MWH AUSTRALIA PTY LTD v WYNTON STONE AUSTRALIA PTY LTD (in liq)

COURT OF APPEAL

WARREN CJ, BUCHANAN and NETTLE JJA

10 November 2009, 21 September 2010
[2010] VSCA 245

Contract — Construction — Intention of parties — Objective test — Deed of novation — Release from claims — Unambiguous language — Broader commercial purpose of deed — Prospective operation only.

Trade practices — Misleading or deceptive conduct — Deed of novation — Warranty of past performance — Causation — Reliance — No direct evidence — Inference — Inducement by warranty.

Practice and procedure — Procedural fairness — Abandonment of claim — Final submissions — Cursory argument — Case management.

In early 1997, the applicant ("MWH") was engaged by the respondent ("WSA") to undertake design work for two sewerage treatment plants. During the continuance of the project, WSA sold its business, and MWH and WSA entered into a deed of novation by which the purchaser ("TTW") was substituted for WSA. Clause 2 of the deed provided as follows:

> "[MWH] releases and discharges [WSA] from all claims and demands whatsoever in respect of the contract and accepts the liability of TTW under the contract in lieu of the liability of [WSA] and agrees to be bound by the terms of the contract in every way as if TTW was named in the contract as a party thereto [in] place of [WSA]."

Clause 4 of the deed provided for outstanding fees to be paid to WSA and an acknowledgment by WSA that the services performed by WSA prior to the date of the deed under the contract had been performed in accordance with the terms of the contract. Moneys due under the contract were to be paid to TTW "as and from" the date of the deed.

The treatment plants leaked, and proceedings were commenced by the client against the construction firm, MWH, WSA, TTW and others. The trial was large and complex. At the outset of the trial, the trial judge informed the parties that he would determine the case only upon the issues which emerged from the pleadings and, even then, only on those issues which were pressed in final address.

At trial, MWH made claims against WSA in negligence, for breach of the retainer, and for breach of warranty constituted by the acknowledgment in cl 4 of the deed. WSA relied on the release of liability in cl 2, among other grounds. MWH alleged that the release applied only in respect of work undertaken after the deed of novation, and, in any event, that WSA was precluded from enforcing the release on the ground that the acknowledgment in cl 4 was false and misleading conduct in contravention of s 52 of the Trade Practices Act 1974 (Cth). MWH did not adduce direct evidence as to its reliance on cl 4, but alleged that its reliance on the acknowledgment was to be inferred from the terms of the deed and the surrounding circumstances.

The trial judge found that WSA had acted negligently in its design work prior to entering into the deed of novation, that WSA was released from liability to MWH for negligence and breach of retainer by the terms of cl 2 of the deed, and that although the acknowledgment in cl 4 was false, MWH had not proven that it had relied on it in entering into the deed. However, he upheld MWH's claim for breach of warranty constituted by cl 4 of the deed.

MWH appealed, seeking judgment for damages on the grounds of negligence and breach of contract. It contended that the release should be read down to enable judgment for negligence and breach of retainer, and that the court should infer that it relied on cl 4 in entering into the deed, so as to preclude WSA from relying on the release. WSA cross-appealed on the grounds (among others) that the release extended to cover the warranty claim, that the warranty claim had been abandoned because it had not been referred to in final submissions by MWH and that another sub-contractor, had been responsible for the negligent work.

Held, allowing the appeal and dismissing the cross-appeal: (1) Although the release in cl 2 of the deed was expressed in the broadest possible language and, viewed in isolation, it could only have been regarded by reasonable business people in the position of the parties as operating both prospectively and retrospectively, the broader commercial purpose expressed by the remainder of the deed was to substitute TTW for WSA from the date of the deed. Approached from a commonsense business point of view, it was more likely that the release should be read with the words "as if TTW was named in the contract in place of WSA, *as and from the date of this deed*" (emphasis added). The release therefore did not also extend to the claim for breach of warranty. [21]–[24], [73]–[85].

> *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 applied.

(2) By Buchanan and Nettle JJA, Warren CJ dissenting. A fair inference arose that the representation in cl 4 of the deed operated as an inducement to MWH to enter the deed. In the light of the relevant surrounding facts and circumstances and the course of conduct leading up to execution, it appeared to be a material representation calculated to induce. Absent determinative evidence, commonsense dictated the conclusion that it played at least some part in inducing MWH into the deed. [96]–[106].

> *Gould v Vaggelas* (1985) 157 CLR 215; *Ricochet Pty Ltd v Equity Trustees Executor & Agency Co Ltd* (1993) 41 FCR 229; *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 43 IPR 545 considered.
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> *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 distinguished.

Per Warren CJ, dissenting. The evidence adduced in respect of the question of reliance was minimal, and an inference could only be made on a speculative basis, founded upon judicial construction of the decision-making of real individuals involved in the execution of the deed. Further, MWH raised the argument in a cursory and perfunctory fashion before the trial judge, and to allow it to advance the claim during an appeal hearing would involve a significant procedural unfairness. [25]–[50].

> *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 considered.

(3) MWH's breach of warranty claim had not been abandoned. The claim was pleaded, opened, pursued in evidence at trial and dealt with in written submissions and final addresses. [112], [113].

(4) The evidence led ineluctably to the conclusion that the contractual arrangements for Barrett Fuller's component of the work was with WSA. It was well open to the judge to reject evidence of WSA's principal that WSA was not engaged in or responsible for the work found to be negligent. [119]–[121].

Decision of Byrne J *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117 varied.

Appeals

These were an appeal by one of the defendants against a decision of Byrne J giving judgment for damages against another defendant in an action by a water authority arising from a contract for the design, construction and commissioning of two sewerage treatment plants, and a cross-appeal. The facts are stated in the judgments.

D S Levin QC, *I H Percy* and *J R M Tracey* for MWH Australia Pty Ltd.

D J O'Callaghan SC and *C M Archibald* for Wynton Stone Australia Pty Ltd.

Cur adv vult.

1 **Warren CJ.** Two appeals seek to challenge different aspects of a decision of the Trial Division.[1]

2 An appreciation of the grounds of appeal raised by the parties is contingent upon a summary understanding of the facts giving rise to the dispute and the proceedings conducted below.

The facts giving rise to the dispute

3 On 18 September 1996, Barwon Region Water Authority ("Barwon") called for tenders for the design, construction and commissioning of two sewerage treatment plants at Apollo Bay and Lorne in Victoria.

4 The tender was won by Aquatec-Maxcon Pty Ltd ("Aquatec") who became the head contractor. Aquatec sub-contracted the design and construction of the civil works associated with the plants to Nacap Australia Pty Ltd ("Nacap").[2] Nacap sub-let design of the civil and structural works to MWH Australia Pty Ltd ("MWH"). MWH in turn, sub-contracted with Wynton Stone Australia Pty Ltd ("Wynton Stone") to perform the structural design component of their contract.

5 Under the terms of the head contract, Aquatec also undertook to conduct geotechnical investigation of the sites proposed for the plants. This geotechnical work was sub-contracted to Nacap, who in turn sub-contracted it to MWH. Critical aspects of this geotechnical investigation were entrusted to JJP Geotechnical Engineering Pty Ltd ("Barrett Fuller"). Which party had engaged Barrett Fuller, MWH or Wynton Stone, and the scope of the work it was required to perform was an issue before the trial judge. The trial judge found that WSA had engaged Barrett Fuller.[3]

6 The contractual arrangements among the various parties were represented diagrammatically by the trial judge. The bottom part of this diagram addresses novation arrangements between Wynton Stone and MWH critical for this appeal.[4] I address them factually below.

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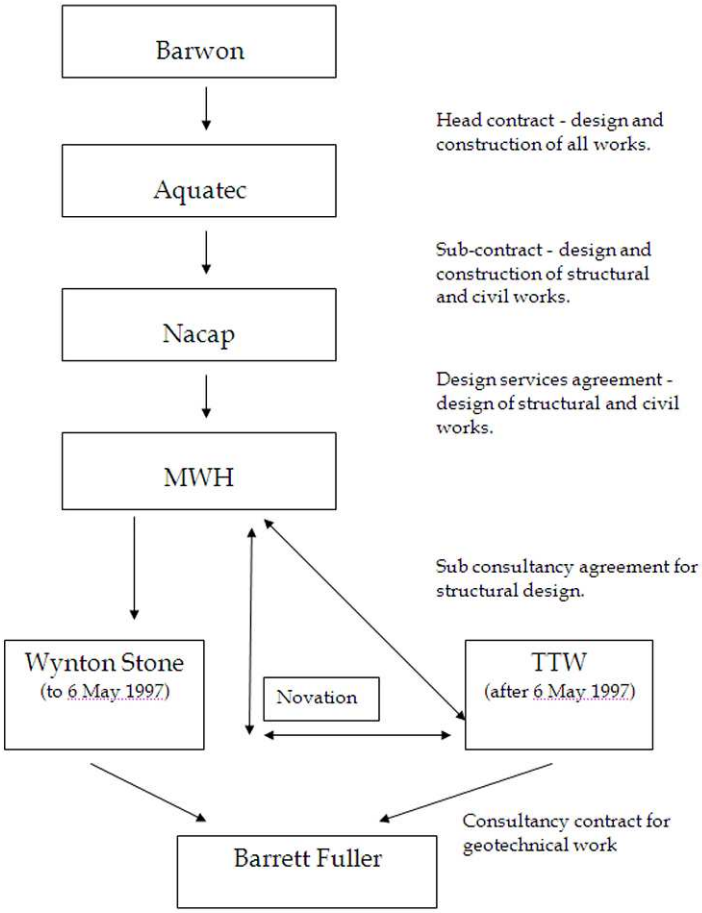
1. *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117 ("*Aquatec No 2*").
2. In *Aquatec No 2* this party was referred to as "Minson Nacap".
3. *Aquatec No 2* at [4] and [174].
4. *Aquatec No 2* at [14].



7 The engagement of Wynton Stone by MWH occurred in a slightly ad hoc fashion. This is no doubt a common incidence for large building projects involving competitive tenders where each contractor bears some risk that the group tender will not be successful:[5]

> MR LEVIN: We are sure that we owe Barwon a duty of care and Your Honour will recall we have been at length in the evidence to establish that everybody is working away before any contract is executed at all, and it cannot sensibly be argued that that was on the basis of some contract or contracts at that point because they might never have been executed.
>
> HIS HONOUR: That's not exactly a novelty in the building construction cases, very often its six months down the track they finally get round to signing the contract. It gets backdated.

5. Transcript of proceedings, *Aquatec No 2* (Byrne J, 11 November 2005).

8 Between 29 October 1996, when MWH sub-let pre-bid design work for the tanks to Wynton Stone, and 4 April 1997, when MWH formally engaged Wynton Stone, Wynton Stone carried out a large amount of the structural design work. In fact, by 24 March 1997, Wynton Stone claimed to have completed 80% of this work. While, this design work was being completed, discussions regarding the eventual contractual arrangements between the parties also continued in parallel. As the trial judge observed:[6]

> Between the end of January 1997 and the end of March 1997 discussions continued regarding the terms of the Wynton Stone retainer. Meantime Wynton Stone continued with its design work. This correspondence culminated in a fax, stamped as a draft, sent by Montgomery Watson to Wynton Stone on 26 March 1997 which was accepted by Montgomery Watson by letter dated 3 April 1997 …
>
> Three things should be noted about this fax of 26 March 1997 for my present purposes … Third, the scope of the Wynton Stone work is not clearly identified. For this it is necessary to look at the dealings which led to this fax.

9 As his Honour's decision makes clear, MWH and Wynton Stone regarded the contract they eventually executed as formalising an existing, implied contractual relationship that had been on foot since the pre-bid design work had been sub-let. It is symptomatic of such an arrangement and understanding that it was necessary to review the course of dealings between the parties in order to understand the scope of work performed under the eventual contract. Similarly, it is symptomatic of this rolling understanding of the contract between them that Wynton Stone advised MWH after that contract had been submitted to budget for additional site inspections and also put in a fee claim for works carried out beyond the scope of the original fee proposal.[7]

10 After completing the structural design work they had been engaged to perform, Wynton Stone merged with, or was acquired by, Taylor Thompson Whiting Pty Ltd ("TTW"). MWH, as a client of Wynton Stone, was invited to and executed a deed of novation on 6 May 1997 ("the deed"). The other parties to the deed were Wynton Stone and TTW. The terms of the deed were as follows:[8]

> *RECITALS*
>
> A. The client has awarded a contract dated 26/3/97 to WS for engineering consultancy services to be provided in respect to the client's job known as Lorne & Apollo Bay [Waste Water Treatment Plants] ("the contract").
>
> B. WS desires to be released and discharged from the contract and the client has agreed to release and discharge WS upon the terms of TTW's undertaking to perform the contract and to be bound by the terms of the contract.
>
> C. This deed is supplemental to the contract.
>
> *WITNESSES*
>
> 1. *Substituted contract to take over liability.*
>
> TTW undertakes to perform the contract and to be bound by its terms and conditions in every way as if it were a party to the contract in lieu of WS.
>
> 2. *Acceptance of transfer by client*
>
> The client releases and discharges WS from all claims and demands whatsoever in respect of the contract and accepts the liability of TTW under

6. *Aquatec No 2* at [147]–[148].
7. On 30 April 1997.
8. In the deed of novation, "WS" refers to Wynton Stone, and the "client" is MWH.

the contract in lieu of the liability of WS and agrees to be bound by the terms of the contract in every way as if TTW was named in the contract as a party thereto to [sic] place of WS.

3. *Effective date for substitution and transfer*

   The effective date for the substitution of TTW for WS and the acceptance of such substitution and transfer by the client is the date of this deed.

4. *Client's undertaking*

   The client undertakes to pay and accepts its liability to WS to pay all moneys due and owing under the contract up to the date of this deed and to TTW as and from such dates. WS acknowledges that the services to be performed under the contract by WS prior to the date of this deed have been performed in accordance with its terms.

11 Clifford Sloggett, Wynton Stone's principal, became an employee of TTW and continued to work on the sewerage treatment plants project after the novation was effected. It was Mr Sloggett who completed the design work ultimately impugned by the trial judge while he was principal of Wynton Stone.

12 Around October or November 1997, shortly after construction of the tanks, but prior to completion of the entire plants, cracking appeared in the tanks at Apollo Bay. In February 1998, cracking also appeared in the tanks at Lorne. This led Barwon to take the civil work away from Aquatec and engage a third party to complete both it and the necessary remedial work occasioned by that cracking.

13 Expert evidence accepted by the trial judge indicated that the cracking discovered was caused by external hydrostatic pressure from groundwater beneath the tank floor slabs. In the case of the tanks at Lorne, it was accepted that this cracking was also caused by the presence of water in embankments surrounding the tanks. His Honour found that Wynton Stone's design had failed to specify a sufficient number of pressure relief valves, failed to provide adequate drainage pathways under the tanks, and failed to properly design a cut-off drain at the Apollo Bay plant in order to alleviate this pressure and address the presence of water in the embankments. These failures had caused cracking to occur.

Background to the proceedings

14 On 6 October 2000, Aquatec instituted an action against Barwon claiming payment for work done. This claim was not ultimately pursued. Instead, the proceeding focused on Barwon's counterclaim against Aquatec for $3,686,464, being the cost of the necessary remedial work plus interest. On 16 March 2001, Aquatec joined Nacap, MWH, Wynton Stone, Barrett Fuller and another party as defendants to this counterclaim, thus seeking to limit any liability it might be found to have by relying on the now repealed proportionate liability provisions of the Building Act 1993.[9] On 7 February 2003, TTW was also joined as a defendant. Once this occurred, it became inevitable that claims and counterclaims would arise between the parties involved in the design and construction of the tanks as each sought to push responsibility for their faults either up or down the chain of contracts and sub-contracts occasioned by the project.

15 Barwon sought no relief against any of the defendants joined by Aquatec. However, their joinder occasioned a multiplicity of claims among them. Aquatec made a claim for breach of contract against Nacap, who made a contractual claim

9. Contained in Pt 9, Div 2.

against MWH. MWH in turn alleged that Wynton Stone had breached the terms of its retainer as well as the warranty it alleged was contained in cl 4 of the deed.

16 When the matter came to trial, it occupied 40 sitting days, from 17 October to 15 December 2005. The proceeding was of Byzantine complexity and morose detail. The learned trial judge's decision makes it clear that much of this complexity was occasioned by the unnecessary mass of claim and counterclaim made by the parties. His Honour felt that this inhibited rather than assisted his task, and was properly forced to adopt a pragmatic approach to addressing the parties' respective cases:[10]

> The pleadings, not including separately delivered particulars and schedules, run to over 750 pages. In the course of the opening, counsel for Barwon informed me that I would not be greatly assisted by them. I was told that many of the pleaded claims were no longer pressed and that the issues in the case would emerge as the trial proceeded. This view was supported by most of the other parties. With some misgivings, I was content to proceed on that basis until it soon became apparent that, in a case of this complexity, such a course was leading to a failure on the part of the parties to address the issues in an organised and disciplined way. Moreover, it made it difficult for me as trial judge to understand the significance of the considerable volume of evidence that was presented, particularly in the early days of the trial, and impossible for me to rule on matters of relevance and to know what was to be dealt with in my judgement. Accordingly, I began to encourage the parties to focus on their pleaded allegations and responses so as to expose the questions in issue. I told them that I would determine this case only upon the issues which emerged from the pleadings and, even then, only on those issues which were pressed in final address. This had the consequence that there were frequent amendments even involving substantial shifting of positions, and this continued up to the closing days of the evidence. Even so, as will be seen, the pleadings generally lacked the rigour which might be expected in a proceeding in this Court. This has meant that much evidence was not focused on issues and that, in this judgment, I have had to unravel arguments which I venture to describe as woolly and to pursue a number of issues which ultimately were of no significance.

17 Having grappled with these shortcomings, his Honour adopted the sensible approach of circulating a draft analysis of the pleadings documents during the course of the trial (24 November 2005) and then receiving responses from the parties with respect to any issues they felt had been raised therein but not adequately addressed.

18 In his reasons for judgment, his Honour rejected MWH's claim against Wynton Stone for breach of contract and negligent preparation of the structural design. He found that cl 2 of the deed operated as a complete release from all claims in respect of the contract, including negligence claims. However, his Honour found that cl 4 operated as a contractual warranty in respect of the work completed under the contract. His Honour rejected MWH's claim that the making of that warranty amounted to deceptive and misleading conduct because that claim was not adequately raised or developed during the course of the trial.

19 Having delivered his principal reasons, his Honour made a number of consequential decisions to give effect to them. By order dated 1 May 2007, pursuant to his decision in *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 6)*,[11] he ordered Wynton Stone to pay MWH $4,138,696 together

10. *Aquatec No 2* at [15].
11. [2007] VSC 127 ("*Aquatec No 6*").

with damages by way of interest of $2,946,601.08 for breach of warranty. To date, Wynton Stone, which was placed into liquidation on 18 August 2006, has not paid these sums, nor has it paid MWH's costs. In contrast, MWH has paid Nacap damages of $4,138,696 together with damages by way of interest of $2,640,951.50 pursuant to an order made by the trial judge on 1 December 2006.

The MWH appeal

20 The issues which must be decided to dispose of MWH's appeal are as follows:

1. Whether cl 2 of the deed operated to release Wynton Stone from all liability for breach of the novated contract, or only from liability for breach of contract on or after commencement of the deed.
2. Whether the trial judge was correct in holding that cl 2 of the deed released Wynton Stone from liability in tort.
3. Whether or not cl 4 of the deed constituted misleading or deceptive conduct within the meaning of s 52 of the Trade Practices Act 1974 (Cth).
4. Whether his Honour erred in law by failing to make key findings including which agreement was novated by the deed.

21 The deed around which each of these grounds of appeal is organised is not without problem. In so far as it uses the nomenclature of transfer, it has clearly been drafted and executed by individuals without a complete understanding of the law of novation. The release provided by cl 2 is not ambiguous on its face. It is expressed in the broadest language available to parties drafting clauses of this nature. Viewed in isolation, it could only have been regarded by reasonable business people in the position of the parties as operating both prospectively and retrospectively, and as covering liability under both contract and tort. This was the approach adopted by the trial judge.[12]

22 However, it is equally clear that a release which operated both prospectively and retrospectively is inconsistent with the broader, commercial purpose expressed by the remainder of the deed. That purpose was to substitute TTW for Wynton Stone from the date of its execution, such substitution being a direct result of the merger or acquisition of Wynton Stone by TTW.

23 Therefore, the court is faced with two possible approaches to construing the disputed release: either to regard cl 2 as a complete release, and thereby render the intention displayed by the deed as a whole subservient to the intention displayed by the terms of cl 2; or to regard cl 2 as a prospective release only, and thereby construe the intention displayed by cl 2 as subordinate to the objective intention displayed by the entire document.

24 In my view, the latter approach best expresses the belief of reasonable business people in the position of the parties.[13] I have arrived at that conclusion on the basis of the reasoning advanced by Buchanan and Nettle JJA. On the basis of the same reasoning, I also concur with their opinion that cl 2 should be construed as covering tortious liability and that cl 4 should be construed as a warranty.

25 However, in contrast to their Honours, I do not regard the making of the warranty contained in cl 4 of the deed as constituting deceptive and misleading conduct under s 52 of the Trade Practices Act 1974 ("the TPA"). My view is

12. *Aquatec No 2* at [213] and [218].
13. *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461–2, [22]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 174, [53].

based upon three reasons: first, my failure to be satisfied that the making of the warranty had a substantial enough causal connection to MWH's decision to execute the deed on the evidence before the court; secondly, the failure of MWH to establish, in light of the court's finding as to cl 2, that it suffered any loss by entering into the deed; and thirdly the procedural unfairness occasioned to Wynton Stone if MWH is allowed to raise such a claim before an appellate court in a fashion inconsistent with its conduct of its case before the trial judge.

26 No intention to mislead or deceive is required for a breach of s 52 of the TPA to occur.[14] However, in order to establish loss or damage flowing from any breach, MWH has the onus of establishing a causal connection between the misrepresentation alleged and the loss purportedly suffered as a consequence of that alleged misrepresentation. In this case, it would require MWH to establish two facts: (1) that the giving of the warranty set out in cl 4 played some part in inducing its entry into the deed; and (2) that it suffered loss as a consequence of its decision to enter that document. This issue is "an objective question that the court must determine for itself."[15]

27 In order for reliance to be established, the party pursuing the cause of action must show that the misrepresentation in question "played some part in inducing entry into the contract".[16] It:[17]

> need[s] to be of a kind likely to provide that inducement and such that: "… common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract."

28 However, it will not suffice to establish reliance if the court is only satisfied that the misrepresentation in question "might" have had the effect of naturally operating on the mind of the representee.[18]

29 MWH has invited this court to determine the issue of reliance solely by reference to documentary construction of the deed. It had led no evidence at trial from the individuals involved in executing that document. MWH invites the court to gloss over the issue of causation on the grounds that: (1) Wynton Stone's representation was materially likely to induce MWH to enter into the deed; and (2) MWH actually entered the deed. In doing so it relies upon the statement of Wilson J in *Gould v Vaggelas*[19] that:

> If a material representation is made which is calculated to induce the representee to enter into a contract and that person in fact enters into the contract there arises a fair inference of fact that he was induced to do so by the representation.

30 In *Campbell v Backoffice Investments Pty Ltd*,[20] a majority of the High Court encouraged those seeking to transpose this inference into statutory misrepresentation actions to exercise caution:

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14. *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1988) 19 FCR 469 at 473–4.
15. *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 625, [109] per McHugh J ("*Butcher*").
16. *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 43 IPR 545 at 556, [45] per Kiefel J with whom Wilcox J agreed.
17. At 556, [45].
18. At 556, [47].
19. (1985) 157 CLR 215 at 236.
20. (2009) 238 CLR 304 at 351–2, [143] ("*Backoffice*") (emphasis in original).

> Three points may be made about this proposition. First, it is a proposition expressed in relation to the law of deceit, *not* the operation of statutory provisions for the award of damages suffered by contravention of consumer protection provisions proscribing misleading or deceptive conduct. Secondly, the proposition carries within it a number of subsidiary questions, such as what is a "material" representation, and when is a material representation "calculated" to induce entry into a contract. Thirdly, because the proposition is directed to the drawing of inferences, consideration of its application must always attend closely to all of the evidence that is adduced that bears upon the question being examined. With considerations of these kinds in mind, Giles JA was right to point out that reliance is *not* a substitute in the context of the Fair Trading Act for the essential question of causation. Moreover, it is also right to observe, as Giles JA said, that "[i]t may be artificial to speak of reliance in determining what action or inaction would have occurred if the true position had been known".

31 As their Honours noted in *Backoffice*, "because the proposition is directed to the drawing of inferences, consideration of its application must always attend closely to all of the evidence that is adduced that bears upon the question being examined". In this case, the evidence adduced in respect of the question of reliance is minimal. It is an inference that can only be made on a speculative basis. That speculation is in turn founded upon judicial construction of the decision-making of real individuals involved in the execution of the deed. No direct evidence has been led on the question of causation, despite the fact that relevant witnesses were available to give such evidence at trial.

32 When an alleged misrepresentation is contained in a document or a part of a document, the court is bound to analyse that document by reference to the circumstances surrounding its production and dissemination:[21]

> The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself. It invites error to look at isolated parts of the corporation's conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct. Thus, where the alleged contravention of s 52 relates primarily to a document, the effect of the document must be examined in the context of the evidence as a whole.

33 Here, MWH's failure to properly develop this claim at trial has denied the court, both at trial and on appeal, the ability to properly contextualise the deed within the surrounding circumstances. MWH invites the court to isolate cl 4, and, in my view, draw far-reaching inferences from its language. Like the trial judge, I cannot make such a finding on this narrow understanding of the entire course of conduct of which cl 4 forms only a small part. Such a finding would be inconsistent with authority that emphasises that the fulcrum of any claim under s 52 of the Act is "causation", and that such causation can only be decided through a proper appreciation of the context in which conduct occurs.

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21. *Butcher* at 625, [109].

34 Buchanan and Nettle JJ are content to draw the inference advanced by MWH. In doing so they cite, among a number of similar authorities, the following statement from the Full Federal Court in *Ricochet Pty Ltd v Equity Trustees Executor and Agency Co Ltd*:[22]

> Counsel for the appellants cited *Gould v Vaggelas* also for the proposition that the trial judge was bound to infer, in the absence of contrary evidence, that the appellants had been induced by the representations to enter into the lease. Reference was also made to the judgment of Jenkinson J (Ryan J agreeing) in *National Australia Bank Ltd v Cunningham* (1990) ATPR 41-047 for the uncontroversial proposition that liability under s 82 of the Act for a contravention of s 52 can be established where the misrepresentation was but one of a number of factors which induced a loss-making decision. That case was also invoked, however, in support of a submission that liability can be established when it is shown that a person *might* have abstained from the course of action or inaction allegedly induced if the misrepresentation had been made.
>
> *Gould v Vaggelas* lays down no exhaustive rule for the approach to evidence of inducement in misrepresentation cases. In particular, it lays down no rule in claims for damages under s 82 of the Act for contravention of s 52, where the gist of the conduct complained of is the making of misrepresentations. On the question of proof of inducement, the judgment of Wilson J in *Gould v Vaggelas* makes the point that a combination of factors may, if unanswered, lead to the conclusion that a person was induced by the representation of another to make the relevant decision. Where, for example, it is shown that a false representation has been made which the representor intended should induce the representee to enter into a contract, and where it is shown that the representation is of a kind likely to provide such an inducement and that the representee entered into the contract, then, as Wilson J said (at 238):
>
> > "… common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract."
>
> The statement provides a practical guide to the way in which inferences can and should be drawn in such cases. It remains for the tribunal of fact, as his Honour pointed out, to determine, when all the evidence has concluded, whether the misrepresentation in question contributed to the decision to enter the contract. The unremarkable logic of these propositions is more likely to be obscured than illuminated by reference to notions of presumptions of fact or the incidence of the evidentiary onus.

35 The important qualification set out in the first sentence of this extracted passage indicates why the relevant principle taken from *Gould v Vaggelas* is inapplicable to the instant case:

> Counsel for the appellants cited *Gould v Vaggelas* also for the proposition that the trial judge was bound to infer, *in the absence of contrary evidence*, that the appellants had been induced by the representations to enter into the lease. [Emphasis added.]

36 This same point is reiterated further down:

> On the question of proof of inducement, the judgment of Wilson J in *Gould v Vaggelas* makes the point *that a combination of factors may, if unanswered*, lead to the conclusion that a person was induced by the representation of another to make the relevant decision. [Emphasis added].

22. (1993) 41 FCR 229 at 233–4 (emphasis in original).

37 It is elementary to the just conduct of appeals, that where the ability to lead "contrary evidence" or properly "answer" the question of inducement has been denied to the respondent by the appellant's conduct of its case at trial, that such an inference cannot and should not be raised in its favour. I will return to this point in more detail below.

38 Secondly, in light of this court's unanimous decision with respect to cl 2, I cannot identify any loss flowing from MWH's decision to enter the deed even if the misrepresentation advanced were made out. Wynton Stone remained liable in contract and tort for all the work that it had performed prior to the execution of the deed. If anything, the deed expanded MWH's remedies against Wynton Stone by providing an additional cause of action for breach of the warranty contained in cl 4.

39 Thirdly, to allow MWH to advance this claim during an appeal hearing would be to punish Wynton Stone for MWH's failure to properly conduct its case before the trial judge. It would involve this court tolerating a significant procedural unfairness. The court is largely precluded by MWH's conduct at first instance from embarking upon the kind of broad investigation required of it in order to satisfy itself with respect to a claim of this type.

40 It is well established that:[23]

> In deciding whether or not a point was raised at trial no narrow or technical view should be taken …
>
> It is necessary to look to the actual conduct of the proceedings to see whether a point was or was not taken at trial, especially where a particular is equivocal.

41 However, while MWH addressed its statutory misrepresentation in a cursory fashion during the course of the trial, it did not address it in anything approaching sufficient depth, or take the opportunity to lead direct evidence with respect to it. The following exchange between counsel for MWH and the trial judge during the former's final address makes this quite clear:[24]

> MR LEVIN: Indeed. Your Honour, we stress that the warranty or term of the agreement may amount to conduct contrary to s 52 of the Trade Practices Act.
>
> HIS HONOUR: Not much has been said about that; do you press that?
>
> MR LEVIN: Not much has been said but, Your Honour, we do press it. We certainly haven't resiled from it.

42 No more was said at that stage.

43 When his Honour published his reasons for judgment on 31 March 2006, he quite rightly rejected MWH's statutory misrepresentation claim because it had not been sufficiently developed at trial. He stated:[25]

> Next it is said that the falsity of the acknowledgement given in cl 4 is misleading and deceptive conduct contrary to the Trade Practices Act 1974 and the Fair Trading Act 1987. It is not clear from the Montgomery Watson reply where this allegation leads. It is not alleged, nor is it proved, that Montgomery Watson relied upon this conduct. In the prayer for relief damages are sought but no loss or damage is alleged or was proved to flow from this misleading and deceptive conduct. It may be that this is directed to the allegation in paragraph 11 of the reply that, as a matter of law, Wynton Stone is not

23. *Water Board v Moustakas* (1988) 180 CLR 491 at 497 ("*Moustakas*").
24. Transcript of proceedings, *Aquatec No 2* (Byrne J, 14 December 2005).
25. *Aquatec No 2* at [217] (footnotes omitted).

entitled to rely upon the release and discharge, for this is what was put in final address. Reliance was placed on the decision of Rolfe J in *Wilkinson v Feldworth Financial Services Pty Ltd*. This case, however, did not concern the statutory prohibition upon misleading and deceptive conduct; the passages to which I was referred concerned a case where a party was precluded from relying upon a contractual exclusion in circumstances where this would be unconscientious. In any event, in the present case, this element of unconscientiousness does not exist. It was never put to Mr Sloggett that, at the time he obtained the execution by Montgomery Watson of the deed of novation, he knew that the design of the tanks was defective. He was, of course, aware of what he had done and not done as part of the design process, but I do not conclude that he had at the time the knowledge that Wynton Stone had not performed its contract in accordance with its terms and that he failed to disclose this to Montgomery Watson. It should be recalled in this regard that the failure of Wynton Stone was a failure to design the tanks so that they achieved the performance requirements of the specification.

44 MWH attempted to re-agitate this point at a hearing conducted by the trial judge on 29 March 2007 to finalise orders as between MWH and Wynton Stone. By this stage, a year had passed, and orders had already been made in respect of Aquatec and Barwon (26 July 2006), Aquatec and Nacap (9 August 2006), and Nacap and MWH (1 December 2006). At that hearing, counsel for MWH invited the trial judge to make the same speculative inference which they now agitate before this court, to revise this aspect of his published reasons accordingly, and to make orders consequent upon that revision. However, MWH declined to re-open this aspect of their case.[26] The trial judge quite rightly rejected this proposal. He understood that the ability to address such a claim properly and fairly had passed with the conclusion of the trial and the submission of direct evidence. He stated:[27]

> I am at this stage addressing the question as to how the case was presented. The case really — if this point was going to be presented it would have to be developed. It would have to be argued not simply that we've got a false statement and we entered into a contract, by why that relief has to be granted rather than some other relief, why the whole contract shouldn't be set aside but just a bit of it.
>
> All of these things I can well understand could have been developed, might even have developed in cross-examination when Mr Sloggett was in the box to try and establish or call your own evidence that this was an important consideration. I don't know. But it's a long time ago and we won't work with what was then before the court, because if you are right and if I were to permit you to reopen this case it wouldn't be just a question of you then sitting down and saying, well now decide that issue, we'd have to have a lot of debate about it all, we'd have to have a lot of argument as to why the sort of matters that I am now raising which would occur to me as to why, assuming that was misleading and deceptive conduct, why that should have the consequence which you now contend, and you will no doubt present a lot of argument and Mr O'Callaghan may well say something to the contrary, and I'd come to a result. But the point is that we would then be reopening the issue, and that's what I'm resistant to doing unless its absolutely necessary.

26. Transcript of proceedings, *Aquatec No 2* (Byrne J, 29 March 2007).
27. Ibid.

45 MWH had adequate opportunity to provide his Honour with the means to understand the facts and circumstances surrounding entry into the deed. As his Honour properly noted they did not avail themselves of that opportunity; "nothing … [was] said about it other than an assertion".[28]

46 MWH is bound by the conduct of its case before the trial judge. It is well settled in law that an appellant cannot raise an argument on appeal that was not advanced before the court below unless all of the facts have been established beyond controversy in respect of that point, or where the point is one of construction, or of law.[29] While, it is not strictly correct to say that the appellant did not raise this argument before the trial judge, it only did so in a cursory and perfunctory fashion.

47 In *Aon Risk Services Australia Ltd v Australian National University*.[30] The High Court admonished courts for indulging precisely these sorts of claims which disadvantage other parties to the litigation and inhibit the efficient administration of the justice system:[31]

> A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient *opportunity* to identify the issues they seek to agitate.
>
> In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

48 In that same case, Heydon J drew attention to an opinion of Bryon J which while not exactly cognate with the situation before this court, bears repeating in this context:[32]

> I do not think that the law requires the discretion to allow amendments to be exercised in entire innocence of understanding the obvious impact of forbearance and liberality on the behaviour of litigants, who have diminished incentive to do their thinking in due time and tell the court and their opponents their full and true positions. *When forbearance and liberality are extended to a delinquent the burden of inconvenience and lost opportunities for preparation tends to fall heavily and without adequate repair on parties who have not been delinquent.* A relative disadvantage is imposed on those who proceed methodically and in due time; their interest in procedural justice should claim at least as much consideration as the interests of the applicant for a late amendment who does not have to look far for the creator of his difficulty. It is even conceivable that a litigant might deliberately pursue a course which will impose disadvantage on an opponent who has to reconsider his ground and change course in the midst of a contest.

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28. Ibid.
29. *Moustakas* at 497.
30. (2009) 239 CLR 175 ("*Aon*").
31. At 217, [112]–[113] (emphasis in original).
32. *Maronis Holdings Ltd v Nippon Credit Australia Ltd* [2000] NSWSC 753 at [15]. Quoted in *Aon* at 222, [133] (emphasis added).

49 It is not appropriate for this court to entertain extensive arguments by an appellant in respect of a claim, which, while technically speaking, has been pleaded within the scope of the original conduct of the appellant's case, was not properly ventilated or argued before the trial judge despite the appellant having adequate opportunity to do so.

50 Therefore, this ground of appeal must fail.

51 Finally, MWH asserts that his Honour erred in law by failing to make key findings including which agreement was novated by the deed.

52 This ground of appeal is clearly an additional attempt by the appellant to avoid the consequences of the trial judge's construction of the release in cl 2 of the deed by arguing that that clause is inapplicable to the services in question because they were not performed under the April 1997 contract. The consequential effects of a finding in favour of this ground of appeal on MWH's ability to claim damages for Wynton Stone's breach of the warranty contained in cl 4 do not appear to have been considered by MWH. As I have rejected this ground of appeal, they do not arise for consideration by this court.

53 In so far as it is necessary to deal with this point, it should be rejected. MWH's case was conducted, and was understood to be conducted, before the trial judge on the basis that there was a single contract between it and Wynton Stone. Addressing counsel for MWH, his Honour stated:[33]

> HIS HONOUR: You've got a contractual claim against Wynton Stone, do you?
> MR LEVIN: Against Wynton Stone until the May 1997 period and against TTW at least from the May [1997 period].

54 So much is made clear in [31], [32] and [33] of its fifth amended statement of claim. A review of the trial judge's decision and the factual material in respect of these appeals indicates that the parties regarded the services provided by Wynton Stone, at the time they were provided, as being provided under a single agreement. This agreement operated on an ad hoc basis before culminating in the April 1997 agreement. To suggest that because some of the design services were completed prior to the formalisation of those arrangements, they were not performed under the written contract accepted by MWH on 3 April 1997, is also to deviate from the understanding of the parties at the time. The 24 March 1997 fax which constituted that formalisation did not describe the scope of works, but required any party reading it to identify those works by reference to the parties' previous course of dealings. To adopt the approach suggested by MWH would actually render the contract nonsensical as it would be impossible to ascertain what work Wynton Stone did and did not do under the contract with any certainty.

55 Finally, the trial judgment makes clear that many of the negligent design decisions of Clifford Stoggett out of which Wynton Stone's liability arises, were made by him after the execution of the soon to be novated contract on 3 April 1997.[34] For example, his direction to Nacap to lower the cut-off drain to 3.3 metres was given on 17 April 1997,[35] while the pressure relief valves were included in his 23 April revision of the relevant drawings.[36] Had MWH wished to conduct its case on the basis that there were multiple contracts, only one of

33. Transcript of proceedings, *Aquatec No 2* (Byrne J, 11 November 2007).
34. *Aquatec No 2* at [188]–[192].
35. At [190].
36. At [195].

which was novated on 6 May 1997, it would have had to identify with more particularity which decisions it was impugning at trial and then provide evidence of which contract they fell under. Such a decision would no doubt have required a great deal of development, evidence, argument and counter-argument from each side. In my view, it is not proper for this court to entertain such a claim on appeal. Nor would it be procedurally fair for the respondent to have to attempt to meet it within the strictures imposed upon such a hearing.

56 Therefore, MWH is successful in respect of its first ground of appeal,[37] the release contained in cl 2 should be construed as operating prospectively from 6 May 1997, but fails on all its other grounds.

57 Wynton Stone has already been found liable to MWH for breach of the warranty contained in cl 4. Therefore, the success of this aspect of its appeal does not affect the damages it is entitled to recover from Wynton Stone.

The Wynton Stone appeal

58 Wynton Stone has appealed the findings of the trial judge on a number of grounds. For the reasons advanced by Buchanan and Nettle JJA, I am of the opinion that this appeal must fail.

59 I note for completeness that in the course of argument, the court raised with counsel for MWH and Wynton Stone the possibility that if the Wynton Stone appeal was successful it might disturb the settlement agreements between the other parties to the original dispute who were not parties to the present appeal.[38] The question was whether the previous application of the proportionality provisions might be disturbed. Senior counsel for MWH indicated that it would give an undertaking not to enforce any judgment and would not oppose any application by TTW notwithstanding it would be out of time. Accordingly, this would be a matter between the parties and not one in which the court would need to intervene.

60 **Buchanan and Nettle JJA.** This is an appeal from a judgment given in the Commercial and Equity Division. The appellant's ("MWH")'s claim below was for damages for breach of contract, negligent breach of duty to exercise reasonable skill and care and misleading and deceptive conduct in connection with the respondent's ("Wynton Stone")'s provision of professional engineering services under a sub-consultancy arrangement. The judge found that the claim for breach of contract was proved, but that Wynton Stone was in part relieved of liability by cl 2 of a deed of novation dated 6 May 1997, and his Honour dismissed the claims in negligence and for misleading and deceptive conduct. In this appeal MWH contends that the judge erred in holding that Wynton Stone was relieved of liability by cl 2 of the deed of novation and was in error in dismissing the claims in negligence and for misleading and deceptive conduct.

The facts

61 On 18 September 1996, Barwon Region Water Authority ("Barwon") called for tenders for the design, construction and commissioning of sewage treatment plants, at Apollo Bay and Lorne. Aquatec-Maxcon Pty Ltd ("Aquatec") was the

37. Amended notice of appeal, 2 December 2008.

38. Many of the parties to the trial at first instance filed appeals and cross-appeals from the trial judge's decision. All of these appeals and cross-appeals, except for the proceedings the subject of this judgment, were settled between the parties prior to the present appeals being heard.

successful tenderer. Having won the tender, Aquatec entered into a sub-contract with Nacap Australia Pty Ltd ("Nacap") for Nacap to undertake the design and construction of the civil works associated with the plants. In turn, Nacap sub-let the design of the civil and structural works, including hydraulics and architectural aspects (but excluding the sewage treatment technical design which remained part of Aquatec's responsibility), to MWH Australia Pty Ltd ("MWH"). MWH then retained Wynton Stone Australia ("Wynton Stone") to prepare the structural design.

62 When the structural design was complete, Wynton Stone's business was merged with or acquired by Taylor Thomson Whitting Pty Ltd ("TTW") and on 6 May 1997 a deed of novation ("the deed of novation") was entered into between MWH, Wynton Stone and TTW.

63 Around October or November 1997, shortly after the completion of the sewage treatment tanks but before completion of the entire works, cracking began to appear in the tanks at Apollo Bay and, in February 1998, cracking began to appear in the tanks at Lorne.

64 The weight of expert opinion, which the judge accepted, was that the cracking was caused by external hydrostatic pressure from groundwater beneath the tank floor slabs and, in the case of the tanks at Lorne, also by the presence of water in the embankments. The build up in pressure was the result of inadequacies in Wynton Stone's structural design. Essentially, Wynton Stone failed to specify a sufficient number of pressure relief valves and to provide for adequate drainage pathways under the tanks. Wynton Stone's design of a cut-off drain at Apollo Bay was also found to be inadequate.

The proceedings below

65 The proceeding below was complex. Aquatec instituted the action by writ on 6 October 2000 against Barwon claiming payment for work done by Aquatec. In the end, however, that claim was not pursued. Barwon counterclaimed against Aquatec for $3,686,464, being the cost of necessary remedial works plus interest, and that became the focus of the proceeding.

66 On 16 March 2001, Aquatec joined Nacap, MWH, Wynton Stone and others as defendants to the counterclaim. Aquatec thereby sought to limit its liability pursuant to the proportionate liability provisions of Div 2 of Pt 9 of the Building Act 1993.[39] TTW was joined as a defendant on 7 February 2003. Aquatec also claimed that Nacap had acted in breach of its contract with Aquatec. Nacap claimed that MWH had breached its contract with Nacap. MWH alleged that Wynton Stone had breached its retainer and cl 4 of the deed of novation.

67 The proceeding came on for trial on 17 October 2005 and occupied 40 sitting days, concluding on 15 December 2005. The judge delivered his principal reasons (Judgment No 2) on 31 March 2006. He rejected the claims for apportionment. He also rejected the claim by MWH against Wynton Stone for breach of its contract with MWH; the claim by MWH against Wynton Stone for negligence in the preparation of the structural design; and the claim by MWH against Wynton Stone for misleading and deceptive conduct in connection with the deed of novation. His Honour upheld a claim by MWH against Wynton Stone for breach of a warranty alleged to be contained in cl 4 of the deed of novation.

39. Since repealed, see now Pt IVAA of the Wrongs Act 1958.

68 In his reasons for judgment, the judge explained that he rejected MWH's claim against Wynton Stone for breach of contract because he considered that cl 2 of the deed of novation operated to release Wynton Stone from all claims and demands whatsoever in respect of the contract, and that he rejected MWH's negligence claim against Wynton Stone on the same basis. He dealt at some length, too, with his reasons for holding that cl 4 of the deed of release amounted to a contractual warranty by Wynton Stone that the design work which it undertook up to the date of the deed of release complied with the contract, and that, because of the defects in the Wynton Stone design, Wynton Stone had breached the warranty. But his Honour did not deal as such with the claim of misleading and deceptive conduct which, by his orders, he is taken to have rejected.

The issues in the appeal

69 The issues in the appeal are:

(a) Whether cl 2 of the deed of novation operated to release Wynton Stone from all liability for breach of the contract or only from liability for breach of contract occurring on or after commencement of the deed of novation.

(b) Whether the judge was correct in holding that cl 2 of the deed of novation released Wynton Stone from liability in tort.

(c) Whether cl 4 of the deed of novation amounted to a contractual warranty and, whether or not it did, was it misleading or deceptive within the meaning of s 52 of the TPA.

The meaning of cl 2 of the deed of novation

70 The deed of novation was as follows:

RECITALS

A. The client has awarded a contract dated 26/3/97 to WS for engineering consultancy services to be provided in respect to the client's job known as Lorne & Apollo Bay [Waste Water Treatment Plants] ("the contract").

B. WS desires to be released and discharged from the contract and the client has agreed to release and discharge WS upon the terms of TTW's undertaking to perform the contract and to be bound by the terms of the contract.

C. This deed is supplemental to the contract.

WITNESSES

1. *Substituted contract to take over liability.*

   TTW undertakes to perform the contract and to be bound by its terms and conditions in every way as if it were a party to the contract in lieu of WS.

2. *Acceptance of transfer by client*

   The client releases and discharges WS from all claims and demands whatsoever in respect of the contract and accepts the liability of TTW under the contract in lieu of the liability of WS and agrees to be bound by the terms of the contract in every way as if TTW was named in the contract as a party thereto to place of WS.

3. *Effective date for substitution and transfer*

   The effective date for the substitution of TTW for WS and the acceptance of such substitution and transfer by the client is the date of this deed.

4. *Client's undertaking*

   The client undertakes to pay and accepts its liability to WS to pay all moneys due and owing under the contract up to the date of this deed and to TTW as and from such date. WS acknowledges that the services to be

> performed under the contract by WS prior to the date of this deed have been performed in accordance with its terms.

71 MWH contended below that the deed operated to discharge Wynton Stone only from its future obligations under the sub-consultancy agreement, which was why cl 4 preserved Wynton Stone's right to be paid in respect of work done up to the effective date of the deed.

72 The judge rejected that submission on three bases:

1) First, his Honour was of the view that to construe the deed as operating only prospectively would be inconsistent with the following words in cl 2:

   > [MWH] releases and discharges [Wynton Stone] from all claims and demands whatsoever in respect of the contract.

   His Honour said that words of that kind would "normally"[40] be effective to release and discharge Wynton Stone from future claims and demands arising out of work previously performed.
2) Secondly, his Honour said that there was throughout the deed a strong flavour of futurity — for example, cl 3 speaks of the effective day for substitution and transfer; the heading to cl 1 speaks of substitution and taking over liability; and cl 4 provides for Wynton Stone to be paid out prior to the effective date.
3) Thirdly, his Honour considered that the acknowledgment in cl 4 of the deed, that the services had been performed in accordance with the contract, suggested that, but for those words, Wynton Stone would have escaped liability, and in turn that implied that cl 2 operated both prospectively and retrospectively.

His Honour concluded that:

> Although the matter is not free from difficulty … the effect of the deed of novation is as counsel for Wynton Stone contends. Its scheme is that TTW takes the contractual position previously held by Wynton Stone and that Wynton Stone ceases to be responsible under the old contract for any defective work. For this, it gives, in cl 4, an acknowledgement of due performance which is in terms sufficiently formal to amount to a contractual warranty.

73 With respect, we take a different view. In our opinion, the judge's construction of the deed overlooks or undervalues the operation of cl 3. According to its plain and ordinary meaning, the effect of cl 3 is that TTW takes the contractual position of Wynton Stone only "as and from"[41] the date of the deed and, correspondingly, that Wynton Stone ceases to be responsible under the contract for any defective work undertaken only "as and from" the date of the deed.

74 It may be, as the judge said, that a release and discharge from "all claims and demands in respect of the contract" would "normally be effective to release and discharge Wynton Stone from future claims and demands arising out of work previously performed". Assuming that "normally" means "in the absence of contrary indication", we would agree that a release "from all claims and demands whatsoever in respect of the contract" would extend to future claims arising out of work previously performed. But, for the purposes of construing cl 2, the

40. *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117 at [211].
41. See cl 4.

release must be read in context, and in our view a critical part of that context consists in the concluding words of the clause: "*as if TTW was named in the contract in place of WS*". As we read those words, they govern each of the three preceding stipulations within the clause, with the effect that MWH:

(a) releases and discharges WS from all claims and demands whatsoever in respect of the contract *as if TTW was named in the contract in place of WS*;

(b) accepts the liability of TTW under the contract in lieu of the liability of WS *as if TTW was named in the contract in place of WS*; and

(c) agrees to be bound by the terms of the contract in every way *as if TTW was named in the contract in place of WS*.

75 Perforce of cl 3 of the deed, one must then overlay the stipulation that "the effective date for the substitution of TTW for WS and the acceptance of such substitution and transfer by [MWH] is the date of this deed". In the result, cl 2 of the deed should in our view be read as having the effect that MWH:

(a) releases and discharges WS from all claims and demands whatsoever in respect of the contract *as if TTW was named in the contract in place of WS* "***as and from the date of this deed***";[42]

(b) accepts the liability of TTW under the contract in lieu of the liability of WS *as if TTW was named in the contract in place of WS* "***as and from the date of this deed***"; and

(c) agrees to be bound by the terms of the contract in every way *as if TTW was named in the contract in place of WS* "***as and from the date of this deed***".

76 We acknowledge that, syntactically, it would be open to construe the concluding words of cl 2 as applying only to the third of the three preceding stipulations. The effect of cl 2 would thus be that MWH:

(a) released and discharged WS from all claims and demands whatsoever in respect of the contract;

(b) accepted the liability of TTW under the contract in lieu of the liability of WS; and

(c) agreed to be bound by the terms of the contract in every way *as if TTW was named in the contract in place of WS* "***as and from the date of this deed***".

77 Such a construction, however, would not appear to make a great deal of sense. It would produce a remarkable lack of symmetry between, on the one hand, MWH being bound by stipulation (c) as if TTW were named in the contract in place of WS *only as and from the date of the deed* and, on the other hand, MWH under stipulation (b) accepting the liability of TTW under the contract in lieu of the liability of WS *both for before and as from the date of the deed*. Approaching the question as one of what reasonable business persons in the position of the parties would take cl 2 to mean,[43] we think it more likely that the two stipulations were intended to correspond and so to operate only as and from the date of the deed.

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42. The formulation "as and from the date of this deed" appears in cl 4 of the deed.

43. *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461–2, [22]; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 174–5, [54].

78 The same is true of stipulation (a). It is difficult to suppose that the parties intended MWH to accept under stipulation (b) the liability of TTW as if TTW were named in the contract in place of WS *only as and from the date of the deed*, and yet to release and discharge WS under stipulation (a) from all claims and demands in respect of the contract *both for before and as from the date of the deed*. Approached from a commonsense business point of view, it seems more likely that the two stipulations were intended to correspond and so to operate only as and from the date of the deed.

79 In our view, the sense of that is also indicated by the provision in cl 4 of the deed of novation that MWH remain liable to WS for all moneys "due and owing up to the date of the deed" and be liable to pay TTW "all moneys due and owing under the contract" *as and from the date of the deed*. One asks rhetorically, what sense would there be in an intention for MWH to "remain liable to WS" for moneys due and owing up to the date of the deed if, in truth, WS were intended to be released and discharged from all claims and demands in respect of the contract up to the date of the deed? Equally, what sense would there be in TTW assuming liability for claims and demands in respect of the contract up to the date of the deed and yet being paid only the moneys due and owing under the contract as and from the date of the deed? Reason and commercial efficacy suggest it is more likely that the parties intended to achieve correspondence between monetary entitlements and contractual responsibilities.

80 As has been seen, the judge rationalised what he took to be the complete release of Wynton Stone by construing the last sentence of cl 4 of the deed of novation as "an acknowledgement of due performance which is in terms sufficiently formal to amount to a contractual warranty".

81 With respect, we do not think that to be persuasive. This was a formal deed of release drafted by solicitors. Consequently, if it were intended that MWH give up all claims under the contract against Wynton Stone in return for a contractual warranty, one would expect to see a more explicit expression of connection between the warranty and the release. If the warranty really were intended to be the *quid pro quo* for a complete release from all claims under the contract, one might have thought that so much would be stated or at least that the warranty would be included in, or in closer proximity to, cl 2 (in which the release is contained) than at the other end of the deed in cl 4 (which deals with payments).

82 In any event, why should it be thought that the parties intended to replace liability for defects in work performed under the contract with a warranty that there were no defects in the work performed under the contract? As counsel for the appellant submitted, why should it be supposed that the appellant intended to give up its rights to hold Wynton Stone liable for breach of duty to exercise professional skill and care in return for a contractual warranty of which the ambit may not have been coextensive or even as broad as Wynton Stone's existing contractual obligation?

83 The respondent's suggested answer to that conundrum was that, unless the acknowledgment were given as the quid pro quo for a complete release from liability under the contract, the acknowledgment would be pointless. More precisely, unless Wynton Stone were relieved of liability under the contract in respect of services performed up to the date of the deed, there would be no need for (or value in) an acknowledgment that services performed up the date of the deed complied with the contract.

84 It appears to us, however, that, because of the close juxtaposition of the acknowledgment and the undertaking of MWH to pay "all moneys due and owing under the contract up the date of this deed", it is more likely that the intended purpose of the acknowledgment was to guard against the chance of the undertaking to pay being construed as acceptance that the services for which moneys were "due and owing under the contract" had been performed in accordance with the contract. Alternatively, even if the acknowledgment added nothing to the rights and obligations for which the contract already provided, it would still be more readily explicable as the product of "belts and braces" drafting[44] than an intended consideration for releasing Wynton Stone from "all claims and demands whatsoever in respect of the contract" up to the date of the deed.

85 In our view, cl 2 of the deed of novation operated to release Wynton Stone only in respect of breaches of the contract committed on or after the date of the deed of novation.

Release from liability in tort

86 Turning then to the question of whether the deed of novation should be construed as releasing Wynton Stone from liability in tort, the judge said this:[45]

> Next it is said that the release granted by cl 2 did not extend to tortious liability. I do not accept this strained construction of the release. If cl 2 is effective to release liability of Wynton Stone for defective design work undertaken prior to the effective date so that the liability of TTW for this is substituted, I can see no rational basis for limiting this in the way suggested. It would have the consequence of undermining the commercial purpose of this aspect of the agreement.

With respect, we agree.

87 In the past, very "clear words were necessary to exclude liability for negligence".[46] While that was so, an exemption clause was not ordinarily to be taken as excluding liability for negligence unless the clause expressly excluded liability for negligence. But since the High Court's decision in *Darlington Futures Ltd v Delco Australia Pty Ltd*,[47] the approach has been different. Now, the meaning of an exemption clause is to be determined by construing it according to its natural and ordinary meaning read in light of the contract as a whole and, only where appropriate, contra proferentem in the case of ambiguity.

88 In this case, liability in negligence was not expressly mentioned. But, according to the natural and ordinary meaning of the phrase "all claims and demands whatsoever in respect of the contract," the phrase encompasses liability for breach of duty to exercise reasonable skill and care in the performance of the contract. There is an abundance of authority that the words "in respect of" are

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44. Scil ex abundanti cautela.
45. *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117 at [218].
46. *Davis v Pearce Parking Station Pty Ltd* (1954) 91 CLR 642 at 649; *Wilson v Darling Island Stevedoring & Lighterage Co Ltd* (1956) 95 CLR 43 at 71 and 86; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231 at 258; compare *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VR 834 at 846–7.
47. (1986) 161 CLR 500 at 510; *Nissho Iwai Australia Ltd v Malaysian International Shipping Corporation, Berhad* (1989) 167 CLR 219 at 227; *Glenmont Investments Pty Ltd v O'Loughlin (No 2)* (2000) 79 SASR 185 at 243; Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Aust ed, (2008), [10.77].

words of wide possible connection.[48] Since it may be taken that it was an implied term of Wynton Stone's retainer that it would exercise reasonable skill and care in the provision of engineering services in accordance with the contract, a breach of its common law duty to exercise that same degree of skill and care can even more readily be seen as something "in respect of the contract".[49]

89 Of course, as with the release from contractual liability, we consider that the release from tortious liability was limited to breaches of duty committed on and after the date of the deed of novation.

Was clause 4 of the Deed of Novation a contractual term or was it misleading or deceptive within the meaning of s 52 of the Trade Practices Act 1974 (Cth)?

90 As was earlier noted, the judge held that Wynton Stone's acknowledgment in cl 4 of the deed of novation, that "the services [required] to be performed under the contract by WS prior to the date of this deed have been performed in accordance with its terms", amounted to a contractual warranty. With respect we agree. The verb "acknowledges" was not promissory but, upon the whole of the evidence, we see no reason to doubt that Wynton Stone intended to accept liability for the truth of the acknowledgment. As Lockhart and Gummow JJ observed in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd*:[50]

> the term "warranty" generally is perceived as identifying (i) a species of contractual affirmation of fact or promise or, alternatively, (ii) not as a promise but as a representation of fact, the truth of which is a condition precedent to the obligation of the other party to perform the contract. (As to this latter use of "warranty", see *McRae v Commonwealth Disposals Commission*;[51] *Corbin on Contracts* (1963), par 14.) As to the former use of "warranty", Williston points out, after giving several definitions:
>
> > "It should be observed that under these definitions, a warranty is not necessarily a promise or contract. The law of warranty is older by a century than special assumpsit, and the action on the case on a warranty was in part the foundation of the action of assumpsit. An action on a warranty was regarded for centuries as an action of deceit, and it was not until the second half of the eighteenth century that the first reported decision occurs of an action in assumpsit on a warranty. And it is still generally possible where a distinction of procedure is observed between actions of tort and of contract to frame the declaration for breach of warranty in tort. It is probable that most persons instinctively think of a warranty as necessarily a contract or promise, but though frequently warranties are true promises and contracts, in other cases they are merely representations which induce a sale …"[52]

48. *Trustees Executors and Agency Company Ltd v Reilly* [1941] VLR 110 at 111; *Powers v Maher* (1959) 103 CLR 478 at 484–5; *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109 at 139–40, [91]; *Golf Australia Holdings Ltd v Buxton Construction Pty Ltd* [2007] VSCA 200 at [17].
49. See and compare *Davis v Pearce Parking Station Pty Ltd* (1954) 91 CLR 642 at 652–3; *Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Aust) Pty Ltd* (1966) 115 CLR 353 at 376–7.
50. (1993) 42 FCR 470 at 504–5.
51. (1951) 84 CLR 377 at 407–10.
52. Williston, *Williston on Contracts*, 3rd ed, (1964), §970.

91 In our view, Wynton Stone's acknowledgment was a contractual affirmation of fact or promise that the work which had been done up to the date of the deed had been done in accordance with the deed and, therefore, in our judgment it was a contractual warranty of the first kind.

Misleading and deceptive conduct

92 Contrary, however, to the effect of the judge's determination, we consider that the warranty was misleading and deceptive. Events have proved that the work which was done up to the date of the deed was not done in accordance with the contract. Thus, tested objectively, an acknowledgment that it had been done in accordance with the contract was likely to mislead or deceive.[53] Nor should there be any doubt that the warranty was capable of amounting to misleading and deceptive conduct within the meaning of s 52 of the TPA. Section 4(2)(a) of the Act expressly provides that "conduct" includes the making of or giving effect to a provision of a contract and, as Lockhart and Gummow JJ stated in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd*:[54]

> s 4(2)(a), in dealing with "conduct" operates generally, in its terms, so that the TP Act after the 1977 Act, was to be read as "one connected and combined statement of the will of Parliament …": *Sweeney v Fitzhardinge*.[55] So understood, s 4(2)(a) provides significant support for the conclusion reached in this case by the primary judge, and for the general proposition that the making of a statement as to a presently existing state of affairs, if false, may be the engaging in misleading or deceptive conduct, where the statement is embodied as a provision of a contract. In many cases, there will have been pre-contractual conduct which itself contravenes s 52. The present case is a striking one because it was presented on a narrower basis, and concerned the giving of the warranties in the contract itself.

Arguably, the acknowledgment was to some extent predictive.[56] But if so, the evidential onus was on Wynton Stone to show that it was reasonably based.[57] And it did not seek to do so.

93 The judge held that MWH had not alleged or proved that it relied on the acknowledgment. In our view, his Honour was in error so to hold. MWH did allege reliance.

94 So far as the pleadings are concerned, MWH alleged in para 7 of its amended reply to the defence of the fourth defendant by counterclaim that:

> *Induced by the warranty and relying on the representation [MWH] entered in to the Deed.*
>
> **PARTICULARS**
>
> *The inducement and reliance is to be inferred from the facts pleaded in paragraphs 5 and 5A above and the particulars thereto and the fact that [MWH] entered into the Deed.*

53. *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 223.
54. (1993) 42 FCR 470 at 505; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 322, [34] per French J.
55. (1906) 4 CLR 716 at 735.
56. (2009) 238 CLR 304 at 321, [32]–[33] per French J.
57. *McGrath v Australian Naturalcare Products Pty Ltd* (2008) 165 FCR 230 at 273, [160]–[192] per Allsop J.

95 In paras 9, 10, 11, 39 and 40 it was pleaded that, if it were found that Wynton Stone had failed to perform the services in accordance with the contract, it would then say that Wynton Stone had, by making the acknowledgment, engaged in conduct that was misleading or deceptive or likely to mislead or deceive; that, in those circumstances, Wynton Stone was not entitled to rely upon the release and discharge contained in the deed; and further, that it would have suffered loss and damage. Then in its prayer for relief MWH claimed, inter alia, damages pursuant to s 82 of the Trade Practices Act and further or other relief including relief pursuant to s 87 of the Trade Practices Act.

96 As to evidence of reliance, it is true that MWH did not adduce any direct evidence of such but, consistently with its pleading, it sought in its written submissions before the judge to have his Honour infer reliance based on what was contended to be the materiality of the acknowledgment; what was said to be the objective likelihood that the acknowledgment would have induced MWH's entry into the deed; and the fact that MWH did in fact enter into the deed.

97 When counsel for MWH pointed all that out to the trial judge, after the judge had published his reasons, but before making final orders as between MWH and Wynton Stone, the judge ruled that it was too late to "re-open the issue" because, he said, it had not been pursued in cross-examination of Mr Sloggett of Wynton Stone and had not been sufficiently developed in argument.

98 It is not clear whether that ruling was intended to form part of the final reasons for judgment, because it is not reproduced or referred to in them. But either way, it appears to us that the ruling was also in error.

99 Like MWH's pleading, to which we have already referred, MWH's written submissions to the judge made plain that the inducement and reliance for which it contended were to be inferred from the facts alleged in paras 5 and 5A of its pleading and the particulars thereto, and from the fact that MWH entered into the deed. So, too, before the judge, as again before this court, senior counsel for MWH made plain that he sought to have the court infer inducement and reliance on that basis, in accordance with the observations of Wilson J in *Gould v Vaggelas*,[58] that:

> [w]here a plaintiff shows that a defendant has made false statements to him intending thereby to induce him to enter into a contract and those statements are of such a nature as would be likely to provide such inducement and the plaintiff did in fact enter into that contract and thereby suffered damage and nothing more appears, common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract. However, it is open to the defendant to obstruct the drawing of that natural inference of fact by showing that there were other relevant circumstances. Examples commonly given of such circumstances are that the plaintiff not only actually knew the true facts but knew them to be the truth or that the plaintiff either by his words or conduct disavowed any reliance on the fraudulent representations. It is entirely accurate to speak of an onus resting on a defendant to draw attention to the presence of circumstances such as those I have described in order to show that the inference of the fact of inducement which would ordinarily be drawn from the fraudulent making of a false statement calculated to induce a person to enter into a contract followed by entry into that contract should not in all the circumstances be drawn. But it is no more than an evidentiary onus — an obligation to point to the existence of circumstances which tend to rebut the inference which would ordinarily be

58. (1985) 157 CLR 215 at 238–9.

drawn from the primary facts. When all the facts are in, the fact-finding tribunal must determine whether or not it is satisfied on the balance of probabilities that the misrepresentations in question contributed to the plaintiff's entry into the contract. The onus to show that they did is a condition precedent to relief and rests at all times on the plaintiff.

100 With all respect to the judge, therefore, the determination of whether or not such an inference was open to be drawn did not require any further cross-examination of Mr Sloggett or any further submissions by MWH. To the contrary, it called for a decision on the basis on which it had been submitted. And by stating that the point had not been pleaded or proved and, once the error in that statement was pointed out, ruling that it was too late to "re-open the issue", the judge ignored the evidential effect of s 51A of the TPA and the written submissions of the appellant "which stood squarely in the path of that conclusion".[59]

101 Admittedly, *Gould v Vaggelas* was a case in deceit and Wilson J was addressing his observations to the proof of a cause of action in deceit. However, in *Ricochet Pty Ltd v Equity Trustees Executor & Agency Co Ltd*,[60] a Full Federal Court constituted by Lockhart, Gummow and French JJ stated that the same sort of reasoning provides a practical guide to the way in which inferences can and should be drawn in such cases involving claims for damages under s 82 of the Act for contravention of s 52, where the gist of the conduct complained of is the making of misrepresentations. Their Honours said that:

> Counsel for the appellants cited *Gould v Vaggelas* also for the proposition that the trial judge was bound to infer, in the absence of contrary evidence, that the appellants had been induced by the representations to enter into the lease. Reference was also made to the judgment of Jenkinson J (Ryan J agreeing) in *National Australia Bank Ltd v Cunningham*[61] for the uncontroversial proposition that liability under s 82 of the Act for a contravention of s 52 can be established where the misrepresentation was but one of a number of factors which induced a loss-making decision. That case was also invoked, however, in support of a submission that liability can be established when it is shown that a person *might* have abstained from the course of action or inaction allegedly induced if the misrepresentation had been made.
>
> *Gould v Vaggelas* lays down no exhaustive rule for the approach to evidence of inducement in misrepresentation cases. In particular, it lays down no rule in claims for damages under s 82 of the Act for contravention of s 52, where the gist of the conduct complained of is the making of misrepresentations. On the question of proof of inducement, the judgment of Wilson J in *Gould v Vaggelas* makes the point that a combination of factors may, if unanswered, lead to the conclusion that a person was induced by the representation of another to make the relevant decision. Where, for example, it is shown that a false representation has been made which the representor intended should induce the representee to enter into a contract, and where it is shown that the representation is of a kind likely to provide such an inducement and that the representee entered into the contract, then, as Wilson J said:[62]
>
> > "… common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract."

59. See and compare *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1 at 43–4, [160] and [162] per Charles, Buchanan and Chernov JJA.
60. (1993) 41 FCR 229 at 233–4 (emphasis in original).
61. (1990) ATPR 41-047.
62. (1985) 157 CLR 215 at 238.

The statement provides a practical guide to the way in which inferences can and should be drawn in such cases. It remains for the tribunal of fact, as his Honour pointed out, to determine, when all the evidence has concluded, whether the misrepresentation in question contributed to the decision to enter the contract. The unremarkable logic of these propositions is more likely to be obscured than illuminated by reference to notions of presumptions of fact or the incidence of the evidentiary onus.

102 Similarly, in *Hanave Pty Ltd v LFOT Pty Ltd*[63] Kiefel J, with whom Wilcox J agreed,[64] said that:

> The question of causation can sometimes be resolved not by direct evidence as to what part a misrepresentation played in the process of entry into contract, but by a court determining what effect must be taken to have resulted. Indeed this course may sometimes be preferable to one which rested solely on evidence later given on the point. In *Gould v Vaggelas*[65] Wilson J held that if a material representation is calculated (which is to say, objectively likely: *Ricochet Pty Ltd v Equity Trustees Executor & Agency Co Ltd*;[66] *Henderson v Amadio Pty Ltd (No 1)*)[67] to induce the representee to enter into a contract and the person in fact enters into a contract, a fair inference arises that the representation operated as an inducement, adding that it need not be the only cause. The latter point is now uncontroversial. It suffices for liability if a misrepresentation played some part in inducing entry into contract for the price agreed. That part of Wilson J's judgment was not stated to be an exhaustive rule, but is to be seen as a guide to a question of fact which may arise. A conclusion of inducement may then be reached where a combination of factors, including the quality of the representation itself, goes unanswered. In relation to the representation itself it would need to be of a kind likely to provide that inducement and such that: "*common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract*",[68] a statement regarded by the Full Court in *Ricochet* as providing a practical guide to the drawing of inferences in such cases.
>
> In *Gould v Vaggelas* the representations were of that kind and the inference, that the purchasers were thereby influenced, arose. Evidence to the contrary was considered not to negative the inference of reliance.[69] In *Sibley v Grosvenor*[70] a conclusion that a representation had materially affected purchasers in the price they considered paying for land was reached because it was such as to "naturally operate" on their minds.[71] The Full Court in *Ricochet* pointed out that the fact the relevant misrepresentation might have had some such effect will not suffice. There would not be the level of certainty necessary to enable an inference to be drawn.
>
> In the present case, his Honour was invited to draw the inference that the contravening conduct of Jagar "caused Hanave loss and damage" but considered that the "… direct evidence Burke gave makes the drawing of any such inference inappropriate" and that there was no relevant connection between the damage Hanave may have suffered and the conduct in question.
>
> A statement to the effect that a principal and long-term tenant has been very satisfactory in meeting its lease obligations, which include the payment of rental, cannot

63. (1999) 43 IPR 545 at 555–7, [45]–[49].
64. Emmett J considered that the trial judge had not erred in finding that causation had not been established.
65. (1985) 157 CLR 215 at 236.
66. (1993) 41 FCR 229.
67. (1995) 62 FCR 1 at 166.
68. (1985) 157 CLR 215 at 238 (emphasis added).
69. At 236–7.
70. (1916) 21 CLR 469.
71. At 473, see also at 481.

in my view be regarded as uninfluential on the mind of a purchaser considering making an offer, even if a purchaser already has an understanding or opinion about their reputation as well established retailers. The statement of fact made not only supports a positive opinion otherwise reached, it adds to it something on a topic known to the landlord. Indeed, it seems likely that his Honour thought that to be the case, since it was only the direct evidence of Mr Burke, referred to above, which was pointed to as rendering a conclusion of inducement impossible. That is to say, it was seen as negativing that inference.

103 More recently, in *Campbell v Backoffice Investments Pty Ltd*,[72] Gummow, Hayne, Heydon and Kiefel JJ adopted what may be seen as a more demanding approach to the proof of causation in cases of misleading and deceptive conduct. Their Honours said that:[73]

> Using tools of analysis drawn from the common law of deceit (misrepresentation and reliance) within the statutory framework provided by ss 42 and 68 of the Fair Trading Act may sometimes be helpful in identifying contravening conduct and deciding whether loss or damage was suffered by the contravention. But as McHugh J pointed out in *Butcher v Lachlan Elder Realty Pty Ltd*,[74] the "conduct' with which s 52 of the Trade Practices Act 1974 (Cth) deals is not confined to "'representations', whether they be representations as to matters of present or future fact or law".[75] This proposition applies with equal force to s 42 of the Fair Trading Act. References to misrepresentation or reliance must not be permitted to obscure the need to identify contravening conduct (here, misleading or deceptive conduct) and a causal connection (denoted by the word "by") between that conduct and the loss and damage allegedly suffered. As McHugh J also pointed out in *Butcher*,[76] with particular reference to s 52 of the Trade Practices Act, but with equal application to s 42 of the Fair Trading Act:
>
> > "The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. *It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself.*[77] *It invites error to look at isolated parts of the corporation's conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct.*[78] Thus, where the alleged contravention of s 52 relates primarily to a document, the effect of the document must be examined in the context of the evidence as a whole.[79] The court is not confined to examining the document in isolation. It must have regard to all the conduct of the corporation in relation to the document including the preparation and distribution of the document and any statement, action, silence or inaction in connection with the document."

72. (2009) 238 CLR 304.
73. At 341–2, [102] (emphasis in original).
74. (2004) 218 CLR 592 at 623, [103].
75. McHugh J dissented in the result of the particular case but not as to these questions of principle.
76. (2004) 218 CLR 592 at 625, [109]. See also the judgment of the court in *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 84, [200].
77. See *Equity Access Pty Ltd v Westpac Banking Corporation* (1990) ATPR ¶40-994 at 50–950 per Hill J; see also *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202–3 per Deane and Fitzgerald JJ.
78. See, eg, *Trade Practices Commission v Lamova Publishing Corporation Pty Ltd* (1979) 28 ALR 416 at 421–2; 42 FLR 60 at 65–6 per Lockhart J.
79. See, eg, *Lezam Pty Ltd v Seabridge Australia Pty Ltd* (1992) 35 FCR 535 at 541 per Sheppard J, Hill J agreeing.

104 On the facts in *Campbell*, their Honours held that causation was not proved because:[80]

> the evidence that was given by Mr Weeks about what he would have done if he had known more than he did was expressed in a way that distinguished between cases where knowledge of *either* of two matters would have meant he would not proceed and cases where he attached significance to knowledge of *both* of two matters. This being the only direct evidence on the subject it was not open to the Court of Appeal to infer, from its own assessment of the materiality of the representation and its own assessment of whether the representation was calculated to induce entry into a contract, that Mr Weeks would not have proceeded with the share purchase.

105 In principle, however, we see nothing in *Campbell* which runs counter to the reasoning of the Full Federal Court in *Ricochet* and *Hanave*. It appears to us that those cases remain as authoritative statements that Wilson J's approach in *Gould v Vaggelas* provides a practical guide to the way in which inferences can and should be drawn in cases of this kind. If we may say so with respect, they also accord with our perception of the manner in which the causative effect of misleading and deceptive representations are to be assessed as a common sense question of fact.[81]

106 At all events, if one looks at the acknowledgment in cl 4 of the deed in the light of the relevant surrounding facts and circumstances and the course of conduct leading up to the execution of the deed, it appears to be a material representation calculated to induce MWH to enter into the deed and make the payment. Absent evidence of the kind which was held to be determinative in *Campbell*, common sense dictates the conclusion that it played at least some part in inducing MWH to enter into the deed and make the payment. We do not consider that the acknowledgment can be regarded as uninfluential on the mind of MWH considering whether to accept the novation and make payment for what had already been done. It follows, in our judgment, that a fair inference arises that the representation operated as an inducement.

107 There is then a question as to the relief which should follow. Given the conclusion to which we have come concerning the effect of cl 2, we are not satisfied that MWH suffered any loss and damage by reason of the misleading and deceptive conduct. As we see it, Wynton Stone remained liable to MWH for breach of contract in respect of engineering design services undertaken before the date of the deed.

108 In case it matters, however, we should say that, if cl 2 of the deed of novation had the effect which the judge attributed to it, we would be prepared to order pursuant to s 87 of the Trade Practices Act that Wynton Stone be disentitled from relying on cl 2 as a release from its liability in negligence for any breach of duty committed before the date of the deed.

Conclusion

109 For the reasons we have given, we consider that three questions set out at the beginning of these reasons should be answered as follows:

a) Upon its proper construction, cl 2 of the deed of novation operated to release Wytnon Stone from liability for breach of contract only in respect of any breach of contract occurring on or after commencement of the deed of novation.

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80. (2009) 238 CLR 304 at 353, [147] (emphasis in original).
81. *Wardley v Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ; *March v E & MH Stramere Pty Ltd* (1991) 171 CLR 506.

b) The deed of novation is to be construed as having released Wynton Stone from liability in tort for breaches of duty committed on or after the commencement of the deed of novation.
c) Clause 4 of the deed of novation amounted to a contractual warranty and constituted misleading or deceptive conduct within the meaning of s 52 of the Trade Practices Act.

110 We would ask counsel to bring in minutes of order to give effect to our determination.

Cross-appeal

111 Wynton Stone cross-appealed on 10 grounds of appeal. Ground 1 was that the judge denied Wynton Stone procedural fairness by finding that Wynton Stone was in breach of the warranty contained in cl 4 of the deed of novation, in circumstances where the claim for breach of warranty was (and ought to have been held to be) abandoned.

112 That contention is unfounded. The claim was pleaded, opened, pursued in evidence at trial and dealt with in written submissions and final addresses.

113 Ground 2 was that the judge erred by deciding MWH's warranty claim contrary to the pleading (inasmuch as it alleged only that Wynton Stone would have breached the warranty if MWH were found liable to Minson Nacap by reason of any breach of contract by Wynton Stone, being a finding that the court was not asked to make and did not make).

114 That contention is devoid of merit. Evidently, the pleading was expressed in the way it was to avoid an admission of liability to Minson Nacap.[82] At the trial, however, the question for determination was whether there was a breach of the warranty by reason of the cracking which appeared in the tanks at Apollo Bay and Lorne. The course of evidence and submissions were directed to that end. There can be no doubt that the point was raised and dealt with.[83]

115 Ground 3 was that the judge erred in allowing MWH to amend its pleading to make the allegation of breach of warranty unconditional on MWH's liability to Minson Nacap. Presumably, that contention was directed to the judge's observations that, if the point about the pleading were an impediment, he would grant leave to amend to overcome it. In fact, no such leave was given, because the judge rightly considered it to be unnecessary in view of the way in which the proceeding had been conducted.[84] But Ground 3 would have been hopeless in any event. Any amendment of the kind contemplated would have been well within the ambit of the cause of action as originally pleaded,[85] even without having to consider the effect of the abrogation in Victoria of the rule in *Weldon v Neal*.[86]

116 Ground 4 was that the judge erred in construing cl 4 of the deed of novation as a contractual warranty. We reject that contention for the reasons earlier given as to the correct construction of cl 4.

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82. See *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 6)* [2007] VSC 127 at [8]–[9].
83. *Water Board v Moustakas* (1988) 180 CLR 491 at 497.
84. [2007] VSC 127 at [9].
85. *Harris v Raggat* [1965] VR 779 at 786; *Hall v National & General Insurance Co Ltd* [1967] VR 355 at 366.
86. (1887) 19 QBD 394; see r 36.01(6) of the Supreme Court (General Civil Procedure) Rules 1986.

117 Ground 5 was that the judge erred in not construing the release contained in cl 2 of the deed of novation as releasing Wynton Stone from all liability to MWH, rather than as subject to cl 4. We also reject that contention for the reasons earlier given as to the correct construction of cl 4.

118 Grounds 6 and 7 were that the judge erred in concluding that the contractual retainer for Barrett Fuller's component of the work was with Wynton Stone and not MWH, and that his Honour ought to have held that the retainer was with MWH. We reject that ground. In our view, the matters referred to by the judge in his reasons for judgment at [141]–[174] lead ineluctably to the conclusion to which his Honour came in the last paragraph, "that the contractual arrangements for all this work were between Wynton Stone and Barrett Fuller".[87]

119 Ground 8 was that the judge erred in finding that Mr Sloggett was engaged in, and Wynton Stone was responsible for, embankment design in respect of cut-off drains and pressure relief valves. That contention is untenable. It is based on evidence given by Mr Sloggett at trial which, for the reasons given at [170] and [171] of the reasons for judgment, the judge wholly rejected. In our view, it was well open to his Honour to do so.

120 Ground 9 was that the judge erred in holding that Wynton Stone breached the warranty in cl 4 of the deed of novation in circumstances where Wynton Stone was not engaged in relevant aspects of the embankment design and MWH had contracted with and delegated responsibility to Barrett Fuller. That contention is rejected for the same reasons as we have rejected Ground 8.

121 Ground 10 was that the judge erred in holding that Wynton Stone was liable to MWH in damages in circumstances where the court did not find that MWH was liable to Minson Nacap. That contention in effect replicates Ground 3 and is thus rejected for the reasons that we have rejected Ground 3.

122 In our view, the cross-appeal should be dismissed.

Appeal allowed; judgment varied to include damages for breach of contract and negligence; cross-appeal dismissed.

Solicitors for MWH Australia Pty Ltd: *Monahan + Rowell*.

Solicitors for Wynton Stone Australia Pty Ltd: *Deacons Lawyers*.

C M ARCHIBALD
BARRISTER-AT-LAW

[On 11 March 2011, the High Court of Australia referred an application for special leave to appeal to the Full Court for argument as on appeal: [2011] HCATrans 61 — Ed, VR.]

87. *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117 at [174].