

CAMPBELL v BACKOFFICE INVESTMENTS PTY LTD - BC200906574

High Court of Australia
French CJ, Gummow, Hayne, Heydon and Kiefel JJ

S435/2008

29 July 2009

Campbell v Backoffice Investments Pty Ltd [2009] HCA 25

TRADE PRACTICES -- Misleading or deceptive conduct -- Where vendor of share in company provided documents prior to making of share sale agreement that did not accurately state company's past financial performance, failed to correct some estimates of company's expected performance when vendor knew or ought reasonably to have known, prior to making of agreement, that estimated performance not achieved, and incorporated some statements of financial performance in share sale agreement with various warranties as to their accuracy -- Whether conduct misleading or deceptive -- Whether representations pleaded actually made -- Relevance of whole course of conduct between parties -- Relevance of character of some statements as estimates.

TRADE PRACTICES -- Misleading or deceptive conduct -- Whether purchaser suffered loss or damage "by conduct of" vendor -- Causation and reliance -- General principles -- Relevance of contractual warranty by purchaser that purchaser had not relied on warranties other than those given in agreement.

CORPORATIONS -- Oppression -- Where Corporations Act 2001 (Cth), s 233(1) empowered court, if one or more grounds set out in s 232 satisfied, to make any order it considered appropriate in relation to company, including order for purchase of any shares by any member -- Where grounds in s 232 included circumstance that conduct of company's affairs "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity" -- Whether vendor's conduct "oppressive to, unfairly prejudicial to, or unfairly discriminatory against", purchaser -- Relevance of circumstance that conduct not continuing at time order made -- Whether order for repurchase of share in company could or should be made in circumstances where, at time of making order, provisional liquidator had sold business and assets of company, proceeds had been disbursed and shares in company were worthless.

CONTRACTS -- Breach of warranties -- Whether vendor breached warranties in share sale agreement.

CONTRACTS -- Implied terms -- Implied duty to co-operate -- Scope of duty contended for.

WORDS AND PHRASES -- "By conduct of another person" -- "Oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member".

(NSW) Fair Trading Act 1987 ss 42, 68

(CTH) Corporations Act 2001 Pt 2F.1

French CJ.

Introduction

[1] On 24 January 2005, Backoffice Investments Pty Ltd ("Backoffice"), a company controlled by Timothy Weeks, entered into a share sale agreement ("SSA") with Douglas Campbell and his companies, Healthy Water (NSW) Pty Ltd ("Healthy Water") and Sentinel Construction Managers Pty Ltd ("Sentinel"), to purchase, for \$850,000, one of the two issued shares in Healthy Water. Under agreements between the three

companies (together referred to as the "service agreements"), the two men were to work as joint managing directors of Healthy Water. By April 2005, they had fallen out. Backoffice and Mr Weeks sued Mr Campbell and Sentinel in the Supreme Court of New South Wales. They alleged oppression. They sought an order that Mr Campbell buy back the share.¹ They also claimed damages for breach of contractual warranty, breach of an implied duty to cooperate, and for misleading or deceptive conduct based, inter alia, on pre-contractual representations.² The facts giving rise to the claims and details of the relevant contractual documents are set out in the joint judgment.³

[2] The primary judge found for Backoffice and Mr Weeks on the oppression claim and ordered that Mr Campbell repurchase the share in Healthy Water for \$853,000.⁴ Healthy Water by this time was an empty shell, its assets having been disposed of by a provisional liquidator appointed by the parties. Her Honour held that the claim for misleading or deceptive conduct failed, as Backoffice and Mr Weeks did not establish that they had relied upon the alleged misrepresentations.⁵ She also held that Mr Campbell had breached contractual warranties⁶ and an implied contractual duty to cooperate, but held it inappropriate to award any damages given the buy-back order.⁷

[3] The Court of Appeal of the Supreme Court of New South Wales set aside the buy-back order but found Mr Campbell liable for misleading or deceptive conduct and awarded \$850,000 damages.⁸ Having been granted special leave,⁹ Mr Campbell and Sentinel then appealed to this court.

[4] For the reasons that follow, the appeal should be allowed. Special leave to cross-appeal should be refused. Unresolved aspects of the claims for misleading or deceptive conduct and for breach of warranty should be remitted to the Court of Appeal of the Supreme Court of New South Wales for determination. I agree with the orders proposed in the joint judgment.¹⁰

The pleading of the misleading or deceptive conduct case

[5] Factual bases for the causes of action in misleading and deceptive conduct were set out in a commercial list statement incorporated in the further amended summons in the original proceedings in the Supreme Court of New South Wales.

[6] In relation to a document produced to Mr Weeks pre-contractually and referred to as the "add-backs document", it was alleged:

44. On or before 11 December 2004, Campbell, by his agent Horn, provided to Backoffice:
 - (a) a document entitled "Healthy Water Operating Results: Non-recurring expenses" for the period July to November 2004 (the "2004 Add-Backs");
 - (b) a document entitled "Healthy Water Operating Results" that stated the operating results, inter alia, for the 5 months to 30 November 2004 (the "30 November 2004 Results").

45. By providing Backoffice with the 2004 Add-Backs and the 30 November 2004 Results, Campbell represented to Backoffice that:
 - (a) the Company incurred non-recurring expenses of \$96,100.00 for the five months ending 30 November 2004 (the "Add-Backs Representation");
 - (b) the Company had an EBIT (after adjustment for the Add-backs) for the 5 months to 30 November 2004 of \$163,590 (the "EBIT Representation").

The representations were said to have been false, misleading and deceptive or likely to mislead and deceive, in contravention of s 42 of the Fair Trading Act 1987 (NSW), on the basis that the 2004 add-backs overstated the amount of non-recurring expenses of the company.

[7] It was further pleaded that on or before 11 December 2004 Mr Campbell, by his agent Mr Horn, provided a document entitled "Healthy Water Operating Results: Sales Revenue" (the "sales revenue report") to Backoffice.¹¹ The sales revenue report was said to have contained estimates that:¹²

- (a) the Company's sales revenue for December 2004 would be \$100,000;
- (b) the Company's EBIT for December 2004 would be \$37,500;
- (c) the Company's sales revenue for the financial year ended 30 June 2005 would be \$1,289,582.

[8] By providing the sales revenue report to Backoffice, Mr Campbell was said to have represented "the December 2004 Estimates" to Backoffice. Those representations were designated as the "Express Representations".¹³ "Implied Representations", arising out of the circumstances in which the sales revenue report was provided to Backoffice, were also set out.¹⁴ They were:

- (a) the December 2004 Estimates were a reliable prediction of the sales revenue and profit that would be achieved by the Company;
- (b) the December 2004 Estimates were suitable to be used for the purpose of estimating the value of the Company;
- (c) there was no information known to Campbell which was material to the accuracy of the December 2004 Estimates, and which tended to show or showed that the December 2004 Estimates were false, misleading or deceptive;
- (d) the December 2004 Estimates represented Campbell's belief as to the likely sales revenue and EBIT that would be achieved by the Company and that there was a reasonable basis for such belief.

The Express and Implied Representations were said to have been continuing from on or about 11 December 2004 to 24 January 2005.¹⁵ The December 2004 Estimates allegedly overstated the company's sales revenue by \$7,147 and its EBIT by approximately \$25,000.

[9] Backoffice and Mr Weeks pleaded that by making the Express and Implied Representations, Mr Campbell engaged in conduct in trade or commerce which was misleading and deceptive in contravention of s 42 of the Fair Trading Act for the following reasons, as particularised:¹⁶

The December 2004 Estimates were representations as to future matters within the meaning of section 41 of the Fair Trading Act 1987. Contrary to the estimates:

- (i) the actual sales revenue of the Company for December 2004 was \$92,853 rather than \$100,000; and
- (ii) the EBIT of the Company for December 2004 was \$12,438 rather than \$37,500.

These matters were or ought reasonably to have been known to Campbell prior to 24 January 2004.¹⁷ The December 2004 Estimates were never revised by Campbell. Nor did he advise that the estimates would, might not be achieved or had not been achieved.

[10] Backoffice and Mr Weeks relied upon the inclusion of Sch 3 to the SSA as an element of misleading or deceptive conduct by Mr Campbell. They pleaded that:

- 38. On or about 24 January 2005, Campbell represented to Backoffice the contents of Schedule 3 of the Share Sale Agreement.

They alleged that by reason of Sch 3 Deficiencies (a defined term)¹⁸, Mr Campbell's conduct in providing Sch 3 to Backoffice and/or failing to correct or qualify it was misleading or deceptive and constituted a contravention of s 42 of the Fair Trading Act.¹⁹ The pleaded Deficiencies were:²⁰

Schedule 3 to the Share Sale Agreement:

- (a) in making the Add-Backs, overstated the non-recurring expenses of the Company for the five months ended 30 November 2004:
- (i) including Obsolete Inventories (\$2,600);
 - (ii) including General Expense Allowance (\$4,167);
 - (iii) including Business Expense Allowance (\$25,000);
 - (iv) including Credit Card Re-imbursement (\$27,083) a significant proportion of which related to business expenses of the Company;
- (b) failed to disclose that the miscellaneous income of \$14,500 related to the sale/trade of a Daewoo and a Toyota motor vehicle (the "Non-Recurring Income") and, as such, did not represent income reflective of the true operating performance of the Company and/or failed to deduct such income to derive the net profit or adjusted operating profit;
- (c) overstated the adjusted operating profit of the Company for the five months ended 30 November 2004 by:
- (i) the inclusion within the calculation of the Add-Backs of the matters referred to in (a);
 - (ii) the inclusion within the calculation of the adjusted operating profit of the income referred to in (b) (the "Profit Overstatement");
- (d) understated the amounts owing to trade creditors of the Company as at 30 November 2004 by \$12,360;
- (e) stated that the liability identified on the Balance Sheet as "Doug Campbell loan to HW" had a balance of negative \$74,507.24 instead of positive \$3,760; and
- (f) overstated the adjusted net assets of the Company as at 30 November 2004 (being the net assets less accrued employee entitlements) by:
- (i) the inclusion within the calculation of the understatement of the trade creditors referred to in (d) above;
 - (ii) the inclusion within the calculation of the incorrect amount for the liability identified in the Balance Sheet as "Doug Campbell loan to HW" referred to in (e) above (the "Assets Overstatement");
- all of which failures will be referred to in this Summons as the "Schedule 3 Deficiencies".

Backoffice alleged that it relied upon Sch 3 and was induced by it to enter into the SSA, the shareholders agreement and the service agreements, and to pay \$850,000 to Mr Campbell in consideration for the transfer of one of his shares in Healthy Water to Backoffice.²¹ It was further pleaded that, but for this misleading or deceptive conduct, Backoffice would not have entered into the SSA, the shareholders agreement or the service agreements, nor paid the sum of \$850,000.

The Court of Appeal's reasoning on the misleading or deceptive conduct claims

[11] It is useful to set out the steps in the reasoning of the majority in the Court of Appeal on the misleading or deceptive conduct claims. The reasons of Giles JA in this respect can be summarised as follows:

1. The statutory test of causation in s 68 of the Fair Trading Act is embodied in the word "by". The essential question is one of causation which is "ultimately a matter of common sense".²²
2. Mr Weeks' concern about the estimates did not mean they played no part in his decision to purchase the share. They were part of the process of arriving at a view as to profitability and an EBIT figure.²³
3. The primary judge was incorrect in so far as she found that Mr Weeks' reliance upon the add-backs, EBIT or December 2004 estimate representations was inconsistent with his reliance upon the warranties.²⁴
4. The protection provided by the performance bonus payable to Sentinel if performance exceeded forecast profitability did not negate reliance and left the representations causally operative.²⁵
5. The representations were made and remained causally operative at settlement. Backoffice was paying for a share in the company, not for a cause of action for breach of warranty. Other than at a pleading level, the characterisation of the add-backs and the EBIT figure as estimates did not negate either their misleading or deceptive nature, or Mr Weeks' reliance on them.²⁶
6. On the primary judge's findings, the figures provided to Mr Weeks were incorrect in relation to obsolete inventories and credit card reimbursement, but not as to the general expense or business expense allowances. There was misleading or deceptive conduct. The obsolete inventories figure was not a non-recurring expense and the figure for credit card reimbursement was excessive well beyond an allowance for estimation.²⁷
7. To the primary judge's findings should be added a finding that the figures provided were incorrect in relation to the general expense allowance of \$10,000. The total misrepresentation was of the order of \$52,000 for the five month period, or \$37,500 if account be taken of \$14,500 arising out of the sale of a

- motor vehicle.²⁸
8. The EBIT representation was misleading in the same manner as the add-backs representation.²⁹
 9. The December 2004 representations continued when left uncorrected by Mr Campbell, although he knew that the actual revenue result was less than the estimate. There was misleading or deceptive conduct in this respect.³⁰
 10. Mr Weeks was not cross-examined on his assertions that, had he known of the true position, Backoffice would not have purchased its share in Healthy Water. Nor was any critique of that evidence presented to the Court of Appeal.³¹
 11. Backoffice would not have purchased the share in Healthy Water if Mr Weeks had known the true position.³²
 12. Therefore, if loss or damage was suffered by Backoffice by reason of its purchase of the share, then it was suffered by conduct of Mr Campbell in contravention of s 42 of the Fair Trading Act.³³
 13. As to the Schedule 3 representation, the repetition in Schedule 3 of the add-back and EBIT representations did not detract from the effect of the misleading or deceptive conduct. It confirmed the material upon which Mr Weeks was already relying. The repetition of the Schedule 3 representation was not necessary to establish a contravention of s 42 of the Fair Trading Act, even if it equally gave rise to contravening conduct. It did not add to Backoffice's position in the cross-appeal.³⁴
 14. Further misleading or deceptive conduct because of other matters said to be breaches of warranties in the SSA, namely the remainder of the Schedule 3 Deficiencies, would not add to Backoffice's position in the cross-appeal.³⁵
 15. No order should be made under s 72 of the Fair Trading Act avoiding the contracts and returning the consideration paid.³⁶
 16. The measure of damages under s 68 of the Fair Trading Act is not confined to the tortious measure.³⁷
 17. As a matter of causation rather than fault, the breakdown in relationship between Messrs Campbell and Weeks, and the consequences of that breakdown on the value of Backoffice's share, had such a connection with the misleading or deceptive conduct that the resulting loss or damage extended to them. Backoffice's loss or damage was the \$850,000 it had paid for the share.³⁸

[12] Basten JA agreed with the reasons of Giles JA on the misleading or deceptive conduct claims.³⁹ He also concluded that if he were wrong in upholding the primary judge's order for repurchase of the share, he would adopt the approach of Giles JA with respect to damages for breach of s 42 of the Fair Trading Act, and give judgment for Backoffice for \$850,000.⁴⁰

[13] Young CJ in Eq, in dealing with the cause of action in misleading or deceptive conduct, focussed on the question of reliance. He dealt with that question on the hypothesis that the pleaded representations were made and that they were false and misleading.⁴¹ He referred to cl 7.4(b) of the SSA and a submission that Mr Weeks had carried out extensive due diligence with the assistance of his accountant.⁴² His Honour noted also that Mr Weeks had the assistance of a solicitor, Mr McClure, from whom he sought advice in relation to the agreements.⁴³ He pointed to the findings of the primary judge that Mr Weeks was a sophisticated businessman with the capacity to review financial records and make judgments about the prospects of a business using his commercial commonsense to his own advantage, which is what he did in making his offer to purchase the share in Healthy Water.⁴⁴ He referred to her Honour's satisfaction that the evidence established that Mr Weeks did not rely upon the estimated sales figure in the sales revenue report and that this was reflected by the protection built into cl 6.2 of the Sentinel service agreement providing for a performance bonus based on the company's profitability of up to \$300,000. His Honour could not discern any error in the primary judge's approach and found that she was entitled to reach the conclusion she did on the matter of reliance which he characterised as an issue of fact.⁴⁵ It followed that no factual matter could affect the result.⁴⁶

The appeal to this Court

[14] The appeal by Mr Campbell and Sentinel challenges the finding by the Court of Appeal of liability for misleading or deceptive conduct. It does so on the basis that Mr Weeks and Backoffice were legally advised and had the benefit of contractual warranties. There was no misleading or deceptive conduct and, in any event, there was no reliance. A challenge is also raised to the measure of damages found by the Court of Appeal on the basis that damages were allowed unrelated to the subject matter of the alleged misrepresentations. Further, the Court of Appeal made a simple error of calculation of the extent of the alleged misrepresentations, with the consequence that its reasoning did not, on its face, support a conclusion of causative reliance on either representation.

[15] By summons filed on 17 October 2008, Backoffice and Mr Weeks sought orders that the time for filing a notice of cross-appeal and notice of contention be extended and that they be granted leave to file such

notices. Draft notices were filed with the summons. Proposed amended notices of cross-appeal and contention were filed with their written submissions.

The notice of contention

[16] In their proposed notice of contention filed on 4 February 2009, Mr Weeks and Backoffice said that the decision of the Court of Appeal should be affirmed "but on the ground that the Court below erroneously decided or failed to decide some matter of fact or law".

[17] Their first ground was that the Court of Appeal erred in failing to find misleading or deceptive conduct in relation to misrepresentations in the Sch 3 balance sheet as to trade creditors, the loan liability to Mr Campbell and the adjusted net assets of the company. They asserted that the Court of Appeal erred in failing to assess damages for the Sch 3 representations in the amount of \$850,000 or an amount to be assessed by the court.

[18] On the second day of the hearing of the appeal counsel for Backoffice and Mr Weeks sought leave to amend the notice by including in it an additional ground in the following terms:

2. Their Honours erred in failing to find that Campbell engaged in misleading and deceptive conduct in contravention of s 42 of the Fair Trading Act 1987 (NSW) by representing to Backoffice that, to the best of Campbell's knowledge, all information given by or on behalf of the Company or its advisers to Backoffice material to the sale of the Shares and the Assets was substantially accurate and complete and not misleading (the "Clause 10.1 Warranty representation"), in circumstances where it was known to Campbell from 11 January 2005 that sales revenue and adjusted EBIT for December 2004 in the Sales Revenue Report were overstated.

For the reasons given in the joint judgment,⁴⁷ I agree that leave to amend the notice of contention in this way should be refused.

[19] Mr Weeks and Backoffice also asserted error in the failure of the Court of Appeal to find a breach of the warranties in cl 3.1(a) of Sch 1 to the SSA arising out of the understatement of trade creditors and the misdescription of Mr Campbell's loan position. The court should also have found a breach of the warranties given in cl 10.1 and 10.2 arising out of the understatement of trade creditors, and a breach of the warranty in cl 10.2 arising out of the overstatement of the adjusted net assets. It was said to have erred in failing to assess damages in the amount of \$440,000 for breach of these warranties.

[20] The notice of contention also complained that the Court of Appeal erred in failing to hold that Mr Campbell breached an implied duty to cooperate under the shareholders agreement and the SSA. It was contended that their Honours should have awarded damages for that breach in the amount of \$410,000.

[21] The proposed notice of contention asserted an entitlement to contractual remedies which differed in character from the statutory relief ordered by the Court of Appeal by way of damages for misleading or deceptive conduct. Rule 42.08.5 of the High Court Rules 2004 provides:

Where a respondent does not seek a discharge or variation of a part of the judgment actually pronounced or made, but contends that the judgment ought to be upheld on the ground that the court below has erroneously decided, or has failed to decide, some matter of fact or law, it is not necessary to give a notice of cross-appeal, but that respondent shall file and serve, within the time limited by rule 42.08.1, a notice of that contention in Form 27.

To the extent that it asserted an entitlement to contractual remedies, the notice of contention did not comply with the requirements of the Rules. By that assertion Backoffice and Mr Weeks did not seek to uphold the judgment of the Court of Appeal, but rather sought alternative relief. In the event the claims for relief for breach of warranty and implied duty to cooperate under the shareholders agreement were properly raised in the cross-appeal.

The grounds of cross-appeal

[22] Subject to the grant of special leave and an extension of time, Mr Weeks and Backoffice also filed a

cross-appeal, the grounds of which were, in substance, that the Court of Appeal erred in:

1. setting aside the buy-back order made by the primary judge;
2. failing to find breaches of the warranties contained in the SSA; and
3. failing to hold that Mr Campbell had breached his implied duty to cooperate under the shareholders agreement and the SSA.

In respect of the breaches of warranty and the implied duty to cooperate, it was asserted that the court ought to have assessed damages in the amount of \$440,000.

Statutory framework – misleading or deceptive conduct

[23] The cause of action for misleading or deceptive conduct invoked by Mr Weeks and Backoffice is created by ss 42 and 68 of the Fair Trading Act read together. They correspond with ss 52 and 82 of the Trade Practices Act 1974 (Cth). In the relevant parts they provide:

42(1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

...
68(1) A person who suffers loss or damage by conduct of another person that is in contravention of a provision of Part 3, 4, 5 (section 43 excepted), 5A, 5B, 5C, 5D, 5E or 5F may recover the amount of the loss or damage by action against the other person or against any person involved in the contravention.

Section 72 of the Fair Trading Act, which corresponds with s 87 of the Trade Practices Act provides for a range of other remedies in relation to contraventions or apprehended contraventions.

The characterisation of conduct as misleading or deceptive

[24] The question whether conduct is misleading or deceptive or likely to mislead or deceive within the meaning of s 42 of the Fair Trading Act is logically anterior to the question whether a person has suffered loss or damage thereby for the purposes of s 68. The distinction between characterisation of the conduct and determination of the causation of the claimed loss said to result from it must be maintained. In so saying, it is necessary to acknowledge that there may be practical overlaps in the resolution of these logically distinct questions. The characterisation of conduct may involve assessment of its notional effects, Judged by reference to its context. The same contextual factors may play a role in determining causation.

[25] Characterisation is a task that generally requires consideration of whether the impugned conduct viewed as a whole has a tendency to lead a person into error.⁴⁸ It may be undertaken by reference to the public or a relevant section of the public. In cases of misleading or deceptive conduct analogous to passing off and involving reputational issues, the relevant section of the public may be defined, according to the nature of the conduct, by geographical distribution, age or some other common attribute or interest. On the other hand, characterisation may be undertaken in the context of commercial negotiations between individuals. In either case it involves consideration of a notional cause and effect relationship between the conduct and the state of mind of the relevant person or class of persons. The test is necessarily objective.⁴⁹

[26] This court has drawn a practical distinction between the approach to characterisation of conduct as misleading or deceptive when the public is involved, on the one hand, and where the conduct occurs in dealings between individuals on the other. In the former case, the sufficiency of the connection between the conduct and the misleading or deception of prospective purchasers.⁵⁰

is to be approached at a level of abstraction not present where the case is one involving an express untrue representation allegedly made only to identified individuals.

Where the conduct is directed to members of a class in a general sense, then the characterisation enquiry is to be made with respect to a hypothetical individual "isolate[d] by some criterion" as a "representative member

of that class".⁵¹ In the case of an individual it is not necessary that he or she be reconstructed into a hypothetical, "ordinary" person. Characterisation may proceed by reference to the circumstances and context of the questioned conduct. The state of knowledge of the person to whom the conduct is directed may be relevant, at least in so far as it relates to the content and circumstances of the conduct.

[27] In *Butcher v Lachlan Elder Realty Pty Ltd*⁵² the approach to characterisation of conduct directed to identified individuals was set out in the joint judgment of the majority as follows:⁵³

The plaintiff must establish a causal link between the impugned conduct and the loss that is claimed. That depends on analysing the conduct of the defendant in relation to that plaintiff alone. So here, it is necessary to consider the character of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known.

Although this passage begins by referring to the need to establish a causal link between the impugned conduct and the claimed loss, it is clear that thereafter their Honours were addressing the task of characterisation.

[28] Determination of the causation of loss or damage may require account to be taken of subjective factors relating to a particular person's reaction to conduct found to be misleading or deceptive or likely to mislead or deceive. A misstatement of fact may be misleading or deceptive in the sense that it would have a tendency to lead anyone into error. However, it may be disbelieved by its addressee. In that event the misstatement would not ordinarily be causative of any loss or damage flowing from the subsequent conduct of the addressee.

[29] A person accused of engaging in misleading or deceptive conduct may claim that its effects were negated by a contemporaneous disclaimer by that person, or a subsequent disclaimer of reliance by the person allegedly affected by the conduct. The contemporaneous disclaimer by the person engaging in the impugned conduct is likely to go to the characterisation of the conduct. A subsequent declaration of non-reliance by a person said to have been affected by the conduct is more likely to be relevant to the question of causation.⁵⁴

[30] The first situation was discussed in *Yorke v Lucas*.⁵⁵ Speaking of an example in which a corporation merely passes on false information provided by another, Mason ACJ, Wilson, Deane and Dawson JJ said:⁵⁶

If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive.

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Commenting on this passage, the majority in *Butcher v Lachlan Elder Realty Pty Ltd* said:⁵⁷

In applying those principles, it is important that the agent's conduct be viewed as a whole. It is not right to characterise the problem as one of analysing the effect of its "conduct" divorced from "disclaimers" about that "conduct" and divorced from other circumstances which might qualify its character.

[31] Where the impugned conduct comprises allegedly misleading pre-contractual representations, a contractual disclaimer of reliance will ordinarily be considered in relation to the question of causation. For if a person expressly declares in a contractual document that he or she did not rely upon pre-contractual representations, that declaration may, according to the circumstances, be evidence of non-reliance and of the want of a causal link between the impugned conduct and the loss or damage flowing from entry into the contract.⁵⁸ In many cases, such a provision will not be taken to evidence a break in the causal link between misleading or deceptive conduct and loss.⁵⁹ The person making the declaration may nevertheless be found to have been actuated by the misrepresentations into entering the contract. The question is not one of law, but of fact.

[32] It is important in considering whether conduct is misleading or deceptive to identify clearly the conduct to be characterised.⁶⁰ If the conduct is said to consist of a statement made orally or in writing, the first question to be asked is what kind of statement was made. Was it a statement of historic or present fact made on the basis that its truth was known to its maker? Was it a statement of opinion? That is to say was it a statement of "judgment or belief of something as probable, though not certain or established"?⁶¹ The term "estimate" itself, used as a verb, means the "act of valuing or appraising" or an "approximate judgement of the number, quantity, position, etc, of something".⁶²

[33] A statement of opinion may be a statement with respect to a future matter.⁶³ It may take the form of a prediction. A forward estimate relating to the financial results of a business is a class of prediction. In strict logic there may be some category overlap between opinions and statements of fact. Opinions may carry with them one or more implied representations according to the circumstances of the case. There will ordinarily be an implied representation that the person offering the opinion actually holds it. Other implied representations may be that the opinion is based upon reasonable grounds, which may include the representation that it was formed on the basis of reasonable enquiries. In the case of a person professing expertise or particular skill or experience the opinion may carry the implied representation that it is based upon his or her expertise, skill or experience.

Contractual statements as misleading or deceptive conduct

[34] As appears from the notice of contention, a head of misleading or deceptive conduct asserted but not decided by the primary judge or the Court of Appeal was the alleged representation by Mr Campbell to Backoffice of the contents of Sch 3 to the SSA. This raises the question whether statements contained in a contractual document, including those the subject of a warranty, can constitute misleading or deceptive conduct.

[35] The term "conduct which is misleading or deceptive or likely to mislead or deceive" is apt to cover a large variety of possible circumstances in which the conduct of one has a tendency to lead another into error. There is no reason in principle why the fact that a false statement is contained in a contractual document thereby takes the use of that statement in the document out of the scope of "misleading or deceptive conduct". Whether the proffering of a contractual document containing a false statement amounts to a misrepresentation or to misleading or deceptive conduct, is a matter of fact to be determined by reference to all the circumstances. The circumstance that such a representation is the subject of a contractual warranty does not, as a matter of law, exclude the making of it from the purview of the statutory prohibition. This is consistent with the observation by Lockhart and Gummow JJ in *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd*:⁶⁴

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.

[36] The question whether the giving of a warranty about the accuracy of a statement of present fact or a forecast of performance is misleading or deceptive raises slightly different considerations. The giving of a warranty embodying a false statement of present fact may be characterised as misleading or deceptive conduct simply because it involves the making of that false statement. A warranty as to a forecast of performance may fall within the category of, or involve the making of, a statement as to a future matter. Such a statement can be characterised as misleading or deceptive or likely to mislead or deceive according to whether there were reasonable grounds for making it or whether any other implied representations which it conveyed were true.

The alleged misleading or deceptive conduct

[37] The conduct said to be misleading or deceptive or likely to mislead or deceive in this case was the making of representations flowing from:

- (1) the provision by Mr Campbell to Backoffice of the 2004 add-backs and the 30 November 2004 results;
- (2) the provision of the sales revenue report for December 2004; and
- (3) the inclusion of Sch 3 in the SSA.