

REPRESENTATIONS AS TO THE FUTURE: SECTION 51A OF THE TRADE PRACTICES ACT 1974 - PLAINTIFF'S SWORD OR DEFENDANT'S SHIELD?

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I INTRODUCTION

Section 51A of the *Trade Practices Act 1974* (Cth) makes provision regarding representations regarding future matters. The concept is relevant to other provisions in the Act dealing with representations. Section 51A provides that where a corporation makes a representation as to a future matter (including the doing of, or refusing to do any act), and it does not have reasonable grounds for making the representation, the representation shall be taken to be misleading (s 51A(1)). The corporation is deemed not to have reasonable grounds for making this representation, unless it adduces evidence to the contrary (s 51A(2)).

Section 51A(2) has commonly been viewed by the courts as reversing the onus of proof, with the effect that the representor must prove reasonable grounds for the subject representation.¹

Section 51A has routinely been described as being merely an evidential provision, rather than a substantive one. It operates in conjunction with other provisions, notably s52, in establishing norms of conduct, departure from which can ground a remedy under one of the remedial provisions in Part VI of the Act.

Section 51A is noteworthy as its dominant interpretation qualifies the absolute liability applying to infringements of s52 and other absolute

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1. *Futuretronics International Pty Ltd v Gadzbis* (1990) ATPR 41-049, 51,650; *Edgar v Farrow Mortgage Services Pty Ltd (in liq)* (1992) ATPR(Digest) 46-096,53,377; *Ting v Blanche* (1993) 118 ALR 543, 553-556; *Cummings v Lewis* (1993) 113 ALR 285, 291; *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191, 194,199,215; *King v GIO Aust Holdings Ltd* (2001) 184 ALR 98, 107; cf *ACCC v Universal Sports Challenge Ltd* [2002] FCA 1276; *Cream v Bushcolt Pty Ltd* (2004) ATPR 42-004 at 48,791ff.
2. Dealing with false or misleading representation in connection with the supply of goods or services.
3. Dealing with false representations and other misleading or offensive conduct in relation to land.

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liability provisions, such as ss53² and 53A.³

Section 51A is most commonly used in conjunction with s52. Section 52 is the most litigated provision in the *Trade Practices Act*. In its express terms, Section 52 is of broad ambit. Section 52(1) provides that a 'corporation shall not in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. The category of conduct which is thereby prohibited is self-evidently broad. The defendant must be a corporation, but this limitation is illusory, given that the State and Territorial *Fair Trading Acts* contain mirror provisions which apply to the 'person'⁴ in trade or commerce.

The party must be engaged in trade or commerce, which is a more substantive limit on the scope of s 52. It excludes from the scope of the provision (and its *Fair Trading Act* equivalents) the owner of a house who makes precontractual misrepresentations to a prospective vendor.⁵

Section 52 does not per se attach legal liability to the person who breaches it, it merely establishes a norm of conduct. Infringement of this norm attracts a remedy when a remedy is sought under one of the remedial provisions in Part VI of the Act for a breach of s52. For damages to be awarded, the plaintiff must establish that the conduct infringing s52 caused loss or harm.

Section 52 is noteworthy in that liability under s 52 is commonly absolute. It is absolute because the defendant's conduct does not need to have any element of culpability. No proof of intent to mislead or deceive is required, nor is any element of recklessness required to be proven. Nor does negligence need to be established. It is sufficient that the defendant is shown to have engaged in conduct which is misleading or deceptive, or which is likely to mislead or deceive. Moreover, liability is absolute, and not merely strict, as in the normal case, because proof that the defendant acted reasonably⁶ is unavailing. Quite simply, no such defence is provided in the Act. However, there are some limited exceptions to this proposition.⁷

One potentially important exception centres on representations as to a

4 This 'person' can be incorporated, natural or otherwise.

5 *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 94 ALR 719 at 733ff.

6 Such as, that it acted as it did because of an honest mistake that was reasonable in the circumstances.

7 Section 85 provides limited exceptions - for example, subs(3) provides that in a proceeding in relation to a contravention of Part V (including s52) or Part VC committed by the publication of an advertisement, it is a defence if the defendant establishes that he or she is a person whose business it is to publish or arrange for the publication of advertisements and that he or she received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that the publication would amount to a contravention of a provision of that Part.

future matter, within the ambit of s 51A. If the representor has a defence, such as the representation as to the future matter was based on reasonable grounds, then the representor whose statement which is alleged to infringe s52 is in an advantageous position compared to other defendants under s52. In these terms s51A is the defendant's shield.

Yet, if s 51A is merely of evidential significance, then in so far as it reverses the onus of proof and places it upon the defendant in relation to a critical matter (the existence of reasonable grounds), the s51A plaintiff is doubly advantaged compared to the s 52 plaintiff. The latter has the benefit of absolute liability being imposed upon the defendant, and the reversal of burden of proof in respect of a material matter.

II DOES s51A CREATE AN EXCEPTION TO THE ABSOLUTE LIABILITY IMPOSED BY s52A?

A *Is s51A of evidential significance only?*

There are two possible analyses of s51A. The first is that it is of evidential significance only.⁸ Where the corporation makes the representation relating to a future matter without reasonable grounds, then it presumes the corporation has made a misleading representation. This is the effect of s 51A(1).

Section 51A(2) reinforces this conclusion, by specifically placing the evidential burden on the corporate defendant to establish reasonable grounds. If the corporation cannot establish reasonable grounds, then the representation is misleading under s 52. Thus interpreted, these provisions make it easier for the plaintiff to establish conduct in breach of s 52. In the absence of sub-ss51(1),(2), the plaintiff would have to prove that the representation as to the future was misleading.

On the premise that these provisions are of evidential significance only, the mere fact that the corporation establishes reasonable grounds, does not prevent it from breaching s52. Proof of reasonable grounds merely repositions the burden of establishing that the representation as to the future was misleading on to the plaintiff. In these terms, liability under s52 remains absolute, as it does in most other cases. Reasonable grounds for making a representation as to the future do not excuse the corporation from liability under s52, where the plaintiff can prove (irrespective of reasonable grounds) that the representation was, at the time it was made, misleading.

⁸ See, eg, *Cummings v Lewis* (1993) 113 ALR 285, 294 (Sheppard and Neaves JJ). *Phoenix Court Pty Ltd v Melbourne Central Pty Ltd* (1997) ATPR (Digest) 46-179, 54,432 (Goldberg J).

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B *Is s51A of substantive significance?*

An alternative view of s51A is that it is of substantive significance, as it creates a defence of acting reasonably, in relation to representations regarding the future. On this analysis, the effect of s 51A(1) is that the corporation that makes the representation as to the future on reasonable grounds, is deemed not to have made a misleading statement. *Ipsa facto*, it does not engage in misleading conduct for the purpose of s52. Therefore, it never gets within the s 52 net. Section 51A(2) merely reinforces that the evidential onus is on the corporation to establish reasonable grounds.

Hill J appears to accept this analysis in the Federal Court case of *Ting v Blanche* ('*Ting*').⁹ In this case, the representations concerned statements as to rent obtainable from a property that was being offered for sale. It was accepted that a representation as to future rental returns would be one as to the future. Justice Hill found on the evidence that the applicants had failed to show that the representations were made. Even if they had been, the defendants had demonstrated that the projected rental return was a reasonable one for the property. While Hill J described s 51A as a section designed to facilitate proof, he clearly accepted that it was of substantive significance. In an obiter comment, Hill J observed that had the alleged representations been proven, the defendants would, by implication, have been exonerated as the projected rental return was a reasonable one:

Should it be possible to construe a representation as to future rental being 'about \$8' as encompassing a rental of \$7.50 or better, then the respondents have satisfied the burden of showing that the representation was made on reasonable grounds. It...goes without saying that it follows that the respondents have shown that the representations in fact made were equally made on reasonable grounds.¹⁰

The representation to the provision as being 'facilitative' must be qualified - it does affect the burden of proof in requiring that the representor establish reasonable grounds, but once this is done, the provision operates to secure for this party an immunity under s 52.

That s 51A is of substantive significance was apparently accepted by Heerey J in *Sykes v Reserve Bank of Australia* ('*Sykes*'),¹¹ who said that the:

[Q]uestion posed by s51A is whether the representor had reasonable grounds for making the representation [as to the future]. If it did not, the representation 'shall be taken to be misleading'. The ordinary s52 representation is treated as misleading or deceptive even if the

⁹ (1993) 118 ALR 543; (1993) ATPR 41-282.

¹⁰ *Ting v Blanche* (1993) 118 ALR 543,555.

¹¹ (1998) 88 FCR 511.

representor be innocent of fraud or negligence.

Section 51A, a subset of s52, applies that strict liability to representations as to future matters. The only difference is a concession in favour of representors. Liability is avoided - in contrast to the ordinary s52 case - if the representor had reasonable grounds for making the representation. Subject only to that, a representor as to a future matter cannot be heard to say that the occurrence or non-occurrence of the future event was unpredictable, any more than the s52 representor can say that the untruth of his or her representation was not reasonably to be expected.¹²

The plaintiff alleged that the bank had made a misleading statement regarding a future matter, in relation to the progressive issue of denominations of new series polymer notes. The plaintiff contended that he had developed a plastic banknote handling system to contain and store the notes in flat format due to the representations made by the defendant. The trial judge found that the bank had made the representations, but because it had had reasonable grounds for making them, it was not in breach of s52.

The Full Federal Court, by majority, allowed the appeal, and held that the trial judge had been wrong in finding that the bank had reasonable grounds.

Technically, Heerey J's observations were obiter, given the finding on the evidence that there were no reasonable grounds. Thus, the question of what the effect of s51A would have been, had the evidence established that there were reasonable grounds (ie, whether this fact would have been of substantive or merely evidential significance), did not strictly speaking have to be decided. It is clearly assumed, however, in his decision that the bank would have been exonerated had these grounds existed. Justice Sunberg agreed with Heerey J's reasoning.¹³

In the concurrent Full Federal Court decision in *Bowler v Hilda Pty Ltd*,¹⁴ s51A was identified as being an evidentiary rather than a substantive provision.¹⁵ Nonetheless, the court proceeded on the same basis as in *Ting* and *Sykes*. In both cases it was held that s51A is of substantive effect - a wrong representation as to the future will not breach s52 where it was made on reasonable grounds. The appellants, the vendor of a property and its agent, had represented without qualification to the defendant who ultimately purchased the property that planning approval could be sought in order that the property could be used as a residence. The court found that there were no reasonable

12 *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511, 514.

13 *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511, 521. The dissenting judge, Emmett J, considered that the appellants had failed to establish that any conduct on the part of the bank was misleading or deceptive: at 536.

14 (1998) 80 FCR 191.

15 *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191,206. (Heerey J), 215 (Cooper J).

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grounds for this statement. The representations were treated by the court as one as to a future matter. The trial judge found in favor of the representors, taking the view that they had been made on reasonable grounds and that this factor operated to exonerate them from liability under s52.¹⁶ The Full Court allowed an appeal against this verdict, finding that there was no reasonable ground for the representations.

Chief Justice Black clearly conceived of the lack of reasonable grounds as being pivotal to the case. He stated that the facts of one representation did not 'provide reasonable grounds for a statement, unqualified as it was, that the proposed serviced apartments could be used for permanent residence'.¹⁷ Justice Heerey likewise was of the opinion that reasonable grounds exonerated a representor from liability, in a case where s51A applied.¹⁸ Justice Heerey considered, however, that s53A applied,¹⁹ and that it excluded the operation of s51A and its reasonable grounds defence.²⁰ Justice Cooper viewed the provision as being a substantive as well as an evidential one, on the basis that proof of reasonable grounds would exonerate.²¹ Justice Cooper would have upheld the trial judge's decision, which was based on a determination that there were reasonable grounds for the representations.

In the case of *King v GIO Australia Holdings*²² Moore J stated that it was well established that s 51A 'simply concerns the burden of proof'.²³ Thereafter, however, he clearly invested it with substantive significance. This is a recurrent theme in the cases on s51A. Section 51A creates a statutory presumption, but if the defendant can displace this presumption, and prove reasonable grounds, it is exonerated from a breach of s52.

Overall, current authority strongly supports the analysis that s51A creates both an evidential presumption, and an exception to the

16 *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191, 203.

17 *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191, 199.

18 *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191, 205. Heerey J citing *Wright v TNT Management Pty Ltd* (1989) 15 NSWLR 679, 690.

19 Dealing with certain misrepresentations in relation to the land.

20 *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191, 207.

21 *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191, 223.

22 (2001) 184 ALR 98.

23 *King v GIO Australia Holdings* (2001) 184 ALR 98, 110. Moore J citing *Australian Competition and Consumer Commission v IMB Group Pty Ltd* (1999) ATPR 41-704 and the cases cited therein.

24 See, eg, *McPhillips v Ampol Petroleum (Vic) Pty Ltd* (1990) ATPR 41-014, 51,257; *Cummings v Lewis* (1993) ATPR(Digest) 46-103 at 53,449ff; *Australian Rugby Union v Hospitality Group Pty Ltd* (2000) ATPR 41-768 at 41,074; *Minister for Health and Aged Care v Harrington Associates Ltd* (2000) 107 FCR 212 at 230; *ACCC v Oceana Commercial Pty Ltd* (2004) ATPR(Digest) 46-244 at 54,206; *Quinlivan v ACCC* (2004) ATPR 42-010.

absolute liability which otherwise characterises the operation of s52.²⁴

III WHY EXEMPT THE DEFENDANT FROM ABSOLUTE LIABILITY UNDER S52, WHEN THE REPRESENTATION CONCERNS A FUTURE MATTER?

It is clearly the law that s52 imposes absolute liability upon the person who infringes it, in that no defence of acting on reasonable grounds²⁵ is available on a general basis. The question therefore arises – why should a defendant be given the benefit of such a defence when it makes misleading representations regarding a future matter under the terms of s 51A?

A starting point is to examine the situation which is obtained in respect of misleading representations regarding future matters alleged to attract liability under s52, before the enactment of s51A in 1986. Two categories of a statement as to the future may be highlighted - predictions and promises. A prediction by definition relates to a future matter, and a promise to do something in the future likewise relates to a future matter.

If a prediction turns out to be wrong, or a promise to do something in the future is not fulfilled, either may be misleading at the time it was made. Under s 52, the time for assessing whether a representation is misleading or deceptive is the time that it is made.²⁶

It can be very difficult for the plaintiff to prove that a prediction was misleading at the time it was made. There may be occasions where the statement is self-evidently misleading, when, for example, the representor claims that the price of a house will double in six months, in the context of a market which has only ever seen gradual price movements. However, most predictions are not this self-evidently misleading.

Where there has been a promise by the defendant that it would do something in the future, it may be especially difficult to prove that a misleading promise was made. This is because it may be difficult to establish that the defendant did not intend, or did not believe that it had the capacity, to fulfil this promise.

These considerations were to the fore in the leading pre-s51A case of *Global Sportsman Pty Ltd v Mirror Newspapers Ltd*.²⁷ The Full Bench

²⁵ Such as, acting on the strength of an honest and reasonable mistake.

²⁶ Despite this, the evidence of what happens subsequently may of course be tendered with a view to establishing that the representation as to the future was unsound when it was made

²⁷ (1984) 2 FCR 82.

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of the Federal Court in this case, held that a statement involving a promise, opinion or prediction conveys a state of mind. The representor in such a case ordinarily will convey the meaning (expressly or impliedly) that the representor had a particular state of mind at the time of the statement, and commonly at least, that there was a basis for that state of mind. If the meaning conveyed in the statement is false in that or any other respect, the making of the statement will have contravened s52(1).²⁸

Thus, a promise or prediction will, to the extent that the representor is conveying that he or she has an honest intent to fulfil the promise or an honest belief that the fact or facts predicted to occur will occur, be false or misleading if the representor does not in fact have this state of mind at the time of the representation. In this roundabout way, promises and predictions that are broadly speaking false, will fall under the ambit of s52.

The difficulty for the plaintiff is how they prove a defendant's state of mind.²⁹ Section 51A was intended to assist the plaintiff by imposing the evidential presumption upon the defendant. The latter was presumed to have made a misleading representation unless it could prove honest and reasonable grounds for the representation.

The reversal of the onus creates a paradox. A provision intended to assist the plaintiff and to burden the defendant, also benefits the defendant. The plaintiff has the benefit of the reversal of onus, but the defendant has the benefit of a defence of honest and reasonable mistake, something not available to s 52 defendants in the normal case. This is the result of reading s 51A as being more than merely an evidential provision. It is this latter dimension of the s 51A regime, which is overlooked.

It is questionable as to whether the defendant should enjoy this benefit. If absolute liability applied to representations regarding a future matter (as it would if s51A was construed as being purely evidential in effect), s51A would place the defendant in a difficult position. It would mean that a prediction, which is not borne out would retrospectively be classed as misleading.

This would place a very onerous burden on potential defendants. The making of promises and predictions, and the expression of other opinions as to future matters, would be potentially hazardous. The concessional treatment of this class of representations, in contrast with

²⁸ *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, 88. (Bowen CJ, Lockhart and Fitzgerald JJ).

²⁹ See *Edgar v Farrow Mortgage Services Pty Ltd (in liq)* (1992) ATPR (Digest) 46-096 at 53,376 (Einfeld J).

s 52 in its application to representations as to present and past matters, reflects the fact that there are more uncertainties in forecasting the future as contrasted with commenting on present and past matters, and that the recipient of the forecast or promise should be aware of this.

IV CAN s51A BE SIDESTEPED, IN CASES OF MISLEADING REPRESENTATIONS AS TO A FUTURE MATTER?

Can a plaintiff (or a defendant) avoid s51A, and have the issue of whether a representation as to the future was misleading, evaluated by reference to s52 alone? Each may have a reason for wanting evaluation to be confined to the s 52 regime.³⁰ Section 51A operates to create an exception to s52. Otherwise its enactment would be pointless. In terms, it creates and subjects to its regulation a subset of representations alleged to be misleading, which would otherwise be evaluated by reference to s52 only, or some parallel provision (such as s53). The case law is consistent with this analysis.³¹

There is a question of whether s 51A must be pleaded by a party, in order that it may be relied upon. In general, relevant case law does not require this, although it has been said that a party should make clear in the statement of claim, the facts grounding a s51A defence,³² or that the relevant facts should be pleaded.³³

In some instances it may be that on a proper interpretation of a provision (s52 aside) in Part V of the Act, s51A cannot be invoked. The issue arose in *Bowler v Hilda Pty Ltd*.³⁴ The appellant purchasers complained that a pre-sale representation as to the use that a property could lawfully be put (that it could be used for residential purposes) was misleading. They pleaded s52 and s53A(1)(b). The representors raised s51A by way of defence. Although s51A had not been pleaded, the trial judge proceeded on the basis that it was applicable. On appeal, Black CJ

30 For example, the plaintiff may want to sue on a prediction which in light of later facts, was self-evidently false at the time. If the plaintiff can have the matter evaluated under s52 alone, the defendant is denied the defence available under s51A, assuming that the facts at the time of the representation, would have fulfilled it.

31 See, for example, the cases cited in n2 above.

32 *Western Australia v Bond Corp Holdings Ltd* (1991) ATPR 41-018.

33 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investments Ltd* (1998) ATPR 41-633.

34 (1998) 80 FCR 191.

35 (1998) 80 FCR 191 at 194.

36 (1998) 80 FCR 191 at 223.

37 (1998) 80 FCR 191 at 207. Section 53A(1)(b) prohibits the corporation in trade or commerce in connection with the sale of land from making a false or misleading representation as to the use to which the land could be put. On Heerey J's analysis, this provision required no more than the plaintiff prove that the representation as to the use of the land was false or misleading. If so the representor could not rely on the

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viewed s51A as being applicable, by implication to both provisions.³⁵ Cooper was of the view that s51A applied to both s52 and s53A(1)(b).³⁶ However, Heerey J considered that where s53A(1)(b) was concerned, its terms of this latter provision excluded the operation of s51A.³⁷ His view was a minority one on this occasion.

V ACCESSORIES

The person sought to be made liable as an accessory to a breach of s52 (or another provision in the Act) pursuant to s75B must be proven to have known of the facts that establish a breach of this provision at the time of the conduct in question. So, for example, if it is alleged that the defendant promoted or assisted an infringing false representation, he or she must be shown to have known that the representation was false at the time of the act of promotion or assistance.³⁸

Consistent with this principle, persons sought to be made liable as an accessory in relation to a representation as to a future matter, are unaffected by s51A. The burden remains on the applicant to establish that the defendant knew at the relevant time that the representation was not based on reasonable grounds.³⁹

VI CAN ss51A, s52 REPLACE AN ACTION FOR BREACH OF CONTRACT?

A promise to do something in the performance of a contract is a promise relating to a future matter. In *Futuretronics International Pty Ltd v Gadzbis*,⁴⁰ Ormiston J commented that not every contractual promise would give rise to an implied representation that the promisor will perform the act in the future, for the purposes of s 51A. However it was also held that:

If there be an unconditional promise which forms part of the contractual obligations, then it is proper to treat the giving of that promise, at least in the ordinary case, as the making of a representation as to a future matter, being either the doing of the act or the refusing [sic] to do an act, being in each case the subject of the promise.⁴¹

On this basis, the court found that when the defendant bid at a property

s51A defence of honest and reasonable ground for the representation. By implication, Heerey J viewed s53A(1)(b) as not putting in issue the representor's intention or belief at the time of making the statement. This is clearly not relevant to future representations within s51A, which merely poses the question of whether the representor had objectively reasonable grounds for the representation.

³⁸ *Yorke v Lucas* (1985) 158 CLR 661.

³⁹ *Quinlivan v ACCC* (2004) ATPR 42-010.

⁴⁰ (1990) ATPR 41-049.

⁴¹ *Futuretronics International Pty Ltd v Gadzbis* (1990) ATPR 41-049, 51,653.

auction he represented by implication that he would sign the contract, which was a representation as to a future matter and one within s 51A. The result was that when he then refused to sign, it was presumed that this representation was misleading, pursuant to s 51A. The onus was then on the defendant to show reasonable grounds for making the representation. If he could not, then he was in breach of s 52, pursuant to ss51A and s52. On the evidence, he had not discharged the onus, and thus was in breach.⁴²

This analysis allows a plaintiff to resort to ss51A and s52 instead of an action for breach of contract, where the claim is that the defendant failed to fulfil his or her contractual promise. However, there would appear to be little incentive in practice for this stratagem, because liability for breach of contract at common law is absolute.

On the other hand, subject to the facts, were a plaintiff to rely on these provisions, the defendant would be able to raise the defence of reasonable grounds under s51A. If anything, it would be the defendant who would seek to invoke ss51A and 52. If the plaintiff's cause of action is at common law, there would be no opportunity for the defendant to plead s 51A, as this section is subsidiary to s 52.

On the evidence of the reported cases, there have been very few attempts to invoke ss51A and s52 in breach of contract cases. Despite this, s52 by itself has more commonly been raised in what, in essence, are contractual disputes.

VI CONCLUSION

Section 51A has both evidential and substantive roles. It operates by way of exception to the absolute liability imposed by s52. Overall, it probably weakens the defendant's position compared to that obtaining prior to the enactment of s51A. Previously, it was open to the defendant alleged to have made a misleading representation regarding a future matter, to adduce evidence of reasonable belief or intent at the time of making the representation, to rebut a claim that it engaged in misleading or deceptive conduct within s52. The onus remained on the plaintiff to establish a lack of reasonable intent or belief. The onus is now reversed, and the defence is a wholly objective one. Nonetheless, s51A is of more than merely conceptual interest in its role in creating an exception to the absolute liability imposed by s52, in relation to representations

⁴² In the result, the court held that the plaintiff had on the evidence suffered very limited harm, and that damages were not warranted; and that the equivalent of specific performance was not available having regard to the facts and the provisions of the statute.

concerning past and present matters.