

Trade Practices - Misleading Representations - Action for Damages Against Directors Only

Matheson Engineers Pty Ltd & Anor v El Raghy;
Matheson Engineers Pty Ltd & Anor v Kriewaldt & Anor (1992) ATPR ¶41-192

Where directors are sued as accessories under s82 of the *Trade Practices Act 1974* there is no requirement that the company of which they are directors, being the principal contravener, be joined as a respondent. So said French J in the Federal Court in rejecting the respondent directors' submission that the statement of claim against them be struck out. The pleading was struck out, but on other grounds.

The former directors of Eon Metals NL were alleged to have engaged in conduct constituting a breach of s52 of the *Trade Practices Act* and loss and damage suffered as a consequence were claimed under s82 of the Act. The conduct alleged comprised express and implied representations relating to time for payment to the applicants for engineering work carried out at the mine. The representations were alleged to have been made in order to induce the applicants to proceed with the work, and to have had that effect.

A plea that, insofar as the representations were made as to future matters, they were made without reasonable grounds and that reliance was placed on s51A of the *Trade Practices Act* was included, as was a plea that the respondents were accessories to the contravention of s52 within the provisions of s82 in that the directors were "knowingly concerned", within the meaning of s75B of the Act, with the alleged conduct.

French J rejected the argument that it was not open to an applicant in proceedings for breach of s52 of the *Trade Practices Act* to sue only the natural persons said to be involved in the relevant contravention without joining the primary corporate contravener. The words of s82 were clear and did not impose as a condition of accessorial liability a requirement that the primary contravener be a party to the action. Nevertheless, in many cases, it may be that a primary corporate contravener should be joined so that the whole dispute could be determined.

The pleadings were rejected, with leave to repeal, because of other deficiencies which rendered the relevant parts of the statement of claim manifestly untenable. The basis of the various implied representations was not disclosed, the falsifying facts were not pleaded, the pleading of s51A did not specify which of the pleaded representations related to future matters and the material facts constituting the conduct by which the respondents were said to have been involved by being knowingly concerned in the contraventions of s52 were not disclosed.

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