

Bullish damages for deception

by DOUG JONES

MOST readers will be aware of section 52 of the Trade Practices Act, which forbids misleading or deceptive conduct.

But what damages are available for the victims of such conduct?

Do common law measures of damages apply, based on contract law, the law of negligence and/or the law of fraudulent misrepresentation, or is there a different measure?

This was the issue before the High Court recently, in *Henville v Walker*.

The answer was that you may be liable for a lot more under the Trade Practices Act.

Bullish but sheepish

A property developer, Mr Henville, bought a property in Albany, Perth and developed three high-quality home units on it.

He did so on the basis of an estimate of the costs to build the units, prepared by himself, and an estimate of the prices they could be sold for, prepared by a real estate agent, Mr Walker.

But the forecast costs were far too low and the forecast prices far too high and the developer lost \$320,000 on the project, through a combination of increased construction costs, delay costs and low sale prices.

Both parties agreed that the real estate agent's price estimate had involved misleading and deceptive conduct contrary to section 52 of the Trade Practices Act.

He had falsely claimed there was a "huge void" at the "luxury" top end of the market for home units in Albany and there were farmers coming to Albany with "million dollar wool cheques" who "were unable to spend them".

The developer sought damages under the Trade Practices Act.

At the trial the judge awarded damages of only \$205,000 — the difference between the actual sale price and the price the real estate agent had estimated. He reasoned the misrepresentations had not caused all of the developer's losses, and in particular the loss related to the developer's own underestimate of the costs.

In effect, the judge awarded damages as if the misrepresentations had been a breach of a contractual promise about the project's revenue.

On appeal, the full WA Supreme Court decided that even though the project would not have proceeded if the real estate agent had not engaged in his misleading conduct, this conduct had not been a cause of any of the developer's loss. Instead, it concluded, the developer had been

"the author of his own misfortune", because even if the real estate agent's estimates had been correct the developer would still not have proceeded had his own cost estimates been correct. The developer was therefore not entitled to any damages.

So when the High Court considered the case it had to address two questions: Did the real estate agent's false representations cause any or all of the developer's loss? And if so, was all or only part of this loss to be compensated by damages under the Trade Practices Act?

The five High Court judges agreed on one thing: the full WA Supreme Court had got it wrong.

All five said that a breach of the Trade Practices Act does not need to be the sole cause of the loss suffered; for damages to be payable, the fact that it is a cause is enough.

Several hinted, however, that in "exceptional" circumstances an "abnormal" event or "unreasonable" behaviour by the victim might mean the breach would not be even a cause of the loss.

The judges also agreed that a victim's own carelessness or negligence is not a bar to recovering damages and four of them agreed that the defendant, and not the victim, has the onus of proving any other causes of the victim's losses.

Agreement, disagreement

But there they parted company.

Two of the judges — the minority — said the damages should be only \$205,000, the difference between the misleading estimate of the sale price and the actual sale price.

Their reasons differed. One argued the only losses to be compensated under the Trade Practices Act are those "directly" caused by a breach of the Act, not those arising from "extraneous" factors or "consequential" losses that are too remote — in this case, the developer's own miscalculations, which had been completely beyond the real estate agent's control.

The other minority judge reached the same conclusion, but by rejecting a requirement for "direct" causation she also rejected tests of the foreseeability or "remoteness" of loss and the apportionment of damages for contributory negligence.

Instead, she said the test was to ask whether the breach of the Act "materially contributes" to the loss in question. But regardless of any fault by the developer the loss suffered as a result of the breach could not have been greater than if the representations been true.

The three majority judges decided the developer was entitled to damages of \$320,000, or all of his losses.

The first adopted the "material contribution" causation

test of the second minority judge and also rejected any apportionment of damages for contributory negligence. But he reached the opposite conclusion, even though he thought damages could be reduced under a "foreseeability" test of the "remoteness" of damages.

He argued that barring "abnormal" events, if a breach of the Trade Practices Act materially contributes to the loss suffered — even if it plays only a minor part — the damages should not be limited by analogy with contract or negligence cases.

Rather, the fair trading and consumer protection objectives of the Trade Practices Act would best be served by ensuring consumers can recover all the losses they suffer if they alter their position because of a breach of the Act.

This judge rejected the "usually" lesser breach-of-contract measure of damages (compensation based on what the victim would have received had the representation been true), pointing out that the Trade Practices Act forbids the making of false representations, not failures to honour them.

The second majority judge adopted similar reasoning. He noted that "on its face the Act's damages provisions permit recovery of the whole of the loss sustained, regardless of the carelessness of the victim."

But there might be cases where some of the loss might not be caused by the breach of the Act. Had the developer (for example) inflated his losses by changing the plans during construction for wholly extraneous reasons, the extra costs would not have been caused by the breach.

The third majority judge simply agreed with his two compatriots.

A new rule — and a caveat

The "bottom line" from this case is that a victim of misleading or deceptive conduct under the Trade Practices Act is entitled to damages for all the loss to which the misleading or deceptive conduct materially contributes, even if the victim's own mistake or carelessness contributes more heavily to the loss.

This is subject, however, to an important caveat. If the defendant can prove that any part of the total loss arose from "unreasonable" conduct by the victim, and/or because of "extraneous" conduct by the victim quite unconnected with the breach of the Trade Practices Act, and/or that any part of the loss was not reasonably foreseeable, the damages might be reduced — although the tests to be applied in judging this are far from clear. ■

Doug Jones is a partner in Clayton Utz law firm.

□ **Wal King**, the chief executive of Leighton Holdings, has won the 2001 Peter Nicol Russel memorial medal, the highest personal award of the Institute of Engineers, Australia. King has won the medal for his contributions to the construction industry through the application of engineering and new technologies, sharing knowledge and development of young engineers, and initiating and supporting the development of standards in quality assurance, environmental management, ethics and corporate governance.

□ **David Anderson** has been appointed chief executive officer of VicRoads, following the resignation of Colin Jordan. Anderson's career spans 33 years with

Vic Rail. He has been director of regional services, general manager of road safety and director of business services.

□ Structural engineer **Tristram Carfrae**, principal of the Arup Group in Sydney, has been named the professional engineer of the year 2002. Over his 20 years with Arup in Australia and the UK, he has been responsible for structures of many award-winning buildings. Carfrae helped design the northern stand at Melbourne Cricket Ground, Star City in Sydney, Royal Agricultural Showground Exhibition Halls/Olympic Sports Halls, Olympic Tennis Centre and Dunc Gray Velodrome, all in Sydney, City of Manchester Stadium and Plantation Place in London.

□ Young professional engineer of the year 2002 is **Jenny Lam**. Lam is employed by Connell Wagner in Sydney. Before joining that engineering company, she was employed by Brown and Root Services Asia Pacific. She has been involved with engineering and project management in bulk materials handling, pressure relief systems, piping and other projects.

□ **Dr John Wagner** has been elected as deputy president of the Institute of Engineers Australia. Wagner is also president elect and will succeed **Dr Peter Greenwood** at the end of Greenwood's term in 2002. He retired in 1998 from his position as associate professor in mechanical engineering and dean of engineering at

University of Western Australia.

□ Wood scientist and structural engineer **Dr Robert Leicester** has retired from the CSIRO. During his 35-year career he accepted 50 invitations from overseas to present his research papers to conferences, workshops and technology transfer events. He won several national and international prizes and awards for his research, including the Stanley Clark Medal for Wood Science, the CSIRO Medal and the Marcus Wallenberg Prize.

□ **Danny Duke** is the new president of the Institute of Quarrying Australia. Duke takes over from past president **Greg Goodsir**. ■