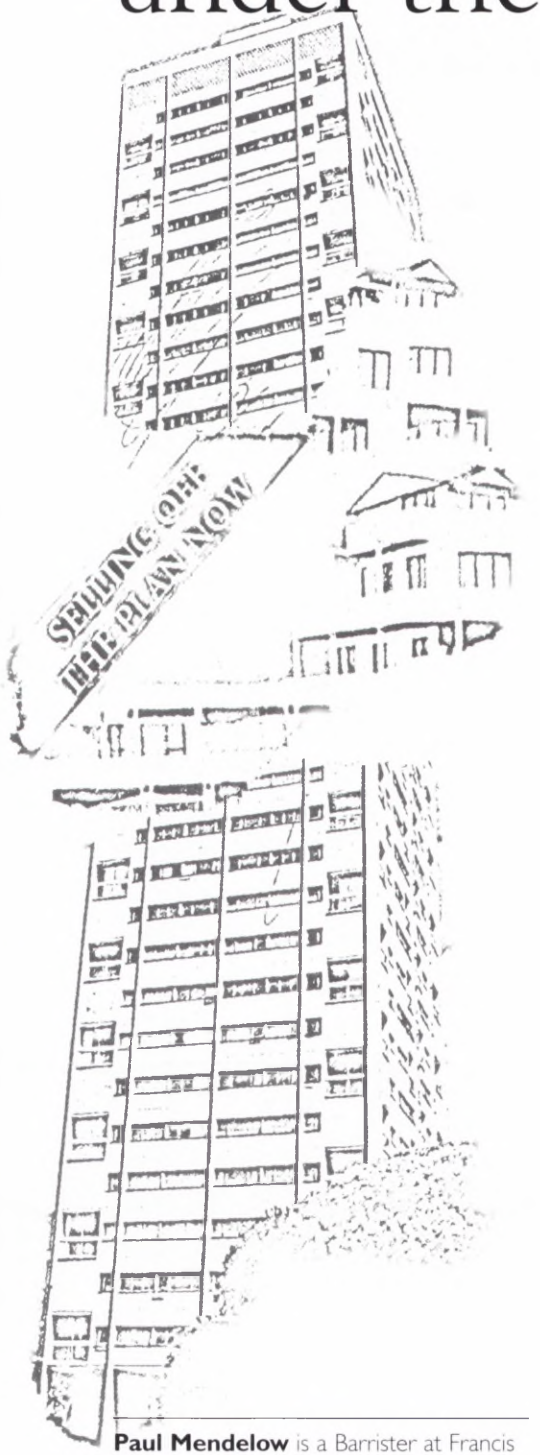
Apportionment, joint causation under the Trade Practices Act:



Paul Mendelow is a Barrister at Francis Burt Chambers **PHONE** 08 9220 0444
EMAIL mendelow@iinet.net.au

Introduction

For more than 25 years since the *Trade Practices Act 1974* ('the Act') came into existence, the High Court had not been called upon to consider vexing issues relating to the extent of liability under sections 82 and 87 of the Act (for contraventions of section 52 of the Act) where the misleading or deceptive conduct has been but one of a number of causes of the loss or damage. Nor had the High Court been required to consider, in the context of joint causation, where the evidential burden lay if not all of the loss alleged to have been caused by the contravention was attributable to the misleading or deceptive conduct.

Within the last year or so a trilogy of cases have hatched for consideration by the High Court, involving issues relating to joint causation, apportionment and rights of contribution involving contraventions of the Act.

The First in the Trilogy: Henville v Walker

The decision of *Henville v Walker* delivered by the High Court of Australia on 6 September 2001[1] is the first I will discuss in this trilogy[2]. The issues raised by the decision dealt with the extent of liability under section 82 of the Act, for a contravention of section 52, where:

- both the misleading conduct of the defendant and negligence on the part of the misled claimant each play a role to induce the claimant to enter into the loss-making venture;
- the misled claimant would not have embarked upon the loss-making venture had the claimant not acted negligently, but would equally not have embarked upon a loss-making venture had the defendant not engaged in misleading or deceptive conduct; and
- the misled claimant 'having entered the arena' suffered additional losses that were not directly related to any fault on the part of the defendant, other than the fact that such loss would not have come into play if the business venture had never been undertaken.

The decision is also illustrative of how the 'common-sense concept of causation' discussed in *March v Stramare (E & MH) Pty Ltd*[3] and applied in *Wardley Australia Ltd v Western Australia*[4] is susceptible to diametrically opposed conclusions being reached by two Appellate Courts in considering the identical factual framework[5].

The Facts

The appellants (collectively referred to as Mr Henville) contemplated the purchase of land in an Albany residen-

PAUL MENDELOW, WA

and rights of contribution

The High Court trilogy

tial area for the purpose of developing home units. Mr Henville was advised by the selling agents (the respondents, collectively referred to as Mr Walker) that there was a 'huge void' at the top end of the market for home units in Albany and Mr Walker often received inquiries from people asking for 'luxury top of the range units for investment and retirement.' Mr Walker further advised that three spacious units 'would fetch between $250,000 and $280,000 each' and 'with a marketing plan, all units would be sold within six months.'

In considering whether to buy the land and develop it, Mr Henville performed a feasibility study which calculated the likely return from the project. The study was based upon estimates of construction and other costs. Mr Henville completely relied upon his own expertise in his estimation.

The costs to build the units were substantially underestimated. The selling prices were substantially overestimated. The state of the market for home units was misrepresented.

The land was acquired and the project undertaken. The units were each sold for between $175,000 and $185,000 (each approximately $65,000 less than the minimum selling price advised by Mr Walker). The costs of the overall development were $865,000 instead of the anticipated cost of $515,000. The substantial underestimation of costs resulted in project delays of a number of months whilst further finance arrangements were put in place, resulting in increased interest costs. As at the date of trial, Mr Henville had sustained a total loss of approximately $320,000 on the project. At trial, Mr Henville gave evidence to the effect that he would not have proceeded with the project unless he was able to satisfy a minimum profit expectation of $80,000.

The Decision of the Trial Judge

Anderson J of the Supreme Court of Western Australia, having found that Mr Walker had engaged in misleading or deceptive conduct in contravention of section 52 of the Act, and having found that Mr Henville proceeded with the development because the representations were a real inducement to his decision to proceed with the project, awarded Mr Henville a sum of $205,000. However, he did not compensate Mr Henville for all of his loss. His Honour excluded losses which he regarded as not attributable to Mr Walker's erroneous estimates of likely selling prices. Such matters included Mr Henville's lack of proper costing, lack of financial resources and the failure to get the project finished in a reasonable time. His Honour assessed Mr Henville's damages by notionally capping his legitimate expenditure at $750,000 (being the minimum represented return he would have achieved on the sale of the units), the award of $205,000 being the difference between the sum of $750,000 and the aggregate sale price of the units achieved at auction.

The Decision of the Full Court

Mr Walker appealed to the Full Court comprising Malcolm CJ, Ipp J and Steytler J. One of the grounds of appeal was that Mr Henville's reliance on his ill-considered feasibility study was the cause of his loss and damage and not the misleading or deceptive conduct. Another ground of appeal was that it had not been proved what loss or damage was attributable to the misleading or deceptive conduct as distinct from other factors.[6]

The Full Court upheld the appeal on these two bases. The court held that, if the costs had not been grossly underestimated, Mr Henville would have realised that there was no prospect of a minimum profit of $80,000 even if the units had sold for $750,000, and it followed that Mr Henville would have realised there was a real risk that the project would sustain a loss. The Full ▶

Court therefore held that the careless estimate of the costs of the project was the sole cause of the loss sustained by Mr Henville.

The Full Court also held that the cost overruns and delays were cumulative causes of Mr Henville's overall loss in the sense that each independently contributed thereto. Since it was not possible to segregate the effect of those losses, it was necessary for Mr Henville to prove their quantum. In the absence of evidence enabling such losses to be identified and assessed, there was no way to establish the amount of the loss that was attributable to Mr Walker's misleading conduct. Mr Henville had therefore failed to prove any entitlement to damages.

"There is no ground for reading into section 82 doctrines of contributory negligence and apportionment of damages."

The Decision of the High Court

In a unanimous decision (the subject of four separate judgments), five Judges of the High Court upheld the appeal and the decision of the trial Judge was reinstated.

Gleeson CJ upheld the appeal on the basis that the Full Court was not justified in reversing the finding of Anderson J that the representations as to likely selling prices were a substantial inducement to the appellants in deciding to buy the land and embark upon the development, and in finding that Mr Henville's erroneous cost estimates were the sole cause of the decision to proceed. The feasibility study was based on two integers, namely costs and returns, and Gleeson CJ held that each was a cause. Gleeson CJ stated:

'It will commonly be the case that a person who is induced by a misleading or deceptive representation to undertake a course of action will have acted carelessly, or will have been otherwise at fault, in responding to the inducement. The purpose of the legislation is not restricted to the protection of the careful or the astute. Negligence on the part of the victim of a contravention is not a bar to an action under section 82 unless the conduct of the victim is such as to destroy the causal connection between contravention and loss or damage ... In the present case there were two concurrent causes of the imprudent decision to buy the land and undertake the development project. The conduct of the respondents was one of those causes. That is enough'.[7]

Gleeson CJ then went on to consider whether Mr Henville would have been entitled to claim all of the costs associated with the ill-fated venture. His Honour identified that 'the task is to select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case'[8]. His Honour upheld the award made by Anderson J on the basis that neither the purpose of the statute nor the justice of the case required Mr Walker to underwrite all the losses, regardless of how they came to be incurred. Gleeson CJ further held that Anderson J was neither obliged nor able to make a precise valuation of the extent of Mr Henville's contribution to such loss and damage. The trial Judge was only obliged to make a reasonable estimate, which is what he did.

Gaudron JA in broad terms agreed with the reasoning of Gleeson CJ except dealt more specifically with who bears the onus of proof and on what issue where contravening conduct is the cause of some but not all of the loss. Gaudron JA held that under section 82(1) of the Act, it is for the person whose contravening conduct materially contributes to the loss or damage to establish what component of the loss or damage is referable to some act or event other than his or her contravening conduct, and not for the person who suffers loss or damage to establish the precise component or components referable to that conduct. The respondents could have proved what particular components of Mr Henville's loss were directly referable to his own conduct. The failure to do so was fatal to any further reduction in the award of damages made by Anderson J. Gaudron JA further held that the award of Anderson J was justified on the basis that Mr Henville's loss could not have been greater than would have been the case if the representations were true[9]. Gaudron JA supported that view in reliance upon the decision of *Kenny & Good Pty Ltd v MGICA (1992) Ltd*[10].

McHugh JA, Hayne JA and Gummow JA held that Mr Henville would have been entitled to recover all of his loss and damage. McHugh JA justified this approach on two bases, namely:

- although Mr Henville badly underestimated the costs of construction, nothing in the findings of Anderson J or the Full Court demonstrate that any of the costs were unreasonably incurred. Matters such as the project being delayed with a consequent increase in costs and interest rates rising are matters that in the ordinary course of a development are reasonably foreseeable; and
- the principles applicable in an action for deceit at common law are appropriate. The purposes of the Act include promoting fair trading and protecting consumers from contraventions of the Act. Where a person contravenes the Act and induces a person to enter upon a course of conduct that results in loss or damage, an award of damages that compensates for the actual losses incurred best serves the purposes of the Act and should ordinarily be awarded.

Their Honours further held that nothing in the common law, in section 52 or section 82 or in the policy of the Act, supports the conclusion that a claimant's damages under section 82 should be reduced because the loss or damage could have been avoided by the

exercise of reasonable care on the claimant's part. There is no ground for reading into section 82 doctrines of contributory negligence and apportionment of damages.

McHugh JA, Hayne JA and Gummow JA further held that in the absence of evidence that cost overruns and delays were unreasonable or reasonably unforeseeable, the lack of evidence enabling those costs to be identified could not affect Mr Henville's right to be compensated for his actual loss. Their Honours stated:

'Arguably, once a plaintiff demonstrates that a breach of duty has occurred that is closely followed by damage, a prima facie causal connection will be established. It is then for the defendant to show that the plaintiff should not recover damages. In the words of Dixon CJ in *Watts v Rake*[11], it is for the defendant who must disentangle, so far as possible, the various contributing factors'.[12]

The Trilogy Continues

On 21 November 2001 the High Court heard the appeal in relation to the matter of *I & L Securities Pty Ltd v HTW Valuers Brisbane Pty Ltd*[13]. Judgment has been reserved. The decision involved a question as to whether under section 87(1) of the Act regard may be had to the claimant's own negligent conduct so as to compensate the claimant for only part of its loss. The Queensland Court of Appeal, sitting as five Judges, affirmed the decision of the trial Judge who awarded the claimant only part of its loss on the basis that the claimant's own negligent conduct was partly responsible for inducing the claimant to participate in the transaction. Whilst section 82 makes no provision for compensating for part of the loss or damage suffered by a victim of a contravention of section 52, section 87 does. This question was expressly left open by Gleeson CJ in *Henville*[14]. It would lead to an anomaly if the High Court upheld the decision of the Queensland Court of Appeal in *I&L Securities*, because that would mean that the extent of relief claimable in such cases would be directly related to whether the claim was framed in terms of section 82 or in terms of section 87.

The Final Instalment

On 4 October 2001 the High Court heard an appeal brought against the decision of the Full Federal Court in the matter of *Burke v LFOT Pty Ltd*[15]. Judgment has been reserved. In this case, the Full Court of the Federal Court upheld the trial Judge's decision permitting respondents to a claim for misleading or deceptive conduct to obtain a 50 percent contribution from a director of the misled claimant on the basis that the director (who was a solicitor) who was retained to provide advice to the misled claimant failed to take reasonable care to check the accuracy of the misleading statements. Heerey J held that there is nothing in the nature of liability for damages under section 82 which excludes it from being the subject of an order for contribution.[16]

Conclusion

Prior to the High Court decision in *Henville*, much debate had ensued as to whether in circumstances in which both misleading or deceptive conduct and the claimant's own failure to take reasonable precautions induced entry into a loss making enterprise, apportionment under section 82 and/or under section 87 of the Act was warranted in determining the amount of the award of damages.[17]

This trilogy of cases has widespread ramifications for legal advisers in determining which parties should be joined to proceedings involving a breach of the Act, and in terms of framing pleadings. For example, having regard to the High Court's ruling in *Henville*, a respondent to a claim for misleading or deceptive conduct who asserts that not all of the loss or damage is attributable to the misleading or deceptive conduct would not be well served by a general denial that the loss or damage (if any) was caused by the conduct alleged. It would need to be pleaded what element of the claimant's loss or damage has been unreasonably incurred, so that a positive case in that regard could be maintained and supported by the evidence required to be led. PL

Footnotes:

1. (2001) 75 ALJR 1410.
2. *Burke v LFOT Pty Ltd* (2000) 178 ALR 161 is a decision from the Full Federal Court on appeal to the High Court involving issues of contribution between joint wrong-doers. The appeal was heard on 4 October 2001. Judgment has been reserved. *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2000) 179 ALR 89 is a decision from the Full Court of the Queensland Court of Appeal (comprising 5 judges) involving issues of apportionment under section 87 of the Act. The appeal was heard on 21 November 2001. Judgment has been reserved.
3. (1991) 171 CLR 506.
4. (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron & McHugh JJ.
5. Stapleton, "Perspectives on Causation", in Horder (ed), Oxford Essays in Juris Prudence (2000) 61 at 76.
6. There were in fact 12 grounds of appeal.
7. See paragraphs 13 and 14.
8. See paragraph 18.
9. See paragraph 72.
10. (1999) 199 CLR 413.
11. (1960) 108 CLR 158 at 160.
12. See paragraph 48.
13. (2000) 179 ALR 89.
14. See paragraph 7.
15. (2000) 178 ALR 161.
16. See paragraph 131.
17. See Campbell, "Contribution, Contributory Negligence & Section 52 of the Trade Practices Act" (1993) 67 ALJ 87; see further Seddon, "Misleading Conduct: The Case for Proportionality" (1997) 71 ALJ 146.

NOTE: Paul Mendelow acted as counsel for Mr Henville in the appeal before the High Court of Australia, appearing with Peter Hannan of the Melbourne Bar as junior counsel.