

# IS SILENCE STILL GOLDEN? MISREPRESENTATIONS IN LAND DEALINGS AND THE TRADE PRACTICES ACT 1974 (Cwth)

By

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## 1. Introduction

For the legal purist whose craft is distilling principles through the application of the doctrine of precedent, the appearance of an all embracing statute supplanting the common law is never a very welcome sight. It takes many years for such a statute to find a comfortable residence alongside the principles of the common law which it has modified or even virtually destroyed. Such a statute is the Trade Practices Act 1974 (Cwth). By way of analogy, it was not until 1934 that the High Court<sup>1</sup> eventually faced up to the concept of immediate indefeasibility of registered title, cases still being argued on the basis of the principles that existed under the old deeds system. The Torrens System was about 80 years old by then. One wonders, even given the innate conservatism of the law, what might be left of general principles of contract after 80 years of the Trade Practices Act 1974 (Cwth).

The reason for the general reluctance of the traditionally trained and educated lawyer's cautious approach to any new statute is obvious. As a property lawyer, my initial approach to the Trade Practices Act 1974 (Cwth) was guarded and affected by the belief that, "deep down", this really has little to do with property law or property contracts. How wrong I was.

Therefore, might I begin by making a few observations of my own concerning the provisions of the Act which concern my area of law, largely the sections relating to definitions, consumer protection and remedies? Firstly, I noted that the Act<sup>2</sup> describes certain conduct and says that it is "unlawful" and carries certain, civil consequences. I had not seen anything quite like this since my distant reading of the Criminal Code. Second, the statute does more than merely imply terms into a contract which could be interpreted and dealt with accordingly; it cuts across these rigid, formal boundaries of contract law which constitute the venerated principles worked out largely in the 19th and early 20th century to bring predictability to commercial transactions. Third, it has adopted the language of Equity "unconscionable", "rescission" and, of course, "conduct", as its yardstick. Like Equity, the Act requires the examination of a party's behaviour rather than what he actually agreed as the paramount consideration.

The principles of vendor and purchaser, whilst forged upon the anvil of the Common Law, have been largely shaped by the hammer of Equity. There are accepted standards by which the behaviour of any person disposing of an interest in land and any person acquiring an interest in land are judged. The ritual of the purchaser's search and the subtlety of the vendor's duty to disclose have through the centuries become a part of the lore of Equity. The principles of vendor and purchaser pay scant regard to representations not reduced to writing in any contract and treat any oral representations with virtual contempt.

It is against the ambient light of the death throes of formal contract at the hands of an aggressive Equity<sup>3</sup> that the application of such a ubiquitous statute must be considered.

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1. *Clements v. Ellis* (1934) 51 CLR 217 (even then the Court was divided).

2. SS. 52, 53A.

3. For a recent example, see *Waltons Stores (Interstate) Ltd v. Maher* (1988) 62 ALJR 110 (Enforcement of promise lacking consideration, relaxation of Statute of Frauds).

## 2. Misrepresentations at Common Law — Setting the Stage

### (a) Limitations of parol evidence rule

One of the most difficult areas in the law of contract concerns the effect of statements made during negotiations which later turn out to be false or untrue for one reason or another. The common law has sought to distinguish these statements by classifying them either as warranties and giving them contractual effect, or as mere representations having little or no contractual effect outside the contract.

The standard contract relating to the sale or other disposition of an interest in land, be it a contract for the sale of freehold or evidencing entry into a lease, is usually concluded orally and later reduced to writing. Generally, that writing should contain all the material terms of the agreement that the parties would wish to be actionable in the event of breach or in the event that the subject matter fails to live up to expectations in the hands of the purchaser or the lessee.

Sometimes, the device of the collateral contract is used where a material term amounting to a promise is made orally and not later reduced to writing, even to comply with the Statute of Frauds. It is thought that an oral promise made in consideration of the promisee entering into the main agreement constitutes a unilateral contract which binds the promisor to honour his promise if the promisee entered into the main contract. Evidence could be given of the existence of this collateral contract distinct from the main contract.<sup>4</sup>

Experience has shown, through the cases, that statements or assurances made pre-contractually prior to the formation of a land contract have invariably been oral, have often been made by agents for the vendor or lessor, and have been difficult to show as promissory in character and not merely representational.<sup>5</sup>

At the other end of the spectrum, there are statements which are representations, either true or false, but which were never meant to have contractual force. These might be mere statements of opinion which are not generally actionable, statements as to future possibilities and what is called mere sales talk or puff. Thus, the common law in considering the effect of misrepresentations has had to undertake enquiry into the intention of the parties at the time when the supposedly actionable representation was made. The well known phrase of Bowen L.J. in *Edgington v. Fitzmaurice*<sup>6</sup> that “the state of a man’s mind is as much a fact as the state of his digestion”,<sup>7</sup> underlines the importance of ascertaining the intention of the party making the representation in endeavouring to show that it was a statement of an existing fact, but known at the time to be false. This is sometimes difficult to prove because of the obvious problems with oral evidence.<sup>8</sup>

The object of the “parol evidence rule” is to exclude evidence outside the four corners of the contract (except surrounding circumstances) including direct statements of intention and antecedent negotiations which apparently contradict or vary the language of written instrument.<sup>9</sup> This was possibly partly in homage to the general rule of construction that express words in contracts are to be given their ordinary meaning and partly to limit the time and cost of litigation.<sup>10</sup> Whilst positive encouragement should be given a party to record

4. *De Lasalle v. Guilford* [1901] 2 KB 215 at 219-220.

5. *J.J. Savage and Sons Pty Ltd v. Blakney* (1970) 119 CLR 435 at 442; *Kennard v. Ashman* (1894) 10 TLR 213; *Jones v. Lavington* [1903] 1 KB 253 (additional terms in leases).

6. (1885) 29 Ch D 459.

7. *Ibid.* at 483.

8. *Heilbut Symons and Co. v. Buckleton* [1913] AC 30 at 47; followed in *Major v. Bretherton* (1928) 41 CLR 62 at 67, 73; See also *Ellul and Ellul v. Oakes* (1972) 3 SASR 377 at 380-382.

9. *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales* (1982) 149 CLR 337 at 347.

10. *Prenn v. Simmonds* [1971] 1 WLR 1381 at 1384; *Akot v. Rathmines Investments Pty Ltd* [1984] 1 Qd R 302 at 305-306.

all material terms in writing in any contract, particularly a land contract requiring compliance with the Statute of Frauds,<sup>11</sup> modern trends have made it imperative to strain this rule to admit evidence of oral negotiations to do justice to the parties and the law has resorted to other devices such as the negligent mis-statement and statutory remedies like the Trade Practices Act 1974 (Cwth) to overcome formal evidentiary deficiencies.

Thus, as far as the common law developed until quite recently, statements of fact, (including intention) made pre-contractually, if not incorporated into the contract, considerably limited the party who relied upon them in his choice of remedies.

**(b) Oral misrepresentations amounting to fraud at law**

Where a statement had been made falsely with a manifest intent to deceive, the representee might terminate the contract, provided the contract had not been affirmed with knowledge of the mis-statement and provided that *restitutio in integrum* was still possible. Where rescission was not possible for one reason or another, damages for the tort of deceit would lie against the representor.

Proof of fraud is shown when a false representation had been made, knowingly, or without belief in its truth, or recklessly, or carelessly whether it be true or false, these being the words of Lord Hershell in *Derry v. Peek*.<sup>12</sup> The burden of proving fraud rests upon the victim and this could be a heavy burden to discharge as it requires proof of the absence of honest belief.

**(c) Effect of obligation upon prospective purchaser or lessee to search**

If no falsehood was involved, Equity would permit the person who had relied upon a misrepresentation to his detriment to rescind the contract, provided it had not already been performed. Rescission on the ground of innocent misrepresentation became especially significant with land contracts. This is so because a purchaser had an obligation under the contract to search and satisfy himself as to the state of the vendor's title and the veracity of any collateral warranties given. This search was to be performed between the time of the contract and conveyance. However, certain instances, rescission would be permitted to escape the consequence of an innocent misrepresentation even though the purchaser had an opportunity to search and did not take advantage of it fully.<sup>13</sup>

In *Wilde v. Gibson*,<sup>14</sup> a purchaser of land endeavoured to set aside the conveyance on the ground of the vendor's fraudulent concealment of a defect in title. The House of Lords dismissed the action because the vendor had no knowledge of the defect, and thus could not be regarded as being guilty of fraudulent concealment. In the course of his judgment, Lord Campbell<sup>15</sup> said that where a contract for the sale of land had been executed by conveyance to the purchaser, a Court of Equity will only set aside the conveyance on the ground of actual fraud. If the view in *Derry v. Peek*<sup>16</sup> applied to the definition of fraud, it would seem that this right to set aside the conveyance was limited to the narrow meaning of common law fraud. Fortunately, in *Svanosio v. McNamara*<sup>17</sup> the High Court appeared to accept that Lord Campbell's comment in *Wilde v. Gibson*<sup>18</sup> referred to fraud in its equitable

11. Section 59, Property Law Act 1974-1986; *Hawkins v. Price* [1947] Ch 645 at 657.

12. (1889) 14 App Cas 337 at 374.

13. *Redgrave v. Hurd* (1881) 20 Ch D 1; *Laurence v. Lexcourt Holdings Ltd* [1978] 1 WLR 1128.

14. (1848) 1 HLC 605.

15. *Ibid.* 632-633.

16. *Supra* n. 14.

17. (1956) 96 CLR 186.

18. *Supra* n. 14.

sense and not its common law sense, Dixon C.J. and Fullagar J.<sup>19</sup> saying that equity would not undo a sale of land after conveyance unless there has been a fraud. Consequently, whilst a contract relating to the sale of land in Australia may be rescinded for innocent or fraudulent misrepresentation,<sup>20</sup> it may only be rescinded for innocent misrepresentation prior to registration of the purchaser or lessee.

Generally, it has been held, in antipodean jurisdictions, that a land contract is not executed until the legal title passes to the purchaser by way of registration.<sup>21</sup>

#### (d) Other causes of action at common law

In later times, the development of the law has put the victim of a misrepresentation in a much better position to recover damages, notably in an action in tort if it could be shown that the misrepresentation was made negligently by the vendor or his agent in breach of a duty of care.<sup>22</sup>

This has most recently found expression in Queensland in the case of *Roots v. Oentory Pty Ltd*<sup>23</sup> where it was held that a real estate agent owed a purchaser a duty of care with respect to information being supplied by that agent about the characteristics of the property being sold. This duty of care may have been narrowed by the High Court in *Sutherland Shire Council v. Heyman*,<sup>24</sup> a view which might now have the support of the House of Lords. In *Curran v. Northern Ireland Co-ownership Housing Association Ltd*,<sup>25</sup> Lord Bridge said<sup>26</sup> that a duty of care should be judged by reference to "the dictates of good sense and a consideration of what is fair and reasonable".

Whilst the equitable remedy of rescission is still available, there has doubtless been a shift of emphasis to the right of the representee to seek damages in respect of misrepresentation.

#### (e) Right to compensation for purchaser

Where relief has been sought under the general law in relation to land contracts, the right to rescission or compensation in lieu has been measured by the extent of the deficiency in subject matter. Compensation is claimable in equity where there is such a deficiency in the subject matter that it would be without compensation.<sup>27</sup> In cases of substantial deficiency, a purchaser will be permitted to resile from the contract.<sup>28</sup> In *Leighton Properties Pty Ltd v. Hurley*,<sup>29</sup> the purchaser was held entitled to rescind a contract for the purchase of a building unit when it transpired that the plan of the property varied so significantly from the plans and specifications represented to the purchaser prior to contract.

The common law therefore endeavours to balance considerations such as seriousness of deficiency against subject matter contracted for to determine ultimate rights and seeks to retain reasonable "equitable" flexibility.

19. *Supra* n.17 at 198.

20. *Taylor v. Johnson* (1983) 151 CLR 422 at 431. Cf. *Walker v. Boyle* [1982] 1 WLR 495 at 507-508.

21. *West v. Read* (1913) 13 SR (NSW) 575 at 579, 582; *Montgomery v. Continental Bags (N.Z.) Ltd* [1972] NZLR 884.

22. *Esso Petroleum Co. Ltd v. Mardon* [1976] QB 801; *Ellul and Ellul v. Oakes* (1972) 3 SASR 377.

23. [1983] 2 Qd R 745; Cf. *MacCormick v. Nowland* (1988) ATPR 40-852 (where real estate agent liable both under Section 52 and general law of negligence for failing to check information prior to advertisement).

24. (1985) 60 ALR 1.

25. [1987] 2 WLR 1043.

26. *Ibid.* at 1052.

27. *Rudd v. Lascelles* [1900] 1 Ch 815 at 819.

28. *Rutherford v. Acton-Adams* [1915] AC 866; *Gilchester Properties Ltd v. Gomm* [1948] 1 All ER 493.

29. [1984] 2 Qd R 534.

### 3. Misrepresentation under the Trade Practices Act, 1974 (Cwth)

It is in this climate that we must identify the rights of a party who is seeking relief against the effects of a misrepresentation in the terms of the Trade Practices Act 1974 (Cwth). The principal provision of that Act relevant to dealings in land is s.52(1) which provides that: "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or that is likely to mislead or deceive."

Section 53A of the Act also sets out what might be considered false statements in relation to the sale or grant of an interest in land, although the Act does state in s.52(2) that nothing is to be taken as limiting, by implication, the generality of s.52(1). Therefore, although the Act could not be brought to bear in relation to a simple breach of contract, without an element of reliance upon a misrepresentation, the path to the Federal Court has become well trodden by purchasers and lessees, who, where appropriate, have preferred to rely upon it rather than the common law for relief.

The section is limited to corporations "engaging in trade or commerce".

By s.4, the word "corporation" is confined to those bodies corporate over which the Commonwealth Parliament has legislative power which would include all trading or financial corporations formed within the limits of Australia and, more recently, held to include a shelf company which has not carried on any business but whose expressed objects include the business of a trading or financial corporation.<sup>30</sup> By analogy, there seems no reason why a corporation acting solely as a holding trustee, where land is the subject matter of the trust, would not also be caught if such corporation had similar objects. By s.6 of the Act, the ambit of s.52 is extended to include an individual "engaging in trade or commerce" within a Territory, between a State and Territory or between two Territories and by s.6(3) can include an individual or corporation engaging in conduct which involves the use of postal, telegraphic or telephonic services or the use of radio or television broadcasts. The second major limitation on s.52 and s.53A is that the conduct complained of must have occurred whilst the representor was "engaging in trade and commerce". A one-off sale by an individual which involved the use of a newspaper as a medium of public advertisement of certain land and the use of the telephone by the parties for conducting negotiations has been held not to be sufficient to involve that person as acting in the course of trade or commerce. As the Federal Court said in *O'Brien v. Smolonogov*:<sup>31</sup>

In our view the mere use, by a person not acting in the course of carrying on a business, of facilities commonly employed in commercial transactions, cannot transform a dealing which lacks any business character into something done in trade or commerce. Of course, the facilities mentioned above have applications which are not commercial in any sense ... We are not persuaded that resort to them can create the business context required by the reference to trade or commerce in s.53A.<sup>32</sup>

It is therefore arguable that an isolated transaction by an individual involving the sale of real estate is not an engagement in trade or commerce and will not attract the provisions of the Act unless done in the course of a business activity. However the sale of a capital asset used for business activity might constitute an indulgence in trade or commerce and the Court will look at the totality of the parties' activities to determine this question. In *Bevanere v. Lubidineuse*<sup>33</sup> the Full Federal Court acknowledge, distinguishing *O'Brien's* case that:

30. *Fencott v. Muller* (1983) 152 CLR 570 at 600-602.

31. (1983) 53 ALR 107.

32. *Ibid.* at 111.

33. (1985) 59 ALR 334.

It is not uncommon for a corporation to acquire and dispose of businesses during the course of its corporate life and we see no sound reason for excluding an obviously commercial transaction from a corporation's conduct in trade or commerce merely because the transaction is a sale of the corporation's principal or sole business undertaking.<sup>34</sup>

The Act thus has wide application to corporations and individuals dealing with land. However, the *O'Brien* qualification where the activities of an individual or individuals are the subject of scrutiny, must be borne in mind.

#### 4. Most significant benefits of claim under Act

Two central difficulties besetting a plaintiff when seeking relief in land transactions, entered into as a result of a misrepresentation, are applicable where relief is sought at common law. Firstly, the difficulty under the general law occurs in attaching any contractual significance to statements made in pre-contractual negotiations unless they are clearly fraudulent or are significant enough to take on the character of collateral warranties has already been alluded to. It is irrelevant to the application of s.52 whether or not such representations form part of the concluded contract. The Act is not concerned to examine the activities of the representor in the narrow confines of the contractual context so as to necessitate the characterization of representations as collateral contracts, warranties, or otherwise. It is solely concerned with conduct. Therefore, any oral representations will have equal force to what has been written when examining effect.<sup>35</sup>

Second, because most misrepresentations are made by "unauthorised" agents acting on behalf of the vendor or lessor, it has always been difficult for a purchaser to sheet home their effect to the respective, vendor principals because of the very limited authority of real estate agents at common law.<sup>36</sup> Under s.75B of the Act, any person "involved in a contravention", as that term is defined, may be subjected to penalties under the Act. Pursuant to s.82(1), such a person may be the subject of a damages claim. It is obviously far easier to show that a person was "involved in a contravention" rather than having to prove the tenuous nexus of agency and the extent of that agency.<sup>37</sup>

##### (a) "Misleading and deceptive conduct or conduct likely to mislead or deceive"

What, therefore, is the foundation of liability under s.52? Before looking particularly at land transactions, there are several elements of s.52 which effectively dictate that conduct under scrutiny for possible breach of s.52 should be viewed differently than the same conduct would be viewed under the general law. Firstly, the section is concerned with consequences and not intention to deceive. If the consequence is deception, regardless of intention, that suffices to make it deceptive.<sup>38</sup>

Second, conduct does not have to be in breach of any common law duty or amount to negligence. Section 52 is not confined to conduct engaged in as a result of a failure to take reasonable care. Thus, a representor who has acted honestly and reasonably may be rendered liable if the conduct has in fact mislead or deceived or is likely to do that.<sup>39</sup> Under the general

34. *Ibid.* at 341.

35. *Gardiner v. Suttons Motors (Homebush) Pty Ltd* (1983) 5 TPR 450 at 464-465.

36. *Petersen v. Maloney* (1951) 84 CLR 91 at 94.

37. *Yorke v. Ross Lucas Pty Ltd* (1983) 80 FLR 143 at 152.

38. *Hornsby Building Information Centre Pty Ltd v. Sydney Building Information Centre Limited* (1978) 140 CLR 216 at 228.

39. *Parkdale Custombuilt Furniture Proprietary Limited v. Puxu Pty Ltd* (1982) 149 CLR 191 at 197.

law, the particular remedy depends upon the nature of the misrepresentation in the sense of whether it is fraudulent, a negligent mis-statement or an innocent misrepresentation. Such an enquiry is of no relevance under the Act. Thus, an innocent agent merely repeating wrong information supplied by his principal, the vendor or lessor, will be liable under s.52 because merely by repeating that information, providing it is misleading and deceptive, he will have unwittingly contravened s.52.<sup>40</sup>

Third, some regard is paid by the Courts to the characteristics of the person alleging deception. In advertisements to the public at large, the standard of conduct must be considered by reference to all possible persons, from the astute to the gullible, the shrewd and the ingenuous and persons experienced and inexperienced in commercial transactions.<sup>41</sup> There is an attempt to retain some objectivity in the nature of the audience to whom the conduct may be directed and the “quite unusually stupid” is not the yardstick.<sup>42</sup> So whilst the Act is not meant to save the average fool from folly, it recognises that the lowest common denominator of intelligence should be afforded some protection and is sensitive to relative, audience abilities.<sup>43</sup>

Where the negotiations, as would be usual in land dealings, are on a one to one basis, the Court will measure the conduct against the comprehension ability of the purchaser or lessee aggrieved. Thus, the same representation made to a businessman well versed in property dealings might be regarded as misleading or deceptive if it were made to a young couple purchasing their first home.<sup>44</sup>

This question is akin to the question of reliance by the representee upon the statements. It is said that purchasers (or lessees for that matter) should take real estate agents’ statements generally “with the proverbial grain of salt”.<sup>45</sup> Certainly, real estate agents who have proffered firm views to purchasers upon matters they have failed to check have been held liable, rather than their principals who have had no knowledge of the false representations.<sup>46</sup> Whilst the state of knowledge of the representee is an element of importance under the general law, so too is the vehemence with which the representor is making the statement, be it in a manner of authority or a mere expression of an opinion.<sup>47</sup> However, a statement of mere belief may still be actionable if the person making the statement may have been thought by the representee to have the expertise to make it.<sup>48</sup>

Thus, at common law, the representee must show reliance upon and misrepresentation in inducing entry into the contract. The causal connection between the misrepresentation and the entry into the contract need not be the material, nor the sole cause of entering into the contract.<sup>49</sup> The test of materiality of the representation, as far as relevant, is the same at law for both innocent and fraudulent misrepresentation.<sup>50</sup>

At the other extreme, where a party has employed legal advisers to negotiate a transaction,

40. *Yorke v. Ross Lucas Pty Ltd* (1983) 80 FLR 143.

41. *Taco Co. of Australia v. Taco Bell Pty Ltd* (1982) 42 ALR 177.

42. *McDonald’s System of Australia Pty Ltd v. McWilliam’s Wines Pty Ltd* (1979) 41 FLR 436 at 443.

43. Terry, *Misleading or Deceptive Conduct in Commercial Negotiations*, (1988) 16 ABLR 189 at 191 “Standard of public perception depressingly low”.

44. *Pappas v. Soulac* (1983) 50 ALR 231 at 233.

45. *Roots v. Oentory Pty Ltd* [1983] 2 Qd R 745 at 757.

46. Eg. *Barrett v. West Limited* [1970] NZLR 789; *Presser v. Caldwell Estates Pty Ltd* [1971] 2 NSWLR 471; *Richardson v. Norris Smith Real Estate Ltd* [1977] 1 NZLR 152.

47. *Smith v. Land and House Property Corporation* (1884) 28 Ch D 7 at 15; *Bissett v. Wilkinson* [1927] AC 177 at 183.

48. *Brown v. Raphael* [1958] Ch 636 at 643.

49. See *Simmons v. Zartom Investments Pty Ltd* [1975] 2 NSWLR 30 at 34; *Leighton Properties Pty Ltd v. Hurley* [1984] 2 Qd R 534 at 540.

50. *Wilson v. Brisbane City Council* [1931] St R Qd 360 at 368.

the burden upon them to show misleading conduct is far greater, and it is proper that this should be so.<sup>51</sup>

### 5. Common Instances of Breach of Act

A great number of the reported decisions on the application of s.52 to land transactions concern the sale of units "off the plan" in southern Queensland. As recognized by Fitzgerald J. in *Sanrod v. Dainford Ltd*,<sup>52</sup> "it would not need a committed cynic to suspect that many purchasers discovered how important were the various aspects of the units, which they were so anxious to purchase, only after the boom had ended and the market in the Gold Coast units had commenced to plummet ...".<sup>53</sup> As with the purchase of any improvements to be constructed, purchasers were only able to rely upon oral and written statements by real estate agents, glossy brochures, and, in some cases, models of the proposed buildings in order to gain some idea of the final product. It is interesting to note, that in this context, the Act played its most crucial, early role in land transactions. It may have been used here because the general law did not treat purchaser "off the plan" so sympathetically.<sup>54</sup>

One means of approaching these cases, in order to examine the effect of the Act, is to tease out the common elements present in a selection of the cases and to compare them to similar cases dealt with under the general law.

Many of the early applications of the Act concerned variations in the construction of the building in relation to what was allegedly represented to them either on a brochure, a plan or orally by a real estate agent. For example, relief was granted to a purchaser where it was allegedly represented that the building would have four lifts, a full-size squash court, balconies with certain access and a storeroom. In fact, there was actually no squash court, only three lifts and balconies of different size and aspect than those alleged.<sup>55</sup> Similarly, in *Turelin Nominees Pty Ltd v. Dainford Pty Ltd*<sup>56</sup> representations were made concerning a shelf which should have adjoined the unit balcony, that no other balcony would adjoin the unit balcony and that the unit was on the fifteenth level. None of these representations were held to be in breach of the Act although the purchaser was held entitled to rescind the contract under the general law as the contract incorporated a plan which clearly showed the subject unit being on the fifteenth floor when in fact this was not true, or, indeed, possible. The words "fifteenth level D" on the plan were held to be part of the description. A unit offered on the fourteenth floor was held not to meet that description and to be of substantially less value.

In *Plant v. Duralla Pty Ltd*<sup>57</sup> an allegation was made that the selling agent had predicted better views at the time of sale than the unit in fact enjoyed once constructed. However, in making this prediction, the agent was found to have made an honest and reasonable mistake and what he said accorded with his genuine and reasonable opinion. Nor was it held to have influenced the purchaser in her decision to enter the contract. Fitzgerald J. found that there was no conduct which contravened any of the provisions of the Trade

51. *H.W. Thompson Building Pty Ltd v. Allen Property Services Pty Ltd* (1983) 48 ALR 667 at 673.

52. (1984) 54 ALR 179.

53. *Ibid.* at 188.

54. *T. Palmerston (Qld) Pty Ltd v. Fogl* [1983] 2 Qd R 700 at 703 (much depended upon the wording of the developers' contract as to whether there was any obligation to build in a good and workmanlike manner). See also *Streeter v. McLennan* [1959] Qd R 136 at 141-142; *Perry v. Sharon Development Co.* [1937] 4 All ER 390 at 394; *Hoskins v. Woodham* [1938] 1 All ER 692 at 695.

55. *Wildsmith v. Dainford Limited* (1983) 51 ALR 24.

56. [1984] ATPR 40-444; Cf. *Akot v. Rathmines Investments Pty Ltd Supra* n.10 at 305-306; This would probably also strike difficulty if the defendant challenged the question as to whether any written material in or annexed to the contract "off the plan" formed part of the description; See *Dainford Ltd v. Lam* [1985] 3 NSWLR 255 at 265.

57. [1983] ATPR 40-432.



Practices Act 1974 (Cwth) and the representation as to the views from the unit were not actionable. The plaintiff was entitled to rescind, but only on the basis of s.49 of the Building Units and Group Titles Act 1980.

In *Sanrod Pty Ltd v. Dainford Limited*,<sup>58</sup> a purchaser "off the plan" was unaware that the vendor had intended that a large "porte-cochere" (canopy) was to be constructed over the driveway near the main entrance to a large block of luxury units which would pose a significant obstruction to the view enjoyed from that unit. The purchaser alleged, that in the course of negotiations with the agent, there was discussion of the view, the tenor of which was that it would be unobstructed. There was certainly no mention of canopy, the presence of which was also not disclosed in the brochure. The omission of the agent to inform the purchasers of the fact of the intended construction of the canopy was held to have created a false impression in the purchasers' minds and was conduct falling within s.52 as modified by s.4(2) of the Act which makes it clear that conduct may include, not only acts, but omissions.

More serious allegations were made in relation to changes in plan in *Tiplady v. Gold Coast Carlton Pty Ltd*.<sup>59</sup> Here, it had been originally contemplated that a certain penthouse would have a private vestibule and open staircase and, in fact, this was shown on the plan. Unbeknownst at the time, to the vendor, it was not possible due to Queensland fire safety legislation, to build a penthouse with the proposed vestibule. When the building was completed, considerable changes from the original plan had been noted not only in respect of the vestibule, but also other significant matters. There was no doubt that the unit as built did not conform to the floor plans on the advertising brochure which the purchaser had seen before signing the contract. It was also found as a fact that the unit was constructed substantially differently from that which the purchasers were entitled to have conveyed to them, and that the private vestibule was a most material and important matter as was the inadequate, dining area. It was found that the purchasers would not have entered into the contract at the price agreed to but for the original proposal in respect of the private vestibule. Thus, the purchasers would have been entitled to rescind or claim compensation at the very least. However, the purchasers' case collapsed because they did not give their notice of rescission early, make any complaint or give any indication that they might not wish to complete. On the contrary, they attempted to resell the unit at a profit continuing to inform the vendors that they intended to complete when settlement was due. The purchasers lost their right to rescind and, upon their failure to complete, were in breach of contract. The trial judge found that the vendor was in contravention of s.52(1) after the contract was entered into by reason of its failure to ensure that the applicants were informed of the variations and alterations with respect to their unit. However, with or without s.52, the purchasers were not entitled to rescind.

It seems from this small selection of cases that, apart from the fact of waiver of a breach by the vendor, most of the purchasers would probably have had a right to rescind the contract under the general law where their complaints were of sufficient seriousness, on the grounds that they were not getting what they had contracted to buy.

For example, in *Gold Coast Carlton Pty Ltd v. Kamalesveran*,<sup>60</sup> a case under the general law, a brochure containing a floor plan showed that each penthouse had its own private lift access. The purchaser, an entertainer, gave evidence that private lift access was important to him. Upon the building not containing this feature, he was permitted to rescind on the

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58. *Supra* n.2.

59. (1984) ATPR 40-491.

60. (1984) Q Conv R 54-144.

basis that the penthouse without that access was substantially different from the property which he had agreed to buy. Similarly, in *Leighton Properties Pty Ltd v. Hurley*<sup>61</sup> a town house to be constructed in accordance with plans and specifications attached to a contract showed a guest suite with a sink and stove, a laundry situated downstairs and a bar on the ground floor. The purchasers were permitted to rescind the contract when the finished building contained no sink and stove in the guest suite, the laundry was on a different level and no bar was provided. The ground of this rescission was simply that the vendor could not tender what the purchasers had contracted to buy, and, there being no relevant compensation clause in the contract, the purchasers were entitled to rescind by reason of a serious, but innocent misrepresentation.

Likewise, where a complainant is trivial, purchasers will not be permitted to withdraw. This was the case in *Hood v. Kariyana Pty Ltd*.<sup>62</sup> Here, the purchaser complained about the finish of a building, having been led to believe that the building was to be a white building with blue glass walls which conformed with an artist's impression on a brochure. Two years later, after the building was constructed, the purchasers observed that it appeared to have grey glass. Their grounds of rescission were held to be baseless as the purchasers could be given almost exactly what they contracted to buy and the difference could not be reasonably estimated. It was simply a matter of taste. It must be said, however, in all such cases, where the differences are insubstantial, the Court has been generally unwilling to come to the assistance of the purchaser. This is not because the vendor was absolved from misleading or deceptive conduct, but simply because there was no evidence at the time of contract that the purchasers had specifically directed their minds to many of their later, trivial complaints. Thus, there was no evidence of reliance upon the representations prior to entry into the contracts and without such reliance the representations were not actionable.

#### (a) Puff and sales talk distinguished

Whilst it is the general view that the Trade Practices Act 1974 (Cwth) permits some form of self-evident exaggeration or puffing, it is possible that exaggerated and outrageous claims may lead to deception where a factual claim might not be capable of substantiation. For example, in *Given v. Pryor*<sup>63</sup> there was a representation that a piece of land was "a wonderful place to live". Whilst this form of eulogistic commendation might appear on most real estate advertisements, the Court held that the representation did infringe s.52(1) because the local authorities prohibited the construction of houses on the land in question and the puff conveyed a misleading impression. It is also necessary to measure sales talk against the yardstick of s.53A(1) which makes it unlawful to make false or misleading representations concerning the nature of the interest in land, price payable for land, its location characteristics and use to which it is capable of being put. In *Guthrie v. Robertson*<sup>64</sup> a number of extravagant claims in advertisements in newspapers were made concerning blocks of land on Russell Island near Brisbane. In a prosecution under s.53A, Spender J. on reviewing these advertisements said as follows:

Shortly put, the course of advertising in these proceedings involved gross and blatant lies which were inserted in a cynical and deliberate endeavour to tap the greed of the gullible for an unbelievable bargain. It would be fair to say the facts in these proceedings demonstrate convincingly that it is almost impossible to over-estimate the gullibility of some members of the consuming public.

61. [1984] 2 Qd R 534.

62. (1984) Q Conv R 54-151.

63. [1980] ATPR 40-165.

64. [1986] ATPR 40-744.

However, it is considered that the Trade Practices Act 1974 (Cwth) would still have some regard to differentiating between such blatant misrepresentations and merely placing a product in its best light. In *Bargal Pty Ltd v. Sienko Hall Investments Pty Ltd*,<sup>65</sup> a case under the general law, a purchaser purported to rescind a contract for purchase of a unit "off the plan" on the basis of alleged misrepresentation concerning the degree of "luxury" that the unit would offer. The vendor was found to have made a representation that the units would be "luxurious". The Full Court of Queensland held such representations which were directed at the quality of finish of the building offered no reference point by which the quality of the subject home unit could be judged. Accordingly, they were mere puffs and the purchaser was in breach in not completing. One would think that this case would not have had any different result if it had been fought under s.52.

### 6. Representations as to Future Matters or Predictions

Often, in the course of the formation of a land contract, either a lease or a contract of sale, the vendor or lessor or their respective agents give some oral assurance to the prospective purchaser or lessee with respect to proposed services to or amenities in the neighbourhood of the land. Such statements are rarely if ever reduced to writing in the main contract. It has been held that only if these assurances amount to collateral undertakings, they might be enforced, even in the absence of a memorandum required by the Statute of Frauds.<sup>66</sup> However, many such assurances in relation to future services or amenities would be very borderline cases. In today's advertising climate, it would be almost impossible to treat them as having any promissory force especially if not included as part of the subject matter of the contract. In any case, as contracts for the sale or disposition of interest in land are presumptively entire, written contracts, oral warranties are largely ineffectual.<sup>67</sup>

Such assurances usually do not relate to an existing fact but to future intention of the vendor. The assurances are rarely sufficiently weighty to amount to collateral warranties or, indeed, promises at all, rather than statements of future intention never intended to have a binding effect.<sup>68</sup>

The courts have generally been loathe to give contractual effect to predictions and statements of future possibilities and have imposed heavy onus of proof upon those seeking to give them contractual effect. This has been particularly so in Australian jurisdictions.

To be sure, if the assurance is reduced to a written plan which is handed to the purchaser or lessee prior to contract, it may give more substance to any claim to give the assurance contractual force. However, this is not invariable.<sup>69</sup> Certainly, in *Shepperd v. Council of the Municipality of Ryde*,<sup>70</sup> the purchaser was successful in restraining a vendor from departing from a plan that had been put before that purchaser prior to contract, and held the plan to amount to a collateral promise to adhere to a proposal in it as to the use of adjacent land as a park.

Sections 51A, 52 and 53A of the Trade Practices Act 1974 (Cwth) do have some effect with respect what might be called assurances as to the future or what have been said to be "facts or statements present belief respecting future events".<sup>71</sup> In *Brown v. Jam Factory*

65. [1984] Queensland Building Units and Group Titles Law and Practice Court Reports and Tribunal Decisions, 30-065.

66. *Jameson v. Kinmell Bay Land Co. Ltd* (1931) 47 TLR 401 at 493.

67. *Kennard v. Ashman supra* n.5; *Jones v. Lavington supra* n.5 being attempts to add terms to leases; cf. *Oades v. Spafford* [1948] 2 KB 74 at 79-80.

68. *Supra* n.4 at 223.

69. *Hodges v. Jones* [1935] Ch 657 at 669 (collateral warranty concerning the use of adjoining land not made out).

70. (1952) 85 CLR 1 at 13.

71. *Brown v. Jam Factory Pty Ltd* (1981) 53 FLR 340 at 349-350.

*Pty Ltd*,<sup>72</sup> a statement to prospective lessees that when a shopping mall opened for business, all the shops would be let and already trading, was found not to be a contravention of s.53A because at the time it was made there was a reasonable belief it would be fulfilled. The state of mind of the person making the representation at the time is considered upon objective standards. However, on the question of a possible breach of s.52, there was no doubt that the plaintiffs believed the statement and were induced to take the lease and start business in the belief that the shopping centre was likely to be fairly successful. There was sufficient reliance as held by Fox J. upon this statement to invoke s.52. Likewise, in *Mr Figgins Pty Ltd v. Centrepont Freeholds Pty Ltd*<sup>73</sup> a similar statement that a shopping mall under construction would open on a certain day and would include at least two restaurants and a high class boutique area on the first floor were actionable under s.52 when these prognostications remained unfulfilled. However, in that case, Northrop J. was more concerned with the reliance placed upon the statements by the intending lessees not on the objective state of mind of the lessor.

The full force of s.52 and s.53A has been utilized by lessees of shopping centres who have successfully claimed that they were induced to take their leases in reliance upon inaccurate surveys of passing trade, false statements as to the number and type of shops already leased and misleading statements as to the nature of signs.<sup>74</sup> The reported decisions in this area reveal that the Trade Practices Act 1974 (Cwth) is more sympathetic to purchasers or lessees who have relied upon what they considered at the time of purchase or leasing to be realistic appraisals of the nature of the constructed improvements or forecasts of the probable commercial success of centres in which the leased property would be situated. It is submitted that there would not have been such a high rate of successful claims if the same had been pursued under the general law which is far less generous to persons about to acquire an interest in real property and does not readily recognise the strength of prediction.

**(a) Strengthening of representations as to future matters — reversal of onus**

On 1st June, 1986, s.51A was inserted into the Trade Practices Act 1974 (Cwth) Subsection (1) so far as it is relevant, states that "where a corporation makes a representation with respect to any future matter, and the corporation does not have reasonable grounds for making that representation, the representation shall be taken to be misleading and Ss.(2) clearly places the onus upon the maker of the representation to show that there were reasonable grounds for making it at the time". Thus, all that is now required for a purchaser or lessee to prove is the actual making of a statement as to the future matter. Once this is proved, the onus falls upon the representor to prove the reasonableness of that statement. When s.51A operates together with s.52 in reversing the onus of proof, one can see the enormous benefit of this Section over and above the common law where the plaintiff, the representee, would bear the onus of proof. It is also thought that s.51A(1) would not affect the principles set down in *Brown v. The Jam Factory Pty Ltd*<sup>75</sup> and *Mister Figgins Pty Ltd v. Centrepont Freeholds Pty Ltd*<sup>76</sup> but merely included to reverse the onus probably because it is easier for a representor to give evidence of the circumstances in which the prediction

72. *Supra* n.71.

73. (1981) 36 ALR 23.

74. E.g., *Jelin Pty Ltd v. Murdoch Pty Ltd* [1985] ATPR 40-562; *Musca v. Astle Corporation Pty Ltd* [1988] ATPR 40-855; See also *A.D.C. Centres Pty Ltd v. Kilstream Pty Ltd* (1979) 25 ALR 549 (breach involving lease of adjoining premises by same lessor); *Cohen v. Centrepont Freeholds Pty Ltd* (1982) 66 FLR 57.

75. *Supra* n.74.

76. (1981) 36 ALR 23.

was made and much more difficult for the representee to obtain proof of recklessness. One would not be guilty of a breach of s.51A by predicting a more intensive reliance upon these sections in the future.

### 7. Representation as to Suitability of Land for any Particular Purpose

Under the general law it is accepted that there is no warranty as to the fitness of any improved land for any particular purpose and in the case of a dwelling-house, this warranty extends to habitability.<sup>77</sup> The same has been held in relation to premises for lease. In *Elder v. Auerbach*<sup>78</sup> Devlin J. said:

It is the business of the tenant if he does not protect himself by an express warranty, to satisfy himself that the premises are fit for the purpose for which he wants to use them, whether such fitness depends upon the state of their structure or the state of the law or any other relevant circumstances.<sup>79</sup>

That dictum was applied in the Court of Appeal in *Hill v. Harris*<sup>80</sup> where a sub-lessee took premises in the belief that he would be able to use them for a confectionery and tobacco business. In fact, there were covenants in the head lease preventing the use of the premises as such without the lessor's consent and the lessor refused to give consent. In an action against the immediate lessee claiming damages for breach of warranty, the sub-lessee claimed that the agent employed by the sub-lessee to sublet the premises had warranted that the premises could be used for those purposes. It was found that whilst a statement had been made, the agent had no express authority to make a warranty. Diplock L.J. on this point said:

It is clear law that the ostensible authority of an estate agent to find a purchaser for premises or a lessee for premises does not extend to entering into any contractual relation in respect of the premises on behalf of the person instructing him. It may well be that he has authority to make representations as to the state of the premises, but representations are a very different matter from warranty.<sup>81</sup>

Where such a representation amounts to a warranty, the situation may be different. For example, in *Laurence v. Lexcourt Holdings Ltd*,<sup>82</sup> the lessor offered premises to the lessee as offices. The premises were set up as offices but in fact there was no planning permission covering the entire premises for that use. The lessee went into possession without making searches and enquiries, and, upon discovering the problem, made an unsuccessful planning application. In this instance, it was held that the lessees were entitled to have their agreement rescinded on the ground of misrepresentation because the lessor's description of the premises as offices were held to amount to a representation, not merely as to the physical state of the premises, but also as to the availability of permission for them to be used for that purpose. Usually, for a vendor to be held liable for breach of warranty or, indeed, damages for deceit, there has to be something more than a mere wrong advertisement. There has to be some conduct on the part of the vendor which positively asserts to an obviously ignorant purchaser that a certain state of facts exists when it is plainly untrue.<sup>83</sup>

However, in the main, it is the duty of a prospective purchaser or prospective lessee to

77. *Supra*, n.54 at 703; *Barber v. Keech* (1988) Q Conv R 54-278.

78. [1950] 1 KB 359.

79. *Ibid.* at 374.

80. [1965] 2 QB 601.

81. *Ibid.* at 615-616.

82. *Supra* n.13.

83. *Jennings v. Zilahi-Kiss* (1972) 2 SASR 493 at 510-511, (a misleading and deceptive description of a property as flats found to constitute common law fraud).

satisfy himself as to the physical suitability of the premises and to legal requirements in relation to use.

Although there is generally no covenant in a contract for the purchase of land negating any warranty as to fitness, it is common in leases to include an express covenant to that effect. In *Bradford House Pty Ltd v. Leroy Fashion Group Ltd*,<sup>84</sup> a lessee failed to make out a case for relief under the provisions of the Trade Practices Act 1974 (Cwth) in the absence of a covenant in the lease that the premises were suitable for their particular purpose, after the floor of the leased premises collapsed because it was not capable of supporting the pressure of a forklift used in the lessee's printing business. Whilst the case turned mainly on the evidence, the judge found nothing in the nature of a representation or creation of an impression that the premises would sustain the strain to which the company would subject it, in the course of its business. To what extent, therefore, must a prospective purchaser or lessee undertake appropriate searches and satisfy himself of the fitness of the property for his purpose? Certainly, under the general law, this is expected. Also expected would be a thorough physical inspection of the proposed site.<sup>85</sup> In *Myers v. Trans Pacific Pastoral Co. Pty Ltd*<sup>86</sup> an agent of the vendor, through oral statements and other statements in a letter, created the impression that certain land was suitable for growing flowers and vegetables commercially and this was found to have induced the purchasers to sign a contract. The land was totally unsuitable for this purpose and any physical inspection would have revealed this fact.

The purchasers lived at Gosford in New South Wales. They had written to the agent in Queensland and agreed to buy the land without having inspected it. They took possession after signing the contract but the transaction was never completed. Pincus J. held that the agent in fact made statements, and that although they were misleading, they did not amount to fraud. His Honour took into account the "irrational enthusiasm" of the purchasers in entering a contract without physically inspecting the land. However, His Honour came to the view that the misleading statements were a substantial factor in inducing the purchasers to contract, that they had placed reliance upon the statements as to the quality of the land without their own inspection, yet were still entitled to relief.

Similarly, in *Rumpe v. Camrol Pty Ltd*<sup>87</sup> a purchaser of a restaurant business which had been wrongly advertised as enjoying a 3.00 am licence, actually made their own enquiries and ascertained the true facts prior to signing the contract. Although there had been a breach of s.52, no action lay as there was no reliance upon the wrong statement.

Other cases in relation to misleading or deceptive conduct, particularly concern leases in shopping centres, predictions as to volume of customers likely to visit the location of the lessee's premises<sup>88</sup> and the nature of competition that the lessees might be intended to expect from other shop owners in the same centre. These are not matters which may be checked by independent search prior to completion. Yet, even where the lessee has not properly perused the lease and has been held to be careless in not protecting his own interests, representations made prior to the formal agreement being signed, if they are not realized by the written agreement will amount to misleading and deceptive conduct. In *Dibble v. Aidan Nominees Pty Ltd*,<sup>89</sup> lessors made oral representations prior to the signing of a lease

84. [1983] ATPR 40-344.

85. Where a physical inspection is carried out, the particular contentious issue may only be a matter of opinion and not actionable, e.g., *Bissett v. Wilkinson* [1927] AC 177.

86. [1986] ATPR 40-672.

87. [1985] ATPR 40-522 46,224 at 46,231.

88. *Lyons v. Kern Constructions (Townsville) Pty Ltd* [1983] ATPR 40-343; *Jelin Pty Ltd v. Murdoch Pty Ltd supra* n.74.

89. [1986] ATPR 40-693.

for a shopping centre to the effect that the lessees would have the sole right of retailing fish and chips in the food market. The lease which they signed was not properly read or understood by them. It contained an acknowledgement that the lessor reserved the right to grant any other under-lessee the right to sell fish and chips. The lessees were obviously led to believe that they would have that sole right although a proper reading of the documentation would have clearly told them otherwise. Relief was granted and the lease was avoided ab initio and damages were payable by the lessor. There is little doubt that the Act does not absolve the intending purchaser or lessee from undertaking prudent enquiries prior to contract and usual searches prior to completion. A failure to do this even where there has been misleading or deceptive conduct in the formation of the agreement in breach of the Act may result in a loss of right to relief. However, each case depends upon its own facts.<sup>90</sup>

### 8. Intervention of an Agent

It is trite law that where an agent personally makes a fraudulent misrepresentation and has actual or apparent authority to make that representation, the principal is responsible vicariously and an action for deceit would lie against the principal as well as the agent.<sup>91</sup>

Where the agent makes a representation which he honestly believes to be true, and which the principal knows to be false, the principal will be responsible for the fraudulent misrepresentation as if there had been actual fraud or dishonesty on his part. If, however, there is no actual fraud or dishonesty on the part of the principal, he would not be liable in deceit if the agent made the representation innocently, without the knowledge of the principal, although the principal knew the facts which would render the representation false. In *Armstrong v. Strain*<sup>92</sup> a real estate agent in negotiations for the sale of a house made certain statements regarding the value of the house which were untrue having regard to its defective, structural condition. The agent made the statements innocently, being unaware of the existence of the defects so he was not liable in fraud. The principal did know of the defective condition but did not inform the agent nor did he authorise or know that the statements were being made. The principal was held not to be liable in fraud for the innocent statements of his agent as there was an absence of dishonesty on the principal's part.<sup>93</sup>

By the operation of s.75B of the Trade Practices Act 1974 (Cwth) any person knowingly concerned directly or indirectly in a contravention of the Act will be liable as a principal. In *York v. Ross Lucas*,<sup>94</sup> the High Court held that before a person can be said to have been in any way directly or indirectly knowingly concerned in or a party to a contravention, he must have knowledge of the essential facts constituting the contravention. However, an agent may unwittingly without intention to defraud or without the knowledge of his principal be drawn into the net of liability. For instance, in *York v. Treasureway Stores Pty Ltd*<sup>95</sup> an

90. Cf *Neilsen v. Hempston Holdings Pty Ltd* (1986) 65 ALR 302 (purchaser buying motel business failed to properly check figures — relief granted notwithstanding clear negligence). A party engaged in misleading or deceptive conduct will not be able to allege successfully that the aggrieved party's solicitor was aware of the true facts and thus that party himself by notional implication; *Obacelo Pty Ltd v. Taveraft Pty Ltd* [1986] ATPR 40-703 at 47-708; *Henjo Investments Pty Ltd v. Collins Marrickville Pty Ltd* [1988] 79 ALR 83 at 97.

91. *Lloyd v. Grace Smith & Co.* [1912] AC 716.

92. [1952] 1 KB 232.

93. If there had been fraudulent concealment by the vendors, the situation would have been very different, see *Ryan v. Hooke* (1987) Q Conv R 54-238.

94. (1985) 158 CLR 661 at 666-669.

95. [1982] ATPR 40-313; *Sutton v. A.J. Thompson Pty Ltd* (1987) 73 ALR 233 (Accountant found liable with principal).

agent who had inadvertently advertised a business in a misleading and deceptive way, after having taken all precautions to check the correctness of the advertisement, was held liable to the purchaser. The rationale for his liability lay in the fact that a party who has acted honestly and reasonably may nevertheless be rendered liable under s.52 if his conduct has in fact misled or deceived or is likely to mislead or deceive. As Gibbs C.J. in *Parkdale Custombuilt Furniture Pty Ltd v. Puxu Pty Ltd*<sup>96</sup> opined, the liability imposed by s.52 in conjunction with Ss. 80 and 82 is unrelated to fault.

For example, in *Latella v. L.J. Hooker Ltd*<sup>97</sup> an agent advertised a property as a three-bedroom cottage with an extra residence at the back. This was done with knowledge of the vendors. In fact, the brick construction at the rear of the property was a shed and could not lawfully be used as a residence. At the time of the auction of the entire property, the shed at the rear of the block was furnished and let, the purchaser had inspected the property and been informed prior to the auction that the rear building could be so used. The solicitors for the purchaser eventually ascertained the true facts and correctly terminated the contract. The vendors successfully sued the agent under s.53A on the basis that it had made false and misleading statements concerning the use to which the land might be lawfully put. The agent was aware at the time of lodging the advertisement in the paper of the fact that consent had not been given for that purpose and was, in fact, a matter under appeal, later unsuccessful, between the Local Authority and the vendor. Certainly, there appears a high duty under the Act for real estate agents to get their facts right before placing advertisements even concerning matters which may be obvious upon reasonable inspection. There is also a positively identifiable duty upon a vendor or lessor to correct facts disseminated by the agent which he knows to be wrong.<sup>98</sup>

### 9. Disclosure of Material Defects

Under the general law, and subject to any provision in the contract of sale, a vendor should disclose material, latent defects in title. Latent defects are those unseen by reasonable physical inspection.<sup>99</sup> The consequences of non-disclosure of any defects may be serious depending upon the materiality of the defect. A vendor could not enforce a contract in circumstances where he failed to disclose a material defect in title<sup>100</sup> and might only enforce it, subject to the payment of compensation, where the defect is not of such gravity to permit rescission.<sup>101</sup> A purchaser may also enforce subject to claiming compensation resulting in a deficiency in price.<sup>102</sup> If the alleged defect is trivial or insubstantial, a purchaser may have to complete or run the risk of being in substantial breach.<sup>103</sup> At the core of the duty to disclose is the principle that the vendor should inform the purchaser about matters of title which might influence the purchaser's mind in deciding whether to contract at the price agreed, or at all. A line has been drawn for these purposes between matters of title and other matters not amounting to defects in title per se but still questions which would influence the purchaser's mind. Such issues as the vendor's knowledge of the possibility of resumption,<sup>104</sup> awareness of the possibility that a pipeline may be laid across the subject land<sup>105</sup> are all

96. (1982) 149 CLR 191 at 197.

97. [1985] ATPR 40-555.

98. *Supra* n.23 (house wrongly advertised as being "brick" instead of concrete block).

99. *Yandle and Sons v. Sutton* [1922] 2 Ch 199 at 209; *Shepherd v. Croft* [1911] 1 Ch 521 at 529.

100. Section 69 Property Law Act 1974-86 (purchaser's deposit must be returned).

101. *Re Belcham and Gawley's Contract* [1930] 1 Ch 56.

102. *Rudd v. Lascelles* *Supra* n.27; *Liverpool Holdings Ltd v. Gordon Lynton Car Sales Pty Ltd* [1979] Qd R 103.

103. *Tarbet Investments Pty Ltd v. Overett* [1983] 1 Qd R 280.

104. *Tsekos v. Finance Corporation of Australia Ltd* [1982] 2 NSWLR 347 at 355.

105. *Dormer v. Solo Investments Pty Ltd* [1974] 1 NSWLR 428 at 432-433.



relevant considerations for a purchaser but, because they do not amount to matters bearing directly upon the title at the date of contract, are not obliged to be disclosed. If the contract provides a right for the purchaser to survey for encroachments, although affecting title, the vendor may not be liable in the event of non disclosure if the purchaser fails to undertake a survey.<sup>106</sup>

So, for the purposes of the exercise, a distinction must be drawn between matters actually affecting the title and mere conjecture as to some matter which might be about to materially affect the title. However, both issues may be of importance in a purchaser's mind.<sup>107</sup>

Another issue of importance to a purchaser, not going to title, is the question of zoning. This is a matter upon which the purchaser to satisfy himself entirely.<sup>108</sup> It is accepted that matters of zoning do not go to title.<sup>109</sup> Changes in the rights to use the property between contract and completion do not amount to discloseable restrictions on the title although radically affecting the value of the land.<sup>110</sup> Looked at in broad perspective, every one of these matters may influence a purchaser's mind in deciding whether to contract. Many are not actionable because of the acceptance of the conventional doctrines of what constitutes title and what does not.

Section 52 examines conduct of the vendor. It is not concerned with matters of title which are the finer distinctions within the law of vendor and purchaser. Conduct is not limited to the spoken word. It is possible to mislead by something left unsaid. Further a statement which may have "conduct" also includes the creation of a false impression regardless of how it is done, making a failure to correct it "misleading and deceptive". The "acts and omissions" of a party will be considered as a whole as to whether they constitute the type of conduct actionable within Section 52. A failure to draw any material matter to a purchaser's attention may be insufficient.<sup>111</sup> The possible impact of the Act in this area is explosive. Facts which hold true at the date of contract may not necessarily be true at the date of completion. Is it not misleading and deceptive not to correct the impression which has been gained by a purchaser?<sup>112</sup> Of course, the vendor would have to be aware of the change. The answer lies in the extent to which s.4(2)(c) defining "engaging in conduct" in refusing to do an act (otherwise by inadvertence) may be applied to land contracts.

## 10. Comparison of Remedies

### (a) Extent of relief available under Act

Sections 52 and 53A describe the conduct which is unlawful. These sections provide no remedies in the event of breach. The usual remedy for a breach of those sections is damages as set out in s.82. This is supported by s.87 which permits the Court to make other more wide-ranging orders.<sup>113</sup> These powers, as shall be seen are far more flexible than those under the general law.

106. *Spooner v. Eustace* [1963] NZLR 913 at 918-919.

107. There are clauses in the Standard R.E.I.Q. Contract (1982 Edition Cl 18) which give the purchaser a contractual right of termination in certain such instances, eg. proposals to resume; See e.g. *Ex parte Christensen* [1984] 1 Qd R 382; *Briggs v. Batts* [1986] 2 Qd R 309.

108. There is expressly no warranty as to "present use" in the R.E.I.Q. Contract (1982) Edition Cl 19).

109. *Sydney Golf Club v. Federal Commissioner of Taxation* (1955) 91 CLR 610 at 624-625; *Dell v. Beasley* [1959] NZLR 88 at 95.

110. *Amalgamated Investments and Property Co. Ltd v. John Walker & Sons Ltd* [1977] 1 WLR 164 at 173; *Brett v. Cumberland Properties Pty Ltd* [1986] VR 107.

111. *Sanrod Pty Ltd v. Dainford Ltd supra* n.52 at 187. *Henjo Investments Pty Ltd v. Collins Marrickville Pty Ltd supra* n.90 at 94-95.

112. *Dinyarrack Investments Pty Ltd v. Amoco Australia Ltd* (1982) 2 TPR 402 at 409. *Collier v. Electrum Acceptance Pty Ltd* (1986) 66 ALR 613 at 637.

113. Section 87(2)(a)—(g) declaring contract to be void, ordering variation of contract, selective enforcement of provisions, ordering refund of money or return of property, ordering repair or restitution.

Section 82(1) provides simply that a person who suffers loss or damage by the conduct of another person that was done in contravention may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

Generally, in the interpretation of s.52 the Courts have leaned to compensating for reliance loss rather than expectation loss, the former being the amount by which the plaintiff is worse off as a result of relying on the truth of the statement and the latter measuring the amount which the plaintiff might be expected to gain by the performance of the promise which was breached. Damages in contract compensate a party because the other party has not answered his promise whether it is reasonable or not. Damages under the Act compensate a party because the other party has not observed a certain standard of conduct and loss has resulted.

In *Brown v. Jam Factory Pty Ltd*<sup>114</sup> Fox J. said:

The correct way to approach the assessment of damages under s.82 is in my view to compare the position in which the applicants might have been expected to be if the misleading conduct had not occurred with the situation that they were in as a result of acting in reliance on that conduct.<sup>115</sup>

However, the Act does not prescribe the measure of damages for contravention for its provisions leaving the question to the Courts. Two established measures of damages, those applicable in contract and tort, are open for consideration. The High Court in *Gates v. City Mutual Life Assurance Society Ltd*<sup>116</sup> considered that expectation loss, to be compared with damages for loss of bargain, and damage suffered, including expenditure incurred in reliance on the contract, was not the appropriate kind of award pursuant to the section. The Court made it clear that, under the Act, damages were awarded with the object of placing the plaintiff in the position in which he would have been had a tort not been committed. This is similar to reliance loss.<sup>117</sup>

Although s.82(1) does not express it, the plaintiff must show a causal link between the conduct complained of and the loss for which compensation is sought. For example, in *Tiplady v. Gold Coast Carlton Pty Ltd*<sup>118</sup> the plaintiffs had purchased a home unit "off the plan". The plans were altered during the course of construction in response to requirements of the fire authorities which prevented the construction of a penthouse with a private vestibule and open staircase. The defendant developers failed to inform the purchaser. However, the purchasers made a major error, in that after becoming aware of these alterations, they attempted unsuccessfully to resell the unit. Thereafter, they purported to avoid the contract. Eventually, the vendor accepted the purchaser's actions as a repudiation and resold the penthouse at a loss. An action by the purchasers to recover damages under s.82 in respect of the vendor's proven "misleading and deceptive" conduct failed because this conduct had not caused the purchasers any loss or damage. The effective cause of the loss was the purchaser's repudiation.

The onus of establishing that parties were induced by or relied upon a certain misrepresentations when entering into agreements lies upon the party alleging it. This is consistent with the position under the general law.

114. *Supra* n.71.

115. *Supra* n.71 at 351.

116. (1985) 160 CLR 1 at 12-13.

117. *Supra* n.22 at 385 (damages for negligent misrepresentation in tort negligible however loss compensate as breach of warranty in contract).

118. *Supra* n.59.

In *Jones v. Acfold Investments Pty Ltd*,<sup>119</sup> the Full Federal Court said that a similar onus lies upon a claimant under the Act as it does upon the claimant alleging the tort of deceit.<sup>120</sup> If a representation is made which is of such a nature as to be likely to induce a representee to act upon it, the inference may be drawn, if the representee does act, that he has acted in reliance on that representation. However, a break in the chain of causation will break that link.

### (b) Assessment of Damages

Generally, a purchaser who suffers loss as a result of a contravention of Sections 52 and 53A will take, as his starting point for the assessment of damages, the difference between the value of the land and what he paid for it. However, if further monies have been expended which are later proved to be to little or no point, these will be included in the assessment. For instance, the cost of plans, legal costs, rates and taxes and interest on purchase price paid by the purchaser would so qualify.<sup>121</sup> Where the contract is not completed by the purchaser and avoidance of the contract is sought under s.87(1A), purchasers will be entitled to a refund of the deposit, and, by way of damages, to legal and other costs reasonably incurred in connection with the contract and the purported rescission.<sup>122</sup>

Under the general law, where there has been wrongful anticipation of repudiation by a vendor of an executory contract for the sale of land, the correct measure of the purchaser's damages is the difference between the contract price and the market value as at the time of performance, (subject to questions of mitigation) not the difference between the contract price and the market value as at the date of acceptance of the repudiation.<sup>123</sup> In cases of ordinary breaches by a vendor, the measure of damages of a purchaser is governed in Queensland by the provisions of s.68(1) of the Property Law Act 1974. The rule is that a purchaser is entitled to damages for loss sustained by him "in such sum as at the time the contract was made was reasonably foreseeable as the loss liable to result, in which there was in fact such a result, from the failure of the vendor to perform the contract." In determining the date for estimating the damages, the words "does in fact result" affords some guidance. Generally, it is accepted that the time for estimating damages is the time when the breach occurred. This is usually the date fixed for completion. The difference between the contract price and the market price at that date would thus be the measure generally.<sup>124</sup>

In *Wildsmith v. Dainford Ltd*,<sup>125</sup> Smithers J. thought that the relevant date for the assessment of damages was the date of the contract. However, this has not been accepted as a general principle.<sup>126</sup>

It should be noted that there is a limitation period in actions for damages under s.82(1) in that these must be commenced at any time within three years after the date on which the cause of action accrued.<sup>127</sup> The cause of action accrues when the applicant suffers loss or damage for which he claims compensation. This is not when there is a breach of the Act, but the time the loss or damage is suffered as a consequence and it might not be until some time later. For example, in *Keen Mar Corporation Pty Ltd v. Labrador Park Shopping*

119. (1985) 59 ALR 613.

120. *Ibid* at 623.

121. *Ceravolo v. Peter Economou Real Estate Pty Ltd* [1985] ATPR 40-635.

122. *Smolonogou v. O'Brien*, *supra* n.31.

123. *Hoffman v. Cali* [1985] 1 Qd R 253.

124. *Wroth v. Tyler* [1974] 1 Ch 30 at 57.

125. *Supra* n.55.

126. *Tiplady v. Gold Coast Carlton Pty Ltd* *supra* n.59.

127. Section 82(2).

*Centre Pty Ltd*,<sup>128</sup> the plaintiffs claimed that they were induced to execute a lease in the Labrador Park Shopping Centre on the basis of misleading and deceptive statements concerning the prospect of the presence of a particular, national chain of specialty shops, amelioration of access to a major highway and the construction of a single shopping level. The lease was signed in October 1981. In 1984 the lessee brought action claiming misleading and deceptive conduct and further misrepresentations in respect of the land in breach of s.53A. The lessee sought damages. The lessor pleaded that the lessee's claims were statute barred by s.82(2) in that the action must be commenced at any time within three years after the date upon which the cause of action accrued. Pincus J. considered that in the ordinary case, where the plaintiff was claiming relief on the basis of misleading conduct inducing him to enter into obligations under a contract, a cause of action accrues by the time the applicant has entered into the relevant transaction. Where the applicant has taken a lease, that will not be later than the date of execution of the lease. Once an applicant has suffered loss or damage relevant to the claim the time begins to run.

By way of analogy, it would seem that once a contract for the purchase of land had been entered into in breach of s.52 or s.53A, the cause of action has accrued and an action for damages should be commenced within three years from that date.

### (c) Other forms of relief — complete flexibility

As mentioned earlier, s.87 permits the Court to make a variety of other orders as ancillary to proceedings under s.82 or in independent proceedings.<sup>129</sup> These include declaring a contract or part thereof to be void ab initio or prospectively avoided,<sup>130</sup> varying a contract, requiring money or property to be returned or directing the payment of loss or damage suffered. These are far more flexible than those under the general law which is virtually limited to rescission or damages or both.

To give some idea of the versatility of this section, in *Mr Figgins Pty Ltd v. Centrepoint Freeholds Pty Ltd*,<sup>131</sup> Northrop J. varied leases between the parties by the deletion of various onerous clauses and a reduction of rent paid from the commencement of the leases some two years earlier. In *Frith v. Gold Coast Mineral Springs Pty Ltd*<sup>132</sup> Fitzgerald J. varied a contract of purchase of a business which failed by reducing the price that the plaintiffs had to pay. This could not be ordered outside the Act.

As a matter of interest, a claim for exemplary damages has not been successful under s.82 because it has been held not to compensate for loss. Section 82 only allows for the recovery of an amount of loss or damage suffered by the conduct or contravention to the Act. The same might be said of s.87.<sup>133</sup>

## 11. Loss of Rights Accrued by Reason of Breach of Act

### (a) Application of doctrine of election

Under this general heading, there are two major matters to consider. Firstly, it is important to ascertain to what extent the doctrine of election applies to rights acquired under the *Trade Practices Act*, 1974. Second, there has been some litigation concerning the effect of exclusion clauses in relation to rights under the Act.

128. (1985) 61 ALR 504.

129. Section 87(1)A.

130. *Supetina Pty Ltd v. Lombok Pty Ltd* (1986) 11 FCR 563 (avoidance of land contracts).

131. *Supra* n.73.

132. (1983) 5 TPR 48.

133. *Musca v. Astle Corporation Pty Ltd* *Supra* n.74.

In relation to the former, there is no reason why a right to rescind under the Act, notably s.87, should not be lost by conduct which constitutes affirmation. In the Queensland decision of *Tiplady v. Gold Coast Carlton Pty Ltd*,<sup>134</sup> the purchasers had a right to rescind the contract for a proven contravention of s.52(1) made after the contract was entered into. Fitzgerald J., whose judgment on this point was not varied by the Full Federal Court, held that the purchasers' right to rescind under s.87 was lost by an election to affirm. The election to affirm in this case was manifested by the purchasers' putting the unit back on the market with knowledge of the misleading and deceptive conduct.

However, in *Byers v. Dorotea*,<sup>135</sup> the purchasers of a home unit "off the plan" sought to avoid contracts on the ground of misleading and deceptive conduct of the vendor in that the proposed features and quality of the units they were purchasing, were represented to be bigger and better than those they already owned in a nearby building. Several obvious deficiencies, for example, the size of the unit, the size of the foyer and the absence of a swimming pool, became known to them as a result of several inspections prior to the date for completion. Having gained this knowledge, the purchasers sought a further extension of time in which to complete and this was granted. As Pincus J. said,

In my view, under the general law, the request for extension would in those circumstances have amounted to an affirmation precluding a right of rescission.

However, it is my opinion that the right to grant relief under the *Trade Practices Act* is not necessarily brought to an end by an affirmation of the contract.<sup>136</sup>

His Honour considered further,<sup>137</sup> after discussion of the effect of "an entire contract clause", that the power given by s.87 was wide enough to justify an order that the deposit be returned notwithstanding the affirmation of the contract. He said that the Court should not necessarily be precluded by the affirmation from granting relief on account of a breach of s.52 and ordered the repayments of the deposits under the respective contracts which he held had been induced by misleading statements.

His Honour was supported in this conclusion by the fact that the purchasers would have been entitled to damages for breaches of s.52 which may have flowed as a matter of course notwithstanding the affirmation of the contract. All the purchasers' rights under the common law in this situation would have been lost by the affirmation and they would have been in breach in failing to complete.

#### (b) Effect of "exclusion" clauses under Act

In *Byers v. Dorotea Pty Ltd*<sup>138</sup> Pincus J. also had to consider the effect of an exclusion clause on relief under the Trade Practices Act 1974 (Cwth).

The clause read as follows:

The purchaser acknowledges that he is not relying on any representations by the vendor, the vendor's agent or any other person or person or corporation in and about entering into this contract other than as set out herein, and that the conditions and stipulations hereof constitute the only agreement between the purchaser and the vendor.

In other words, the intention of the vendor was to exclude any innocent misrepresentation as being actionable. A fraudulent misrepresentation would always remain actionable

134. *Supra* n.59.

135. (1986) 69 ALR 715.

136. *Ibid.* at 722.

137. *Ibid.* at 732.

138. *supra* n. 135

notwithstanding the existence of such a clause. Pincus J. expressed the view that the courts of equity were unwilling to permit claims to rescind land contracts on the grounds of innocent misrepresentation to be defeated by contractual provisions.<sup>139</sup> However, His Honour was squarely faced with a decision of the Full Court of Queensland in *Brisbane Unit Development Corporation Pty Ltd v. Robertson*.<sup>140</sup> which was followed more recently in Queensland in *Dorotea Pty Ltd v. Christos Doufas Nominees Pty Ltd*<sup>141</sup> where it was held that clauses of a very similar nature were effective to defeat claims based on innocent misrepresentation. This only represented the picture under the general law. His Honour was quite clear that it was ineffective against a claim under the Trade Practices Act 1974 (Cwth) because the purchasers could not be estopped from asserting that the breach had occurred. This must be one of the greatest advantages of the seeking of relief under the Act and a clear case where such relief would be available in the absence of relief under the common law.

It is also apposite to note that disclaimers of liability would be of little use in determining whether information supplied was false or misleading. Statements of that alleged character would not be read down merely because of the existence of a disclaimer in relation to the subject matter of the statement.<sup>142</sup>

By an large, therefore, relief under the Trade Practices Act 1974 (Cwth) may be unaffected by entire contract clauses or disclaimers. Such will not prevent the Court from looking exactly at what was represented either orally or in writing in any particular contract.

## 12. Conclusions

Mr Justice Pincus in a recent address to the Commercial Law Association<sup>143</sup> after a consideration of the present ramifications of s.52 said that "one tends to become exasperated at the task of trying to marry the consequences of (the section) with pre-existing legal rules."<sup>144</sup>

In a sense, His Honour is totally correct and one has felt similar exasperation in compiling this paper. The essential reasons for this are clear. At the foundation of the frustration of the lawyer who clings desperately to his conventional views of contract, is the revelation that s.52 simply cuts across all traditional boundaries. It ignores all those essential elements of contract that we learned and accepted with reverence. Absent from consideration in matters involving s.51A, s.52 and s.53A is the necessity to ascertain the terms of a concluded agreement, the importance of consideration in support of promises, the standing of oral terms outside a written agreement. What is now relevant is conduct and the consequences of that conduct. Previously, any statement made by a representor which was innocently made, without negligence on the part of that representor, was largely not actionable. The Act now creates liability in damages for such a representor notwithstanding the statement is totally innocent — made without deceitful intent and without negligence. Whilst Equity gave relief in land transactions where the aggrieved party acted to set aside the contract whilst it remained executory, no action for consequential relief lay and it was necessary to show unequivocally that the statement was an inducing cause to contract. This has proved a difficult hurdle to surmount.

With the focus on conduct, negotiations have assumed an importance beyond that of the contract in its ultimate form. What effect will this have on land contracts? Negotiations

139. *Laurence v. Lexcourt Holdings Ltd Supra* n.13; *Walker v. Boyle Supra* n.20.

140. [1983] 2 Qd R 105.

141. [1986] 2 Qd R 91.

142. *Phillip and Anton Homes Pty Ltd v. The Commonwealth* (1988) ATPR 40-838.

143. Commercial Law Association Bulletin (June 1988), 15.

144. *Ibid.* at 16.

are usually carried out by real estate agents whose well accepted disability to make warranties affecting their principals has been a source of anguish to many a potential plaintiff who might risk a great sum in costs trying to prove that a principal was bound by a representation made by an agent, that the agent had authority of some kind to make the representation and that it induced, although not solely, the formation of the contract. Often, fraud is pleaded in such cases as a possible alternative as fraud will both lead to a setting aside of the transaction and a claim for damages for deceit. But fraud is rarely shown and in most cases totally inapposite.

Indeed, if the action was framed in negligence against an agent and vendor, it was essential to prove a duty of care, a breach of that duty and consequent, reasonably foreseeable kind of loss. The Act does away with the necessity to adhere to these formalisms. Conduct and consequence is all.

In land contracts, where there are subtle balances between the vendor's duty to disclose and the purchaser's obligation to search, to some degree, regard, is had to conduct of the parties especially in the awarding of equitable remedies. Can these balances remain as the lynch-pin of the land transaction? The simple and easy answer is that it is too soon to tell. With the advent of cross-vesting of jurisdiction,<sup>145</sup> as more and more vendor and purchaser cases are instituted in reliance upon the Act, a pattern should emerge. If the cases to date are any guide, they have tended to be concentrated upon purchase or lease contracts which have signed prior to the construction of improvements being bought or leased, where purchasers and leasees have not had premises to physically search prior to signing up. In these instances, oral and written representations are everything. Total reliance must be placed upon the written brochure and the enthusiastic, verbal endorsements of an ebullient real estate agent. It remains to be seen whether the Act infiltrates the law of vendor and purchaser to such an extent in relation to contracts for the purchase and lease of premises existing at the date of contract where a party must use his own judgment in obeisance to the well settled obligation to search which whittles down the vendor's total obligation to disclose.

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145. Jurisdiction of Courts (Miscellaneous Amendments) Act 1987; Jurisdiction of Courts (Cross Vesting) Act. 1987 (Cwth); Jurisdiction of Courts (Cross Vesting) Act 1988.