a mere conduit, might be directly liable for misleading or deceptive or unconscionable conduct in their employer's trade or commerce because the contravening conduct was their own; alternatively the employee might the liable as an accessory because they were an intentional[39] participant in contravening conduct of their employer. By contrast, under the pre-amended 1999 Act, which lacked the accessorial provision, the employee could only be directly liable. For these reasons, I think direct liability of employees was a feature of the legislation from the start, and still is.

154. For these reasons, treating the issue as one of pure statutory construction, I would conclude employees can be directly liable for conduct of their own, done in the course of their employer's trade or commerce, which contravenes ss7(1) or 9(1) of the *Fair Trading Act*.

155. Let me now turn now to the decided cases.

156. Prior judicial consideration of this issue may be grouped into three categories – decisions concerning estate agents, company directors and employees.

157. The Full Court of the Federal Court held an estate agent directly liable in *John G Glass Real Estate Pty Limited v Karawi Constructions Pty Limited.*[40] This was a misleading and deceptive conduct case under s52 of the *Trade Practices Act* 1974 (Cth). The agent engaged in conduct beyond "merely passing on information."[41] However the Full Court saw the agent's conduct as an ordinary part of the business of an estate agent, not part of the business of its principal. The case is therefore not an exact analogy with the present, where the employee – Mr Cellante – was acting in his employer's business. In *Pricom Pty Ltd v Sgarioto*[42] Eames J (as he then was) decided

an estate agent who had contravened s11(1) of the *Fair Trading Act* 1985 (Vic) was directly liable. But again, the basis of the decision was that the estate agent, a company, was engaged, through its employee, in "its own trade and commerce."[43]

158. The position of a company director is more closely analogous to that of an employee. There have been several cases in which directors have been held liable, not as accessories to their company's conduct, but directly for their own conduct.

159. *Lauriana Pty Ltd v Corfield Food Warehouse Pty Ltd*[44] arose under the *Fair Trading Act* 1987 (WA). The directors made false and misleading statements on behalf of their company. The company was found liable under s52 of the *Trade Practices Act.* The directors were found liable, both as aiders and abetters under that Act and as direct contraveners under s10 of the *Fair Trading Act.* The directors were not engaged in an independent business; they were engaged in trade or commerce on their company's behalf, like an employee.

160. Another Western Australian case, but in the Full Court of the Federal Court of Australia, is *Arktos Pty Ltd v Idyllic Nominees Pty Ltd.*[45] One question was whether a director was directly liable under s10. The answer given by Carr, Tamberlin and RD Nicholson JJ could not have been clearer:

> "[A] director of a corporation who acts on its behalf in the course of trade or commerce also acts himself or herself in trade or commerce and, if the corporation is liable under a State *Fair Trading Act* for their conduct, they also attract primary liability under the same statute..."[46]

161. The director was held directly liable in *Nescor Industries Group Pty Ltd v Miba Pty Ltd*,[47] which concerned the Victorian legislation. The trial judge found[48] that, acting on behalf of the company, the director misled the buyer of the company's franchise. He was not a mere passer-on. [49] Again, the company was held liable under s52 of the *Trade Practices Act* and the director was held liable under the State legislation, this time s11(1) of the *Fair Trading Act* 1985. The appeal to the Full Court failed. Davies J (Tamberlin and RD Nicholson JJ agreeing) saw a director as a species of agent (as is, I would add, an employee):

> "Agents may be held to be in breach of the statutory provision because they are directly responsible for the misleading information or because the fact that the information has come from them has added something to its weight and authority."[50]

162. *Cleary v Australian Co-Operative Foods Ltd*[51] was decided under the *Fair Trading Act* 1987 (NSW). The directors, acting on behalf of the company, engaged in misleading and deceptive conduct. Under the NSW legislation, the conduct of the directors was deemed to be that of their company. Austin J found them to be directly liable. Therefore it was not necessary to consider the question of their liability as accessories.[5]

163. I can now turn to cases involving employees, of which there are three.

164. The first is *Australian Competition and Consumer Commission v McCaskey.*[53] Here French J made orders by consent against an employee and her employer company in relation to contravening conduct in which she engaged on its behalf. This is an unusual federal case. As the conduct involved the use of telephonic services, the prohibitions in the *Trade Practices Act* 1974 applied both to the employee as an individual and to the employer as a company. The legislative context is therefore analogous to the prohibitions in the *Fair Trading Act*. Before making the orders, French J satisfied himself they were called for. The orders against the employee could only be justified if her conduct gave rise to concurrent liability for her and her employer.

165. The second is *Daniel Wong v Citibank Ltd*,[54] a decision of the New South Wales Court of Appeal. The defendant, like Mr Cellante, was employed as the general manager of a company. She engaged in misleading and deceptive conduct on behalf of her employer. The company was sued under s52 of the *Trade Practices Act* and she was sued under s42 of the *Fair Trading Act* 1987 (NSW). The trial judge reviewed the authorities, found she was not a mere conduit and held that she, as an employee, and the company, as her employer, were liable under the state and federal legislation respectively. As to her liability under the state legislation, Hamilton J said this;

> "The FTA proscribes conduct by natural persons. If that conduct is in trade or commerce and cannot

> be said not to be misleading conduct of the person who engages in it by reason that that person is acting merely as a conduit, in my view the person is not removed from the purview of the Act by the fact he engages in the conduct as the employee of another."[55]

166. Dismissing the appeal, Beazley JA (Sheller and Bryson JJA agreeing) said:

> "As a matter of law, an employee acts as agent for the employer. There is no basis in principle why different rules should apply to agents who are appointed in different circumstances. Provided that a party alleging the contravention is able to establish that the agent is liable within the principles stated in *Yorke v Lucas*, then liability under the section attaches, notwithstanding that the agent in question is an employee acting within authority in the course of employment."[56]

167. The third is *Arms v Houghton*,[57] a decision of the Full Court of the Federal Court of Australia concerning the *Fair Trading Act* 1999 (Vic) in its pre-amended form, the very form applicable in the present case. The trial judge decided the employee defendants could not be directly liable for misleading and deceptive conduct in which they engaged on their employer's behalf. The appeal was upheld. Nicholson, Mansfield and Bennett JJ reviewed the authorities, most of which I have dealt with here, and firmly concluded that employees could be directly liable:

> "The acceptance of the principle of possible employee liability in the circumstances considered in these reasons has not yet been considered by the High Court. If there are reasons upon which to distinguish the position of an employee in that respect from a director, they have not been articulated either by the Full Court in *Arktos*, the Court of Appeal in *Wong* or in argument before this Court... Furthermore, if there were some foundation in principle it would not appear to be likely to be germane in the context of s9 of the FTA 1999. That provision is to be understood in the context of its enacted objectives as explained by the Minister and in the absence from that Act of any provision for accessorial liability which might arguably be utilised to provide a foundation for argument that the statute should be otherwise construed." [58]

168. These decisions strongly support the construction of the *Fair Trading Act* I prefer.

169. Counsel for Mr Cellante invites me to distinguish or not follow these decisions. He submits Mr Cellante cannot be found directly liable under ss7(1) and 9(1) of the *Fair Trading Act* 1999 because, to pick up the words of Lord Reid in *Tesco Supermarkets Ltd v Nattrass,*[59] he was the "embodiment of the company." It was submitted that Mr Cellante "so dominated the business and affairs...[of Astvilla and Perna] ... that his conduct was the conduct of each of the companies."[60]

170. The logic of the analysis in the above decisions does not support the drawing of a distinction between one kind of agent, director or employee and another. To take employees as an example, they have been found to be liable where, within the scope of their authority, acting as more than a mere conduit and in their employer's trade or commerce, they have engaged in contravening conduct. This principle of liability comes from the provisions of the state and federal legislation, which are in relevantly common terms, and is applicable to all such employees, including employees who embody the company.

171. I mentioned the terms of the legislation. Sections 7(1) and 9(1) of the *Fair Trading Act*, for example, prohibit a person from engaging in the proscribed conduct "in trade or commerce." One necessary basis of the decisions on the direct liability of employees, and many decisions in analogous situations, is that the conduct said to be contravening can be "in" someone else's trade or commerce. This basis is well established.[61]

172. Counsel for Mr Cellante relies upon the decision of the High Court in *Hamilton v Whitehead* [1988] HCA 65; (1988) 166 CLR 121; 82 ALR 626; (1988) 63 ALJR 80; [1989] ATPR 40-923; 7 ACLC 34; 14 ACLR 493. This case is distinguishable. It concerned the question whether a managing director could be held liable as an accessory under companies and securities legislation for contravening conduct of his own which the legislation treated as the direct conduct of the company as a principal. It did not concern, and the result in the case does not demand a particular answer to, the different question whether an employee and an employer can both be liable under trade practices or fair trading legislation for contravening conduct of the employee. I also point out the legislation in *Hamilton v Whitehead* contained no analogue to the particular words in ss7(1) and 9(1) that make a person potentially liable for contravening conduct "in" someone else's trade or commerce.

173. The state fair trading legislation gives effect to a cooperative state-federal scheme for the national regulation of trade and commerce in accordance with widely-accepted trade practices principles. It is highly desirable that the same answers be given to legal questions about important aspects of the operation of the legislation in different states, especially where the enactments are not in materially different terms. At least in relation to misleading or deceptive, and unconscionable, conduct the state fair trading legislation is uniform. Therefore I should apply the principle of interpretation governing the interpretation of uniform legislation. According to this principle, I, especially as a single judge, would not depart from the interpretation adopted by an Australian intermediate appellate court unless convinced that the interpretation was plainly wrong.[62] This principle applies to the decision of the New South Wales Court of Appeal in *Wong v Citibank Limited*[63] but with special force to the decision of the Full Court of the Federal Court of Australia in *Arms v Houghton*.[64] Although this decision is not binding, it is a unanimous decision of an intermediate appellate court concerning the Victorian legislation and directly on point.

174. I do not consider the decisions reviewed above to be plainly wrong. I consider them to be correct. In particular, for the reasons given in my own analysis of the *Fair Trading Act* 1999, I consider that, with respect, the Full Court of the Federal Court of Australia correctly decided *Arms v Houghton*.

175. I therefore conclude the magistrate correctly decided Mr Cellante, as the employed general manager of the companies, could be found directly liable under ss7(1) and 9(1) of the *Fair Trading Act* 1999 for the misleading or deceptive conduct, and unconscionable conduct, in which he engaged on their behalf.

THE RESTRAINING ORDER: The restraining order was supported by valid findings of fact

176. The magistrate made an order against Cellante restraining the companies and Mr Cellante from "making representations in trade or commerce that they are the owners of properties when they are not in fact the owners."

177. Counsel for Cellante attacked the restraining order on the same three grounds upon which he attacked the decision of the magistrate generally, namely that the findings went beyond the particulars, the findings went beyond the evidence and the findings involved the misinterpretation of ss7 and 9 of the *Fair Trading Act.* As the attack upon the findings of the magistrate on each of these three grounds has been rejected, the attack upon the restraining order on these grounds must also be rejected.

The restraining order was not too wide

178. On the invitation of the Court the parties made submissions on whether the terms of the restraining order were too wide. Counsel for Cellante submitted that the terms were too wide.

179. If the order purported to restrain Cellante from selling properties that it did not own at the time of sale, there would be a strong argument that it was too wide. The provisions of Parts I and II of the *Sale of Land Act*[65] permit a person who satisfies the statutory requirements to sell under a terms contract land that the person does not "own." It would be wrong to restrain a person from doing what he or she may lawfully do. However, this is not what the restraining order made by the magistrate does.

180. The order restrains Cellante from selling properties by representing that it is the owner of the properties when it is not. The terms of the order arise directly out of the findings of the magistrate about the nature of the misleading or deceptive, and unconscionable, conduct that Cellante engaged in. These findings are set out in paragraphs 111 - 115 of the magistrate's reasons for decision (see above).

181. As these findings reveal, the magistrate considered it was central to the contravening nature of the conduct that Cellante had misrepresented to Ms Brown that it was the owner of the property. It was this misrepresentation that enabled Cellante to create an atmosphere of urgency and pressure. Unless Ms Brown was made to believe that Cellante, because it owned the property, could, virtually overnight, sell it to somebody else, she could not be induced to buy it herself on the first visit. If she knew the property did not belong to Cellante, and Cellante had no more than an oral agreement to buy it, she would have been put seriously on her guard.

182. It made sense, therefore, to cast the order in the terms that the magistrate adopted. The order clearly and unequivocally restrains Cellante from engaging in the conduct found to be contravening, as required by s149 of the *Fair Trading Act*. The order does not restrain Cellante from engaging in lawful trading activity. Cellante can continue to sell property under terms contracts in compliance with the provisions of the *Sale of Land Act*. But, if it does so by representing that it owns property when it does not, it will be in breach of the order of the magistrate. Therefore, the terms of the restraining order were not too wide.

CONCLUSION

183. The Director of Consumer Affairs brought a test case against the Cellante property organisation alleging that, when it sold a house to Kerrie Brown, it engaged in misleading or deceptive, and unconscionable, conduct in contravention of ss7(1) and 9(1) of the *Fair Trading Act* 1999.

184. The Director sought, from the Magistrates' Court of Victoria, an order for damages for Ms Brown and an order restraining Cellante from selling properties in the same way in the future.

185. The magistrate heard the evidence and found Ms Brown was a single mother with young children, was receiving the single parent's pension, was living in a rented house in a suburb of Melbourne and wanted to buy a cheap house in the country on vendor terms. After contacting Cellante, Ms Brown drove to Horsham in north-western Victoria and met a Cellante salesperson. On that day, for $55,000.00, and for the first time in her life, she bought from Cellante a house in a nearby town - a house Cellante did not own, which it had agreed orally to buy only days earlier for $25,600.00 and which had been on the market for years.

186. The magistrate found Cellante, on the pretext it owned the house, convinced Ms Brown, whom it knew to be inexperienced, to buy the house, at a price represented to be reasonable, which was false, and immediately, because the property was in high demand, which was also false.

187. The magistrate upheld the Director's case. His Honour found Cellante had engaged in misleading or deceptive, and unconscionable, conduct in the way it sold the house to Ms Brown. The Cellante companies, Astvilla Pty Ltd and Perna Pty Ltd, and their general manager, Livio Cellante, were ordered to pay her damages and interest. To protect other buyers in the future, they were also ordered not to make representations in trade or commerce that they are the owners of properties when in fact they are not owners.

188. Cellante appealed to this Court on a question of law. It submitted the findings of the magistrate were not open on the pleadings or the evidence, the magistrate misconstrued the *Fair Trading Act* and no orders could or should have been made against Mr Cellante.

189. I reject each of Cellante's grounds of appeal and uphold the decision of the magistrate and the orders his Honour made. Cellante well knew the case the Director put against it. The magistrate made no legal errors in the way he conducted the hearing or dealt with the pleading issues. The findings that Astvilla, Perna and Mr Cellante had engaged in misleading or deceptive, and unconscionable, conduct were open on the evidence. The magistrate did not misconstrue the legislation and he properly applied the correct legal tests.

190. Cellante has established that s143(1) of the *Fair Trading Act* did not allow the magistrate to make orders against Mr Cellante, being an officer of the Cellante companies, as a deemed contravener. This provision applies only to proceedings for an offence, whereas the proceedings brought by the Director were civil in nature. But the magistrate's orders against Mr Cellante were still valid. He correctly decided the prohibitions in the *Fair Trading Act* against misleading or deceptive, and unconscionable, conduct applied directly to employees who, like Mr Cellante, had engaged in such conduct in their employer's trade or commerce as something more than a mere conduit.

191. The appeal is dismissed.

[1] More precisely, on 22 June 2004 and 13 July 2004 the magistrate ordered Astvilla, Perna and Mr Cellante

and each of them to pay Ms Brown damages in the amount of $29,984.00 and interest of $5,679.76 and damages in the amount of $1,600.00 and interest of $303.06, together with costs. This order appears in the order made by Master Kings in this Court on 11 August 2004. Counsel for the parties informed me this could be treated as an accurate source of the terms of the orders made by the magistrate.

[2] The order made was that Astvilla, Perna and Mr Cellante be restrained from "making representations in trade or commerce that they are owners of properties when they are not in fact the owner" (taken from the order of Master Kings).

[3] *Dare v Pulham* [1982] HCA 70; (1982) 148 CLR 658 at 664; 44 ALR 117; 57 ALJR 80; *Leotta v Public Transport Commission (NSW)* (1976) 9 ALR 437 at 446; (1976) 50 ALJR 666; *Water Board v Moustakas* [1988] HCA 12; (1988) 180 CLR 491 at 497; (1988) 77 ALR 193; (1988) 62 ALJR 209; [1988] Aust Torts Reports 80*; Mummery v Irvings Proprietary Limited* [1956] HCA 45; (1956) 96 CLR 99 at 100; [1956] ALR 795; *Douglas v John Fairfax & Sons Ltd* [1983] 3 NSWLR 126 at 133.

[4] At 133 (citations in the text omitted).

[5] (1997) 150 ALR 633; [1998] ATPR 41-609. See also *Steutel v Kimple Pty Ltd* [2005] VSCA 312 (21 December 2005) at [41] per Nettle JA: "While the pleadings are intended to mark out the area of a dispute, the evidence travelled beyond the pleadings and in the way in which the trial was conducted the failure to amend the pleadings did not preclude the case being decided on the evidence."

[6] *Miba Pty Ltd v Nescor Industries Group Pty Ltd* (1996) 141 ALR 525 at 543; [1996] ATPR 41-534.

[7] At 640.

[8] At 650.

[9] The ruling is at page 56 of the transcript.

[10] *Intrac (Sales) Pty Ltd v Riverside Plumbing & Gas Fitting Pty Ltd* (1997) ATPR 41-572 at 43,942.

[11] Ibid at 43,943.

[12] (1997) ATPR 41-572.

[13] At 43,942.

[14] Rule 4.02 of the *Magistrates' Court Civil Procedure Rules* 1999.

[15] For the rule that governs the pleadings see (1997) ATPR 41-572 at 43,942-43,943 and for the rules that govern the conduct of a trial see at 43,948-43,949.

[16] *Transport Accident Commission v Hoffman* [1989] VicRp 18; [1989] VR 197 at 199; (1988) 7 MVR 193.

[17] [2003] HCA 18; (2003) 214 CLR 51 at 77; (2003) 197 ALR 153; (2003) 24 Leg Rep 2.

[18] At 64.

[19] [2004] VSC 36 (16 February 2004) at [340].

[20] Par 114 of his Honour's reasons for decision. The case is *Citibank Ltd v Liu* [2003] NSWSC 569 and it is discussed below.

[21] I have included the section heading for completeness but it is not part of the Act as s143 was not enacted or amended after 1 January 2001: see s36(2A)(c) and (d) of the *Interpretation of Legislation Act* 1984.

[22] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; (1985) 157 CLR 309 at 315; (1985) 60 ALR 509; [1985] Aust Torts Reports 80-323; (1985) 3 ANZ Insurance Cases 60-653; (1985) 2 MVR 289; (1985) 59 ALJR 658.

[23] *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCATrans 242; (1997) 141 ALR 618; (1997) 187 CLR 384 at 408.

[24] By s58 of the *Fair Trading (Amendment) Act* 2003.

[25] Section 1.

[26] Section 35(a) of the *Interpretation of Legislation Act* 1984.

[27] Par 114 of the reasons for decision.

[28] *ABC Developmental Learning Centres Pty Ltd v Wallace* [2006] VSC 171 (3 May 2006); 161 A Crim R 250.

[29] Section 38 of the *Interpretation of Legislation Act* 1984.

[30] Of course an employee who acts as nothing more than a mere conduit may not be regarded as engaged in contravening conduct and an employee who engages in contravening conduct outside the scope of their authority may not be regarded as acting in their employer's trade or commerce (see below).

[31] *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661 at 668; (1985) 61 ALR 307; (1985) 59 ALJR 776; [1985] ATPR 40-622.

[32] *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 612; (1990) 92 ALR 193; (1990) 64 ALJR 293; 17 IPR 39; [1990] Aust Torts Reports 81-020; [1990] ATPR 41-022; [1990] ASC 55-970.

[33] Section 3.

[34] As in s144(2) and (3) now.

[35] Again, as s144(2) and (3) do now.

[36] The one exception, not presently material, is the reference in s145(c) to a "party."

[37] See A*rms v Houghton* [2006] FCAFC 46 (30 March 2006) at [43]; 151 FCR 438.

[38] This was the equivalent of s9(1); there was no equivalent of s7(1).

[39] *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661 at 670; (1985) 61 ALR 307; (1985) 59 ALJR 776; [1985] ATPR 40-622.

[40] (1993) ATPR 41-249.

[41] At 41,359 per Davies, Heerey and Whitlam JJ.

[42] [1994] ATPR (Digest) 46-135.

[43] At 53,662.

[44] Supreme Court of Western Australia, 28 April 1995, unreported.
[45] [2004] FCAFC 119 (10 May 2004); [2004] ATPR 42-005.
[46] At [13].
[47] (1997) 150 ALR 633; [1998] ATPR 41-609. I have already mentioned this case in another context.
[48] *Miba Pty Ltd v Nescor Industries Group Pty Ltd* (1996) 141 ALR 525; [1996] ATPR 41-534.
[49] At 540-541.
[50] At 641.
[51] [1999] NSWSC 991; (1999) 32 ACSR 701.
[52] At 717.
[53] [2000] FCA 1037; (2000) 104 FCR 8; 183 ALR 159.
[54] [2004] NSWCA 396 (3 November 2004).
[55] *Citibank Ltd v Liu* [2003] NSWSC 569 (26 June 2003) at [53].
[56] At [19].
[57] [2006] FCAFC 46; 151 FCR 438 (30 March 2006)
[58] At [42]-[43].
[59] [1971] UKHL 1; [1972] AC 153 at 170; [1971] 2 All ER 127; [1971] 2 WLR 1166.
[60] Written submissions dated 27 February 2006 at par 11.
[61] *Concrete Constructions (NSW) v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 613 per Toohey J; (1990) 92 ALR 193; (1990) 64 ALJR 293; 17 IPR 39; [1990] Aust Torts Reports 81-020; [1990] ATPR 41-022; [1990] ASC 55-970.
[62] *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485 at 492; (1993) 112 ALR 627; (1993) 10 ACSR 230; (1993) 67 ALJR 517.
[63] [2004] NSWCA 396 (3 November 2004).
[64] [2006] FCAFC 46; 151 FCR 438 (30 March 2006).
[65] See ss3(1)(b) and (3) and 32(1) and (3).

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