Legal notes

ACCC v Australian Safeway Stores Pty Ltd & Ors (George Weston Foods)

Federal Court Melbourne
Goldberg J
30 May 1997

In this matter, the Court determined that George Weston Foods (GWF) must pay $1.25 million in pecuniary penalties for its admitted role in price fixing and resale price maintenance. The Court's assessment of this penalty largely turned on the senior level of the managers involved, the blatant and systematic nature of the breaches, and the failure of the company's compliance program to prevent them.

Background

The offences involved the Victorian State operations of Tip Top Bread, a division of GWF. According to the agreed facts lodged by the Commission and GWF with the Court, Safeway Stores had a direct role in persuading Tip Top to halt its own and others' discounting of bread products sold in competition with Safeway. The offences occurred in relation to a small number of local retail outlets, but the Court did not consider that this altered the serious nature of the conduct itself. Nor did the Court in any way excuse Tip Top's conduct by reference to the pressure exerted by Safeway; instead, Tip Top was under a duty not to acquiesce in breaches of the law. It should be noted that the agreed facts pertain only to the action against GWF — Safeway did not agree to those facts and continues to contest the matter.

Amount of pecuniary penalty

The offences were admitted by GWF, but no agreed penalty amount was submitted to the Court. The Court made reference to s. 76 of the Act concerning the matters prescribed there as relevant to penalty, and also reviewed the other relevant factors as established in *TPC v CSR Ltd* (1991) ATPR ¶ 41-070 and followed thereafter, including by the Full Court in *NW Frozen Foods Ltd v ACCC* (1996) 141 ALR 640. The factors which the Court considered particularly relevant were:

- 'the corporate level at which the contraventions occurred' — the Court noted that the persons involved in the offences 'were effectively the top management for the Tip Top bread business in Victoria', that they acted together rather than individually, and that each failed to be a 'check or control on the others';

- 'GWF's corporate structure' — the Court noted the 'decentralised' nature of GWF's and Tip Top's corporate structure which allowed a degree of local autonomy, but the Court pointed out that senior management's choice of that structure increased the risk for illegal conduct not subject to central detection and control;

- the 'failure' of 'the compliance program adopted and implemented by GWF' — the Court expressed particular disappointment that the persons involved in the offences had had, or should have had, direct access to trade practices knowledge, including details about the 'severe pecuniary penalties' involved, yet the illegal conduct recurred and thus showed a systematic failure of the compliance program. In the Court's view, this failure made it important that all GWF staff be reminded of the obligation to comply with the law and also supported the inclusion of a deterrent element in the penalty imposed;

- 'the nature and circumstances of the contraventions and their effect' — with reference to Safeway's involvement and Tip Top's exertion of pressure on small retail

outlets, Goldberg J stated: 'I cannot accept that the conduct was not deliberate and systematic ... There was no suggestion that the relevant officers tried to avoid participating in the conduct; rather they willingly embraced it. In my opinion they consciously and deliberately contravened the Act albeit under commercial pressure';

- 'the relative size and position of GWF' — the Court referred to GWF's 1996 turnover of $1.28bn, its employment of almost 7000 staff and its significant share of the Victorian bread market, and added that 'corporations of the size of GWF have a responsibility to the public at large to ensure that their commercial activities do not contravene Part IV of the Act'; and

- 'the cooperation of GWF and its admission of the contraventions at a very early stage' — having made the admissions, and thus avoided the costs of trial, and having fully cooperated with the Commission, GWF was entitled to a reduction in penalty.

Comment

This case illustrates how seriously the Court will view repeated breaches by senior managers, where they knew, or should have known, about the Act's requirements and penalties. On a more minor point, the Court also rejected arguments that penalty amounts imposed in one case could serve as a clear analogy or guide in another case. Rather, the Court observed that penalty amounts must be individually assessed on the facts of the particular case under consideration. Whatever relevance penalties in other cases had, the Court saw no distinction between such cases whether the penalties therein were based on an agreed penalty submission by the parties or whether the penalties therein were determined by the Court in the absence of any such joint submission.

Tim Moe, Assistant Director Compliance Education Unit, ACCC

Private actions

Fasold & anor v Roberts & anor — The 'Noah's Ark' case

Federal Court of Australia
Sackville J
2 June 1997

On 2 June 1997, Sackville J decided that Dr Roberts and Arc Search Inc had not breached the State and ACT Fair Trading Acts and the Trade Practices Act as argued by Professor Plimer and Mr Fasold. Dr Roberts was, however, found to have infringed the copyright of Mr Fasold.

Facts of the case

Dr Roberts, a Christian minister, believes that a boat-shaped geological formation in Turkey could contain the remnants of the Noah's Ark referred to in the *Book of Genesis*. He and Noah's Ark Research Foundation (NARF), an unincorporated association and predecessor of Ark Search Inc, sought to publicise the existence of the formation and to encourage further investigation to determine whether or not the formation really was Noah's Ark. NARF aimed to raise funds, and give some of those funds to Dr Roberts, for the purpose of further investigation. Under the auspices of NARF, in 1992 Dr Roberts spoke at a number of public lectures at which publications and video and audio tapes of the lectures were sold. Dr Roberts made or authorised statements contained in those publications and tapes.

Professor Plimer, a Professor of Geology, and Mr Fasold, the author of the book *The Ark of Noah*, argued that Dr Roberts had, at the public lectures and in the publications and the tapes, misrepresented his qualifications and the nature and extent of investigations he personally carried out at the site. In doing so, they argued that Dr Roberts had breached the State and ACT Fair Trading Acts. The applicants were unsuccessful in contending that Ark Search Inc contravened s. 52 of the Trade Practices Act by selling and distributing the publications and tapes, because most of the conduct complained of occurred before its incorporation in July 1992.

Was the conduct 'in trade and commerce'?

The case against Dr Roberts was based on the misleading and deceptive conduct provisions of the State and ACT Fair Trading Acts. Section 42(1) of the NSW Act, which is representative of the other Fair Trading Acts, provides that 'a person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. Section 4(1) defines 'trade or commerce' to include 'any business or professional activity'. 'Business' includes 'a business not carried on for profit' and 'a trade or profession' (s. 4(1)).

The applicants claimed that Dr Roberts had made representations in trade or commerce. Relying on *Meadow Gem Pty Ltd v ANZ Executors & Trustee Co Ltd* (1994) ATPR (Digest) 46-130, they argued that although Dr Roberts was not paid for his lectures, nor for the sale of the tapes of those lectures or publications, he was nevertheless acting in trade or commerce in promoting the trade or commerce of NARF. As Sackville J pointed out, the assumption of the applicants' case was that NARF's conduct was in trade or commerce. It was necessary to establish that NARF was, indeed, acting in trade or commerce for the applicants to succeed.

Was NARF engaged in a business?

Following *Hope v Bathurst City Council* (1980) 144 CLR 1 and *Hungier v Grace* (1972) 127 CLR 210, Sackville J found that there must be a 'system, repetition and continuity' in an undertaking for it to be characterised as a business. He added that, in the case of a non-profit organisation, 'the less commercial the character and objective of an organisation, the greater the degree of the system and regularity required for the organisation's activities to be characterised as a 'business'.

In this case, NARF was a non-profit organisation with the principal objectives to 'encourage and support further investigation at the site and to publicise what its founding members saw as the significance of the site'. Sackville J found that its activities lacked the degree of system and regularity needed for there to exist a business. This was because NARF lacked office premises, retail outlets and paid staff. In addition, the lectures at which fees were collected and tapes and publications sold took place over a period of about two months. The lecture tour was simply 'a "one-off" venture' rather than a forerunner of similar events in the future. Sales of merchandise and entry fees were modest and incidental to NARF's non-commercial objectives. Thus, NARF was found not to be engaged in a 'business', and hence was not acting in 'trade or commerce', within the meaning of the Fair Trading Acts. Since the applicants' assumption was not proved, their argument that Dr Roberts had also acted in trade or commerce failed.

Had Dr Roberts made representations in trade or commerce?

Assuming that NARF was engaged in business, Sackville J then considered whether or not Dr Roberts had made representations in trade or commerce in giving the lectures and contributing to the preparation of publications and tapes. Sackville J reviewed the High Court decision of *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594. He correctly noted that conduct 'in trade or commerce' does not refer to conduct in the course of an overall trading or commercial business, but instead refers to 'conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character'.

There was no commercial or trading relationship between Dr Roberts and NARF, as Dr Roberts was not paid for any of his services and merely expected NARF to use some of its funds for the purpose of conducting further investigation into the site. Dr Roberts' objectives, in giving the lectures and contributing to the tapes and publications, were to promote his own ideas, encourage interest in the site and assist NARF in its fund raising. His primary motivation was not to promote any business activity or commercial interest of NARF; he could not be found to be seeking to encourage a commercial relationship between his audience and a trading entity, especially since NARF was not a trading entity. Thus, his activities did not occur 'in trade or commerce' pursuant to the Fair Trading Acts.

Has this decision altered the law with respect to 'in trade and commerce'?

This decision has not altered the meaning of 'in trade and commerce' in the Trade Practices Act. Courts have said that for conduct to be in trade or commerce, it must have some business character. In *O'Brien & Anor v Smolonogov & Anor* (1983) ATPR 40-418, the Full Federal Court said that

> ... the mere use, by a person not acting in the course of carrying on a business, of facilities commonly employed in commercial transactions, cannot transform a dealing which lacks any business character into something done in trade or commerce.

Sackville J, in finding that NARF was not engaged in 'business', followed the principle that there must be some sort of system and regularity in the conduct of the activity. This is consistent with cases such as *J.S. McMillan Pty Ltd & Ors v Commonwealth of Australia* (15 July 1997, Federal Court of Australia, Emmet J).

In determining whether conduct is in trade or commerce, as opposed to conduct in respect of, or in the course of, trade or commerce, courts have considered the purpose or reason for which the conduct is undertaken. In addition to the cases cited in the judgment of Sackville J — such as *Glorie v WA Chip and Pulp Co Pty Ltd* (1981) 55 FLR 310 and *Australian Federation of Consumer Organisations Inc v The Tobacco Institute of Australia Ltd* (1991) 27 FCR 149 — see also, by way of example, *Forbes & Anor v Australian Yachting Federation Inc & Ors* (1996) ATPR (Digest) 46-158 and *Odco Pty Ltd v Building Workers' Industrial Union of Australia & Ors* (1988) ATPR (Digest) 46-042.

Sackville J considered the objectives of Dr Roberts in undertaking the lectures and in making or authorising the statements in the tapes and publications, and in doing so, correctly considered the purpose of such conduct.

Carmina G. Mangoba, Project Officer, ACCC Legal Unit

Hughes Aircraft Systems International v Airservices Australia

Federal Court
Finn J
30 June 1997

This decision may have significant implications for government conduct of tender processes. The Court found that Airservices Australia (in its previous incarnation as the Civil Aviation Authority (CAA)) breached several of its contractual obligations to Hughes Aircraft concerning the conduct of the tender process for TAAATS 2 (The Australian Advanced Air Traffic System). In parallel with a number of the contract breaches, the Court found related contraventions of s. 52 of the Trade Practices Act.

Background

The TAAATS 1 tender process had been the subject of controversy and of the 1992 Macphee Report. This report found, in the words of Finn J, 'that the TAAATS 1 process was in significant respects unsound and unfair'. The report made specific recommendations for what became TAAATS 2 and, again according to Finn J, 'contributed directly both to the criteria and to the processes' for TAAATS 2.

At the beginning of TAAATS 2, the CAA stated to Hughes and Thomson-CSF (the other and successful tenderer) that procedures and evaluative criteria would be put in place to regulate and improve the conduct of the later tender process. These statements were reflected in a number of the specific terms of the later Request for Tender (RFT) and of the 'tender process contract' which the Court found to exist.

The 'tender process contract'

In relation to tendering, a 'process contract' is a pre-award contract under which the agency and the tenderers obligate themselves to the conduct of the tender process subject to agreed rules. Finn J stressed that the existence or otherwise of a process contract depends on the facts of *individual* cases (emphasis added). As to TAAATS 2, those facts strongly supported the existence of a process contract.

This was due in part to the impact of TAAATS 1 and the Macphee Report on the later process. More significantly, it was due to the CAA's 9 March 1993 letter to the tenderers in which the CAA sought concurrence with an array of procedures and criteria designed to ensure the integrity of TAAATS 2. The tenderers signed this letter, and Finn J found that the parties had clear contractual intent concerning its contents. Separately, Finn J found that the RFT also had contractual effect in respect of 'the processes to be followed and the criteria to be applied'.

Implication of 'fair dealing' term

In this case, Hughes sought to persuade the Court that it should imply into the contract arising from the RFT a term not explicitly spelled out there — i.e. that the CAA would deal fairly with the tenderers in TAAATS 2. The circumstances cited in support of the implication were the historical background preceding TAAATS 2; the various RFT provisions concerning criteria and evaluative processes; and the appointment of an independent auditor to scrutinise the tender process.

The Court agreed with Hughes on the basis that expectations of fairness were so fundamental to TAAATS 2 that the parties could be taken to have impliedly contracted that fair dealing would be observed. The Court found that such a 'fair dealing' provision should be implied generally as a term of *process contracts* (i.e. where these are found to exist) between public bodies and tenderers (emphasis added).

In view of its findings concerning specific breaches of contract (see below), the Court found it unnecessary to rule on whether the implied term of fair dealing was in fact breached.

Breaches of contract

After extensive consideration of the evidence, Finn J found that the CAA breached its contracts with Hughes in the following major and relevant respects.

1. 'The methodology and criteria of the RFT were not applied as contractually required' (the Board of the CAA had treated two criteria as *equivalent* for balancing and decision-making purposes, whereas the criteria were in fact *weighted differently*).

2. The Chief Executive Officer of the CAA improperly disclosed the confidential Tender Evaluation Committee (TEC) recommendation and the confidential price difference between the bids to then Minister Collins.

3. The TEC (of the CAA) improperly disclosed confidential price information to a consultant from the Department of Industry, Technology and Regional Development.

4. The CAA failed to act in relation to the above consultant's subsequent and further unauthorised disclosure of the confidential information.

5. The CAA allowed the successful tenderer, Thomson, to make an out of time change to its deed in relation to its Australian Industry Involvement (AII) commitments.

Section 52 contraventions

The Court approached these contraventions on the basis that the CAA made certain contractual promises about the tender process which it then breached in practice. When the breaches occurred, the CAA came under an obligation to so inform Hughes, which relied on the CAA as its only possible source of information about such breaches. The consequent silence of the CAA in the face of this obligation could therefore constitute 'misleading or deceptive' conduct under s. 52.

As to several, but not all, of the contractual breaches, the Court found corresponding s. 52 contraventions. This was the case in relation to all bar item 4 of the above listed breaches of contract.

The Court separately found that the CAA, apart from any breach of contract, also engaged in misleading and deceptive conduct in the course of the debriefing it provided to Hughes on the tender process and the basis on which Thomson was favoured. This conduct

concerned the related bid and contract prices, and the 'percentage point' difference between the two tenderers.

Conclusion

The decision illustrates the potential impact of contract law and the Trade Practices Act on the tendering process. It should be borne in mind that, as noted above, significant aspects of the case turned on its particular facts. To the latter extent, the decision may be a particular instance of the possible legal consequences of a tender process, rather than a necessarily binding precedent for what those consequences will be.

Tim Moe, Assistant Director Compliance Education Unit, ACCC

Akron Securities Ltd v Iliffe

Supreme Court of New South Wales Court of Appeal
Mason P, Priestly JA, Meagher JA
4 April 1997

At trial it was held that Iliffe had been induced to become an investor in a breeding venture because of misleading conduct (s. 52 of the Trade Practices Act).

The trial judge held that this was the legal responsibility of Akron and all contractual arrangements were declared *void ab initio*. Therefore Iliffe was relieved of all risks of the failed venture. Akron appealed the decision on the basis that the remedy was inappropriate.

Background

A breeding venture, Bernborough Breeding and Racing Ltd, was set up to derive profits from breeding mares to produce commercial yearlings. Investors bought shares in the venture and derived profits from the yearling sales. As part of the arrangement, investors borrowed sums from Akron and in addition investors paid money to receive minimum receipts over the period of the venture. In acquiring the relevant shares in the venture, the investors were required to execute an investment agreement, a sale agreement, a lease agreement, and a loan agreement. The scheme attracted investors because of the taxation incentives and because of minimum receipts 'insurance' which reduced inherent hazards in the speculative and risky enterprise. The 'insurance' commitment was given by Bernborough and was not further guaranteed by a third party. In communications, an employee of Akron represented to some of the investors that NZI Securities would effectively back the guarantee. This was in fact not the case.

Over the life of the venture, yearling prices collapsed and the profit forecasts were not met. Eventually a receiver was appointed but proceeds from the sale of the horses were insufficient to provide surplus. The minimum receipts insurance was not able to be paid because of Bernborough's liquidation. The investors ceased repayment of loans to Akron.

The action

Akron commenced proceedings against many of the investors, including Mr Iliffe, to recover amounts under the lease and loan agreements. They were successful against most of the investors except Mr Iliffe, Mr Gundry and John Iliffe and Associates Pty Ltd (the respondents). In a cross claim, brought by Mr Iliffe and the other parties, it was argued that there had been a breach of s. 52 of the Act. The trial judge, Rolfe J, found that a false representation had been made, that it had been relied upon, and that the respondents would not have entered the venture if they had been aware that NZI was not guaranteeing the minimum receipts. Therefore the conduct of Akron's representative fell within s. 52 of the Act.

The remedy granted by the trial judge was to declare *void ab initio* all agreements between the parties. The agreement was rescinded, effectively putting the respondents in a position they were in before the transaction. Akron challenged the appropriateness of the remedy, but not the finding that there had been a breach of s. 52 of the Act. Akron claimed that the trial judge should not have held that the agreements were void without regard to the principle of *restitutio in integrum*. That is, Iliffe and the other defendants should have been required to repay the loan principal as the price of rescission. Alternatively, Akron argued that

a less extreme remedy should have been imposed.

Appeal

In the court of appeal, the Court unanimously rejected the argument as to *restitutio in integrum*. It found that it was artificial to regard the respondents as having received the loan money and thus were not required to pay back the loan principal.

Mason P (Priestly JA concurring) further found that the trial judge had erred in his judgment as to the appropriate remedy. Rolfe J had found that remedies inevitably flowed from a breach of s. 52 and that the respondents should be retrospectively relieved from the agreements. Looking at the facts, reference was made to whether the loan principal should have been set off and to whether rescission of the agreement was inevitable. Both questions were answered in the negative. The appeal court was also entitled to review a more appropriate remedy.

Mason P extensively reviewed the scope and application of s. 87 remedies and concluded that the section was not to be given a restrictive interpretation (*Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31). Therefore, s. 87 and the court's discretion should not be restricted by common law or equitable principles (*Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23). It was also held that the purpose of the section was to *prevent* or *reduce* loss or damage which was likely to be suffered, unlike s. 82 which seeks to compensate for *actual* loss or damage. As part of this process, all appropriate remedies in s. 87 should have been considered. Mason P believed a more flexible remedy should be sought, stating 'There is no point in having a remedial smorgasbord if the table is not scanned at least briefly to see what is best on offer'. Mason P, however, cautioned: 'This is not to demand of trial judges evidence of a slavish picking over of every part of s. 87 before a suitable remedy is selected. And the onus of establishing judicial error in the exercise of discretion remains firmly on the shoulders of a disappointed appellant'.

Looking specifically at the subject of the appeal, consideration of the taxation benefit should have been taken into account, and s. 87 should be proportionate to the wrong and not necessarily reflect the plaintiff's loss or injury. In exercising the Court's discretion Mason P ordered that the equivalent of the 'guarantee' should be paid by Akron to the respondents and not rescission of the total agreement. The reasons for this were that it put the parties in the position they should have been in; the misrepresentation was only a discrete aspect of the whole transaction; no attempt had been made to show damages; and this method took into account the benefits of the taxation windfall.

Meagher JA, in dissent, believed that the respondents did not get what they bargained for and that the loan was an integral part of the venture arrangement. Therefore he proposed to dismiss the appeal.

Matthew Crowley, ACCC Legal Unit

Menmel Pty Ltd & Anor v The Great Australian Bite Pty Ltd & Ors; Finkelstein & Anor v The Great Australian Bite Pty Ltd & Ors

Federal Court of Australia, New South Wales District Registry (General Division)
Davies, Lee, Sackville JJ
18 March 1997

At trial it was held that Menmel Pty Ltd had, in its dealings with the Great Australian Bite Pty Ltd (GAB), contravened s. 52 of the Trade Practices Act. Mr Griff, a director of Menmel, was found to have knowingly participated in Menmel's actions. The solicitors for GAB were found to be negligent in the advice given to their clients with respect to those dealings. Appeals were lodged against these decisions.

Background

Mrs Winters was an experienced and successful restauranteur in search of a new business opportunity. In July 1990 she inspected premises owned by Menmel on which a restaurant business was operated by Menmel's tenant, Tibiki. During this inspection she saw, in addition to a restaurant, bar areas and a dance floor. She also saw equipment consistent

with the premises having been used as a restaurant and night club, such as a disc jockey box with twin turntables, amplifiers and strobe lighting. During a second inspection, Mrs Winters commented that the rent was an excessive amount to pay for a restaurant. Mr Griff replied that the premises had been successfully operating as a night club for the previous six years, and that with Mrs Winters' past experience in restaurants, she 'should do okay'. Before these inspections, Mrs Winters had seen the premises used as a bar and night club under the names of 'Il Fiasco' and then 'Cafe Royale', operated by Menmel and Tibiki respectively. Mr Griff failed to mention that whilst they operated as such, they did not have the correct licence to do so.

In August 1990, Mrs Winters' business, the Great Australian Bite, leased the premises from Menmel and purchased Tibiki's business which included the goodwill, plant, fittings, chattels and fixtures included in an inventory. Mr Pozniak acted as GAB's solicitor in relation to the purchase and lease.

GAB operated a discotheque on the premises. However, in February 1991, South Sydney Council notified GAB that it had to cease its night club activities unless it obtained council authorisation. Mrs Winters sought Mr Griff's consent to apply for an entertainment authority from the Council. She agreed to make all the necessary payments to obtain the authority, provided that the authority was in GAB's name. Mr Griff would not consent unless it was in his name.

In 1991 and 1992, GAB suffered substantial losses. In early 1992, GAB unsuccessfully attempted to sell the premises and eventually abandoned the premises later that year.

The action

GAB brought an action against Menmel and Mr Griff for misleading or deceptive conduct, claiming that Menmel had induced GAB, through representations to Mrs Winters, to purchase a restaurant business from Tibiki and to enter into a lease with it. The representations were to the effect that the premises could lawfully be used as a night club, where liquor could be served otherwise than as ancillary to a meal. Menmel was found to have engaged in misleading and deceptive conduct, and Mr Griff was found to have been knowingly concerned in Menmel's contraventions of the Act. Menmel and Mr Griff appealed, challenging the findings made by the trial judge and the assessment of damages in the event that the trial decision was upheld.

GAB also brought an action against the partners of the firm for which Mr Pozniak worked, claiming that Mr Pozniak had breached his duty to GAB by failing to advise that the premises could not be used as a night club without an entertainment licence. At trial, an award of damages was made against the solicitors on the basis that Mr Pozniak breached his duty of care owed to GAB. The solicitors appealed, also challenging the findings and assessment of damages.

Appeal

Menmel and Mr Griff. Menmel and Mr Griff were unsuccessful in establishing that it was not open to the trial judge to make the findings that he did, as discussed below.

Despite his knowledge that such use of the premises in the past had been unlawful, Mr Griff told Mrs Winters that the premises had been successfully operating as a night club for six years and that, with her restaurant experience, she 'should be okay'. He said this during the inspection in which she saw equipment indicating that the premises had previously been used as a night club. In these circumstances, it was open to the trial judge to interpret the representation to be that the premises had been, and could continue to be, lawfully used as a night club where liquor was sold otherwise than as ancillary to meals.

Moreover, even if Mrs Winters failed to communicate her intention of operating a night club in addition to a restaurant on the premises, this did not change the meaning of the representation made on behalf of Menmel for two reasons. The trial judge found that Mr Griff must have understood that Mrs Winters would assume the entertainment area and bar was part of the restaurant. The trial judge also found that Mr Griff must have understood that Mrs Winters would have known of the

successful night club businesses operating on the premises in the past, and would have thought that that success could be repeated.

It was open to the trial judge to find that Mr Griff must have appreciated that Mrs Winters would assume a repeat of that success, considering the existence of the equipment on the premises, Mr Griff's knowledge of the previous night club operations on the premises, Mr Griff's express reference to past successful night club operations, and the trial judge's assessment of Mr Griff as a witness.

The Full Court also found that it was open to the trial judge to find that the misrepresentations induced GAB to enter the purchase agreement and lease, when Mr Griff's statements and awareness of Mrs Winter's likely state of mind were taken into account. Citing *Gould v Vaggelas* (1985) 157 CLR 215, the Full Federal Court said that there is inducement 'so long as the representation plays a part, even if only a minor part, in contributing to the formation of the contract'.

Mr Pozniak. The solicitors were also unsuccessful in establishing that it was not open to the trial judge to make the findings that he did. The Full Federal Court upheld the finding that Mr Pozniak had breached his duty to Mrs Winters in failing to make the necessary inquiries to ascertain whether her contemplated use of the premises required approval, and to warn her that such approval had not been obtained. It did not matter that Mrs Winters did not expressly communicate her intention to operate a night club on the premises since, in the circumstances, Mr Pozniak should have realised that Mrs Winters might have been contemplating such a use and that there was a real possibility that an entertainment authority was needed for that purpose.

Mr Pozniak had been aware that the premises had previously been used as a night club. He was also aware of the substantial rental to be paid by GAB. Furthermore, although Mr Pozniak claimed that he did not read the equipment leases and inventory attached to the purchase agreement and was therefore not alerted to the possibility that Mrs Winters might have contemplated using the premises as a night club, Mr Pozniak was aware that Mrs Winters was acquiring a large volume of equipment. These factors reveal that it was open to the trial judge to find that Mr Pozniak should have made further inquiries to establish the intended use of the premises because of the realistic possibility that Mrs Winters intended to use the premises as a night club.

It was insufficient that Mr Pozniak advised Mrs Winters that the permitted use of the premises was as a 'restaurant' only, because this term could have included a night club in association with a restaurant. At any rate, Mr Pozniak's failure to read the inventory and equipment leases was not consistent with the exercise of reasonable care to protect the interests of his clients whilst drafting the provisions of the purchase agreement relating to the equipment leases.

Mitigation. The Full Court accepted the trial judge's finding that GAB, through Mrs Winters, had not failed to take reasonable steps to mitigate the loss caused by Menmel and Mr Griff's misleading conduct and by Mr Pozniak's breach of duty. The appellants argued that Mrs Winters was unreasonable in insisting on the requirement that the entertainment authority be in GAB's name. They contended that had she not been so unreasonable, an entertainment authority would have been obtained and the losses incurred by GAB would have been reduced.

The Full Court proceeded on the assumption that it did not matter in whose name the application for an entertainment authority was made, although the evidence did not clearly establish this matter. Nevertheless, the Full Court agreed with the trial judge's conclusion that it was reasonable for Mrs Winters to insist that the licence be in GAB's name because of the trial judge's assessment of Mr Griff being prepared to be obstructive and dilatory in relation to the application for the licence. Furthermore, the Full Court did not agree with the appellants' argument that Mrs Winters was unreasonable in failing to appreciate that it may not have been necessary to insist on a licence in GAB's name since Menmel, Mr Griff, and more importantly, her own solicitor, Mr Pozniak, similarly failed to appreciate that it may not have been necessary.

Damages. Having found Menmel, Mr Griff and the solicitors liable, the trial judge considered it appropriate to set the lease aside under s. 87 of the Act and to make an award of damages against them.

The Full Federal Court agreed with the trial judge's assessment of damages except for the double counting in the calculations. GAB, in the appeal, conceded that there had been double counting in respect of two matters. First, GAB acknowledged that the depreciation components of trading losses should be excluded from the damages because depreciation was included in the damages awarded for the sum paid by GAB under the purchase agreement, as well as the sum paid for the repair and renovation of the premises. Secondly, GAB admitted that the sum allowed for the disposal of assets should also be excluded from the damages awarded. Thus the award of damages in respect of trading losses was reduced.

The Full Court found that the trial judge was correct in not discounting the damages by the chance that GAB might have entered into the purchase agreement and the lease in the event that it was aware that no entertainment authority had been obtained. The Full Court found, on the balance of probabilities, that had the misleading conduct and breach of duty not taken place, GAB would not have entered into the two transactions. Thus, damages were assessed on this basis and no issue arose as to the loss of any commercial opportunity by GAB.

Furthermore, there was no basis for altering the assessment of damages for the reason that GAB did operate a night club on the premises for some time because the trial judge allowed all trading losses, subject to a discount for a variety of factors, on the basis that GAB would not have entered into the transactions had the misleading conduct and breach of duty not taken place.

Carmina G. Mangoba, Project Officer, ACCC Legal Unit