SUPREME COURT OF QUEENSLAND

CITATION:	*Guirguis Pty Ltd & Anor v Michel's Patisserie System Pty Ltd & Ors* [2017] QCA 83
PARTIES:	**GUIRGUIS PTY LTD** ACN 151 423 577 (first appellant) **FREDERICK GUIRGUIS &** **KAREN GRACE GUIRGUIS** (second appellant) **v** **MICHEL'S PATISSERIE SYSTEM PTY LTD** ACN 132 424 947 (first respondent) **MICHEL'S LEASING PTY LTD** ACN 130 002 023 (second respondent) **RFGA MANAGEMENT PTY LTD** ACN 071 765 609 (third respondent) **TRENT DELLIT** (fourth respondent) **APLUS BUSINESS BROKERS PTY LTD** ACN 098 689 840 (fifth respondent) **GEORGE METZAKIS** (sixth respondent)
FILE NO:	Appeal No 5974 of 2016 DC No 2515 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2016] QDC 117
DELIVERED ON:	9 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2016
JUDGES:	Fraser and McMurdo JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Set aside the order made in the District Court at Brisbane on 27 May 2016 dismissing the plaintiffs' claim, except insofar as that order dismissed the first plaintiff's claim against the first defendant for**

damages for breach of contract and breach of warranty and the first plaintiff's claim against all defendants for damages for negligent misrepresentation.

3. **Set aside the other orders made in the District Court at Brisbane on 27 May 2016.**
4. **Order that there be a new trial of all claims and counter-claims, other than the first plaintiff's claims against the first defendant for damages for breach of contract and breach of warranty and the first plaintiff's claim against all defendants for damages for negligent misrepresentation.**
5. **Order that the new trial be conducted by a judge other than the judge who conducted the original trial.**
6. **The respondents are to pay the appellants' costs of the appeal.**
7. **Grant the respondents indemnity certificates in respect of the appeal.**

CATCHWORDS: TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – FALSE REPRESENTATIONS GENERALLY – where the first respondent granted a franchise to the first appellant to operate a "Michel's Patisserie" business in Townsville – where the second appellants guaranteed the first appellant's obligations under the franchise agreement – where the appellants claim they suffered loss and damage by entering into the agreements because of misleading conduct arising out of misrepresentations made and omissions to disclose certain events – where those representations were not included in a Deed of Prior Representations – whether the pleaded representations had been made – whether the pleaded representations should be characterised as "conduct that is misleading or deceptive or is likely to mislead or deceive" – whether a non-disclosure amounted to misleading conduct in the circumstances – whether the representations not included in the Deed of Prior Representations could later be relied upon

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES – NECESSITY FOR FINDING TO BE CLEARLY WRONG – where the primary judge made findings about credibility, and did so with reference to only part of the evidence – where the primary judge failed to take into account other evidence of reliance – where the primary judge erroneously concluded that the respondents were not obligated to disclose any of the events alleged by the

appellant – where the primary judge made no findings about which, if any, of the representations had been made and whether those representations, or any of them, should be characterised as misleading – whether a retrial should be ordered

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – WHEN GRANTED – where the appeal succeeds on questions of law – where the error of law was made by the primary judge to which no party contributed – whether indemnity certificates should be granted under the *Appeal Costs Fund Act*

Australian Consumer Law (Cth) s 2, s 18, s 236
Appeal Costs Fund Act 1973 (Qld), s 15
Competition and Consumer Act 2010 (Cth), s 75B

400 George Street (Qld) Pty Ltd v BG International Ltd [2012] 2 Qd R 302; [2010] QCA 245, cited
Armagas Ltd v Mundogas SA (The "Ocean Frost") [1985] 3 WLR 640; [1985] 1 Lloyd's Rep 1, cited
Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25, followed
Campomar Sociedad Limitada v Nike International Ltd (2000) 202 CLR 45; [2000] HCA 12, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, considered
Guirguis Pty Ltd & Ors v Michel's Patisserie System Pty Ltd & Ors [2016] QDC 117, related
Hanave Pty Ltd v LFOT Pty Ltd (1999) 43 IPR 545; [1999] FCA 357, cited
Henville v Walker (2001) 206 CLR 459; [2001] HCA 52, cited
Juniper Property Holdings No 15 Pty Ltd v Caltabiano (No 2) [2016] QSC 5, cited
Mitchell v Pacific Dawn Pty Ltd [2003] QCA 526, cited
Silver Queen Maritime Ltd v Persia Petroleum Services Plc [2010] EWHC 2867 (QB), cited
Societe d'Avances Commerciales (Societe Anomyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana") (1924) 20 Ll L Rep 140, cited
Yorke v Lucas (1985) 158 CLR 661; [1985] HCA 65, cited

COUNSEL: R A Ashton QC, with P E O'Brien, for the appellants
R Derrington QC, with D E F Chesterman, for the first, second, third and fourth respondents
D Whitehouse for the fifth and sixth respondents

SOLICITORS: Thomson Geer for the appellants
Thynne & Macartney for the first, second, third and fourth respondents
Ferguson Cannon Lawyers for the fifth and sixth respondents

[1] **FRASER JA:** By a written franchise agreement dated 28 May 2012 the first respondent granted a franchise to the first appellant to operate a "Michel's

Patisserie" business in Townsville. The second appellants, Mr and Mrs Guirguis, guaranteed the first appellant's obligations under the franchise agreement. Related agreements were made between the appellants and the first, second and third respondents. (I will refer to the first, second, and third respondents, or any of them, as "RFG", except where it is necessary to identify a particular respondent.) The fourth respondent was an employee of RFG. The sixth respondent was the sole shareholder and director of the fifth respondent, which was engaged by RFG to market "Michel's Patisserie" franchises.

[2] The appellants brought proceedings in the District Court against the respondents for damages and other orders. The first appellant claimed damages for negligent misstatement and breach of contract, but the main focus at the trial and in this appeal was upon the appellants' statutory claims under the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act* 2010 (Cth) ("the ACL"). The appellants sought various orders under the ACL, including that the franchise agreement and related agreements were void, voidable or unenforceable and should be set aside and for damages pursuant to s 236 of the ACL. That section entitles a person who has suffered loss or damage "because of" conduct of another person which contravened a provision of chapter 2 or 3 of the ACL to recover the amount of the loss or damage by action against that other person or against any person "involved in" the contravention. In such a proceeding, the court may make a variety of orders against the respondent, including an order declaring a contract made between the injured person and the respondent to be void: ss 238, 243. Chapter 2 provides, in s 18(1), that "[a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." I will use the expression "misleading conduct" as shorthand for any of the conduct described in s 18(1).

[3] The appellants claimed that they suffered loss and damage by entering into the agreements because of misleading conduct arising out of misrepresentations made on RFG's behalf by the fourth and sixth respondents and omissions by RFG to disclose certain events. The fourth and sixth respondents were alleged to be personally liable as parties involved in the alleged contraventions of the ACL. There was no issue about the authority of the fourth and sixth respondents to engage in the pleaded conduct on behalf of RFG.

[4] It is necessary to mention only the four of the alleged representations upon which the appellants relied in this appeal. The appellants alleged that the respondents made these representations between about late January and March 2012, before the appellants signed the franchise agreement and the related agreements on 26 March 2012:

(a) Deliveries of stock from Brisbane to Townsville would not be a problem.

(b) Deliveries would be made at least weekly.

(c) The products were snap frozen, delivered in freezer trucks, and of undiminished quality when thawed.

(d) A Queensland regional pricelist forwarded by email dated 22 March 2012 from the fourth respondent to the second appellants in response to Mr Guirguis' email dated 21 March 2012 included all Michel's Patisserie cakes, including sugar icing cakes up to 70 serves, and

thereby represented that such cakes would be supplied to the appellants.

[5] The appellants also relied upon non-disclosures of five alleged events occurring between February and April 2012:[1]

> "(ai) as at 23 March 2012 there were no companies currently able to manufacture and supply product to the Michel's Patisserie system and achieve the requirements of the system (email Mr Szysz to franchisees 23 March 2012);
>
> (aii) as at 23 March 2012, bakeries across Australia had not been able to meet their contractual requirements and operate and produce products for Michel Patisserie stores (email Mr Szysz to franchisees 23 March 2012);
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> (aiii) as at 16 February 2012 the Dyson's Bakery being the suppliers for 56 Michel's Patisserie franchisees was in financial difficulty and unable to meet orders (email Mr Connors to Mr Nell and Mr Alford 16 February 2012);
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> (aiv) Mr Connors had deliberately refrained from inquiring as to Dyson's solvency 'preferring not to ask' (email from Mr Connors to Mr Nell and Mr Alford 16 February 2012);
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> (av) as at 2 April 2012 Dyson's had been placed in administration; that this outcome was the 'worst case scenario'; and that it would 'result in many disgruntled franchisees' (email from Mr Alford to Mr Hancox 2 April 2012)."

[6] The appellants' pleaded case under the ACL included the following elements:

(a) The sixth respondent made the representations in [4](a)-(c) in response to expressions of concern to him by Mr Guirguis that RFG would not be able be make timely deliveries of the full range of fresh Michel's Patisserie products to the Townsville franchise because of the remoteness of Townsville from Brisbane.

(b) At an interview to determine the appellants' suitability as franchisees, Mr Guirguis again expressed that concern and the fourth respondent or an officer or employee of the third respondent made substantially the same representations.

(c) The fourth respondent subsequently forwarded to the second appellants (by email dated 22 March 2012) a pricelist which confirmed the representation mentioned in [4](d) of these reasons.

(d) The representations were false and, insofar as the representations were in relation to matters occurring in the future, the respondents had no reasonable grounds for making them.

(e) By reason of those matters RFG and the fifth respondent made representations with respect to future matters which were misleading

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1 Further amended statement of claim paras 36A and 33(ai) – (av).

and they engaged in misleading conduct in contravention of s 18 of the ACL.

(f) The fourth and sixth respondents were involved in those contraventions within the meaning of expressions used in s 75B of the *Competition and Consumer Act* 2010 (Cth). (The reference to s 75B was evidently intended as a reference to the indistinguishable provision in s 2 of the ACL.)

(g) The appellants entered into the agreements in reliance upon and induced by the representations.

(h) Prior to their entry into the agreements, the first, third and fourth respondents knew or ought to have known of the five pleaded events mentioned in [5] of these reasons, those events were inconsistent with the representations, the respondents did not disclose those events to the appellants prior to their entry into the agreements, and the first and third respondents thereby engaged in misleading conduct.

(i) If those events or any of them been disclosed the first appellant would not have entered into the agreements.

[7] Issues arose at the trial in relation to each of those elements of the claims, although some admissions were made by the respondents. In relation to the representation in [4](d) of these reasons, the email dated 22 March 2012 from the fourth respondent was admitted but the alleged representation was denied. The amended defence of the fifth and sixth respondents, and the sixth respondent in his evidence, admitted that the sixth respondent made representations to Mr Guirguis which, with some exceptions, were to much the same effect as those mentioned in [4](a)-(c) of these reasons. So much was also admitted by counsel for the first to fourth respondents in his final submissions at the trial,[2] but those respondents denied that the fourth respondent made any of the alleged representations. The appellants' case about the misleading character of the representations, as described in their argument on appeal, was that the respondents had no reasonable basis for making any of the representations, they had never before delivered frozen products to so remote a destination as Townsville, they had not delivered such products to any Queensland destination from as far away as Sydney for at least two years, and (with reference to the pleaded non-disclosures) they left the representations unchanged when they knew it was going to be necessary to deliver from Sydney. The respondents denied that any of the alleged representations and non-disclosures were misleading or a cause of the appellants entering into the agreements.

[8] The first and second respondents counter-claimed against the first appellant, and the second appellants as guarantors, for damages for breach of the franchise agreement and a related agreement. Each of the first, second and third respondents also counter-claimed against the appellants, for damages equal to the amount of any monetary judgment which might be given against any of them in favour of the appellants, and for an indemnity in respect of any costs they incurred as a result of the claims against them. The main bases for the latter counter-claim lay in provisions of the franchise agreement and a "Deed of Prior Representations" executed by the appellants.

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2 Defendants'/Counter-claimants' written submissions, 22 April 2015, para 107.

[9] A great deal of oral and documentary evidence was adduced upon the many issues at the trial, which occupied some nine days. I will mention here aspects of the evidence which assumed particular importance in the parties' arguments in this appeal.

[10] The evidence suggested that Mr Guirguis was the principal decision-maker for the appellants. He gave evidence generally in accordance with the appellants' pleaded case that the alleged representations [4](a)-(c) of these reasons were made to him in response to his expressions of concern, including evidence to the effect that, after the sixth respondent had made the representations, the fourth respondent made much the same representations to him in response to his repetition of those concerns. Mr Guirguis gave evidence to the effect that he would not have entered into the agreements if the representations had not been made to him or if the non-disclosed events had been disclosed to him.

[11] The fourth respondent acknowledged in his evidence that the sixth respondent introduced him to Mr Guirguis at RFG's Gold Coast headquarters, that he took Mr Guirguis into a conference room, and that it was part of the RFG process to interview approved franchise applicants, but the fourth respondent gave evidence that he did not recall making any of the alleged representations. Under cross-examination the fourth respondent adhered to that evidence but he made it clear that he did not deny that he had made the alleged representations.

[12] There was extensive cross-examination of Mr Guirguis about his omission to refer to any of the alleged representations on a Questionnaire in the Deed of Prior Representations. The cross-examination of him, and the submissions on this matter at trial and in this appeal, focussed upon Mr Guirguis' answer of "No" under topic 22, in the Questionnaire "Any other relevant matter which may have influenced your decision to execute Franchise Grant Documentation or proceed with the Franchise?" The text on the first page of the Questionnaire directed each franchisee and guarantor to complete it, exhorted that it was to be completed fully and as accurately as possible, described its aim as being to ascertain "all statements made to you, and information provided to you, which influenced your decision to execute Franchise Grant Documentation", and directed that, "Where applicable, you must specify any such statement or information, who provided it to you and whether it influenced your decision to proceed as aforesaid."

[13] Twenty-four topics were identified in the Questionnaire. They were preceded by this text: "Have you been provided with any information, or has anyone made a statement, representation or warranty to you (either verbally or in writing) in relation to the matters set out below? If so please specify in the space provided: A) the statement, representation or warranty (or other information); B) the person who made the statement, representation or warranty (or provided the information); and C) advise us whether it influenced your decision to execute Franchise Grant Documentation and proceed with the franchise." Each of Mr and Mrs Guirguis completed a Questionnaire, which they signed. A solicitor witnessed their signatures in conformity with another instruction in the Questionnaire. The signed Questionnaires are dated 26 March 2012, the date upon which the second appellants also signed the franchise agreement and other agreements.

[14] None of the 24 topics in the Questionnaire described the subject matter of any the pleaded representations and non-disclosures. The topics included matters such as the turnover, income, profit, viability, overheads, cost/turnover ratio, value, and

possible competitors of the business. A deal of attention was also directed to topics 15 and 24. In relation to topic 15, "The terms upon which the lesser of the Premises is willing to lease the Premises and the possibility of a further lease term?", Mr Guirguis answered, "Yes. A. We were told we would get a refund of the Shop Fitout $82500. B. George Metzakis. C. Yes it did influence our decision to buy." In relation to topic 24, "The amount of ongoing support you will be provided with by the Franchisor and the regularity and extent of that support?", Mr Guirguis answered "Yes. A person will spend 3 days with us when the shop first opens. A area manager will visit our shop and assist us if we need assistance. B. George Metzakis. C. Yes it helped us to make up our mind to buy the business". Mr Guirguis answered "No" under the other topic headings (except in relation to topic 21, in which he gave a responsive answer).

[15] Mrs Guirguis answered "No" to the questions asked with reference to each of the same 24 topics. Mrs Guirguis said in evidence she said that she relied upon her husband's judgment and supported his decision. She also gave evidence to the effect that she relied upon the product range in the pricelist enclosed with the email of 22 March 2012.

[16] A letter from RFG dated 28 March 2012 noted that Mr and Mrs Guirguis had answered "No" to question 22, stated that a franchisor proceeded on the basis that they did not rely upon any information in proceeding beyond that contained in the Franchisor's Disclosure Document, and other documentation including Franchise Grant Documentation, emphasised the importance of the Questionnaire, offered Mr and Mrs Guirguis the opportunity to complete a fresh Questionnaire if they wished, and noted that in the absence of them completing a fresh Questionnaire RFG would assume that they did not rely upon any information in proceeding beyond that contained in the documents already mentioned.

[17] At the conclusion of the trial the primary judge reserved judgment. The primary judge subsequently published reasons and made orders dismissing all of the appellants' claims and upholding the first and second respondents' counter-claims for damages for breach of the franchise agreement and a related agreement.

The primary judge's reasons for rejecting the appellants' claims under the ACL

[18] The primary judge described the pleaded misrepresentations as comprising "representations…that regular deliveries from Brisbane to Townsville in freezer trucks of snap-frozen product which would maintain its quality once thawed would not be a problem" and the pleaded non-disclosures as "the defendants' silence about a number of matters concerning uncertain future supplies from the Brisbane bakery [Dyson's]".[3]

[19] The primary judge did not decide whether or not the pleaded representations had been made or whether they should be characterised as "conduct that is misleading or deceptive or is likely to mislead or deceive" within the meaning of s 18(1) of the ACL. The primary judge based the rejection of the appellants' claim under the ACL solely upon his Honour's conclusion that "the element of reliance has not been made out".[4] This was a reference to the aspects of the appellants' pleaded case

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3 [2016] QDC 117 at [4].

4 [2016] QDC 117 at [37].

summarised in [6](g) and (i) of these reasons concerning the causal link required by the words "because of" in s 236 of the ACL.

[20] The primary judge described Mr Guirguis as "a mature and educated man who had held senior, highly-paid occupational health and safety positions in the resources and construction industries" and observed that Mr Guirguis "was not one to rush or be pushed into signing business agreements".[5] Mr and Mrs Guirguis had legal advice, including about the Questionnaire, they reflected on the franchise proposal, and they carefully read the documents again before signing them. The primary judge also observed that they were given a further opportunity to correct any inaccurately or inadequately, completed answers in the Questionnaire, but they remained silent.

[21] In relation to the pleaded misrepresentations, the primary judge reasoned that, having regard to Mr and Mrs Guirguis' failure to mention the alleged representations on the Questionnaire in the Deed of Prior Representations, their answers to various questions, the follow-up letter of 28 March 2012 from RFG, Mr Guirguis' evidence about both documents, and the primary judge's finding that "Mr Guirguis knew full well what was being asked of him in the Questionnaire but disingenuously attempted at the trial to convey the contrary impression",[6] his Honour was not satisfied that the appellants entered into the agreements or borrowed money and commenced operating the franchise in reliance upon or induced by the alleged representations.[7]

[22] In relation to the pleaded non-disclosures, the primary judge reasoned as follows. The pleaded non-disclosure in (av) (see [5] of these reasons) was irrelevant because the appellants' case was that the relevant respondents knew or ought to have known of the alleged events before the date on which the appellants entered into the agreements, which was 26 March 2012, and this alleged event occurred after that date, on 2 April 2012. The pleaded events in (ai) – (aiv) "effectively allege a failure to supply product *at all* and not an inability to supply product *from the Brisbane Bakery*",[8] but there was no evidence that when the agreements were signed on 26 March 2012 there were any "acute problems with supply of the products to Townsville"; unchallenged evidence by Mr Alford of RFG was that 'regional franchises such as Townsville could be supplied by other bakeries (because regional stores were being supplied under RFG's "frozen model")'.[9] The primary judge then referred to his Honour's findings that the appellants did not enter into the agreements in reliance upon any representations about the location of the manufacturing bakery and, specifically, that the product would be supplied from Brisbane, and observed that when the appellants' franchise commenced operation on 28 May 2012 "any temporary disruption caused by the Dyson's bakery problems had been remedied as the products were coming out of a bakery in Sydney".[10] The primary judge concluded that it followed from those matters that an obligation to disclose was not established and the appellants' contention with respect to reliance also failed.[11]

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5 [2016] QDC 117 at [11].
6 [2016] QDC 117 at [22].
7 [2016] QDC 117 at [23].
8 [2016] QDC 117 at [28].
9 [2016] QDC 117 at [29].
10 [2016] QDC 117 at [30].
11 [2016] QDC 117 at [32].

Summary of the arguments about the primary judge's rejection of the misleading conduct claim

[23] The appellants argued that the primary judge erred in principle by rejecting their claims under the ACL upon the ground that they had not established that they had relied upon the alleged representations or non-disclosures in circumstances in which the primary judge failed to find whether or not the respondents had made the pleaded representations, and whether or not the pleaded representations were misleading or deceptive. The primary judge failed to take into account other evidence of reliance including the evidence given by Mrs Guirguis (adverted to in [15] of these reasons), and the sixth respondent's admissions that he made representations to the same or similar effect as some of the pleaded representations (referred to in [7] of these reasons). The appellants argued that the primary judge's adverse findings about causation were falsified by errors in the primary judge's descriptions of the alleged representations and non-disclosures, his Honour's failures to advert to the open-ended character of the Questionnaire and ambiguities and confusion in its requirements, and errors in the primary judge's analysis of the evidence given by Mr Guirguis about his answers in the Questionnaire. The appellants also argued that the answers of "No" in relation to topic 22 ("any other relevant matter which may have influenced your decision to execute the Franchise Grant Documentation or proceed with the Franchise?") formed only one part of a much larger body of evidence which the primary judge should have taken into account when addressing the issue of causation. The primary judge's reliance upon the fact that the appellants obtained legal advice, including about the Questionnaire, was misplaced in the absence of any finding about the nature of the legal advice and, in particular, whether or not it concerned the appropriate way to complete the Questionnaire. The appellants argued that the evidence of the legal advice was that it was not to that effect. They referred to statements and correspondence by Mr Guirguis seeking advice about various matters before he signed the Franchise Agreement, concerns about supply which the sixth respondent accepted in evidence were raised by Mr Guirguis, evidence that the fourth and sixth appellants made representations in response to Mr Guirguis' expression of those concerns, evidence by Mrs Guirguis that after she and Mr Guirguis consulted their solicitor Mr Guirguis was not sure about proceeding but after he obtained answers to further questions, he signed the contractual documents, and evidence that the appellants made complaints immediately upon their alleged discovery of the falsity of the representations.

[24] In relation to the pleaded non-disclosures, the appellants' argument included the following submissions. The primary judge's conclusion that the pleaded non-disclosure in (av) was irrelevant was premised upon a flawed understanding that the franchise agreement and related agreements were concluded on 26 March 2012; the agreements were signed by the appellants on that date but they were not concluded until 28 May 2012, the date upon which RFG signed the agreements. The primary judge's reliance on a conclusion that when the agreements were signed there were no "acute problems with supply to Townsville" did not apply the correct test for determining whether a non-disclosure amounted to misleading conduct in the circumstances. The invocation of Mr Alford's evidence that the Townsville franchise could be supplied by other bakeries did not deny the misleading character of the non-disclosures; Mr Alford's opinion about the effect upon the represented problem-free, weekly deliveries from Brisbane to Townsville of products which would be of undiminished quality when thawed could not detract from the fact that

the events which were not disclosed falsified the representation that the deliveries would be from Brisbane (rather than from Sydney). The events falsified the representations and inevitably required their characterisation as misleading conduct, in the absence of any disclosure of those events. The primary judge's conclusion that the respondents were not obliged to disclose any of the alleged events was also based upon his Honour's erroneous conclusion that (ai) – (aiv) alleged a failure to supply at all, rather than an inability to supply product from the Brisbane bakery. In fact, Dyson's bakery was the Brisbane bakery and the events did evidence RFG's inability to supply from that bakery. In any event, that distinction did not bear upon the misleading character of the non-disclosures of the alleged events when they were viewed in the context of relevant circumstances established by the evidence. The appellants also argued that the primary judge failed to give adequate reasons for his judgment and orders, including in relation to the conclusion that the pleaded non-disclosures effectively alleged a failure to supply product at all and not an inability to supply product from the Brisbane bakery.

[25] The fifth and sixth respondents adopted the entirety of the submissions advanced for the first to fourth respondents.[12] In addition, counsel for the fifth and sixth respondents made further oral submissions which supported submissions advanced for the first and fourth respondents or focussed upon the position of the fifth and sixth respondents. I have not thought it necessary in most aspects of this summary to identify the particular respondents on whose behalf the submissions were made.

[26] The respondents argued that the primary judge's decision was correct for the reasons given by his Honour. The pleaded representations were inconsistent with contractual terms which imposed upon RFG only "reasonable endeavours" obligations to supply product. The respondents argued that the evidence of Mr and Mrs Guirguis' answers in the questionnaires, and the answers and the other evidence to which the primary judge referred, established an overwhelming case that they did not rely upon the pleaded representations when they signed the franchise agreement and related agreements. The respondents argued that the primary judge had the advantage, not possessed by an appellate court, of seeing and hearing Mr Guirguis being cross-examined for some two and a half days. The respondents also referred to details of Mr Guirguis' evidence, particularly his evidence in cross-examination, which the respondents submitted demonstrated that there were inconsistencies, contradictions, and other features such as to justify the primary judge's finding that he was disingenuous. It was submitted for the respondents that, whilst in many cases it would be necessary for a trial judge to take into account all of the evidence bearing upon causation before deciding whether or not that element of the statutory claim was established, the evidence upon which the primary judge relied in this case was so completely clear that it was unnecessary to undertake further enquiry. There was no basis for an appellate court to set aside the primary judge's conclusions based upon his Honour's views about the credibility of Mr Guirguis' and the reliability of the evidence given by Mr and Mrs Guirguis. In relation to the pleaded non-disclosures, the respondents submitted that the primary judge was correct in concluding that there was no obligation in the respondents to disclose the pleaded events; in particular, there was no evidence that the change in the arrangements for supply impeded the supply of products to the appellants' franchise at Townsville. There was no basis for finding a reasonable expectation in the appellants that RFG would inform them about changes to its supply chain in

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12 Fifth and sixth respondents' outline of argument, para 1, and transcript 27 September 2016 at 1-73.

circumstances in which those changes would not affect the supply of the products to the franchisee.

[27] The respondents also supported the primary judge's conclusion that the pleaded event in (av) was irrelevant. The respondents argued that there was no evidence of the date upon which the agreements were counter-signed by RFG but that, by clause 12.29 of the franchise agreement, that agreement operated as a deed and the appellants were therefore immediately bound on 26 March 2012, when they delivered the franchise agreement to RFG.[13] In oral submissions, senior counsel for the first and fourth respondents made the further or alternative submission that an email dated 6 May 2012 from Mr Guirguis to the fourth respondent established that the appellants were aware that the RFG cake supplier had gone into liquidation and the cakes were now being supplied from Sydney, but the appellants nonetheless did not complain about those facts or seek to escape from the franchise agreement.

Consideration

[28] Contractual provisions such as clauses of the Franchise Agreement and the Deed of Prior Representations (including the second appellants' answers in the Questionnaire) that are inconsistent with claims that the appellants sustained loss by entering into contracts because of misleading conduct may be relevant in the fact finding process but they are not legally effective to preclude such claims. In *Campbell v Backoffice Investments Pty Ltd*,[14] Gummow, Hayne, Heydon and Kiefel JJ observed that, "neither the inclusion of an entire agreement clause in an agreement nor the inclusion of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent the provision of misleading information before a contract was made constituting a contravention of the prohibition against misleading or deceptive conduct by which loss or damage was sustained… whether conduct is misleading or deceptive is a question of fact to be decided by reference to all of the relevant circumstances, of which the terms of the contract are but one."

[29] In the same case French CJ made a similar observation[15] and observed that the question whether conduct was misleading or deceptive, or likely to mislead or deceive, was "logically anterior to the question whether a person has suffered loss or damage thereby…". After referring to the necessity to maintain the distinction between characterisation of the conduct and the determination of causation of the claimed loss said to result from it, French CJ acknowledged that "there may be practical overlaps in the resolution of these logically distinct questions. The characterisation of conduct may involve assessment of its notional effects, judged by reference to its context. The same contextual factors may play a role in determining causation."[16]

[30] The primary judge referred to *Campbell v Backoffice Investments Pty Ltd* for the proposition that an expressed declaration by a person in a contractual document that the person did not rely upon pre-contractual representations may be evidence of non-reliance and the want of a causal link between the impugned conduct and any loss or damage flowing from the entry into the contract.[17] The primary judge also observed that assertions of reliance in the present context, being essentially self-serving hindsight, have little probative value unless their reliability is confirmed by

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13 First to Fourth Respondents' outline of argument, 12 August 2016, at para 67.
14 (2009) 238 CLR 304 at 348 [130].
15 (2009) 238 CLR 304 at 321 [31].
16 (2009) 238 CLR 304 at 318 [24].
17 [2016] QDC 117 at [15].

reference to objective factors.[18] In one of the cases cited by the primary judge, *Juniper Property Holdings No 15 Pty Ltd v Caltabiano (No 2)*, Jackson J, after referring to authority for the proposition that courts adopt a cautious approach to assertions of reliance in this context, observed that "I must look to see what other evidence supports the defendant's evidence that he would not have entered into the contract but for the alleged representations."[19]

[31] Unfortunately, the primary judge did not undertake that enquiry. Rather, the primary judge confined his Honour's attention to part of the evidence upon which the respondents relied in support of their cases that the pleaded conduct did not influence the appellants' decision to enter into the agreements. An aspect of this approach was the primary judge's departure from the conventional methodology of making findings about causation only after first having made findings about the logically anterior questions whether the respondents had engaged in the pleaded conduct and whether that conduct should be characterised as misleading. Although the primary judge had the benefit of detailed submissions about the evidence and the law relevant to all of the issues, the primary judge made no findings about what, if any, of the alleged conduct had occurred and whether that conduct or any of it should be characterised as misleading.

[32] For present purposes it is sufficient to refer to four matters to which the primary judge did not advert but which were potentially significant in the resolution of the causation issue. Because I consider that the trial miscarried as a result of the methodology adopted by the primary judge, my remarks should not be understood as indicating a view about the ultimate significance of any of these four matters for the causation issue or any other issue in the litigation.

[33] First, upon Mr Guirguis' evidence it was open to find that the sixth respondent, who admittedly acted with RFG's authority, made the pleaded representations to Mr Guirguis *in response to expressions of concern by Mr Guirguis*. Mr Guirguis' evidence was that he expressed concern that RFG would not be able to make timely deliveries of the full range of fresh Michel's patisserie products to Townsville because of its remoteness from Brisbane. The sixth respondent agreed in evidence that Mr Guirguis questioned him about a timeframe for deliveries, how the product was to be delivered, whether delivery would be a problem, and whether the quality of the product would be maintained,[20] and that Mr Guirguis asked the sixth respondent whether the remoteness of Townsville from Brisbane would be a problem.[21] The sixth respondent's evidence substantially corroborated Mr Guirguis' evidence on those topics. If Mr Guirguis expressed those concerns and the sixth respondent responded by making reassuring representations to Mr Guirguis upon the same topics, that was capable of being regarded as strong support for an inference that the representations materially influenced Mr Guirguis' decision to proceed with the venture. Thus the sixth respondent's evidence was capable of being found to supply independent support for Mr Guirguis' evidence that he relied upon the representations.

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18 The primary judge cited *Chappel v Hart* (1998) 195 CLR 232 at [32], [93], *Rosenberg v Percival* (2001) 205 CLR 434 at [24], and *Juniper Property Holdings No 15 Pty Ltd v Caltabiano (No 2)* [2016] QSC 5 at [74]-[76].

19 [2016] QSC 5 at [76].

20 RB 715-716.

21 RB 732.

[34] Secondly, Mr Guirguis gave evidence to the effect that the pleaded representations were not only made by a marketing agent (the fifth respondent, represented by the sixth respondent) but also directly by RFG's appropriate employee (the fourth respondent). The respondents contended that the Court could not conclude that any of the alleged representations were made by the fourth respondent. In support of that contention, the respondents made these points. It was relevant that in the appellants' pleading reference was made to the representations having made by the fourth respondent "alternatively an officer or employee of"[22] the third respondent. In evidence Mr Guirguis referred to the fourth respondent as being an operations manager but the fourth respondent's evidence was that his job title was instead "Regional leasing executive, Queensland, Northern Territory".[23] The fourth respondent gave evidence denying that he conducted any interview with Mr Guirguis on the Gold Coast and that it was not part of his role to conduct such interviews.

[35] In cross-examination, however, the fourth respondent gave evidence that he recalled that at the Gold Coast headquarters of RFG the sixth respondent introduced Mr Guirguis to him, he had a meeting with Mr Guirguis in an office, and an interview with the prospective franchisee was a requirement of RFG's system. Furthermore, although the fourth respondent professed to have no recollection of the parts of the conversation to which Mr Guirguis testified, the fourth respondent disavowed any denial that he made the pleaded representations or that he did so in response to expressions of concern by Mr Guirguis. Whether or not, as was submitted for the appellants, the primary judge should have rejected as improbable the fourth respondent's evidence that the purpose of this meeting, for which Mr Guirguis apparently travelled from Townsville to the Gold Coast, was for "Putting a face to a name",[24] it cannot be accepted that it was not open to find that the fourth respondent made the alleged representations. If it were found that that the fourth respondent repeated the representations which the sixth respondent admitted he had made to Mr Guirguis, it would be open to a trial judge to conclude that this would make the representations seem more reliable to Mr Guirguis, thereby making it seem more likely that Mr Guirguis did rely upon them.

[36] Upon this point, counsel for the fifth and sixth respondents referred to evidence that Mr Guirguis also spoke about the same topics to an existing franchisee and argued that the continued questioning and checking by Mr Guirguis suggested that he did not rely upon representations by the fourth or sixth respondents. Resolution of that issue might depend upon other findings. Depending upon the context, Mr Guirguis' repeated questioning might be viewed as confirming, rather than denying, the importance for him of the representations in his decision whether to proceed. It must be borne in mind that the necessary causal relationship will exist if the misrepresentation was one of the causes of loss or damage sustained by the appellants; it is not necessary that it be the sole cause.[25] A finding that Mr Guirguis questioned and checked the representations made by the sixth respondent would not necessarily require rejection of the appellants' case that their claimed loss was recoverable from the fifth and sixth respondents under the statutory claim.

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22 RB 4130.

23 RB 642.

24 RB 650.

25 *Henville v Walker* (2001) 206 CLR 459 at [14] (Gleeson CJ), [61] (Gaudron J), [109] (McHugh J), [153] (Gummow J), [163]-[164] (Hayne J).

[37] Thirdly, the representations concerned the kinds of products to be supplied to a potential franchisee for retail sale by it, the reliability and frequency of that supply, and the quality of those products upon their receipt in Townsville after having been transported from Brisbane. Upon an objective analysis, and without reference to any other relevant evidence, the nature of the pleaded representations makes them seem likely to have been material in a decision by the potential franchisee and potential guarantors whether to embark upon the proposed transactions. This factor might therefore justify an inference that the representations (and non-disclosures) were a cause of the appellants' entry into the agreements. Whether or not that inference should be drawn might depend upon any influence of other relevant evidence upon the topic.[26] The presently relevant point is that the nature of the pleaded representations is itself capable of supplying substantial support for a conclusion that those representations induced the appellants to enter into the agreements.

[38] Fourthly, the respondents acknowledged in the course of argument in this appeal that there was a live issue at the end of the trial whether the fourth and sixth respondents was liable under the ACL as a "person involved in" in the contraventions alleged against the corporate respondents. Conclusions that either individual was liable would require a finding that the individual knew of the essential elements of the contravention by his corporate principal.[27] Thus the claims against the individuals could succeed only if the appellants secured findings that the relevant individual made the representations knowing that they were false or, insofar as the representations related to matters occurring in the future, knowing that there were no reasonable grounds for making the representations. Such findings might supply further support for the appellants' case on causation, upon the footing that the inference then might be drawn that one of both of the individuals made the alleged representations with the intention of misleading the appellants, from which a trial judge might more readily infer that their intention was effective.[28]

[39] The primary judge's omission to refer to the evidence upon any of those four matters was compounded by his Honour's inaccurate re-statement of the pleaded representations as being that "regular deliveries from Brisbane to Townsville in freezer trucks of snap-frozen product which would maintain its quality once thawed would not be a problem".[29] That was substantially inaccurate because it did not comprehend either of the representations in [4](b) and (d) of these reasons.

[40] In relation to the representation in [4](b), the respondents argued that the evidence of the sixth respondent was not that he told Mr Guirguis that deliveries would be made "at least" weekly, but the respondents accepted that it was open to find that the sixth respondent did say to Mr Guirguis that deliveries would be weekly. The difference is not significant in relation to the present point. The primary judge's restatement was inaccurate by the omission of reference to the pleaded representation about the frequency of deliveries.

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26 See *Campbell v Backoffice Investments* (2009) 238 CLR 304 at 351 [142] – [143] (Gummow, Hayne, Heydon and Kiefel JJ).

27 *Yorke v Lucas* (1985) 158 CLR 661 (see in particular per Mason ACJ, Wilson, Deane, Dawson JJ at 670 and per Brennan J at 677).

28 See *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45 at [33] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ), citing *Cadbury-Schweppes Pty Ltd v Pub Squash Co Ltd* [1980] 2 NSWLR 851 at 861 and *S & I Publishing Pty Ltd v Australian Surf Life Saver Pty Ltd* (1988) 88 FCR 354 at 361-362.

29 [2016] QDC 117 at [4].

[41] In relation to the representation in [4](d), the appellants' case was that this representation was made in an email dated 22 March 2012 from the fourth respondent to Mr and Mrs Guirguis, which was copied to the sixth respondent. That email referred to an attached Queensland regional pricelist which included recommended retail prices for each item and a purchase price for a minimum order. The email noted that there was no extra shipping or freight costs for regional stores but there were minimum order numbers per item. The fourth respondent concluded his email by expressing a hope that it would clarify the first appellants' questions and they should feel free to give him a call if they required an explanation of the attachments. The respondents argued that the attached pricelist was, as it was described, a list of prices and products as at 1 July 2011, and bearing in mind an expectation that the range of products and prices might change over time, the email and the attachment relevantly communicated only that the feature products were available for order by the Townsville franchisee at the time of the email. If so, the respondents submitted, the pleaded representation was not established. The respondents also submitted that the pleaded representation was not established because the pricelist did not include sugar icing cakes, as pleaded, but instead referred to sugar icing adornments for other cakes.

[42] Since the appellants' complaints about this representation extended beyond sugar icing cakes, the last point does not appear to be determinative in circumstances in which the representation alleged was that RFG's cakes, "including sugar icing cakes", would be supplied. As to the first point, in order to determine the relevant effect of the email it would be necessary to take the context into account. The context includes preceding emails. In an email dated 19 March 2012 from Mr Guirguis to a representative of RFG, Mr Guirguis stated that, "We have not received **a list of Michel's products that we will be selling in our store** and what our profit margin might be." A representative of RFG sent an email to Mr Guirguis on 20 March 2012, noting that the email under reply had been passed to her for response and she was the responsible legal counsel for Michel's Patisserie. The email stated that she acted for the Franchisor and could not give Mr Guirguis any legal or financial advice and that he would note that she had responded to most of the questions by noting that he needed to seek independent advice. Her response to the statement in Mr Guirguis' email which I have quoted was that, "As this is a new store we cannot estimate the 'profit margin' as this is dependent on many things. We direct your attention to the Premises Disclosure Statement, Franchise Grant Documents and approval letter which have all been issued to you. It is also important that you seek independent legal and financial advice in this respect."

[43] Mr Guirguis responded by email on the same day, 20 March 2012. In relation to the present matter, he referred to not having received **a list of the products that would be sold in the Townsville store** and what the profit margin might be, asked how his legal or financial people possibly could help him with that, referred to the fact that RFG had the prices and new costs so should be able to give a "ball park figure" of the items to be purchased and RFG's recommended retail price, and concluded that this could be a "deal breaker". After referring to another matter, Mr Guirguis wrote that in the absence of a better reply to the questions he did not think that the appellants would proceed. In an email dated 21 March 2012, the sixth respondent wrote to a representative of RFG, with reference to Mr Guirguis' email, that "…questions that have been raised at the last minute with our prospective franchisee… [have] come back to bite us in the back side". An email from a different representative of RFG, which was copied to the fourth respondent, stated that the information being sought

(a reference to the "**bakery product range regional stores can order**", the "cost of these products into store", and whether "any additional [freight] or distribution charges applied to regional stores"[30]) "is a little 'scattered' at present". Thereafter the fourth respondent sent the email of 22 March 2012 relied upon as conveying the representation.

[44] Whether or not the pleaded representation was made in precisely the terms in which it was pleaded, one potentially available view of the email when considered in this context (particularly the statements I have emphasised) is that the fourth respondent, with the knowledge of other representatives of RFG, made a statement about the available range of products. Of more significance for the present point is that, although the evidence allowed for findings that the respondents knew of the statement in the fourth respondent's email of 22 March 2012, that the appellants were likely to have relied upon it (particularly in view of the evidence summarised in [42]), and that the statement fell within the instructions about what to include in the Questionnaires (see [13] of these reasons), the statement is not referred to in either of the completed Questionnaires. Although the Questionnaires were signed on 26 March 2012, each includes a statement on the front page that it was completed on 16 March 2012. That is a possible explanation of why the fourth respondent's statements in the email of 22 March 2012 were not mentioned in the Questionnaires, but the primary judge's reasons do not advert to any of this context or explain how the conclusion that absence of any reference to the alleged representations in the Questionnaires evidenced the appellants' non-reliance upon the representations was to be reconciled with the evidence that Mr and Mrs Guirguis completed the Questionnaires before the date upon which this representation was allegedly made.

[45] I would also accept the appellants' argument that the primary judge made legal errors in the course of rejecting the appellants' arguments about the pleaded non-disclosures. It should first be noted that the primary judge's findings upon that topic are infected by the errors in his Honour's reasons for findings that the appellants did not enter into the agreements in reliance upon any pleaded representations. It was also an error of law for the primary judge to disregard the pleaded non-disclosure in (av) upon the ground that "it is nonsense to say that *prior to 26 March 2012* (the date on which the plaintiffs entered into the agreements), the defendants knew or ought to have known something 'as at 2 April 2012'."[31] That confused the date upon which the appellants signed the agreements with the date upon which the agreements were made. The franchise agreement is dated 28 May 2012. It seemed to be uncontentious that, as the statement of that date evidences, the franchise agreement was made on that date.

[46] The respondents' reliance upon clause 12.29 of that agreement as establishing that the agreement was made on 26 March 2012 was misplaced. That clause records an agreement between the parties "that they have entered into this Agreement, and are deemed to have delivered it, as a deed with the intention of being immediately bound by the terms thereof". The decisions cited by respondents for the proposition that the appellants became bound by the agreement on the date they delivered it to RFG concerned very different contractual provisions.[32] Clause 12.29 does not

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30 Email 20 March 2012, 5.47 pm, AB 3107.

31 [2016] QDC 117 at [27].

32 *400 George Street (Qld) Pty Ltd v BG International Ltd* [2012] 2 Qd R 302 at [9] and [10]; *Silver Queen Maritime Ltd v Persia Petroleum Services Plc* [2010] EWHC 2867 (QB) at [124].

purport to make the agreement binding upon any party to it before all parties to it "had entered into this Agreement", an event that did not occur until well after all of the events the non-disclosure of which was relied upon in this appeal. That being so, it is not necessary to consider whether a contractual provision purporting to have the effect for which the respondents contended would have any relevant effect in a statutory claim of the kind litigated by the appellants.

[47] The primary judge also erred in law by not giving any reasons for his Honour's conclusion that the allegations of non-disclosures alleged "a failure to supply product *at all* and not an inability to supply product *from the Brisbane bakery*".[33] In the appellants' final submissions at the trial the appellants made the following submissions: Mr Guirguis had been told that deliveries of stock "from Brisbane to Townsville" would not be a problem, Mr Guirguis had "expressly enquired about the achievability of delivery of quality stock from Brisbane to Townsville", RFG had supplied product to regional franchisees "from Dyson's Bakery in Brisbane", the effect of the issues concerning Dyson's Bakery "would be to shift the Guirguises from what they had been told would be a Brisbane-Townsville supply to a Sydney-Townsville supply", the Guirguises "had been told supplies would come from Brisbane and this was in the context of concerns about supply and quality given Townsville's remoteness from Brisbane", Mr Guirguis "had been specifically told by Mr Metzakis that there would be no problem in transporting from Brisbane" and he was "entitled to expect to be told that Michel's intended supplying from Sydney", when the sixth respondent was allaying Mr Guirguis' concerns about getting product from Brisbane to Townsville a representative of RFG "knew the product would not be coming from Brisbane at all", and after the event Mr Guirguis had written that "…since your Brisbane bakery went into liquidation we are unable to order a lot of products (products that were available when we signed on)…".[34] Upon the face of the evidence invoked in those submissions, the appellants presented a case that the alleged non-disclosed events comprehended an inability to supply product from a bakery in Brisbane. In circumstances in which Dyson's Bakery was referred to by name in three of the matters allegedly not disclosed to the appellants and (upon the appellants' case) all parties knew that this bakery was in Brisbane and Mr Guirguis had expressed concerns about the effect of its remoteness from Townsville, the appellant's argument that the alleged non-disclosure comprehended an inability to supply product from the Brisbane Bakery deserved serious consideration. That argument was not so obviously lacking in merit as to justify not giving any reasons for rejecting it.

[48] The fundamental error made by the primary judge though was deciding the causation issue without first finding what alleged conduct the respondents engaged in and whether that conduct was misleading. As is commonly the case in claims of this kind, there manifestly were overlaps in the evidence relevant to each of those three issues. In these circumstances, the proper conclusion is that the primary judge failed to fulfil the duty of a trial judge to consider and reflect upon the entirety of the evidence viewed as a whole.[35] In the result, "the question at issue has not been properly tried or determined, and adequate findings about credibility and the essential facts of the dispute have yet to be made".[36]

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33 [2016] QDC 117 at [28].

34 Plaintiff's closing submissions, paras 73(a)(b), (e), 78, 79, 81, 85 and 86 at AB 4522 et seq.

35 See *Fox v Percy* (2003) 214 CLR 118 at [23] (Gleeson CJ, Gummow J and Kirby J).

36 *Mitchell v Pacific Dawn Pty Ltd* [2003] QCA 526 at [16] (McPherson JA).

[49] As the respondents submitted, the primary judge's findings adverse to the appellants upon the question of reliance were influenced by his Honour's views about the credibility of Mr Guirguis. That lacks significance where the primary judge made findings about causation without considering a body of evidence that was potentially significant for the resolution of that issue. As the passage from *Fox v Percy* cited in footnote 35 explains, the general reluctance of appeal courts to interfere with factual findings influenced by a trial judge's views about credibility is premised upon the assumption, that the duty of trial judge to reflect upon the entirety of the evidence viewed as a whole has been fulfilled.

[50] Most experienced judges subscribe to the view expressed by Goff LJ in *Armagas Ltd v Mundogas SA (The "Ocean Frost")*[37] that it is essential "when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities". Goff LJ was referring to cases of fraud, but the statement is of general application. As Goff LJ observed in the same passage:

> "It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

[51] This is not a recent revelation. About 60 years earlier, for example, Atkin LJ, after observing that "an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour", confirmed that trial judges were encouraged "to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events".[38] The primary judge's failure to consider and make findings about many aspects of the evidence, including evidence relevant to causation, deprived his Honour of those important tools for judging the credibility and reliability of the contentious oral evidence.

[52] The main focus of the respondents' contention that the primary judge nevertheless did not err in concluding that the appellants did not rely upon the alleged representations was the second appellants' answers, and their evidence about those answer, of "No" in relation to topic 22 in the Questionnaire ("Any other relevant matter which may have influenced your decision to execute Franchise Grant Documentation or proceed with the Franchise?"). As will be apparent from my brief summary of the parties' arguments, the parties presented many competing submissions about the significance, or lack of it, of those answers. The parties also made submissions about the significance of various other aspects of the evidence bearing upon causation. It is not appropriate to express a view upon those topics without also taking into account other relevant evidence which, depending upon the proper assessment of that evidence, might have a substantial bearing upon the credibility of

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37 [1985] 1 Ll L Rep 1 at 57.

38 *Societe d'Avances Commerciales (Societe Anomyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* (1924) 20 Ll L Rep 140 at 152, quoted with approval in *Fox v Percy* (2003) 214 CLR 118 at [30]-[31] (Gleeson CJ, Gummow and Kirby JJ).

the second appellants and the reliability of their evidence. This Court would merely perpetuate the primary judge's error if it were to sustain the primary judge's findings about the causation issue upon the basis of arguments about the suggested strength of parts only of the relevant evidence, where at least some of the evidence about which the primary judge made no findings seems capable of supplying substantial support for the appellants' case.

[53] The appellants argued that the Court should enter judgment in their favour against the respondents. This argument encounters much the same difficulties as the argument for the respondents that the judgment in their favour was not affected by the error in the primary judge's methodology. To give one example of the difficulty, the question whether the representation alleged in [4](d) of these reasons was conveyed by the identified email was itself in issue, and the questions whether in all of the circumstances that representation, together with the non-disclosures pleaded in [5], of these reasons should be characterised as misleading conduct and whether that conduct was causative of the appellants' alleged loss, could not properly be decided without an assessment of a substantial body of evidence. The relevant evidence includes Mr and Mrs Guirguis' statements in the Questionnaires and their evidence upon that topic, upon which the respondents relied as supporting an inference that the alleged representations and non-disclosures had no influence in the appellants' decision to enter into the agreements.

[54] The absence of many necessary findings of fact about the evidence precludes the Court from deciding the appeal in favour of the appellants upon the basis that the evidence upon which the respondents relied could not rebut an inference derived from the nature of the alleged misleading conduct that it was likely to have been a cause of the appellants' entry into the agreements.[39] After a lengthy trial in which a great deal of oral evidence was adduced and challenged in cross-examination but about which the trial judge made no findings, it is to be expected that any party might reasonably be dissatisfied with an adverse determination of that party's rights with reference only to the record of the trial by judges who did not see and hear any witness give evidence. The circumstance that the case against the fourth and sixth respondents involves proof of what may be tantamount to deceit - that they knew the essential elements of contraventions in which they participated - adds emphasis to the inappropriateness of this Court deciding the case on the papers.

[55] I note that in the event, as I would hold, that the Court rejected the appellants' argument that judgment should be entered for the appellants, senior counsel for the first and fourth respondents, whose submissions were adopted by counsel for the fifth and sixth respondents, submitted that the Court should not consider the first to fourth respondents' notice of contention, which contended for a great many findings in favour of the respondents with a view to judgment being entered in their favour. It is therefore not appropriate further to consider those matters, which included contentions that the evidence was insufficient to sustain judgments against the fourth and sixth respondents.

Contractual and negligent misrepresentation claims

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39 Cf *Hanave Pty Ltd v LFOT Pty Ltd* (1999) 43 IPR 545 at [11], [37], [45] – [50].

[56] The primary judge held that the claims by the first appellant against the first respondent for breach of contract[40] and negligent misrepresentation[41] were excluded by clauses of the franchise agreement and observed that the appellants had not contradicted the respondents' argument to that effect. The appellants challenged the rejection of their contractual claim in one ground in their notice of appeal[42] but they abandoned that challenge in their outline of argument.[43]

[57] The appellants did not make oral submissions about the rejection of their negligent misrepresentation claim. They included a short submission in their outline of argument, but that submission did not contend for error in the primary judge's reasoning or conclusion that the claim was excluded by clauses of the franchise agreement.[44] Two paragraphs of the ground of appeal relating to this issue[45] asserted that the primary judge erred by failing to make certain findings, but those paragraphs were not supported by argument. The remaining paragraph of that ground contended that the primary judge erred by failing properly to consider whether the clauses of the franchise agreement applied but no particulars of that were given and that ground also was not supported by argument. Notably, the ground of appeal did not contend that the clauses did not have the effect of excluding liability. Furthermore, the appellants did not seek to challenge the respondents' argument that many clauses of the franchise agreement excluded liability for damages for negligent misrepresentation. The very broad "entire agreement" provisions in clauses 12.7(b), 12.7 (g), 12.7 (h), 12.8 and 23.12[46] of the franchise agreement purport, in effect, to exclude any claim for negligent misrepresentation. The appellants have not argued that those clauses should not operate according to their tenor. Thus no ground appears for finding error in the primary judge's conclusion.

[58] It follows that the judgment rejecting the appellants' contractual and negligent misrepresentation claim should not be set aside.

Disposition and proposed orders

[59] If the judgment against the appellants on their statutory claims is set aside, as I consider it should be, the order upholding one of the counter-claims also should be set aside. That is so because the counter-claim was based upon agreements which would be rendered unenforceable if the appellants obtained the orders sought in their statutory claims.

[60] As to the costs of the appeal, the appellants' outline of submissions abandoned the only ground of appeal against the order dismissing the first appellant's claim for damages for breach of contract, very little space in the outlines and no time at the hearing of the appeal was devoted to the first appellants' claim for damages for negligent misrepresentation, and the resolution of those issues turned upon a short legal point. In those circumstances, the respondents' successful defence of the order dismissing the claims for damages for breach of contract, warranty, and negligent

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40 Further amended statement of claim paras 37 – 39, 34(b), first plaintiff's claim for "(a) damages for breach of contract; (b) damages for breach of warranty".

41 Further amended statement of claim paras 42, 43(c), and the first plaintiff's claim for "(f) damages for negligent misrepresentation".

42 Notice of appeal ground 10.

43 Appellants' amended outline of argument at p. 11.

44 Appellants' amended outline of argument paras 34 – 35.

45 Notice of appeal ground 9.

46 RB 1575 -1576, and 1591 – A.

misrepresentation does not justify departure from the general approach that costs should follow the event of the appeal. Similarly, the circumstance that the respondents succeeded on these minor points at trial does not justify an order for costs against the appellants.

[61] Because the primary judge made findings about credibility, and did so with reference to only part of the evidence, it should be ordered that the retrial be conducted by a judge other than the primary judge. Because the order for a retrial is required by errors of law made by the primary judge to which no party contributed, an indemnity certificate should be granted in favour of the respondents under s 15 of the *Appeal Costs Fund Act* 1973. The effect of such an indemnity certificate is to entitle the unsuccessful respondents to be reimbursed any amounts they pay for the appellants' costs of the appeal and of the new trial and for the respondents' own costs incurred in the appeal and the new trial, in each case subject to the provisions of the Act, but the Act does not confer any power upon the Court to order reimbursement of any parties' costs of the first trial.[47] There being no basis in this case upon which the Court could properly order any party to pay another party's costs of the trial, the regrettable fact is that those costs must lie where they fall.

[62] I would make the following orders:

(a) Allow the appeal.

(b) Set aside the order made in the District Court at Brisbane on 27 May 2016 dismissing the plaintiffs' claim, except insofar as that order dismissed the first plaintiff's claim against the first defendant for damages for breach of contract and breach of warranty and the first plaintiff's claim against all defendants for damages for negligent misrepresentation.

(c) Set aside the other orders made in the District Court at Brisbane on 27 May 2016.

(d) Order that there be a new trial of all claims and counter-claims, other than the first plaintiff's claims against the first defendant for damages for breach of contract and breach of warranty and the first plaintiff's claim against all defendants for damages for negligent misrepresentation.

(e) Order that the new trial be conducted by a judge other than the judge who conducted the original trial.

(f) The respondents are to pay the appellants' costs of the appeal.

(g) Grant the respondents indemnity certificates in respect of the appeal.

[63] **McMURDO JA:** I agree with Fraser JA.

[64] **BODDICE J:** I have read the reasons of Fraser JA. I agree with those reasons and the proposed orders.

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47 *Mitchell v Pacific Dawn Pty Ltd* [2003] QCA 526 at [18].