> united in rejecting? It is possible that evidence of mutual intention, if amounting to concurrence, is receivable so as to negative an inference sought to be drawn from surrounding circumstances." (Emphasis added.)

and considered himself free to contemplate the admission of the fact of deletion of the clause for repayment.

Although there was no direct evidence that the deletion took place as a result of the refusal to include a provision which would have given effect to a "presumed intention of persons in their position" that the loan be repaid, the inference to be drawn was clear. The lawyer for NZI who reviewed the document and checked it again, in its altered form, prior to execution, must have agreed to the deletion, or acquiesced to it, as giving affect to the parties' intention, even if he had not carried out the deletion himself.

- Tom Davie, Allen Allen & Hemsley, Solicitors.

Misleading and Deceptive Conduct and Defamation - Whether Declaratory Relief Available - Damages

FAI General Insurance Co Limited v RAIA Insurance Brokers Limited (1992) ATPR 41 - 176.

RAIA Insurance Brokers Ltd ("RAIA Brokers") acted as broker for the Royal Institute of Architects, providing its members with professional indemnity insurance. FAI also provided indemnity insurance. It underwrote a new form of indemnity insurance for architects (the "Plan") and wrote to architects to tell them about it.

In response to this letter about seven of RAIA Brokers' architect clients requested RAIA Brokers' comments on the plan. RAIA Brokers' employee, an experienced insurance broker, wrote an appraisal of the Plan. It was critical of a number of features of the Plan including those relating to its extensive civil liability cover, recovery of fees, reinstatements, viability of premiums, exclusions and grounds for cancellation of policies. Some of the comments in the proposal used the words "illusionary" or "almost illusionary" with reference to the extent or type of cover provided by the Plan.

FAI claimed that the representations contained in the appraisal were false and untrue, misleading and deceptive contrary to section 52 of the T*rade Practices Act* 1974 (Cth), and that by reason of the representations being made FAI had suffered loss and damage. FAI also claimed that the representations were defamatory.

In its claim for relief under the T*rade Practices Act* FAI claimed, in addition to damages and interest, declarations that the representations were false and untrue, misleading and deceptive.

Defamation

Foster J regarded it as proper to accept that the architects who read the appraisal were knowledgable in their profession, of a level of intelligence and acumen consistent with their membership of it, and, by virtue of their request for the material, interested in reading it with care and attention, even if they did not study it and analyse it with precision. The judge then asked himself whether such readers would reasonably derive from the appraisal the representations and imputations relied upon as being defamatory.

Amongst other things FAI's statement of claim alleged the appraisal conveyed the defamatory imputation that:

> "the Applicant was a stupid insurer in that it had so badly worded the Policy as to ensure that architects would be unable to defend themselves when sued by third parties."

The judge found that although the relevant portions of the appraisal merited criticism, he was quite satisfied that no architect of the kind he had referred to would derive either the representation or the imputation from the appraisal and that this aspect of FAI's claim could not succeed.

FAI's statement of claim also alleged the appraisal conveyed the defamatory imputation that:

"The Applicant was a deceitful insurer in that it had worded the Policy so that much of the cover was illusory"

The judge found that a fair-minded reader would not take this to be an assertion that the policy was deliberately worded in a deceitful fashion, when considering the appraisal document in a reasonably careful way. The cause of action therefore failed.

In respect of FAI's allegation of defamatory imputation in the appraisal that:

> "The Applicant was an incompetent insurer in that it set the rating for the Policy so badly that it and Heath would lose over $5,000,000 per annum",

the judge found that the relevant portion of the appraisal (unlike other portions) constituted a sensibly reasoned if not reasonably correct argument as to possible future difficulties and that it did not make the representation and imputation relied upon. Therefore, that aspect of FAI's claim could not succeed.

In respect of FAI's allegation of defamatory imputation that:

> "The Applicant was guilty of perpetuating a confidence trick on architects by offering to insure them under the Policy when it knew that the cover thereunder was in reality negligible",

the judge found that a reader, reading the document as a whole, would not derive from it that RAIA Brokers was making the alleged assertions. Accordingly that part of the claim also failed.

Misleading and Deceptive Conduct

Similarly, FAI alleged that the appraisal contained the following representations which were false and untrue and misleading and/or deceptive (section 4 of FAI's statement of claim):

"(a) the Policy was so stupidly worded that it would ensure that architects would be unable to defend themselves when sued by third parties;

(b) much of the cover provided by the Policy was illusory;

(c) the rating for the policy had been so badly calculated that the applicant and Heath would lose more than $5,000,000 per annum;

(d) the Policy was proffered by the Applicant as a confidence trick on architects."

In respect of the allegation in paragraphs 4(a), (c) and (d) the judge found, as he had in respect of the corresponding allegations of defamation, that the architects to whom the document in contention was addressed would not have derived the representations or imputations alleged.

In respect of the allegation in paragraph 4(b) the judge was satisfied that the effect of the appraisal was to convey that the cover offered by the FAI policy was not as satisfactory and effective as it might seem to be because it was vulnerable, in ways which would not be readily apparent, to exclusions and conditions biased in favour of the insurer. He was satisfied that a representation was thereby made that much of the cover was illusory.

The judge was firmly of the view that the appraisal would be taken to be an expression of the opinion of RAIA Brokers rather than an expression of fact.

The judge found that the representation that the proposed cover for architects' liability for claims other than for negligence was almost illusory was false, misleading and deceptive, and a breach of section 52 of the Trade Practices Act.

Foster J found further that the criticism in the appraisal that the reinstatement provisions in the Plan were not as good as they seemed was not based on reasonable grounds and was misleading and a breach of section 52. The assertion in the appraisal that the proposed cover was not what it appeared to be lacked any material basis and also constituted a breach of section 52.

However, Foster J found the criticism in the appraisal that the provision for the recovery of fees was "almost illusory" was not misleading and deceptive: it highlighted a problem which a reader might fail to appreciate if he did not give the policy provisions careful consideration.

Where RAIA Brokers singled out two exceptions in the proposed FAI policy for "specific comment", when basically similar wording was to be found in their own policies, this was not misleading and deceptive because the appraisal did not purport to be a comparative exercise.

Foster J found there was no basis for stating in the appraisal that a condition in the policy was "very biased in favour of the insurer" when it merely reproduced the provisions of section 60 of the Insurance Contracts Act 1984. This was objectively most misleading, supported the general representation that much of the cover in the policy suggested by the Plan was illusory, and it involved a clear breach of section 52 of the Act. Also the words "and from what date" were misleading and deceptive because they carried the suggestion that a failure to notify the insurer of certain matters could lead to retrospective cancellation of the policy when in fact the policy specifically provided for cancellation and the Insurance Contracts Act provided that cancellation of a insurance policy could not take effect without notice. Accordingly the words involved a breach of section 52.

Relief

Foster J held that where a civil proceeding has been instituted under Part VI of the *Trade Practices Act* claiming damages for contravention of s. 52 the court has the power under s. 21(1) of the Federal Court Act of Australia to make declarations of right. S. 163A of the *Trade Practices Act* was not intended to provide the only basis for the making of declaratory orders under that Act.

In accordance with the principle in *Enzed Holdings Ltd v Wynthea Pty Ltd & Ors* (1985) ATPR 40-507 if a court finds damage has occurred it must do its best to quantify the loss even if a degree of speculation and guesswork is involved. In this case actual damage had occurred because the judge was satisfied that there was a likelihood that some at least of the recipients were influenced against taking out insurance with FAI by RAIA Brokers' representations. Further the unjustified belittling of FAI's product could cause potential insurers to adopt an unnecessarily cynical view of the policy cover, and it was reasonable to assume that the effect of the representations would have spread to some extent beyond the recipients of the appraisal with consequent injury to the applicant. Accordingly damages in the sum of $15,000 were awarded.

The orders made were:

(i) a declaration that the respondent made the representation set out in paragraph 4(b) of the statement of claim and that representation was:
  (a) false and untrue, and
  (b) misleading and/or likely to mislead contrary to s. 52 of the Trade Practices Act;

(ii) that there be judgment for the applicant in the amount of $15,000. (In awarding $15,000 damages, Foster J said it was open to him to award damages for vindication of personal reputation under s. 82 of the Trade Practices Act);

(iii) that the respondent pay the applicant's costs.

- **Tom Davie, Allen Allen & Hemsley, Solicitors.**