John G. Glass Real Estate Pty Limited v Karawi Constructions P/L - [1993] FCA 431

JOHN G. GLASS REAL ESTATE PTY LIMITED v. KARAWI CONSTRUCTIONS PTY LIMITED;
BONEFIND PTY LIMITED; GYMEA DEVELOPMENTS PTY LIMITED and ALBERT EDWARD JOHN
DAVEY
No. NG880 of 1992
FED No. 431
Number of pages - 4
Trade Practices
(1992) ATPR 41-265
(1993) ATPR 41-249

COURT

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
Davies(1), Heerey(1) and Whitlam(1) JJ

CATCHWORDS

Trade Practices - misleading and deceptive conduct - representations contained in folder compiled by estate agent - information as to net lettable area provided by vendor - printed disclaimer on agent's folder - whether agent's conduct involved any endorsement of the information.

Trade Practices Act 1974 (Cth) s. 52

Yorke v Lucas (1985) 158 CLR 161

The Saints Gallery Pty Ltd v Plummer (1988) 80 ALR 523

Lezam Pty Ltd v Seabridge Australia Pty Ltd (1992) 35 FCR 535

HEARING

SYDNEY, 18 May 1993

#DATE 18:6:1993

Counsel for the applicant: L.G. Foster

Solicitor for the applicant: Murray Stewart and Fogarty

Counsel for the respondent: J.E. Thompson and K. Burke

Solicitor for the respondent: B.E. Miller

ORDER

The Court Orders that:

1. The appeal be dismissed with costs, including reserved costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules

JUDGE1

DAVIES, HEEREY AND WHITLAM JJ The first respondent Karawi Constructions Pty Limited (Karawi) purchased a property in New South Head Road Edgecliff on which was being constructed a three storey office building. The appellant, who was the estate agent acting for the vendor, produced to Karawi a brochure concerning the property which included a statement that the net lettable area of the building would be 180m2. Karawi brought a claim against the appellant and other parties alleging a contravention of s. 52 of the Trade Practices Act 1974 (the Act). Karawi contended that the net lettable area was in fact only 137.4m2.

2. The trial judge (Beaumont J) upheld Karawi's claim and awarded damages in the sum of $496,255.39 against the appellant and other parties.

3. The appellant is the only party to challenge that judgment on appeal. The finding of the learned trial judge as to the true net lettable area of the building is not attacked. But the appellant says that, given that it was acting as an agent, in the circumstances the only representation that it made was that it had obtained the information in the brochure from the vendor. The appellant's conduct, it was said, did not involve it giving any endorsement or approval of the information in the brochure. It was no more than a conduit through which information, albeit false information, passed from vendor to purchaser.

The Facts
4. Karawi was a property developer. Its Managing Director was Mr Kenneth Richard McDougall. In 1989 the appellant acted on behalf of Karawi in connection with the sale of a property at Ryde. In about March 1990 Mr McDougall enquired of the appellant's Mr Robert Glass if the appellant had any project which he could become involved in "with a

little less worry" than the Ryde property. Mr Glass said that as a matter of fact they did. Indeed on 20 February the appellant had been retained by the vendor of the Edgecliff property for its sale by private treaty and had given an opinion as to a current reasonable selling price at $1 million. The appellant's calculations on which that figure was arrived at were produced in evidence (although not shown to Mr McDougall at the time). They are based on a nett lettable area of 180m2. Mr Davey, the principal of the Bojac Management Consultancy Pty Ltd, consultants acting for the vendor, had given this figure to the appellant.

5. At some time between 9 March and 5 April Mr Robert Glass prepared a typed document which was referred to at the trial as Folio 3. It was as follows:

> 155 New South Head Road, Edgecliff PROJECT: commercial building 3 floors with car parking for 5 NET LETTABLE
>
> AREA: LG - 48 m2
>
> GR - 66 m2 lst - 66 m2 180 m2 PRICE: $1.1 million

6. The source of all the information in Folio 3 was Mr Davey.

7. In about early April Mr McDougall spoke to Mr John Glass of the appellant and asked him to get from the vendor "as much information as the vendor could supply to him in order to help him assess the project further". He also asked for a price on the land and a quote from the builder who had been engaged by Mr Davey.

8. On 5 April Mr Davey sent to the appellant a letter of that date. It was on the letterhead of Bojac Management Consultancy Pty Ltd and addressed to Mr John Glass of the appellant. The letter referred to the property and confirmed a sale price of $360,000 with a fixed price building contract of $410,000 which was subject to rise and fall on certain items which were detailed in the letter. Those resulted in an estimated figure for completion of $410,000. Enclosed with the letter were a summary of a Quantity Surveyor's report, a copy of plans, a copy of the Building Approval from Woollahra Council and a feasibility study.

9. Upon receipt of Mr Davey's letter, Mr Robert Glass photocopied it and put a copy of Folio 3 immediately behind the letter itself, ie between the letter and the enclosures that accompanied the letter. The letter, Folio 3 and enclosures to the letter were then bound into a black A4 sized folder with a glossy cover. On the front appears the words JOHN G GLASS and the firm's logo. On the inside of the front cover appear the insignia of some Real Estate organisations and the following:

> REAL ESTATE AGENTS SPECIALISING IN * Commercial and industrial sales, leasing and management * Prestige residential properties * Real estate investment consultants to Institutional investors and to developers of major properties

10. The next page simply bears the name of the appellant and its address, telephone and fax numbers together with its logo. Immediately before the back cover there is a page with the name and address of the appellant described as "SELLING AND LEASING AGENTS" and the following:

> "The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case we have no reason to doubt its completeness or accuracy. However, neither John G Glass Real Estate Pty Limited, its employees or its clients guarantee the information nor does it, or is it intended, to form part of any contract. Accordingly, all interested parties should make their own enquiries to verify the information as well as any additional or supporting information supplied and it is the responsibility of interested parties to satisfy themselves in all respects."

11. On the inside of the back cover there is a statement extolling the virtues of land as a medium of investment. The back cover is plain glossy black.

12. Mr McDougall was telephoned and asked to come to the offices of the appellant. He attended on the same day and was handed the brochure. He read it immediately upon receipt. In the form in which Folio 3 was handed over, the hand printed word "(completed)" had been inserted next to the $1.1 million.

Mr McDougall's Evidence

13. Before us counsel for the appellant relied on evidence which Mr McDougall gave at the trial. The gist of that evidence was that Mr McDougall was aware at the time that the vendor had provided the information to the appellant about the net lettable area which appeared in the brochure and that he did not think that the appellant had verified the statements about net lettable area. However in answer to a question from his Honour, as to whether he wanted to add something, Mr McDougall said:

> "I was going to say that when we - the thing that impressed me about everything from the agent, his professional manner in which I'd had dealings with him to when this occurred, with our discussions with both parties of the real estate office to then when this - the position of building and the things that we had seen there, the proposal. Then when this arrived, it was to my way of doing things, it was presented, everything had been done. We had a management consultant that had done - we had had quantity surveyors, John Stringer and Associates, everything had been done. I was very impressed. Apart from that the BA and the DA had been approved. The building had already started and I was - I felt that I was quite happy in the surroundings that I was in, the manner in which it had been presented, just everything about it I was - that was it."

The Appellant's Case

14. At the forefront of the case put by the appellant is a passage from the judgment of Mason ACJ, Wilson, Deane and Dawson JJ in Yorke v Lucas (1985) 158 CLR 661 at 666 . Before going to that passage it is to be noted that the High Court was only concerned with the issue of persons alleged to have aided and abetted a contravention of the Act. The finding that the corporation itself had breached the Act was not in issue on the appeal. After pointing out that contravention of s. 52 does not require an intent to mislead or deceive, their Honours said:

> "That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false. 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."

15. That passage has been applied in a number of cases including decisions of Full Courts of this Court: The Saints Gallery Pty Ltd v Plummer (1988) 80 ALR 523 at 530-531 and Lezam Pty Ltd v Seabridge Australia Pty Ltd (1992) 35 FCR 535 at 552-553, 556-558 .

16. In our view, a close analysis of the factual situations in the Saints Gallery and Lezam does not assist in the disposition of question arising on this appeal which is essentially one of fact, albeit, as the appellant correctly submits, fact not depending on questions of credibility and in respect of which an appellate court is as able to draw inferences as was the trial judge.

17. In our opinion an estate agent which holds itself out as, amongst other things, "consultants to institutional investors and to developers of major properties" would not be regarded by potential purchasers of properties as merely passing on information about the property "for what it is worth and without any belief in its truth or falsity".

18. Information of the kind in question, the net lettable area of a building, stands on a different footing from the puffery which often accompanies the sale of real property. The figure is one of hard physical fact. As the appellant's own calculations indicate, it is an essential factor in determining the likely profitability of a commercial building and hence its value. We think a purchaser like Karawi would ordinarily expect, to quote the terms of the appellant's own disclaimer, that the agent had no reason to doubt the completeness or accuracy of the information provided.

19. In the present case the appellant adopted the information in question and incorporated it as a central and prominent feature of their selling effort on behalf of the vendor. There was certainly no express disclaimer of the appellant's belief in the truth of the information in the brochure - indeed there was an express assertion of such belief. As part of its ordinary business the agent was providing information in a persuasive form with a view to achieving a sale of its principal's property and of course earning commission. It was this conduct which the learned trial judge, correctly in our opinion, held to be misleading and deceptive. Once the falsity of the figure was demonstrated, it seems to us that no other conclusion could follow.

20. The appeal will be dismissed with costs, including reserved costs.

Cited by:

Hyder v McGrath Sales Pty Ltd [2018] NSWCA 223 (04 October 2018) (McColl JA at [1]; Macfarlan JA at [2]; Emmett AJA at [108])

John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd (1993) ATPR 41-249

Hyder v McGrath Sales Pty Ltd [2018] NSWCA 223 (04 October 2018) (McColl JA at [1]; Macfarlan JA at [2]; Emmett AJA at [108])

61. The Court observed at [87]:

> "The Purchaser contended that the area of vine planting was 'one of hard physical fact' and that a prospective buyer was entitled to assume that a statement as to a 'hard physical fact' had been verified by the agent (see *John G. Glass Real Estate Pty Ltd v Karawi Constructions Pty Limited* [1993] ATPR 41-249 ...at 41, 359). However, if the expression 'one of hard physical fact' is intended to signify 'an uncontroversial matter, admitting of only one answer', it must be said that the question of how the area of land planted with vines is to be described is not a matter of 'hard physical fact'. Whether access areas (headlands and sidelands) or only the trellised areas are to be included was debateable. In any event, it would be unreasonable to attribute to an agent responsibility for every representation which can be correctly described as going to a matter of hard physical fact."

Hyder v McGrath Sales Pty Ltd [2018] NSWCA 223 (04 October 2018) (McColl JA at [1]; Macfarlan JA at [2]; Emmett AJA at [108])

Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592; [2004] HCA 60 ; *Dalton v Lawson Hill Estate Pty Ltd* [2005] FCAFC 169; (2005) ATPR 42-079; *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41-249 ; *CH Real Estate Pty Ltd v Jainran Pty Ltd; Boyana Pty Ltd v Jainran Pty Ltd* [2010] NSWCA 37; (2010) 14 BPR 27,361; *Borzi Smythe Pty Ltd v Campbell Holdings (NSW) Pty Ltd* [2008] NSWCA 233, considered.

Hyder v McGrath Sales Pty Ltd [2018] NSWCA 223 (04 October 2018) (McColl JA at [1]; Macfarlan JA at [2]; Emmett AJA at [108])

62. In *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41-249 , a real estate agent included in a brochure (which featured the name and logo of Mr Glass's real estate agency) information, sourced from the vendor, that the net lettable land of the property in question was 180m2 when it was in fact less. Moreover, the brochure included the following statements:

> "REAL ESTATE AGENTS SPECIALISING IN:
>
> - Commercial and industrial sales, leasing and management
> - Prestige residential properties
> - Real estate consultants to Institutional investors and to developers of major properties
>
> ...
>
> The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case we have no reason to doubt its completeness or accuracy.
>
> However, neither John G Glass Real Estate Pty Limited, its employees or its clients guarantee the information nor does it, or is it intended to form part of any contract. Accordingly, all interested parties should make their own enquiries to verify the information..."

Hyder v McGrath Sales Pty Ltd [2018] NSWCA 223 (04 October 2018) (McColl JA at [1]; Macfarlan JA at [2]; Emmett AJA at [108])

67. First, as in *Butcher* , the Hyders are apparently wealthy and intelligent people. Mr Hyder had had considerable experience and success in property development. On the other hand, McGrath is a suburban real estate agent which, as Mr Hyder acknowledged in his evidence, did not profess any legal or valuation expertise (*Butcher* ; cf *John G Glass Real Estate* and *CH Real Estate*).

Alameddine v Pickles Auctions Pty Ltd (Civil Claims) [2018] VCAT 91 (12 January 2018) (Member Ussher)

37. I have found that the impugned representation did not contain any statement to the effect that the trucks mileage had been merely inferred from a service sticker.[8] If that information had been supplied by the vendor, then it was not passed on by the Respondent. Here, the Respondent's employees interpreted the information supplied by the vendor and expressed the truck's mileage as "5,000 Kms (approximately)" without further qualification. In doing so, the Respondent did not simply relay a pre-prepared statement but actually created the impugned representation based upon its employees own interpretation of the information supplied to it. The case law is quite clear on this point. Where the agent is responsible for the preparation of the misleading information, the agent is not a mere conduit. [9]

via

[9] See *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41-249 ; and *Havyn Pty Ltd v Webster* (2005) ATPR 42-079 (Santow JA with whom Tobias JA and Brownie AJA agreed)

Nguyen and Australian Securities and Investments Commission [2017] AATA 920 (21 June 2017) (The Hon. Justice Stevenson)

132. Counsel for ASIC further referred to the authority *John G Glass Real Estate Pty Limited v Karawi Constructions Pty Limited* [1993] FCA 295, where the Full Federal Court held at [17] :

> *In our opinion an estate agent which holds itself out as, amongst other things, consultants to institutional investors and to developers as major properties" would not be regarded by potential purchasers of properties as merely passing on information about the property "for what it is worth and without any belief in its truth or falsity.*

Perpetual Trustee Company Ltd v Ishak [2012] NSWSC 697 (25 June 2012) (Brereton J)
John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd [1993] FCA 295; (1993) ATPR 41-249 ;

Perpetual Trustee Company Ltd v Ishak [2012] NSWSC 697 (25 June 2012) (Brereton J)

107. The Defendant submitted that the section was concerned with parties who are themselves selling or granting an interest in land. If this is intended to mean that the section is concerned with misrepresentations by or on behalf of vendors and grantors, not purchasers and grantees, then as explained above I agree, but - as between Equis and Perpetual - Equis, for whom Mr Ishak was acting, was a (possible) grantor. If, however, the submission is intended to mean that the section captures only misrepresentations made by principals, and not those made by agents, then it is wrong [see *Garvey v Vamamu Pty Ltd* [1998] NSWSC 444; (1998) ATPR 41-656; *Benlist Pty Ltd v Olivetti Australia Pty Ltd* [1990] FCA 288; (1990) ATPR 41-043; and, in the context of *TPA* , s 53 , *Gardam v George Wills & Co Ltd* [1988] FCA 194; (1988) 82 ALR 415, 427 (applied in *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* [1993] FCA 295; (1993) ATPR 41-249, 41,355); see also *Lezam Pty Ltd v Seabridge Australia Pty Ltd* [1992] FCA 206; (1992) 35 FCR 535].

8. At paragraphs 11 - 23 of the second judgment I identified, in the following terms, the matters which the plaintiff had to establish:

The legal requirements

(a) Misleading or deceptive conduct

Section 52 of the TPA is in the following terms:

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

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).

See also s 42 of the FTA .

In Butcher v Lachlan Elder Realty Pty Limited (2004) 218 CLR 592 , McHugh J (although dissenting in the result) observed that:

The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself. (at 625)

See also Higgins v Sinclair [2011] NSWSC 163 at paras 192-198 .

(b) Unconscionable conduct

Section 51 AB of the TPA provides that:

(1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

(2) Without in any way limiting the matters to which the court may have regard for the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the consumer), the court may have regard to :

(a) the relative strengths of the bargaining positions of the corporation and the consumer;

(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the

corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

(3) A corporation shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.

(4) For the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person:

(a) the court shall not have regard to any circumstances that were not reasonably forseeable at the time of the alleged contravention; and

(b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

(5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

(6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.

(7) Section 51A applies for the purposes of this section in the same way as it applies for the purposes of Division 1 of Part V.

See also s 43 of the FTA .

In Director-General of the Department of Fair Trading v Monaghan [2003] NSWSC 1099 , Bell J observed:

It was common ground that the principles stated by the High Court in *Commercial Bank of Australia Ltd v Amadio* (1982-1983) 151 CLR 447 concerning unconscionability for the purposes of the common law have application when considering unconscionability for the purposes of s 43(1) of the FTA. In *Amadio* Mason J observed at 461 :

"But relief on the ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, e.g., a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink. Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position."

Deane J, in the same case, observed at 474:

"The jurisdiction of courts of equity to relieve against unconscionable dealing developed from the jurisdiction which the Court of Chancery assumed, at a very early period, to set aside transactions in which expectant heirs had dealt with their expectations without being adequately protected against the pressure put upon them by their poverty. The jurisdiction is long established as extending generally to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable: 'the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract' (see per Lord Hatherley, *O'Rorke v. Bolingbroke* (1877) 2 App. Cas., at p. 823; *Fry v. Lane* (18 88) 40 Ch.D. 312, at p. 322 ; *Blomley v. Ryan* (1956) 99 CLR 362, at pp. 428-429).

The equitable principles relating to relief against unconscionable dealing and the principles relating to undue influence are closely related. The two doctrines are, however, distinct. Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party (citations omitted). Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogued. In *Blomley v. Ryan* , Fullagar J. listed some examples of such disability: 'poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary' As Fullagar J. remarked, the common characteristic of such adverse circumstances 'seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other'".

In *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57; 77 ALJR 1853 the High Court discussed the concept of unconscionable conduct in a case involving a claim for equitable relief against forfeiture. In that context Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ in their joint judgment observed at [23] that the phrase "unconscionable conduct" tends to mislead in the several respects that are discussed in the succeeding paragraphs. By these proceedings the Plaintiff claims orders under the *FTA* in respect of unconscionable conduct engaged in by the First Defendant in the supply of services to various of her clients. Section 43 of the *FTA* is not confined to a consideration of the circumstances as they existed at the time of the formation of the contract but includes consideration of conduct that occurs during the course of the contract. In *Holloway v Witham* (1990) 21 NSWLR 70 Lee CJ at CL said at 74:

"But important though it be that the Act enables the Commissioner to make applications on behalf of consumers for compensation, the real virtue in the Act, in so far as it is aimed at unfair trading, is that it enable remedies available to consumers and /or the Commissioner which are dependent, not upon breach of contract by the trader, but upon proof of specific conduct on the part of the trader as defined in the Act. The fact that the trader may by *reason* of the conduct engaged in be in breach of the contract, is largely irrelevant to the pursuit of remedies provided by the Act and, equally, breach of contract by the consumer will not necessarily displace the right of the consumer to the remedies provided in respect of the *conduct* of the supplier. In *Holt v Biroka Pty Ltd* (1988) 13 NSWLR 629, Kearney J held that s 4(4) of the Act, in defining "conduct", produced the result that the conduct to be considered was the whole of the

conduct related to the contractual bargain and its performance and I respectfully adopt that view - it plainly carries out the purpose of the Act." [at paras 11-12]

Accessorial liability of the defendants

Section 75B(1) of the TPA provides that:

(1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB, V or VC, or of section 95AZN, shall be read as a reference to a person who:

(a) has aided, abetted, counselled or procured the contravention;

(b) has induced, whether by threats or promises or otherwise, the contravention;

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention ; or

(d) has conspired with others to effect the contravention. (emphasis added)

See also s 61 of the FTA .

As the focus of the plaintiff's case has been upon s 75B(1)(c) of the TPA , it is necessary to identify what it must establish in order to satisfy that particular provision. The concept of being "knowingly concerned" has both a physical and a mental element.

(a) the physical element

In Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd [2002] FCAFC 157 , Weinberg and Dowsett JJ in their joint reasons, observed:

... At a practical level, the following passage from the judgment of Wilcox J in Trade Practices Commission v Australian Meat Holdings Pty Ltd (1988) ATPR 40-876 at 49,512 demonstrates the relevant considerations:

"The words 'knowingly concerned' are commonly found in statutory provisions creating criminal offences. In that context the word 'concerned' has been read as requiring facts connecting the accused with the commission of the relevant offence. ... In Ashbury v Reid, the Full Court of the Supreme Court of Western Australia, after quoting the Oxford Dictionary definition of 'concerned', said at p51:

'The question which a court should ask itself in determining whether an act or omission on the part of an individual comes within the terms of s54 is whether on the facts it can reasonably be said that the act or omission shown to have been done or neglected to be done by the defendant does in truth implicate or involve him in the offence, whether it does show a practical connexion between him and the offence .'

(R v Tannous) is an interesting case, in the present context. The appellant had agreed with two other persons that certain money owing to him could be used in the importation of cannabis, in the sale of which he was to become a participant. He took no other part in the enterprise. In fact his money was not used so that there was no causal relationship between the involvement of the appellant and the actual importation. Notwithstanding this, the Court held that there was evidence upon which he could be convicted of being knowingly concerned in the importation. At p308 - p309, Lee J said:

The 'concern' to which the section speaks is not a concern personal to the appellant in the sense of being in his mind, but it is a concern which can be demonstrated objectively by reference to his association, whatever it may be, with the importation. It must be shown that he is 'concerned in' not just 'concerned about the importation'. A father, learning that his son had made arrangements to import narcotic drugs into this country, might well be anxious about, interested in or concerned about the fact and he might evince that anxiety, interest or concern to others. But he would not be guilty of the offence of being knowingly concerned merely from his knowledge of the importation and his state of mind arising therefrom. Before he could be convicted under the section he would have to do something to connect himself with or involve himself in the importation .... [at para 154] (emphasis added)

In Rafferty v Time 2000 West Pty Limited (No 4) [2010] FCA 725 Besanko J said:

In *Fencott v Muller* (1983) 152 CLR 570, the High Court held that s 75B of the TPA is a valid law of the Commonwealth. In the course of his reasons, Gibbs CJ said (at 584):

"By the combined provisions of ss. 75B and 82 , the Parliament has made natural persons liable in damages for a contravention by the corporation only if they have been involved in the manner described by s. 75B , which, in my opinion, refers to a close rather than a remote involvement in the contravention. In the most general words of s. 75B , those of par. (c), the word 'knowingly' significantly confines the operation of the provision."

In a case where a party seeks to establish that another party has been involved in a contravention within s 75B(1) of the TPA , there are two questions. The first question is whether the person's acts are sufficient to bring the person within the terms of the subsection. The second question is whether the person has sufficient knowledge for the purposes of the subsection.

In terms of the authorities, a common case to come before the Courts is a case where a corporation has been guilty of misleading or deceptive conduct and an applicant seeks to make liable a director of the corporation who made representations or otherwise participated in the misleading or deceptive conduct. In those cases, the second question is likely to be the one which determines the outcome of the case. However, s 75B(1) has resulted in many other groups being held liable in respect of a contravention by another. In *Sutton v A J Thompson Pty Ltd (in liquidation)* (1987) 73 ALR 233, the company's accountant was held liable under s 75B(1) of the TPA . The representations which formed the basis of the misleading and deceptive conduct were made during discussions at which the accountant was present and in which he took part. In *Heydon v NRMA Ltd* (2000) 51 NSWLR 1, McPherson A-JA (with whom Ormiston A-JA agreed) said, *obiter* , that solicitors engaged to advise on a prospectus would fall within s 75B(1)(a) or s 75B(1)(c) provided they had the knowledge required by that section (at 150 [436]).

There is not a great deal of authority on the level of involvement required in order to establish that a party was "knowingly concerned in" or "party to" a contravention within s 75B(1)(c) .

In *Butt v Tingey* (1993) ATPR (Digest) 46-110 a claim was made that a solicitor had been knowingly concerned in a contravention of s 52 of the TPA . The solicitor had been retained by Blu-Binda Marina Pty Ltd. Blu-Binda had entered into a contract to sell a motor vessel to the respondent. Blu-Binda had accepted part-payment from the respondent in the form of money and an old vessel which Blu-Binda had promptly sold. Blu-Binda failed to deliver the new vessel to the respondent. The respondent sought return of the funds provided and an assurance that they would not be distributed. The solicitor for Blu-Binda wrote to the respondent by facsimile indicating

that the funds would not be disbursed. In fact, the funds had already been applied to Blu-Binda's overdraft facility.

At first instance, the solicitor was held liable. This decision was overturned on appeal by Neaves and Beazley JJ (Davies J dissenting). The majority held that the solicitor in question did not have actual knowledge that the funds had been applied to the overdraft. Their Honours also held that the evidence did not establish that the solicitor was doing anything more than conveying to the respondent's solicitors the essence of the instructions he had received. Davies J, in dissent, held that, by giving his authority as a solicitor to the facsimile and letter, the solicitor had knowingly assisted Blu-Binda to mislead and deceive the respondent.

In *Nescor Industries Group Pty Ltd v Miba Pty Ltd* (1997) 150 ALR 633, Davies J said (at 641) :

"Agents may be held to be in breach of the statutory provision either because they are directly responsible for the misleading information or because the fact that the information has come from them has added something to its weight and authority"

In *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* [1993] ATPR 41-249 , Davies, Heerey and Whitlam JJ upheld a decision at first instance that a real estate agent was liable under s 75B(1)(c) . The agent had provided to the purchasers a brochure produced by the vendors which contained misrepresentations as to the net lettable area of the property. The agent claimed that it was not "knowingly concerned" because it had merely passed on the information. The Court said (at 41,359):

"In our opinion an estate agent which holds itself out as, amongst other things, 'consultants to institutional investors and to developers of major properties' would not be regarded by potential purchasers of properties as merely passing on information about the property 'for what it is worth and without any belief in its truth or falsity'."

Their Honours placed particular reliance on the fact that the misrepresentations related to the net lettable area which "stands on a different footing from the puffery which often accompanies the sale of real property" because it is a figure of "hard physical fact" (see 41,359).

The meaning of the phrase "knowingly concerned" has been considered in the context of criminal offences. The old s 233B(1)(d) of the *Customs Act 1901* (Cth) prohibited a person being knowingly concerned in the importation of a prohibited import. In *R v Tannous* (1987) 10 NSWLR 303, the New South Wales Court of Criminal Appeal considered the meaning to be given to the phrase "knowingly concerned" as it appeared in s 233B(1)(d) . Lee J (with whom Street CJ and Finlay J agreed) indicated that what was required was more than just knowledge, but also some act or omission which implicated or involved the accused by establishing a physical connexion between him and the offence (see 308). ...

In *R v Kelly* (1975) 12 SASR 389, the Full Court of the Supreme Court of South Australia considered the meaning of the word "concerned". Hogarth ACJ, Mitchell and Zelling JJ said (at 400):

"The word is no doubt deliberately chosen to cover a wide range of activities since it would be well-nigh impossible to define more closely the various acts which could go towards the fulfilment of a plan for the importation of prohibited articles."

In *R v Lam* (1990) 46 A Crim R 402 (NSW CCA), Gleeson CJ cited this passage with approval. The Chief Justice said (at 405):

"The expression 'concerned in' is of general import and it is impossible to state with precision what it comprehends. It is necessary to consider the facts and circumstances of the particular case." [at paras 312-322]

(b) the mental element

In Yorke v Lucas (1985) 158 CLR 661 , a majority of the High Court observed that:

...a person will be guilty of the offences of aiding and abetting or counselling and procuring the commission of an offence only if he intentionally participated in it. To form the requisite intent he must have knowledge of the essential matters which go to make up the offence whether or not he knows that those matters amount to a crime. So much was affirmed recently in *Giorgianni v The Queen* where the relevant authorities were examined. [at 667]

A little later, their Honours said:

In our view, the proper construction of par (c) requires a party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention. [at 670]

In Australian Competition and Consumer Commission v IMB Group Pty Ltd [2003] FCAFC 17 the Court said:

It is not necessary to establish any subjective element in relation to a contravention of Pt V of the Act. A contravention may be committed unintentionally. That is to say, a person may contravene a provision of Pt V even though that person does not have knowledge of all of the essential elements that constitute the contravention. However, before any accessorial liability will arise, it is necessary to establish the subjective element of knowledge of each of the essential elements of the contravention. That knowledge may be constructive in the same sense that it may be possible to show wilful blindness in relation to the elements of a contravention. However, absent a finding of wilful blindness, it is necessary to establish actual knowledge on the part of a person to whom it is sought to sheet home accessorial liability in respect of a contravention of PtV. [at para 135]

See also Compac Computer Australia Pty Ltd v Merry (1998) 157 ALR 1 at pp 4-5 ; Medical Benefits Fund of Australia v Cassidy (2003) 205 ALR 402 ; Australian Competition and Consumer Commission v Kaye [2004] FCA 1363 [at paras 176-189].

In Pereira v Director of Public Prosecutions (1988) 82 ALR 217 the High Court made the following observations:

Even where, as with the present charges, actual knowledge is either a specified element of the offence charged or a necessary element of the guilty mind required for the offence, it may be established as a matter of inference from the circumstances surrounding the commission of the alleged offence. However, three matters should be noted. First, in such cases the question remains one of actual knowledge: Giorgianni v. The Queen [1985] HCA 29; (1985) 156 CLR 473 at pp 504-507 ; He Kaw Teh, at p 570. It is never the case that something less than knowledge may be treated as satisfying a requirement of actual knowledge. Secondly, the question is that of the knowledge of the accused and not that which might be postulated of a hypothetical person in the position of the accused, although, of course, that may not be an irrelevant consideration. Finally, where knowledge is inferred from the circumstances surrounding the commission of the alleged offence, knowledge must be the only rational inference available. All that having been said, the fact remains that a combination of suspicious circumstances and failure to make inquiry may sustain an

inference of knowledge of the actual or likely existence of the relevant matter. In a case where a jury is invited to draw such an inference, a failure to make inquiry may sometimes, as a matter of lawyer's shorthand, be referred to as wilful blindness. Where that expression is used, care should be taken to ensure that a jury is not distracted by it from a consideration of the matter in issue as a matter of fact to be proved beyond reasonable doubt. [at pp 219-220] (emphasis added)

The liquidation of TLC does not prevent orders being made against individuals provided it can be established that the individuals were 'knowingly concerned' in the impugned conduct of the company: Australian Competition and Consumer Commission v Black on White Pty Limited [2001] FCA 187 per Spender J [at paras 51-53] . As to the accessorial liability of an individual for his or her conduct even if he or she also be the "mind of the company": see Houghton v Arms (2006) 225 CLR 553 .

The evidence upon which the plaintiff relies

Director General, Department of Services, Technology and Administration v Veall (No 2) [2011] NSWSC 358 (03 May 2011) (Buddin J)

19. In **Rafferty v Time 2000 West Pty Limited (No 4)** [2010] FCA 725 Besanko J said:

In *Fencott v Muller* (1983) 152 CLR 570, the High Court held that s 75B of the TPA is a valid law of the Commonwealth. In the course of his reasons, Gibbs CJ said (at 584):

"By the combined provisions of ss. 75B and 82 , the Parliament has made natural persons liable in damages for a contravention by the corporation only if they have been involved in the manner described by s. 75B , which, in my opinion, refers to a close rather than a remote involvement in the contravention. In the most general words of s. 75B , those of par. (c), the word 'knowingly' significantly confines the operation of the provision."

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(b) the mental element

Rafferty v Time 2000 West Pty Ltd (No 4) [2010] FCA 725 (13 July 2010) (Besanko J)
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Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd (No 2) [2009] FCA 1153 (09 October 2009) (Middleton J)

29. Further, a disclaimer was included in the PIR reports. I accept that disclaimers may not be effective to absolve a maker of a statement from liability for misleading or deceptive conduct

or liability under s 53 of the TPA : see eg *Petera Pty Ltd v EAJ Pty Ltd* (1985) 7 FCR 375. However, in this case there is not just the disclaimer. Contrary to the contention of Wealthcare, I do not regard the position as analogist to the attempted reliance upon the disclaimer in *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* 1993 ATPR 41-249 . The context of all the statements in the PIR report referred to above indicated the limited basis of the information being put forward by PIR: see *Campbell v Backoffice Investments Pty Ltd* (2009) HCA 25 at [29]-[30] .

Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 7) [2008] FCA 1364 (05 September 2008) (Collier J)

151. It is clear from considering this data in the context of preparing the 1 June 2004 Valuation Report that Mr Neubecker did not have detailed and exact information with respect to production. Rather, he presented what he perceived to be a careful estimate of expected yields for 2003/2004 as well as historical production figures for financial years (not Crop years as claimed by the applicants) based on the incomplete information before him which had been supplied by the first respondent. Similarly, by forwarding to Mr Tracy, as an interested potential purchaser, a copy of the 1 June 2004 Valuation Report with a view to providing an overview of the properties by an independent valuer, Mr Strahley and the first respondent were, at most, making a representation that the data in para 7.3 was a careful estimate of historical production figures and no higher. This did not somehow translate – as claimed by the applicants – into an unequivocal representation by either Mr Strahley or the first respondent that the data represented the unequivocally accurate position, which is the claim of the applicants. Given that the 1 June 2004 Valuation Report was provided by Mr Strahley (via Mr Douglas) to Mr Tracy, this is obviously not a case in that class where information is merely being passed on about property by an intermediary without any belief in its truth or falsity (cf *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41-249) However to say that a potential vendor's provision of a report by a valuer containing highly qualified estimates of production constitutes, without more, an unequivocal adoption and confirmation of those estimates as fact is simply incorrect in the circumstances of this case.

APF Properties Pty Ltd v Kestrel Holdings Pty Ltd (No 2) [2007] FCA 1561 (15 November 2007) (Heerey J)

352 However, what Mr Mantach said in the valuations as to croppable area was a matter of "hard physical fact"; see *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41-249 at 41,359 cited with implicit approval by the High Court in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [65] . *John G Glass* dealt with a misrepresentation by a vendor's agent as to net lettable area of a commercial building, something obviously analogous to croppable area of a rural property.

Lymquartz Pty Limited v 2 Elizabeth Bay Road Pty Limited [2007] NSWSC 457 (09 May 2007) (Biscoe AJ)
John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd (1993) ATPR 41 – 249
Morrow v Tucker [No 2]

Lymquartz Pty Limited v 2 Elizabeth Bay Road Pty Limited [2007] NSWSC 457 (09 May 2007) (Biscoe AJ)

190 The second consideration is that the words about the aesthetic quality of apartments in the building - that they will have a "*sense of space*" and " *be comfortable and easy and very liveable*" - contain a subjective element. The plaintiff's case is that such words containing a subjective element convey a representation of hard fact. The Full Federal Court in ***John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd*** (1993) ATPR 41 – 249 at 41,359 referred to a representation of " *hard physical fact*" such as the net lettable area of a building which was an essential factor in determining the likely profitability and, in turn, the value of a building. The Full Court observed that information concerning " *the net lettable area of a building, stands on a different footing from the puffery which often accompanies the sale of real property* " because the matter of the size of the net lettable area of the building was " *one of hard physical fact* ".

Genocanna Nominees Pty Ltd v Thirsty Point Pty Ltd [2006] FCA 1268 (22 September 2006) (Lander J)

289. Mr Wong, who died subsequent to the trial, was the general manager of the corporation of which Ms Liu was the principal. His executor appealed against the finding of the trial judge that Mr Wong had breached s 42 of the *Fair Trading Act (NSW)* . The Court of Appeal said at [17]-[19]:

> *'In the course of his reasons, the trial judge referred to* John G. Glass Real Estate Pty. Limited v. Karawi Constructions Pty. Limited *(1993) ATPR 41-249 , where the Full Court held that an agent (in that case a real estate agent), who had transmitted a false misrepresentation to it by the owner, itself engaged in conduct that was misleading and deceptive. Here, his Honour held that it did not matter that the* "agent" *was an employee. In support of this proposition, he relied upon the decision of French J in* Austr alian Competition and Consumer Commission v. McCaskey *(2000) 104 FCR 8 where French J made injunctive orders against an employee who had engaged in the misleading and deceptive conduct.*
>
> *Counsel for the appellant submitted that* McCaskey *was not binding on this Court and was of little persuasive authority in circumstances where the issue as to whether an employee could be liable under s. 52 had not been fully argued. He submitted therefore that his Honour erred in placing reliance upon it. Although* McCaskey *is a first instance authority, French J is an experienced Federal Court judge who, in the Full Court system of that court, sits both at first instance and on appeal. His decision commands respect, and, if the appellant wishes this Court not to have regard to it, an attempt should have been made to establish that his Honour was wrong in some respect or that there was some reason why the case had no application or was irrelevant to the issue under consideration. No such attempt was made.*
>
> *But in any event, his Honour's acceptance that relief could be granted against an employee for breach, in that case of s. 52 of the* Trade Practices Act *, is clearly correct. As a matter of law, an employee acts as agent for the employer. There is no basis in principle why different rules should apply to agents who are appointed in different circumstances. Provided that a party alleging the contravention is able to establish that the agent is liable within the principles state in* Yorke v, Lucas*, then liability under the section attaches, notwithstanding that the agent in question is an employee acting within authority in the course of employment.'*

Astvilla Pty Ltd v Director of Consumer Affairs Victoria [2006] VSC 289 (04 August 2006) (Bell J)

157. The Full Court of the Federal Court held an estate agent directly liable in *John G Glass Real Estate Pty Limited v Karawi Constructions Pty Limited.* [40] This was a misleading and deceptive conduct case under s. 52 of the *Trade Practices Act* 1974 (Cth) . The agent engaged in conduct beyond "merely passing on information."[41] However the Full Court saw the agent's conduct as an ordinary part of the business of an estate agent, not part of the business of its principle. The case is therefore not an exact analogy with the present, where the employee – Mr Cellante - was acting in his employer's business. In *Pricom Pty Ltd v Sgarioto* [42] Eames J (as he then was) decided an estate agent who had contravened s. 11(1) of the *Fair Trading Act* 19 85 (Vic) was directly liable. But again, the basis of the decision was that the estate agent, a company, was engaged, through its employee, in "its own trade and commerce."[43]

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via

[40] (1993) ATPR 41-249 .

Dalton v Lawson Hill Estate Pty Ltd [2005] FCAFC 169 (22 August 2005) (Lindgren Finn and Emmett JJ)

87. The Purchaser contended that the area of vine planting was '*one of hard physical fact*' and that a prospective buyer was entitled to assume that a statement as to a '*hard physical fact*' had been verified by the agent (see *John G. Glass Real Estate Pty Ltd v Karawi Constructions Pty Limited* [1993] ATPR 41-249 ('*John G Glass*' discussed further below) at 41 , 359). However, if the expression '*one of hard physical* fact' is intended to signify '*an uncontroversial matter, admitting of only one* answer', it must be said that the question of how the area of land planted with vines is to be described is not a matter of '*hard physical fact*'. Whether access areas (headlands and sidelands) or only the trellised areas are to be included was debatable. In any event, it would be unreasonable to attribute to an agent responsibility for every representation which can be correctly described as going to a matter of hard physical fact.

Lawson Hill Estate Pty Ltd v Tovegold Pty Ltd [2004] FCA 1593 (10 December 2004) (Wilcox J)

101. In *Nescor* , Davies J referred to an earlier Full Court decision, *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41-249 ('*John G Glass*'). In that case, the appellant, a real estate agent, was informed by the vendor's consultant that the net lettable area of a building under construction would be 180 square metres. The appellant included this information in a brochure that it prepared, along with a disclaimer as to the completeness and accuracy of the information in the brochure. However, the brochure contained no disclaimer of the appellant's belief in the truth of the information it contained. At 41,359, the Court said:

> *'In our opinion an estate agent which holds itself out as, amongst other things, "consultants to institutional investors and to developers of major properties" would not be regarded by potential purchasers of properties as merely passing on information about the property "for what it is worth and without any belief in its truth or falsity".*
>
> *Information of the kind in question, the net lettable area of a building, stands on a different footing from the puffery which often accompanies the sale of real property. The figure is one of hard physical fact. As the appellant's own calculations indicate, it is an essential factor in determining the likely profitability of a commercial building and hence its value. We think a purchaser like Karawi would ordinarily expect, to quote the terms of the appellant's own disclaimer, that the agent had no reason to doubt the completeness or accuracy of the information provided.*
>
> *In the present case the appellant adopted the information in question and incorporated it as a central and prominent feature of their selling effort on behalf of the vendor. There was certainly no express disclaimer of the appellant's belief in the truth of the information in the brochure – indeed there was an express assertion of such belief. As part of its ordinary business the agent was providing information in a persuasive form with a view to achieving a sale of its principal's property and of course*

earning commission. It was this conduct which the learned trial judge, correctly in our opinion, held to be misleading and deceptive. Once the falsity of the figure was demonstrated, it seems to us that no other conclusion could follow.'

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108. Consistently with the authorities mentioned above, Mr M A Ashhurst, counsel for the applicants, accepted there are circumstances in which agents are not liable for misrepresentations in brochures produced or distributed by them. However, he contended, these are not the circumstances of the present case. Rather, he suggested, this case is similar to *John G Glass* . *John G Glass* was distinguished, but not disapproved, in *Butcher.*

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119. To a large extent, the authorities cited by counsel depend on their own facts. I think this case has some factual similarities to *John G Glass* . It is dissimilar to *Butcher* . As the High Court majority held in the latter case, it was obvious to the purchaser that the survey diagram was the work of an independent professional person having specialised training in surveying. It was a document for whose accuracy an untrained person could not be expected to vouch.

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

62. In *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* [29] , a real estate agent ("John G Glass") placed a typed document emanating from the principal of a firm of consultants acting for the vendor with other materials in a folder with a glossy cover. The typed document showed that the net lettable area of a building being offered for sale was 180 m^2. In fact, the net lettable area was 137.4 m^2. John G Glass contended that the only representation it had made was that it had obtained the information in the brochure from the vendor; that it had not endorsed or approved the information in the brochure; and that it was no more than a conduit. These contentions relied on the following statement in the brochure on a page immediately before the back cover:

> "The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case we have no reason to doubt its completeness or accuracy.
>
> However, neither John G Glass Real Estate Pty Limited, its employees or its clients guarantee the information nor does it, or is it intended, to form part of any contract. Accordingly, all interested parties should make their own enquiries to verify the information as well as any additional or supporting information supplied and it is the responsibility of interested parties to satisfy themselves in all respects."

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

118. A similar result was reached in *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* [95] which concerned a real estate agent "specialising in: ... [r]eal estate investment

consultants to Institutional investors and to developers of major properties". The agent had incorporated into a marketing dossier incorrect information about the lettable area of a commercial property that was under construction. After obtaining a set of incorrect calculations concerning the net lettable area of the building from a consultant, the agent prepared a document setting out the calculations. The document contained a disclaimer that stated *inter alia*:

> "The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case we have no reason to doubt its completeness or accuracy."

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

214. The disclaimer in the present case is neither as detailed nor as prominent as that described in *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* [200]. It is true that the real estate agents involved in *John G Glass* promoted themselves as investment consultants. However, the present was hardly a case where the agent was selling an ordinary suburban bungalow. Self-evidently, this was a substantial transaction for vendor, agent and purchasers alike. And the boundary line was included in the pamphlet because it could reasonably be anticipated that it might be relevant to potential purchasers, as in fact it was to these purchasers. For the lay recipient, the pamphlet communicated the location of the waterfront boundary. It did so by the actions of the agent in including the surveyor's diagram in its publication as it did[201].

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

62. In *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* [29], a real estate agent ("John G Glass") placed a typed document emanating from the principal of a firm of consultants acting for the vendor with other materials in a folder with a glossy cover. The typed document showed that the net lettable area of a building being offered for sale was 180 m^2. In fact, the net lettable area was 137.4 m^2. John G Glass contended that the only representation it had made was that it had obtained the information in the brochure from the vendor; that it had not endorsed or approved the information in the brochure; and that it was no more than a conduit. These contentions relied on the following statement in the brochure on a page immediately before the back cover:

> "The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case we have no reason to doubt its completeness or accuracy.
>
> However, neither John G Glass Real Estate Pty Limited, its employees or its clients guarantee the information nor does it, or is it intended, to form part of any contract. Accordingly, all interested parties should make their own enquiries to verify the information as well as any additional or supporting information supplied and it is the responsibility of interested parties to satisfy themselves in all respects."

via

[29] (1993) ATPR ¶41-249.

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

64. The first ground of distinction is that in the brochure John G Glass held itself out as "consultants to institutional investors and to developers of major properties", and the Full Federal Court held that such an agent "would not be regarded by potential purchasers of properties as merely passing on information about the property 'for what it is worth and without any belief in its truth or falsity'." [30]

via

[30] *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR ¶41-249 at 41,359 paraphrasing *Yorke v Lucas* (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ.

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

65. The second ground of distinction is that the Full Federal Court said that the net lettable area figure was "one of hard physical fact", and an essential matter in determining the profitability and value of the building [31]. The issue of whether there was a precise correspondence between the Pittwater boundary of the Rednal land and the "MHWM" line on the surveyor's diagram here, however, is not a matter of hard physical fact. What is more, there was nothing to indicate that the net lettable area figure had not been calculated by John G Glass itself: indeed, the part of the disclaimer which stated that some of the information had been "prepared with care by" John G Glass suggested that it had, since it is the type of information an estate agent might be capable of working out for itself. It is quite different from the survey diagram, which had obviously not been prepared by the agent here. Hence Handley JA's succinct explanation of why the case was distinguishable is correct [32]:

> "In that case the agents claimed relevant expertise, adopted the figures as their own, and put them forward without any reference to their source. In the present case the agents claimed no relevant expertise, and the diagram itself indicated that it was the work of a professional surveyor."

via

[31] *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR ¶41-249 at 41,359.

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

66. Not only is the case distinguishable, but its reasoning in one respect is questionable. The Full Federal Court said [33]:

> "There was certainly no express disclaimer of the [estate agent's] belief in the truth of the information in the brochure – indeed there was an express assertion of such belief."

via

[33] *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR ¶41-249 at 41,359.

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

118. A similar result was reached in *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* [95] which concerned a real estate agent "specialising in: ... [r]eal estate investment

consultants to Institutional investors and to developers of major properties". The agent had incorporated into a marketing dossier incorrect information about the lettable area of a commercial property that was under construction. After obtaining a set of incorrect calculations concerning the net lettable area of the building from a consultant, the agent prepared a document setting out the calculations. The document contained a disclaimer that stated *inter alia*:

> "The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case we have no reason to doubt its completeness or accuracy."

via

[95] (1993) ATPR ¶41-249 .

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

119. The Full Federal Court (Davies, Heerey and Whitlam JJ) held that the agent had engaged in misleading or deceptive conduct. The Court thought the agent's claimed "expertise" was significant. It held that potential purchasers would not regard an agent that held itself out as "consultants to Institutional investors and to developers of major properties" as merely passing on information about the property "for what it is worth and without any belief in its truth or falsity" [96] . A reasonable purchaser would ordinarily expect that the agent "had no reason to doubt the completeness or accuracy of the information provided." [97] This was particularly so where the information concerned a matter of "hard physical fact" and was an essential factor in determining the likely profitability and, hence, the value of the building. The Full Court said [98] that information concerning "the net lettable area of a building, stands on a different footing from the puffery which often accompanies the sale of real property" because the matter of the size of the net lettable area of the building was "one of hard physical fact". In addition, there was no express disclaimer of any belief by the agent in the truth of the information.

via

[96] *John G Glass Real Estate* (1993) ATPR ¶41-249 at 41,359 , citing *Yorke* (1985) 158 CLR 661 at 666 per Mason ACJ, Wilson, Deane and Dawson JJ.

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

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via

[97] *John G Glass Real Estate* (1993) ATPR ¶41-249 at 41,359 .

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

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via

[98] *John G Glass Real Estate* (1993) ATPR ¶41-249 at 41,359 .

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

158. The case law suggests that disclaimers that appear in small print at the foot of marketing brochures are rarely effective to prevent conduct from being found to be misleading or deceptive or likely to mislead or deceive. If misleading conduct has induced a contract, that fact cannot be negated by the mere circumstance that there is a statement to the contrary [146] . In *Benlist*, for example, the disclaimer appeared in a footnote on the back cover of a brochure prepared in connection with the sale of a city building, and in another section of the brochure. The disclaimer stated that all descriptions, dimensions and other details "are given in good faith and are believed to be correct, but any intending purchasers should not rely on them as statements or representations of fact and must satisfy themselves by inspection or otherwise as to the correctness of each of them" [147] . A disclaimer in similar terms appeared at the foot of the proposed lease Schedule for the commercial premises in *Lez am Pty Ltd v Seabridge Australia Pty Ltd* [148] , namely that all descriptions, dimensions and other details "are given in good faith and are believed to be correct but any intending tenant /purchaser should not rely on them as statements or representations of fact but must satisfy themselves by inspection or otherwise as to the correctness of each of them". The disclaimer in the marketing dossier prepared by the real estate agents in *John G Glass Real Estate* stated [149] :

> "The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case we have no reason to doubt its completeness or accuracy.
>
> However, neither John G Glass Real Estate Pty Limited, its employees or its clients guarantee the information nor does it, or is it intended, to form part of any contract. Accordingly, all interested parties should make their own enquiries to verify the information as well as any additional or supporting

information supplied and it is the responsibility of interested parties to satisfy themselves in all respects."

via

[149] (1993) ATPR ¶41-249 at 41,358 .

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60 (02 December 2004) (Gleeson CJ,McHugh, Kirby, Hayne and Heydon JJ)

214. The disclaimer in the present case is neither as detailed nor as prominent as that described in *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* [200] . It is true that the real estate agents involved in *John G Glass* promoted themselves as investment consultants. However, the present was hardly a case where the agent was selling an ordinary suburban bungalow. Self-evidently, this was a substantial transaction for vendor, agent and purchasers alike. And the boundary line was included in the pamphlet because it could reasonably be anticipated that it might be relevant to potential purchasers, as in fact it was to these purchasers. For the lay recipient, the pamphlet communicated the location of the waterfront boundary. It did so by the actions of the agent in including the surveyor's diagram in its publication as it did[201].

via

[200] (1993) ATPR ¶41249 . The terms of that disclaimer appear in the joint reasons at [62] .

Wong v Citibank Ltd [2004] NSWCA 396 (03 November 2004) (Sheller JA at 1; Beazley JA at 2; Bryson JA at 27)

John G. Glass Real Estate Pty. Limited v. Karawi Constructions Pty. Limited (1993) ATPR 41-249 Yorke v. Lucas

Wong v Citibank Ltd [2004] NSWCA 396 (03 November 2004) (Sheller JA at 1; Beazley JA at 2; Bryson JA at 27)

17 In the course of his reasons, the trial judge referred to *John G. Glass Real Estate Pty. Limited v. Karawi Constructions Pty. Limited* (1993) ATPR 41-249 , where the Full Court held that an agent (in that case a real estate agent), who had transmitted a false misrepresentation to it by the owner, itself engaged in conduct that was misleading and deceptive. Here, his Honour held that it did not matter that the " *agent*" was an employee. In support of this proposition, he relied upon the decision of French J in *Australian Competition and Consumer Commission v. McCaskey* (2000) 104 FCR 8 where French J made injunctive orders against an employee who had engaged in the misleading and deceptive conduct.

Expectation Pty Ltd v PRD Realty Pty Ltd [2004] FCAFC 189 (28 July 2004) (Carr, Emmett and Gyles JJ)

John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd (1993) ATPR 41-249 referred to

Expectation Pty Ltd v PRD Realty Pty Ltd [2004] FCAFC 189 (28 July 2004) (Carr, Emmett and Gyles JJ)

168 It is not axiomatic that a statement to the effect that tenants of specialty shops were paying not more than an appropriate market rent must be one of opinion. Depending upon the circumstances, the question whether specialty shops were paying more than an appropriate market rent could be one of fact capable of proof by reference to comparable rentals then being paid in the market. There may be borderline problems where excessiveness or inappropriateness might be a question of opinion (*John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41–

249 ; *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191; *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at [307], [431]–[432]). But there might also be sufficient evidence to be able to establish as a fact whether the statement was true or untrue.

Alison Jane Whittle and ROZILIE Patricia Munday v Filaria Pty Limited ACN 056 933 843 and Independent Group Pty Limited ACN 008 659 792 and David Shearer and Millie Phillips [2004] ACTSC 45 (11 June 2004); Henry... [2004] ACTSC 45 (11 June 2004) (Crispin J)

95. In any event, any representation relied upon as contravening s 52 must have been made by or on behalf of the defendant or at least adopted by him or her rather than merely passed on with an express or implied disclaimer as to any belief in its truth or falsity: *Yorke v Lucas* (1985) 158 CLR 661 at 666 . See also *Argy v Blunts & Lane Cove Real Estate* (1990) 26 FCR 112; *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41,249 at 41,359 ; and *Butche r v Lachlan Elder Realty Pty Ltd* (2002) 55 NSWLR 558.

Council of the City of Sydney v Goldspar Pty Limited [2004] FCA 568 (07 May 2004) (Gyles J)

145. It will often be the case that assertions made either by an agent or the party concerned will be understood as a claim or allegation amounting only to an opinion genuinely held or held on reasonable grounds. There is considerable debate about the circumstances under which an agent may be found to have made a misleading statement when acting for a client (cf, for example, *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41249 ; *Bo wler v Hilda Pty Ltd* (1998) 80 FCR 191; *Butcher v Lachlan Elder Realty Pty Ltd* (2002) 55 NSWLR 558 at [41]–[52] ; *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 per Malcolm AJA at [307] and McPherson AJA at [428]–[433] ; *Reiffel v ACN 075 839 226 Ltd* [2003] FCA 194; 45 ACSR 67; 21 ACLC 469 at [24]–[32] and SG Corones, 'Solicitors' Liability for Misleading Conduct' (1998) 72 *ALJ* 775). The nature of the Griffith Hack Notice, starting with the description of it as a 'Notice', the unequivocal nature of the statements made in it, the lack of an express or implied disclaimer and the fact that it is directed to the world at large by a firm of lawyers does not enable the representations made in it to be considered only as expressions of opinion.

Citibank Ltd v Liu [2003] NSWSC 569 (25 June 2003) (Hamilton J)
John G Glass Real Estate Pty Limited v Karawi Constructions Pty Limited (1993) ATPR 41-249

Citibank Ltd v Liu [2003] NSWSC 569 (25 June 2003) (Hamilton J)

52 In **John G Glass Real Estate Pty Limited v Karawi Constructions Pty Limited** (1993) ATPR 41-249 a Full Court of the Federal Court (Davies, Heerey and Whitlam JJ) was dealing with a case under s 52 where a real estate agent had transmitted a false representation conveyed to it by the owner concerning the floor area of rental premises. After citing from **Yorke v Lucas** supra the joint judgment continued at 41,359 :

> "That passage has been applied in a number of cases including decisions of Full Courts of this Court: **The Saints Gallery Pty Ltd v Plummer** (1988) ATPR 40-882 at 49,562 - 49,563; (1988) 80 ALR 525 at 530 - 531 and **Lezam Pty Ltd v Seabridge Australia Pty Ltd** (1992) ATPR 41-171 at 40,352 - 40,353, 40,355 - 40,357; (1992) 35 FCR 535 at 552 - 553, 556 - 558 .
>
> In our view, a close analysis of the factual situations in the **Sai nts Gallery** and **Lezam** does not assist in the disposition of question [sic] arising on this appeal which is essentially one of fact, albeit, as the appellant correctly submits, fact not depending on questions of credibility and in respect of which an appellate court is as able to draw inferences as was the trial judge.

> In our opinion an estate agent which holds itself out as, amongst other things, 'consultants to institutional investors and to developers of major properties' would not be regarded by potential purchasers of properties as merely passing on information about the property 'for what it is worth and without any belief in its truth or falsity'.
>
> Information of the kind in question, the net lettable area of a building, stands on a different footing from the puffery which often accompanies the sale of real property. The figure is one of hard physical fact. As the appellant's own calculations indicate, it is an essential factor in determining the likely profitability of a commercial building and hence its value. We think a purchaser like Karawi would ordinarily expect, to quote the terms of the appellant's own disclaimer, that the agent had no reason to doubt the completeness or accuracy of the information provided.

In the present case the appellant adopted the information in question and incorporated it as a central and prominent feature of their selling effort on behalf of the vendor. There was certainly no express disclaimer of the appellant's belief in the truth of the information in the brochure - indeed there was an express assertion of such belief. As part of its ordinary business the agent was providing information in a persuasive form with a view to achieving a sale of its principal's property and of course earning commission. It was this conduct which the learned trial judge, correctly in our opinion, held to be misleading and deceptive. Once the falsity of the figure was demonstrated, it seems to us that no other conclusion could follow."

Reiffel v ACN 075 839 226 Ltd [2003] FCA 194 (14 March 2003) (Gyles J)
John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd (1993) ATPR 41-249 referred to

Reiffel v ACN 075 839 226 Ltd [2003] FCA 194 (14 March 2003) (Gyles J)

27. There is little direct assistance to be gained from the authorities in relation to the content of an expert's so-called negative assurance. The only authority to which I was referred by counsel was *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41-249 ("*Karawi Constructions*"). The appellant was the estate agent acting for the vendor of an office building, and produced a brochure concerning the property which included a statement that the net lettable area of the building would be 180 square metres. It was found that the net lettable area in fact was significantly less. A description of part of the brochure taken from the judgment of the Full Court is as follows:

> *"9. ... On the front appears the words JOHN G GLASS and the firm's logo. On the inside of the front cover appear the insignia of some Real Estate organisations and the following:*
>
> *REAL ESTATE AGENTS SPECIALISING IN*
> * *Commercial and industrial sales, leasing and management*
> * *Prestige residential properties*
>
> * *Real estate investment consultants to Institutional investors and to developers of major properties*

10. The next page simply bears the name of the appellant and its address, telephone and fax numbers together with its logo. Immediately before the back cover there is a page with the name and address of the appellant described as 'SELLING AND LEASING AGENTS" and the following:

> *"The information contained herein has been prepared with care by our Company or it has been supplied to us by apparently reliable sources. In either case we have no reason to doubt its completeness or accuracy. However, neither John G Glass Real Estate Pty Limited, its employees or its clients guarantee the information nor does it, or is it intended, to form part of any contract. Accordingly, all interested parties should make their own enquiries to verify the information as well as any additional or supporting information supplied and it is the responsibility of interested parties to satisfy themselves in all respects."*

11. On the inside of the back cover there is a statement extolling the virtues of land as a medium of investment. The back cover is plain glossy black."

Reiffel v ACN 075 839 226 Ltd [2003] FCA 194 (14 March 2003) (Gyles J)

31. *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191 was another case concerning representations by a real estate agent, but it is difficult to find any ratio decidendi relevant to the present problem. Black CJ decided the matter on review of the facts, Heerey J expressed views about some contentious matters of law and Cooper J took a different tack altogether. In any event, that case concerned the making of an unqualified statement of fact by an agent. This brought into play the various issues and lines of authority considered by Heerey J. The same, it seems to me, can be said of *Karawi Constructions* . The present case is different in character. The statements in question are limited on their face to the expression of opinion by an expert upon and in relation to statements by others.

Harkins v Butcher [2002] NSWCA 237 (28 August 2002) (Handley JA at 1; Beazley JA at 98; Hodgson JA at 99)

49 Mr Moore, who appeared for the purchasers, relied strongly on *John G Glass Real Estate Pty Limited v Karawi Constructions Pty Limited* (1993) ATPR 41-249 , a decision of the Full Federal Court. The appellant had prepared and distributed a typed document which stated that the net lettable area in a commercial building under construction was 180m. The agents obtained this information from the vendor's consultants and believed it to be true. They provided the purchaser with a bound dossier which included a letter from the vendor's management consultants, a copy of their typed document, a summary of a quantity surveyor's report, a copy of the building plans, a copy of the building approval and a feasibility study. The inside cover stated that the agents specialised in "real estate investment consultants to Institutional investors and to developers of major properties" (sic). There was a disclaimer at the back.

Pratt and Ors. v Latta and ANOR. [2001] FMCA 84 (05 October 2001) (Driver FM)
John G Glass Real Estate Pty Limited v Karawi Constructions Pty Limited (1993) ATPR 41-249
Karedis Enterprises Pty Ltd

Pratt and Ors. v Latta and ANOR. [2001] FMCA 84 (05 October 2001) (Driver FM)

28. The first ground of defence of the respondents is that, notwithstanding the falsity of at least the written representation, there was no breach of the Trade Practices Act or the Fair Trading Act because the respondents were doing no more than passing on information supplied by another. I was referred to the decision of the High Court in *Yorke & Another v Lucas* (1985) 158 CLR 661 at 666 . That decision may be contrasted with the decision in *John G Glass Real Estate Pty Limited v Karawi Constructions Pty Limited* (1993) ATPR 41-249 . The question really is whether the respondents were simply the innocent carriers of a false representation from one person to another so that they were merely acting as a conduit or whether they were actively involved in the promotion and sale of the land in such a way that they should be held responsible for the false representations.

Imaginative Investments Pty Ltd v BIPEN Pty Ltd T/As Premier Business Brokers [1999] WASC 174 (21 September 1999) (Wallwork J)

John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd (1993) ATPR 41-249
Jones v Dunkel

Imaginative Investments Pty Ltd v BIPEN Pty Ltd T/As Premier Business Brokers [1999] WASC 174 (21 September 1999) (Wallwork J)

John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd (1993) ATPR 41-249
Jones v Dunkel

Bruce William Bowler v Hilda Pty Ltd [1998] FCA 210 (25 February 1998) (Black CJ, Heerey and Cooper JJ)

John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Limited (1993) ATPR 41-249 referred to

Bruce William Bowler v Hilda Pty Ltd [1998] FCA 210 (25 February 1998) (Black CJ, Heerey and Cooper JJ)

But in any event, Leader's belief as to the intention of its principal Hilda was irrelevant. The evidence does not suggest that anything was said at the time of the representation about the intention of Leader, Hilda or anybody else. The appellants were simply told that if they bought the unit it could be lawfully used, amongst other things, for living in themselves or for private rental. Leader did not say anything as to what had transpired in the owner's camp in connection with obtaining the necessary approvals. Rather it presented to the appellants an unqualified assertion as to the lawful use to which the unit could be put. Coming from an estate agent, a professional who might reasonably be seen as having expertise as to the planning restrictions applicable to the property it was engaged to sell, the representation was not something merely passed on by Leader for what it was worth- *Yorke v Lucas* (1985) 158 CLR 661 at 666, *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Limited* (1993) ATPR 41-249 at 41,359 .

Nescor Industries Group Pty Ltd v Miba Pty Ltd [1997] FCA 1431 (17 December 1997) (Davies, Tamberlin and RD Nicholson JJ)

John C Glass Real Estate Pty Ltd v Karawi (1993) ATPR 41-249 , *refd*

Nescor Industries Group Pty Ltd v Miba Pty Ltd [1997] FCA 1431 (17 December 1997) (Davies, Tamberlin and RD Nicholson JJ)

His Honour held that, because Mr Nelson had developed and had held himself out as having developed a special expertise in relation to food outlets, he was not regarded by the potential franchisees, Mr & Mrs Vittouris, as merely passing on information *"for what it is worth and without any belief in its truth or falsity"*. The trial judge cited from *John Glass Real Estate Pty Limited v Karawi* (1993) ATPR 41-249 where, at 41,359 , Davies, Heerey & Whitlam JJ said:

Campbell v Mihnyak, George [1996] FCA 1172 (19 December 1996) (Davies J)

Real estate and business agents can be guilty of a direct breach of the *Fair Trading Act* or of the *Trade Practices Act* though acting as agent. *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112 is one example, in which case the agent was responsible for the offending brochure. On occasions, the circumstances of the case can give a representation a special significance by reason of its being made by the agent. Two such cases were, I think, *John G Glass Real Estate Pty Ltd v Karawi Constructions Pty Ltd* (1993) ATPR 41-249 and *Butt v Tingey* (1993) ATPR (Digest) 46-110. In *Glass's*

case the representation, which had been made by the agent in a brochure, was as to net lettable area, which is a trade term, a term used by agents. The fact that the term used was a trade term and that the information appeared in the agent's brochure led the court to think that the agent had engaged in misleading and decepture conduct. In *Butt v Tingey,* a solicitor had written to say that there was no need for an injunction because certain funds were held. In my dissenting judgment, I expressed the view that, because the matter was stated by a solicitor in relation to threatened proceedings, the representation involved more than the mere passing on of information from a client. However, in the ordinary course of events, an agent, such as a real estate or business agent, is not liable for passing on information obtained from a client.

Gurr, Vera v Forbes, Richard [1996] FCA 240 (12 April 1996) (Carr J)
John G. Glass Real Estate Pty Ltd v. Karawi Constructions Pty Ltd (1993) ATPR 41-249
Jacques v. Cut Price Deli Pty Ltd

Gurr, Vera v Forbes, Richard [1996] FCA 240 (12 April 1996) (Carr J)

The applicants relied heavily on a decision of the Full Court of this Court in *John G. Glass Real Estate Pty Ltd v. Karawi Constructions Pty Ltd* (1993) ATPR 41-249 which concerned the vendor's selling agent wrongly stating the nettable area of a building. As the Full Court observed (at p. 41,359) the question is essentially one of fact. In that case the Full Court held that an estate agent which holds itself out as, amongst other things, "consultants to institutional investors and to developers of major property", would not be regarded by potential purchasers of properties as merely passing on the information about the property "for what it is worth and without any belief in its truth or falsity".

Gurr, Vera v Forbes, Richard [1996] FCA 240 (12 April 1996) (Carr J)
amounting to his joining in the making of those representations. In all the circumstances there arose, in my view, an implied disclaimer of any belief by Mr Van Halewyn, one way or the other, in the truth or falsity of the information being passed on. It was merely being passed on for what it was worth in a situation where its worth was to be tested by the applicants' chartered accountant. The uncontested evidence was that Mr Van Halewyn assisted in channelling the information (and further information requested by the Gurrs) from Mr Forbes to Ms Le Fevre. The nature of the information being conveyed and the circumstances of the matter, in my opinion distinguish it from the facts in *John G. Glass Real Estate Pty Ltd v. Karawi Constructions Pty Ltd* .