

# SUPREME COURT OF QUEENSLAND

CITATION: *Prospect Industries v Anscor Pty Ltd & Ors* [2003] QSC 296

PARTIES: **PROSPECT INDUSTRIES PTY LTD**  
(plaintiff)  
v  
**ANSCOR PTY LTD**  
(first defendant)  
**ROBERT CORBETT**  
(second defendant)  
**COUNT FINANCIAL GROUP**  
(third defendant)  
**RUSSELL WOODROW**  
(fourth defendant)

FILE NO/S: SC11941 of 1998

DIVISION: Trial Division

PROCEEDING: Civil Trial

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 10 September 2003

DELIVERED AT: Brisbane

HEARING DATE: 7 - 15 April 2003

JUDGE: Philippides J

ORDER: **Judgement for the third defendant against the plaintiff**

CATCHWORDS: AGENCY – AUTHORITY – ACTUAL AUTHORITY – OSTENSIBLE AUTHORITY – whether holding out by permitting business card to be used – whether alleged principal liable for representations made

NEGLIGENT REPRESENTATION – LIABILITY OF ALLEGED PRINCIPAL – misleading and deceptive representations – liability of alleged principal

CORPORATIONS LAW – whether alleged principal liable under s 819 – alleged contravention of s 995, s 1018, s 1064 and s 1065

*Corporations Law* s 819, s 995, s 1018, s 1064, s 1065  
*Trade Practices Act* 1974

*Brockway v Pando* (2000) 22 WAR 405

*Capricorn Financial Planners Pty Ltd v ASIC* [1998] FCA 405

*Crabtree-Vickers v Australian Direct Mail Advertising and*

*Addressing Co.* (1975) 133 CLR 72  
*Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471  
*Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd (The Raffaella)* [1985] 2 Lloyd's Rep 36  
*Freeman & Lockyer v Buckhurst Park Properties* [1964] 2 QB 480  
*Gould v Vaggelas* (1985) 157 CLR 215  
*Green v Chenoweth* [1998] 2 Qd R 572  
*Lloyd v Grace, Smith & Co.* [1912] AC 716  
*NMFM Property Ltd. v Citibank Ltd (No 10)* (2000) 107 FCR 270  
*Walplan Pty Ltd v Wallace* (1985) 8 FCR 27

COUNSEL: B O'Donnell QC for the plaintiff  
R Morton for the third defendant

SOLICITORS: McCullough Robertson for the plaintiff  
R Corbett for the first defendant  
The second defendant appeared on his own behalf  
Corrs Chambers Westgarth for the third defendant

## **PHILIPPIDES J:**

### **The Plaintiff's Claim**

- [1] The plaintiff, Prospect Industries Pty Ltd ("Prospect") is the trustee of the Hope Family Trust. Its directors are Robert Hope, a civil engineer, and his wife. The plaintiff claims damages in respect of failed investments totalling \$400,000. During the relevant period, Prospect was used as the vehicle by which income earned by Mr Hope was invested.
- [2] Prospect settled its claims against the second defendant, Robert Corbett, and the first defendant, Anscor Pty Ltd ("Anscor"), who it was alleged was responsible for the acts of Corbett. It also settled its claim against the fourth defendant, Russell Woodrow. Prospect's sole remaining claim is that against the third defendant, Count Financial Group ("Count"), a licensed securities dealer and personal financial planner. In addition, Prospect has brought third party proceedings seeking contribution against the first and second defendants. No contribution proceedings were pursued against Woodrow.
- [3] Prospect's claim against Count is brought on the basis that it is responsible both at common law and under provisions of the *Trade Practices Act 1974* and the *Corporations Law* for representations alleged to have been made with actual or ostensible authority by Woodrow on Count's behalf, in respect of the failed investments. In summary, Prospect makes the following allegations:
  1. At all material times, Woodrow had actual authority to act as a representative of Count in the provision of investment advice and financial services or alternatively was held out by Count as having such authority.

2. In April 1995, a meeting was arranged by Trevor Bishop (an accountant who provided accountancy services to Prospect), and attended by Hope, Bishop, Corbett and Woodrow to discuss potential investment opportunities for Prospect. At the meeting an investment scheme (“The Wattle Scheme”) was explained to Hope by Corbett and Woodrow as having the following features:
  - (a) a group of corporate entities known as the “Wattle Group” carried on the business of providing short term financial accommodation to borrowers in need of bridging finance or other short term finance who were unable to obtain such finance from banks or other regular financial institutions;
  - (b) the Wattle Group facilitated the provision of such financial accommodation by lending funds from private investors;
  - (c) the financial accommodation provided by the Wattle Group was fully and adequately secured; and
  - (d) the Wattle Scheme provided high rates of return to investors.
  
3. In the course of the meeting, the following representations were made to Hope by either Woodrow or Corbett (with Woodrow expressing agreement with such representations as were made by Corbett):
  - (a) investments in the Wattle Scheme were safe and viable;
  - (b) there would be adequate security for the investments in the Wattle Scheme, although the security would not be in a form which strictly satisfied bank lending requirements;
  - (c) each loan made through the Wattle Scheme would be for a short term period, ordinarily for one month’s duration;
  - (d) Corbett and Woodrow were aware that such loans had been made over a period of six years, during which no borrower had defaulted;
  - (e) high rates of interest, namely 5% per month, would be paid to Prospect on any investment in the Wattle Scheme, with payment to be made no later than 30 days after the end of each calendar monthly period; and
  - (f) Corbett and Woodrow, being familiar with the Wattle Scheme, were able to recommend that Prospect invest in the Wattle Scheme.
  
4. A second meeting in 1995 was attended by Corbett, Woodrow, Hope and also by an acquaintance of Hope, Robert McKay. It was held for the purpose of discussing possible investments in the Wattle Group by Hope and McKay. At that meeting, the representations made at the first meeting were repeated and further representations were made by either Woodrow or Corbett (with Woodrow expressing agreement with the representations made by Corbett) as follows:
  - (a) the Wattle Group was run by a man called Dexter, who was a person of integrity;
  - (b) in on-lending funds, the Wattle Group would receive interest of 15% per month, which would be distributed as 5% each to Wattle, Anscor and Prospect;

- (c) the total amount invested in the Wattle Scheme, from time to time, was limited to between \$6 million and \$9 million to ensure that the Wattle Group did not over-extend its ability to make secure loans;
  - (d) borrowers accepted by the Wattle Group were typically people who needed short-term funds, who were recommended to the Wattle Group by solicitors, accountants, finance brokers or insurance brokers, who were able to provide security for the monies borrowed and who were willing to accept high fees;
  - (e) Wattle vetted and approved the security offered before it would agree to lend funds;
  - (f) an investment of funds in the Wattle Group was a sound investment.
5. In mid June 1996, Hope phoned Woodrow as a result of concerns held by Hope, after having read an advertisement in the Courier Mail seeking information about Corbett and after having spoken to a private investigator whose contact details were provided therein. During the conversation, Woodrow made the following representations:
- (a) Prospect's investment in the Wattle Scheme was safe;
  - (b) All of the funds which Prospect had invested in the Wattle Scheme had been properly invested on adequate security; and
  - (c) Dexter was a person of integrity.
6. Between 3 November 1995 and 30 June 1997, Prospect lent funds totalling \$400,000 by way of investment in the Wattle Scheme, as follows:
- (a) \$50,000 on 3 November 1995;
  - (b) \$50,000 on 7 November 1995;
  - (c) \$50,000 on 9 April 1996;
  - (d) \$100,000 on 8 May 1996;
  - (e) \$50,000 on 24 March 1997;
  - (f) \$100,000 on 30 June 1997.
7. In making the investments, Prospect, through Hope, relied on the representations made at the two meetings. Further, in reliance on the representations made by Woodrow in June 1996, Prospect lost the opportunity to withdraw the investments already made as at June 1996 and made the March and June 1997 investments.
8. It is alleged the representations made by Woodrow at each of the 1995 meetings and in mid June 1996 were made on behalf of Count, with actual or ostensible authority, and were false, misleading and deceptive and made negligently. In addition, various breaches of the *Corporations Law* are alleged.
- [4] Count defended the claims on a number of grounds. Count contended that Woodrow had no actual authority to act on behalf of Count in making the alleged representations, that there was no holding out by Count of Woodrow as agent, and that Hope did not understand Woodrow to be representing Count. It was argued that Woodrow did not make any relevant representation to Prospect through Hope,

and that if Woodrow did make representations binding on Count, there was no reliance by Hope on them or, alternatively, that Hope abandoned reliance on Count.

### **Woodrow's relationship with Count**

- [5] Woodrow was appointed to act as a representative of Count for the provision of investment advice and financial services pursuant to a written "Count Representative Agreement" dated 15 April 1993 and subsequently, pursuant to an agreement in substantially the same terms dated 15 April 1994. He so acted until approximately 31 December 1995. In addition, he held a proper authority for Count from 1993, which had also ceased by the end of 1995.
- [6] From about March 1995, Woodrow began working part-time as a "business development consultant" with Count. His position required him to service the various accounting practices that had Count business. He was responsible amongst other things for compliance, audits, assisting those practices in promoting Count products, and looking at financial advice to see that it was sound. In addition to acting as a representative for Count, he was permitted to operate his own business. The Count agreement required reference to be made on Woodrow's stationery to Count's business name and address, the fact that Count was licensed and that Woodrow was an authorised representative of Count.

### **Woodrow's involvement with Anscor and Wattle**

- [7] By late April 1995, Woodrow had himself, through his company Hinatorie, invested \$100,000 in the Wattle Group. By that stage Woodrow was also developing a business relationship with ANZCorp, Corbett's company, which Corbett had been discussing with Woodrow since Christmas of the previous year. ANZCorp (which subsequently changed its name to Anscor) earned commissions on investment funds which it brought into the Wattle Group. By April 1995, Woodrow, through his company Hinatorie, had entered into an arrangement with Anscor, whereby Hinatorie would earn commission on investments which Woodrow introduced to the Wattle Group. The commission was to be half the amount that Anscor would otherwise have received, being 5% per transaction per month. Thus on any investment introduced by Woodrow, Anscor and Woodrow were each to receive 2½ per cent per month of the value of investments introduced by Woodrow for the duration of the investment.
- [8] Woodrow earned lucrative commissions in this manner, prompting him to cease working for Count. By July 1997, Woodrow had introduced \$10 million of funds into the Wattle Group through this arrangement. Some time thereafter, as a result of a dispute with Corbett, Hinatorie itself became a selling agent for Wattle, distinct from Anscor, and thereby received a higher level of commission.

### **The April 1995 meeting**

- [9] For some time before 1995, Hope had been looking for business/investment opportunities for Prospect. He discussed this with Trevor Bishop, a chartered accountant with the firm Hart Larwill, who was Hope and Prospect's accountant. Bishop was a friend of Hope, and had known Hope for about 20 years. Bishop was also a friend of Woodrow, and knew him to be an employee of Count, having a managerial type role looking after Count's Queensland agents, of which Hart

Larwill was one. Bishop became aware that Woodrow, although working for Count, had also gone into a new business working with Corbett, offering investment opportunities in respect of what Bishop called “loans of last resort”. Woodrow had introduced Corbett to Bishop as the person with whom he was going into business. Bishop said they had inquired if he knew of anyone who might be interested in the type of investments they dealt with. Later, when he was talking to Hope, Bishop thought Hope was an “appropriate person who could be interested in the type of proposition they were putting forward”. He therefore arranged for Hope to meet Corbett and Woodrow.

- [10] There was a conflict in the evidence of Hope and Bishop as to the details of the discussions between them before the first meeting with Corbett and Woodrow. Hope’s evidence was that all he was told by Bishop was that Bishop knew a couple of gentlemen, who had good opportunities for investment, and that Bishop wanted him to meet them. After initially saying that he could not recall what discussions he had had with Hope prior to the meeting, Bishop gave evidence that he told Hope that Woodrow was a friend of his, who was “working with Corbett looking for funds to finance loans of last resort” and “consequently the returns would be high”.
- [11] The meeting arranged by Bishop took place at the Pier Nine restaurant on 4 April 1995. Hope’s evidence was that when he arrived for the meeting, Corbett and Woodrow were already present and that he exchanged business cards with Woodrow. (Woodrow agreed that he gave Hope his Count business card, but could not recall whether he had done so at this or a later meeting, although he conceded that it was more likely that he did so at the April meeting). The business card set out Count’s name in large type, stated Count’s business as being that of “financial planners” and set out Count’s address in Sydney. It also identified Woodrow as an “authorised representative” of Count and provided a Brisbane address<sup>1</sup> and contact numbers for him.
- [12] There was also a conflict in the evidence as to what was said by Woodrow when he provided the business card to Hope. Hope’s evidence was that when Woodrow provided his business card, he indicated he was from Count, saying words to the effect “This is where I’m from”. Count’s name and Woodrow’s status as an authorised representative of Count had not been obliterated when the card was handed to Hope. Hope said that he noticed the Sydney address and was impressed that somebody had come up from Sydney to talk to him about investments. He also said that he knew Count to be a Sydney based group of accountants, who provided investment advice and were of good standing.
- [13] Hope said that Corbett told him that Corbett’s company was “ANZCorp”. He said that, when he returned to his office after the meeting, he made the notation “ANZCORP” on Woodrow’s business card. Hope said that he recorded that name, so that he had “a record of who Corbett represented”, that is, to remind him of the name of Corbett’s company. He explained that he did not then also note down Corbett’s name, because he “remembered his name”, nor did he note any other details about Corbett, because Corbett “was going to present things to [him], so [he] was waiting for something to come across and, when it came, it would have all

---

<sup>1</sup> The Brisbane address was Woodrow’s residential address which also served as Woodrow’s business address and was the address specified in the schedule to the Count Representative Agreement.

the particulars on it.” (In cross-examination, Hope conceded that he may have made the note of ANZCorp’s name on the business card while at Pier Nine).

- [14] Hope said that Corbett phoned him in January 1996 to say that ANZCorp had changed its name to “Anscor” and had changed its address. Hope then recorded on Woodrow’s card the names “Rob Corbett Anne Corbett” above the new phone number and address given by Corbett. The name “Anscor” was not recorded.
- [15] Woodrow’s evidence was that Corbett introduced himself as being from ANZCorp. Woodrow said that he handed his business card to Hope, saying words to the effect of “This is not what I’m here about. This is Count’s company I’m working part-time for. Nothing to do with these transactions.” He said that he gave Hope the card, because it was the only one he had on him, as he did not yet have his Anscor business cards. Woodrow’s evidence was that Hope wrote something on the card when he handed it to him, although he could not see what he wrote.
- [16] Corbett’s evidence about the business card differs from that of Woodrow. Corbett’s evidence was that Woodrow said “I don’t have my Anscor card yet. Here’s a card with my numbers on”. Corbett’s recollection was that the card was not handed over at the April meeting, but that “Count” was mentioned by either Woodrow or Bishop in terms of it being said that Woodrow was bowing out of Count and joining Corbett.
- [17] As to the matters discussed at the April meeting, Hope’s evidence was that there was a discussion, in broad terms, concerning two categories of investment opportunities. Both concerned the provision of short term bridging loans, where, it was said, borrowers were prepared to pay a high fee for the facility. One concerned investments made through Anscor, where the lender would enter into a loan agreement directly with the borrower. Into this category fell certain opportunities for investments in certain island schemes. The second line of investments was through the Wattle Group, which provided similar investment opportunities, but which involved Wattle providing loans to borrowers from a fund which Wattle managed.
- [18] Hope’s evidence was that he was told that the return on the investment was 50% per year. This was because, so it was explained, borrowers were prepared to pay high fees “for the opportunity to consummate some deal or other.” Hope’s evidence of what he was told at the April meeting is encapsulated in the following passage of his evidence:

“They said – they being Woodrow Corbett – that the man called Dexter had a similar investment opportunity where he actually loaned out the money to the individuals, rather than through Anscor and that would provide another opportunity that was run by a fellow called Dexter and the return on the investment was around 50% per year, but because of the short term nature of the loans, the people borrowing weren’t, in effect, paying an annual rate of 50%. They were paying a high fee for the opportunity to consummate some deal or other they had in business and that all made sense and so it was agreed that, after the lunch was over, that Corbett would present to me opportunities for investment and apart from general pleasantries of the meal that’s essentially my recollection.”

- [19] Hope was unable to recollect who made which statements during these discussions, other than that Corbett “did the running”, that is, he did most of the talking and that Woodrow appeared to agree with all that Corbett said. Woodrow’s agreement was indicated by saying “yes”, by nodding and by his positive reaction and body language. Hope said that he therefore understood that Woodrow was agreeing to whatever Corbett said. However, later in his evidence he qualified this to say that Woodrow’s participation and agreement did not extend to everything Corbett said, but was limited to what Corbett said about the Wattle scheme, which both appeared to be promoting.
- [20] Bishop, who was not present for the whole of the meeting, gave evidence that his recollection of the luncheon meeting was that there was a discussion in general terms about the business that Corbett and Woodrow were involved in, and that it was said that funds were lent out on short term loans with high interest rates, where the securities were “not traditional ones”. He could not recall whether there was any specific mention of the Wattle Group, nor could he recall that the name “Anscor” was mentioned.
- [21] Woodrow’s evidence was that he could not recall Wattle being discussed at the first meeting. However, he agreed that he was not in a position to deny that it was discussed. Woodrow’s recollection was that there were discussions about “last resort type loans”. He conceded that he had sufficient knowledge about the Wattle investment scheme to have discussed it at the meeting with Hope in April 1995 and that he had a commission interest in proposing it to Hope at the meeting.
- [22] Corbett likewise did not recall Wattle being discussed. He had little recollection of what was said on any particular matter at that meeting.

### **Findings as to the First Meeting**

- [23] As to the conflict in the evidence of Bishop and Hope concerning the discussions between them prior to the meeting, Prospect submitted that Bishop’s recollection was unreliable and that even on the best version for Count of what Bishop said, there was no information which would convey to Hope, when he was later given the Count card, that Woodrow was not representing Count. However having considered the evidence, I accept that it was more probable than not, that Bishop said more to Hope than that he knew of a couple of men who had good investment opportunities. I accept that it was more probable than not that Bishop told Hope by way of background something about Corbett and Woodrow and the investment opportunities. The evidence indicates that Bishop had an understanding of the business that Woodrow had joined Corbett in; he understood it involved loans of last resort. I prefer Bishop’s evidence over that of Hope as to what he was told by Bishop. I accept that Bishop told Hope that Woodrow was a friend of his, who was working with Corbett looking for funds to finance loans of last resort and that the returns would be high.
- [24] I also find that there was an exchange of business cards between Woodrow and Hope at the April 1995 meeting. (Indeed, it was ultimately conceded by Counsel for Count that that was the most probable time the business cards were exchanged, because the notation “ANZCORP” would most likely not have appeared on the card if it had been provided at the second meeting, since that name was no longer in use then, having been replaced by the name “Anscor”). I also find that Hope made the

notation “ANZCORP” at the meeting, after he was given the business card, rather than later at his office.

[25] As regards the conflict in the evidence as to what Hope was told when he was given the business card, I am unable to accept Hope’s evidence as to what he said he was told by Woodrow. I am also unable to accept Hope’s explanation as to why he wrote the name “ANZCORP” on the business card. Hope’s explanation as to why, if his purpose in recording the name “ANZCORP” on the card was to have a record of where Corbett was from, he did not also record Corbett’s name or any other details is odd, given that Corbett was someone he had not previously known. His explanation that he “remembered” Corbett’s name and therefore did not need to record it is peculiar, if, as I accept, Hope made the notation at the meeting itself; ie in Corbett’s presence. It is also difficult to understand Hope’s explanation as to the need to record Corbett’s company’s name, but no other details, on the basis that the latter would be provided in documentation to come, since one would expect that such documentation would also have recorded Corbett’s company’s name.

[26] I find that by the time of the meeting Hope already knew from Bishop that Woodrow was working together “with” Corbett, in respect of finding funds for investment opportunities. I accept Woodrow’s evidence that he indicated when handing the card to Hope that he was not present on Count’s behalf. While Woodrow and Corbett each gave differing versions as to what was said, the effect of their evidence, which I accept, was that it was indicated that Woodrow was not present on behalf of Count. I find that the notation “ANZCORP” was made on the business card because Hope understood that Corbett and Woodrow were both with ANZCorp.

[27] I find that Wattle was mentioned at that meeting and that the mention was more than a fleeting one. In this regard, I note McKay’s evidence that he recalled Hope telling him about the Wattle Group in about April 1995. I accept that the evidence indicates that it was likely that Corbett and Woodrow were marketing Wattle in April 1995. Indeed Woodrow conceded that he began marketing the Wattle investments in early 1995 and had a commission interest in proposing it. Count submitted that in considering the evidence of Hope as to what was said at the April 1995 meeting and his credibility in that regard, the failure to refer to the first meeting and representations made at it in the first Statement of Claim filed was significant. I am not persuaded that, given exhibit 6, that is so. I accept that Wattle was discussed in terms stated by Hope and that representations to the following effect were made:

- (a) The Wattle Group provided investment opportunities in respect of short term bridging loans and was run by a man called Dexter;
- (b) Wattle facilitated the provision of loans to borrowers from a fund which Wattle managed;
- (c) The return on the investment was 50% per year;
- (d) Borrowers were prepared to pay high fees for the facility.

### **Investments with Anscor**

[28] After the April meeting, Corbett, on behalf of Anscor, put a number of proposals to Hope. The documentation he received made no mention of Wattle and Hope understood that it was Anscor who was arranging these proposals. Hope took up

one of these, a loan of \$50,000 to a person called Westerman for a term of one month, secured against an insurance policy, with a return to Hope of 5 % per month. That loan was not repaid on the due date, but some 7 months later and only after Hope engaged solicitors to recover the money.

- [29] Corbett also put to Hope an Anscor proposal for investment in an island project called Clearview, which required finance of \$500,000. Hope agreed to put \$100,000 into the investment, which he provided to Corbett in August 1995. However, that money was returned to Hope shortly thereafter, because the investment opportunity had fallen over.

### **The Second Meeting**

- [30] Hope was aware that his friend, McKay, also had funds available for investment. Hope's evidence was that he mentioned the investment discussions concerning Anscor and the Wattle Group to McKay. As McKay seemed interested, he involved him in a meeting to meet Corbett and Woodrow. The meeting took place in August 1995 at a coffee shop.
- [31] Hope (no longer having access to his diary) was unable to recall the actual date of the meeting, other than to say that it was in late 1995. Nor was he able to recall exactly who said what, except that Corbett was principally the person speaking and that, as at the first meeting, Woodrow conveyed his agreement with what Corbett was saying.
- [32] Hope's evidence was that the main discussion at this meeting concerned the Wattle scheme and that he and McKay were told that:

“it was run by a man called Dexter, that he obtained funds from different sources, accountants and solicitors and business investors, which were loaned out short-term to people requiring funds for a short period. For that service they were prepared to pay a high fee which enabled Wattle to pass on a high return on the funds borrowed.”

- [33] Hope's evidence was that he was told that the return equated to “15 per cent per month, [of] which 5 per cent went to Wattle, 5 per cent went to the lender, and 5 per cent went to Anscor”. He said that “it seemed an extraordinary amount, but in the logic of their explanation it made sense”. Hope said that “the explanation was that somebody borrowing funds requiring it for a short term period, in order to make some financial arrangement was prepared to pay a high fee for that facility”. Hope said he was told that “the funds being loaned were secured against real assets that the people borrowing the money had, so there was no real risk”, and that the assets were always of substance, so there was virtually no risk in the arrangement. Hope specifically recalled Corbett saying that Wattle always took a “charge” over the borrower's assets.
- [34] Hope also recalled that Corbett said that “the key part of the thing ... was the loans were limited to \$ 6 to 9 million to make the process viable, so that they didn't run out of clients so to speak”. Hope noticed that Woodrow agreed with this. It was said that “the market for those sorts of funds was limited, that the number of people that could match the requirements for security and were prepared to pay the high

fees on the short term loans [was] ... limited to \$6 to \$9 million in total at any one time". In addition, it was said that the Wattle Group had been in existence for about 6 years and there had never been a default on a loan. It was also said that Dexter was reputable and that the scheme was very viable.

- [35] The presentation concerning the Wattle Scheme was a purely oral one. No documentation was provided at the meeting nor subsequently as to its operation. However, there was mention of an agreement, which Hope had not then seen, but which he would be required to sign. He was told not to have any worries about signing it and that it contained a reference to risk, but that he was not to worry about that, as the Wattle scheme was very low risk, because of the secured assets.
- [36] Hope agreed that there was no mention of Count at the meeting and no discussion of any fee being paid to Woodrow or to Count. Hope said that, as at the April 1995 meeting, he was under the impression that Woodrow was representing Count as stated on the business card he had been given and that Count, through Woodrow, was recommending the sorts of investments mentioned at the first meeting. However, Hope said that when he started receiving the Anscor loan proposals, and there had been no mention of Woodrow, he had formed the view that Woodrow and Count were only involved in the Wattle scheme proposal and that the Anscor loan proposals were matters that Woodrow was not involved with. Hope thus qualified his initial evidence to say that, at the August meeting, he understood that Woodrow was only agreeing with Corbett's statements about Wattle and was only involved in the Wattle discussions, and not in the Anscor loan proposals concerning the island development. When pressed as to the extent of Woodrow's involvement, Hope said:

“ I initially thought he was tied behind both lots. [Anscor and Wattle]. When – as the thing unfolded I assumed they [Count] were only with the Wattle scheme and to that extent I kept him [Woodrow] as – his card as reference point”.

- [37] McKay's evidence of the August 1995 meeting, was that it took place with Woodrow, Corbett, Hope, and that also present was a person involved in a proposed island deal, (a reference to a person called Baynes). McKay said that the purpose of the meeting was to discuss the possible investment in the Clearview Island project and also to hear information about the Wattle Group. He said that most of the talking about the Wattle Group was done by Corbett and that Woodrow appeared to be in agreement with what was said by Corbett. McKay's evidence was that, at the meeting, it was stated that: (a) the Wattle Group loaned money to borrowers who were looking for bridging finance or other short-term finance; (b) the typical borrower would be giving security; (c) the Wattle Group's function was to vet the security and approve it and hold it on behalf of the investors. Although McKay could not recall mention of the funds in the group being limited to a specific amount, he did recall that it was said that the number of investors in the group at any one time was to be limited so as to keep it manageable. McKay also recalled hearing that during the period that the Wattle Group had been operating, no borrower had defaulted, although he could not be sure whether that was said at the August meeting.
- [38] McKay gave evidence that he first learnt of the Wattle Group from Bishop, and that Hope had discussed the Wattle Group with him in about April 1995. McKay's evidence was that Hope told him that he was involved in or was looking at some

investment opportunities that the Wattle Group had not taken up. (One of these McKay said concerned Clearview Island, which was discussed as a possible investment opportunity for them). In addition, McKay said Hope discussed investing in the Wattle Group. McKay said that before the August 1995 meeting there was some discussion about the risk involved in the Wattle Group, in terms of Hope saying that they “were giving money to people and after they got enough money they might go overseas and we would not see it again”. Hope also mentioned that they would be “relying on the competence and integrity” of those involved in running the investment. This appears to be a reference to the fact that the security was not held by the investors, but by those running the scheme.

- [39] Woodrow’s evidence as to the August meeting was that those present were, in addition to himself and Corbett, Hope, McKay and Baynes, a developer. His evidence was that the principal purpose of the meeting was to meet Baynes and discuss the Clearview Island Proposal. Woodrow agreed that he did not participate much in the discussion about the island investment. As regards the discussion concerning Wattle, Woodrow agreed that, while Corbett did most of the talking, he also contributed to that discussion, backing up what Corbett had said. Woodrow indicated that he was an investor in the Wattle Group and that he had run a check on the Wattle Group’s bank account through his bank. He agreed that there was a substantial commission interest for him and Corbett to promote the Wattle scheme to Hope and McKay, if the island investment was not to proceed.
- [40] Woodrow conceded that Hope and McKay were told that the Wattle Group engaged in short term lending of 30 – 60 days and that money was lent to people looking for bridging finance or after short term finance. He also conceded that they were told that the borrowers were people who were introduced by accountants, solicitors, finance and insurance brokers and other professionals. In addition, he conceded that it may have been said that there was a strategy by Wattle not to take in more than \$6-9 million. Woodrow denied that any representation about obtaining “security” was made, but conceded that the term “surety” may have been used. He also conceded that Corbett said words to the effect that, “deals may have lost money, but ... those losses have never been sheeted home to the investor”. That is, investors in the Wattle Group had not lost money as a result of any of the loans.

### **Findings as to the August 1995 Meeting**

- [41] I find that at the meeting, which took place on 24 August 1995, and at which Corbett, Woodrow, Hope, McKay and a developer named Baynes were present, both Wattle and an island investment opportunity were discussed. I reject Count’s submissions that while Wattle was mentioned, it was only discussed in terms of it being said that Wattle lent money on short term loans to people looking for business finance on security obtained by Wattle. I do not accept that the discussions concerning Wattle were so limited.
- [42] There was a surprising degree of similarity in the evidence of Hope, McKay and Woodrow as to the nature of the statements made at a meeting concerning Wattle. One aspect of Hope’s evidence that was challenged concerned the allegation that Hope was told no borrower had ever defaulted. However, Woodrow himself conceded that a statement was made to the effect that investors had not lost as a result of any of the Wattle loans. Woodrow also denied that it was said that Wattle would ensure there was “proper security for the loan”, insisting that only the term

“surety” had been used. Both Hope and McKay gave evidence that the representation made was that proper security would be arranged by Wattle. Moreover, Corbett conceded that he would have used the expression “security or surety provided by borrowers which Wattle assessed as being satisfactory”.

- [43] I accept that representations were made to Hope to the effect that:
- (a) in on-lending funds, the Wattle Group would receive interest of 15% per month, which would be distributed as to 5% each to Wattle, Anscor and Prospect;
  - (b) the total amount invested in the Wattle Scheme, from time to time, was limited to between \$6 million and \$9 million to ensure that the Wattle Group did not over-extend its ability to make secure loans;
  - (c) borrowers accepted by the Wattle Group were typically people who needed short-term funds, who were recommended to the Wattle Group by solicitors, accountants, finance brokers or insurance brokers, who were able to provide security for the monies borrowed and who were willing to accept high fees;
  - (d) Wattle vetted and approved the security offered before it would agree to lend funds;
  - (e) an investment of funds in the Wattle Group was a sound investment.

- [44] The latter representation, although not made in express terms, was implicit in what was said to Hope. Count submitted that it was unlikely that Woodrow or Corbett recommended investment in the Wattle Scheme, it being more likely that they simply made statements about the Wattle scheme (whether they were truthful or not) leaving it to the others to make a judgment. In this respect Count relied on McKay’s evidence that no “recommendation” was made. I reject that submission. The thrust of the evidence that I accept is that both Corbett and Woodrow were recommending the investment.

### **Investments in Wattle**

- [45] On 30 August 1995, McKay invested \$100,000 in the Wattle Group and thereafter received interest payments in accordance with what he had been told at the August meeting. McKay said he told Hope of his investment in Wattle and of the receipt of interest payments and that he was in frequent contact with Hope, who he said informed him that he had also made an investment in Wattle. McKay’s evidence was that he was in weekly contact with Hope until the collapse of the Wattle Group. McKay said discussions with Hope continued concerning the risk involved in investing in Wattle, but became less frequent after the investments were made. He said that “in the early stages, the investment seemed to be a good investment from the point of view that the money was coming in regularly, it seemed well documented and [their] earlier fears were probably allayed to a certain degree”.
- [46] Hope’s evidence was that in late 1995 he decided to make some investments in Wattle and obtained from Corbett Wattle’s bank account details, which he recorded on the reverse side of Woodrow’s business card. Hope made an initial investment of \$50,000 on 3 November 1995, by a cheque which was provided to Anscor. After that initial investment was made, Hope received a letter on Anscor letterhead dated 1 November 1995 as follows:

“RE: WATTLE GROUP/ SHORT TERM BRIDGING FINANCE

Introduced by Mr Russell Woodrow

We hereby acknowledge receipt of the amount of \$50,000 and advise that these funds will now be placed with THE WATTLE GROUP, and will be monitored on your behalf. Individual documentation will be issued for each transaction as it occurs.

Yours faithfully  
Anne Corbett”

- [47] Hope made a further investment in the Wattle Group on 7 November 1995 of \$50,000. He started to receive “interest” payments on his investment of 5% and received regular statements of the interest payments, which he checked. He then increased his investment over the next 12 months. He made further investments of \$50,000 on 9 April 1996 and \$100,000 on 8 May 1996. On 24 March 1997, an additional \$50,000 was invested and on 30 June 1997, a final investment of \$100,000 was made. Hope forwarded all cheques for the investments to Corbett. All correspondence acknowledging receipt of the monies invested was sent by Anne Corbett on Anscor letterhead. Indeed, all correspondence directed to Hope concerning Wattle came from Anscor.
- [48] Hope was sent an agreement between Dexter, trading as the Wattle Group, and Prospect for his signature some time after the first investment was made. Hope raised with Corbett the fact that the interest stated as payable in the agreement did not accord with the discussed interest rate of 5% per month per transaction. Hope corrected the document in accordance with the previous discussions, signed it on behalf of Prospect and forwarded it to Corbett for signature by Dexter.
- [49] Hope received regular statements from Anscor concerning his investments in Wattle recording the interest payments paid into his account in accordance with the agreement. The statements appeared to record the making of loans by Wattle and to record various dates indicating that the loans were of a short term. Interest payments continued to be paid until the Wattle scheme was closed as a result of action by ASIC. Hope’s evidence was that from his point of view, from the time he commenced the investments in the Wattle Group, until it was closed down, the investment was performing in accordance with his expectations based on what had been said to him.

#### **The mid 1996 telephone discussions with Woodrow**

- [50] Hope agreed that after the August 1995 meeting, he did not speak to Woodrow again, until some time after 22 June 1996. On 22 June 1996 an advertisement appeared in the Courier Mail stating that information was wanted concerning two individuals, one of which was Corbett, and providing a contact number. Hope rang the number given and spoke to a private investigator, who told him that he was acting for some people in Perth who had been “duded” by Corbett, and that he was trying to get in touch with people elsewhere who might be doing business with Corbett to let them know that Corbett was not reputable.
- [51] This caused Hope to have concerns about the financial position of his Wattle investments. He phoned Woodrow to express his concerns about the advertisement and about what he had been told, which Hope had found worrying. Hope’s evidence was that he rang Woodrow on the basis of his understanding that he was a

Count representative. Hope said Woodrow's response was to tell Hope that Corbett was from a good family and was reputable, that Dexter had been a bankrupt, "but that that was a pure technicality". Hope was also told that he should not have any concern about the loans, but that if he was concerned that he could always withdraw the monies invested. Woodrow also said that he did not think that that was appropriate, because Dexter was "of good character" and that he had "all the assets in his own name, that there was no seeking to hide these assets, that if something fell over, they would be attainable". He told Hope that he should not worry about Dexter or the Wattle scheme and that his investments in the Wattle scheme were "safe". Hope said that he accepted what Woodrow had said. Thereafter, Hope made his last two investments totalling \$150,000.

- [52] Hope also relayed what he had been told by Woodrow to McKay, whom he alerted about the advertisement, but made no mention of his understanding that Woodrow represented Count.
- [53] Woodrow's evidence about the telephone conversation was that he recalled being phoned by Hope, who was concerned about a newspaper article in relation to Corbett and in particular as to whether his money was safe. Woodrow said his response was along the lines that "Corbett doesn't have control of the money, Dexter does", and that he could not see the relevance of the article. He conceded that he may also have said that Corbett was from a good family, that he was reputable and that Dexter was of good character.

#### **Findings as to the 1996 telephone conversation**

- [54] Woodrow substantially accepted Hope's evidence about the 1996 telephone conversation, save for the statements that Hope should not have any real concerns about his investment in Wattle, and that Hope should continue his investment in Wattle. However, on both these points Woodrow accepted that such statements reflected the views he held at the time. Woodrow also conceded that in mid-1996 he had a financial incentive to persuade Hope to continue his investment in Wattle. I find that during the telephone conversation Woodrow represented that:

- (a) Hope should not have any real concern about his investment in the Wattle Group.
- (b) The plaintiff's investment with the Wattle scheme was safe.
- (c) Dexter was of good character, and the assets were in Dexter's name.

#### **The New 1997 Agreement with Dexter**

- [55] Before the last investment was made by Hope, Corbett contacted him and advised him that a new agreement would be sent to him and said that it was a "very positive development that Dexter from henceforth was going to guarantee the funds himself rather than relying on individual securities from the borrowers and that he was of enough substance to do this and that it would make the investment even safer". Hope accepted the explanation. He said that he understood that Dexter would be responsible for the return of the funds to the lenders and that instead of having to rely on securities from individual borrowers, that he could now look to Dexter to get his money back. On 23 July 1997, Hope, on behalf of the plaintiff, signed the second Wattle agreement.

## The Representations

[56] The plaintiff's case as it emerged at trial was that the following representations were made in the 1995 meetings and that they were misleading, deceptive and negligent:

- (a) Wattle operated a business of providing short-term loans, typically 30 to 60 days.
- (b) Borrowers accepted by Wattle were those in need of bridging finance or other short-term loans, who were able to provide adequate security for the loans, and who were willing to pay high fees over a short period.
- (c) Borrowers were typically people introduced by solicitors, accountants, insurance brokers and finance brokers.
- (d) Loans by Wattle were made on security provided by the borrowers.
- (e) Wattle's role was to ensure the security was adequate.
- (f) The risk for the investor was low because of the assets provided by the borrowers by way of security.
- (g) Investments in the Wattle Group were safe and viable.
- (h) Wattle had a business strategy not to take in more than \$6m to \$9m from investors, so as to ensure it did not over extend its ability to make secure loans.
- (i) Wattle had been making loans for 6 years and there had never been a default on a loan or alternatively that no investor had lost money on a loan

[57] I find that these representations were made to Prospect, through Hope, at the 1995 meetings and that Woodrow participated in making these representations. Prospect's case was that Woodrow was actively involved with, and agreed with, the representations concerning Wattle. Hope's evidence that while Corbett did most of the talking at both the 1995 meetings, Woodrow, by his conduct, indicated that he adopted and agreed with what Corbett said about Wattle accorded with McKay's impression in respect of the August meeting. Woodrow himself accepted that, at the August meeting, he had participated in the discussion about the Wattle investment, chiming into the discussion, and backing up what Corbett was saying. Furthermore, as the plaintiff submitted, the evidence tends to show that Woodrow had sufficient knowledge about Wattle to be confirming what Corbett was saying, and adding in his own remarks; he had met Dexter in March 1995 and knew about the scheme in early April, had introduced buyers to invest in the scheme in early April, and was himself sufficiently persuaded by it to make a decision, at least by 28 April, to put \$100,000 of his own company into it. He also had a substantial commission incentive to be encouraging an investment in Wattle to Hope.

[58] The plaintiff also alleged that during the mid-1996 telephone conversation Woodrow made representations, which were misleading, deceptive and negligent as follows:

- (a) Hope should not have any real concern about his investment in the Wattle Group.
- (b) The plaintiff's involvement with the Wattle scheme was safe.
- (c) Dexter was of good character, and the assets were in Dexter's name.

[59] I accept that these representations were made by Woodrow.

- [60] I find that all the representations in question were false. In addition, I find that the representations were both misleading and deceptive under the *Trade Practices Act*. So much is apparent from the evidence of the witnesses called by Prospect and was not seriously disputed by Count.
- [61] It is clear that Woodrow was negligent in making the representations and that he had no reasonable basis for making the representations. Woodrow conceded that at the time of the 1995 meetings, he had taken no steps to verify that Wattle was in fact conducting a short term lending business and was taking security on loans. He also conceded that he took no steps to look at financial statements of Wattle, statements recording Wattle's performance or statements recording loans actually made or interest actually received from borrowers. Nor did he take steps to verify that Dexter was actually following the practice of limiting funds brought in from investors to \$6 to \$9 million. In fact, Woodrow conceded that for all he knew in 1995, Dexter could have been putting the money invested by members of the public into his own businesses instead of lending the funds on short term loans and that he could well have been paying the interest due to investors and the commission due to selling agents out of the incoming money from investors. The evidence indicates that is what in fact occurred.

### **Reliance**

- [62] There is no dispute as to the approach to be taken in determining whether a representation has acted as an inducement. The following classic statement of principle of Wilson J in *Gould v Vaggelas*<sup>2</sup> (with whom Gibbs CJ<sup>3</sup> and Dawson J<sup>4</sup> agreed) sets out the matters for consideration:

- “1. Notwithstanding that a representation is both false and fraudulent, if the representee does not rely upon it he has no case.
2. If a material representation is made which is calculated to induce the representee to enter into a contract and that person in fact enters into the contract there arises a fair inference of fact that he was induced to do so by the representation.
3. The inference may be rebutted, for example, by showing that the representee, before he entered into the contract, either was possessed of actual knowledge of the true facts and knew them to be true or alternatively made it plain that whether he knew the true facts or not he did not rely on the representation.
4. The representation need not be the sole inducement. It is sufficient so long as it plays some part even if only a minor part in contributing to the formation of the contract.”

- [63] Hope's evidence was that he relied on the representations relating to Wattle made to him by Woodrow in both making the investments, and in not withdrawing

---

<sup>2</sup> (1985) 157 CLR 215 at 236. See also *Green v Chenoweth* [1998] 2 Qd R 572 at 576; *Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471 at 482–3.

<sup>3</sup> (1985) 157 CLR 215 at 219.

<sup>4</sup> *ibid* at 262.

Prospect's money from the Wattle investment. Woodrow conceded that he appreciated that the information given to Hope during the 1995 meetings might influence Hope's decision to invest in Wattle and that Hope was relying on Woodrow and Corbett for the accuracy of that information.

- [64] Hope mentioned three matters which influenced him to invest in the Wattle scheme. These were firstly, "the argument mounted [in favour of the investment] made sense in terms of people being prepared to pay high fees for a short period of borrowing". A second influence was "that the Wattle group did the administering of the loans", which he said was attractive after his experience in having to chase up the Westerman loan. (The reference to administering the loans should be placed in the context of Hope's evidence of what he was told of Wattle's role at the second meeting in 1995, that is, that one of the benefits of investing in the Wattle scheme was that Wattle administered the loans so that Wattle would take the responsibility for placing the investor's funds, obtaining adequate security and vetting it, collecting the interest of fees and forwarding the appropriate return to the investor). Hope said that "thirdly and importantly, ... Woodrow was in the picture as the representative of Count and that was [his] basic comfort on this thing". As regards this matter, Hope said that he was comforted by the knowledge that Count was a reputable group and that Woodrow, as Count's representative, agreed with what was said by Corbett, since he did not know the Wattle Group and his knowledge of Corbett was limited to being introduced by Bishop. (It is convenient to address this third matter below in the context of the issue of ostensible authority).
- [65] As I have mentioned, McKay gave evidence of discussions with Hope as to the risk involved in the Wattle Scheme. McKay said that his concerns were allayed by the fact that the investment was performing in the sense that "the money was coming in regularly" and "well documented", referring to the regular statements provided. On behalf of Prospect, it was submitted that the evidence indicated that McKay was sufficiently persuaded by what he was told at the second meeting that, despite his concerns, he proceeded to make an investment of his money and that that strongly supported Hope's evidence that the information he was given persuaded the plaintiff to proceed to make the investment.
- [66] I accept that Prospect, through Hope, relied on the representations made at the 1995 meetings and in the mid 1996 telephone conversation; Hope was induced by the representations *inter alia* as to the returns to be generated, the nature of the investments made by Wattle, the fact that Wattle administered the loans, which Hope's evidence indicated he understood to include that Wattle vetted the security to be provided and placed a ceiling on the funds to be invested in the scheme. I also find that Prospect, through Hope, was induced by the 1996 representation not to withdraw the investments already made and to make the last two investments.

### **Prospect's case as to Count's liability for Woodrow's actions**

- [67] It is alleged that Count is responsible for Woodrow's action for the purposes of the *Trade Practices Act 1974*, by virtue of actual or alternatively apparent authority at common law, the case, on the authority of *Walplan Pty Ltd v Wallace*,<sup>5</sup> falling within the words of s 84(2)(a) of the Act. In addition, it is alleged that Count is vicariously liable at common law for the actions of Woodrow carried out within the

---

<sup>5</sup> (1985) 8 FCR. 27.

scope of his actual or ostensible authority and that Count is liable under the *Corporations Law*.<sup>6</sup> The plaintiff alleged that in making the investments, Prospect, through Hope, relied on the advice of Woodrow, who acted or purported to act on behalf of Count by reason that:

- (a) Woodrow gave the advice as a representative of Count;
- (b) alternatively, Count held out Woodrow as authorised to give the advice as a representative of Count.

**Did Woodrow have actual authority to make the representations ?**

[68] Woodrow’s authority is specified in the Count Representative Agreement dated 15 April 1994, which states:

“1.1 Count hereby appoints the Representative to be a representative of COUNT for the provision of investment advice and financial service, subject to the Representative abiding by all clauses in this agreement.

...

2.9 The Representative shall assess the needs of the client as indicated by the client and shall observe the investment strategies recommended by COUNT and only recommend products approved by COUNT. Failure to observe this clause may render VOID any Professional Indemnity Insurance. Clients will be made aware by the Representative of any general risks involved in the portfolio recommended by the Representative.”

[69] On behalf of the plaintiff it was submitted that Woodrow’s actual authority was as wide as cl 1.1 stated; that is, that his actual authority was “... for the provision of investment advice and financial services ...”. Count, on the other hand, submitted that Woodrow had no relevant actual authority on behalf of Count, because cl 2.9 of the agreement limited Woodrow’s authority to “only recommend products approved by Count.” It was not disputed that an investment in Wattle was not a product recommended by Count.

[70] The plaintiff contended that cl 2.9 merely concerned the manner in which the representative was to provide the investment advice and financial service, rather than a limit of the representative’s authority. It was argued the voiding of insurance referred to in cl 2.9 did not assist in construing the clauses. It was submitted that voiding insurance by recommending products not approved by Count could occur whether the action was within or without the actual authority of a representative. Therefore, even if the action was outside the actual authority of the representative, (but within ostensible authority), Count would still be liable as regards the client, but might be without insurance cover. Consequently, construing the employee’s contractual obligation in cl.2.9 as within or without actual authority would not affect availability of insurance.

[71] I accept Count’s submissions that cl 2.9 is not merely concerned with the way in which Woodrow might exercise the authority he had on behalf of Count, but that it

---

<sup>6</sup> *Lloyd v Grace, Smith & Co.* [1912] AC 716; *Capricorn Financial Planners Pty Ltd v ASIC* [1998] FCA 405 at paras.10 – 13; *NMFM Property Ltd. v Citibank Ltd (No 10)* (2000) 107 FCR 270 at para 520; *Brockway v Pando* (2000) 22 WAR 405 at 431.

imposed a limitation on his authority; he was only permitted to recommend products approved by Count. That limitation was imposed in clear terms. I also note that there was no suggestion that Woodrow was merely placing investments which were independently suggested or decided upon by Prospect, rather Prospect's case was that it only invested in Wattle because of the recommendations made by Woodrow.

- [72] Accordingly, I find that Woodrow had no actual authority to give the advice and to make the representations concerning the investment in the Wattle Group.

### **Woodrow's ostensible authority**

- [73] The scope of ostensible authority is determined by the representation of authority made by the principal.<sup>7</sup> The agent is taken to have the authority which the principal represents the agent to have. The critical issue is the nature of Count's conduct in putting Woodrow in a position in which he was allowed to act as he did in his dealings with the plaintiff.<sup>8</sup> As was explained by Browne-Wilkinson LJ in *Egyptian International Foreign Trade Co v Soplex Whole sale Supplies Ltd (The Raffaella)*<sup>9</sup>:

“It is important to bear in mind that the doctrine of holding out is a form of estoppel. As such, the starting point is that the principal must be shown to have made a representation, which the third party could and did reasonably rely on, that the agent had the necessary authority. The relevant enquiry, therefore, in all cases is whether the acts of the principal constitute a representation that an agent had a particular authority and were reasonably so understood by the third party.”

- [74] The only holding out by Count relied upon at trial was Count's conduct in permitting Woodrow to use pre-printed business cards, identifying Woodrow as an authorised representative of Count, one of which was handed to Hope at the April 1995 meeting. The plaintiff's case was that because Count allowed Woodrow to have business cards identifying him as an authorised representative of Count, who were stated to be “financial planners”, there was a holding out to the plaintiff of Woodrow's agency to deal with financial planning matters.
- [75] Given my earlier findings concerning Hope's understanding when he made the notation “ANZCorp” on Woodrow's card, I am unable to accept that there was a relevant holding out by Count by virtue of the Count business card. I do not accept that Hope understood Woodrow to be representing Count at any relevant time. In those circumstances, no estoppel arises against Count on the basis of the principle of apparent authority.
- [76] Notwithstanding that conclusion, I shall address the additional issue of reliance, in respect of which substantial submissions were made. Even if there had been a holding out by virtue of the business card, I am not satisfied that Hope in fact

<sup>7</sup> Bowstead & Reynolds, *Agency* 17th ed. at para.8-013; Dal Pont, *Law of Agency* (2001) at [20.22]; *Chitty on Contracts* 28th ed., Vol.2, para.32,057.

<sup>8</sup> *Crabtree-Vickers v Australian Direct Mail Advertising and Addressing Co.* (1975) 133 CLR 72 at 78, *Freeman & Lockyer v Buckhurst Park Properties* [1964] 2 QB 480 at 503-5, Bowstead & Reynolds *Agency* 17th ed., para.8-022

<sup>9</sup> [1985] 2 Lloyd's Rep 36 at 41.

reasonably relied on the holding out, accepting that the holding out need only be a factor relied upon.

- [77] Hope's evidence was that, in investing in the Wattle scheme, an influencing factor was his belief that "Woodrow was in the picture as the representative of Count and that was [his] basic comfort on this thing". He said that he was comforted by the knowledge that Count was a reputable group and that Woodrow, as Count's representative, agreed with what was said by Corbett, since he did not know the Wattle Group and his knowledge of Corbett was limited to being introduced by Bishop.
- [78] Hope admitted to a conversation with McKay when Hope was considering commencing litigation, during which McKay had asserted to Hope that Hope knew Count had nothing to do with Wattle. On behalf of Prospect it was said that that simply demonstrated that the two formed different impressions - possibly because McKay was not at the first meeting. It was said that the fact that Hope contacted Woodrow in mid-1996, after speaking to the private investigator, was consistent with Hope believing that Woodrow was representing Count and was independent of Anscor. It was also submitted on behalf of Prospect that, while Hope agreed that after the exchange of business cards, Count's name was not mentioned again at either meeting in 1995 and that he could not remember ever mentioning to either Bishop or to McKay that he understood that Woodrow was representing Count, Hope had explained this by saying that he thought McKay knew and that he did not think it was of importance to Bishop.
- [79] Count disputed that Hope placed any reliance on Count's involvement, submitting that Hope's behaviour was inconsistent with him having actually relied upon Count. Count further submitted that any reliance by Hope on the representation as to Woodrow's authority was not reasonable in the circumstances of the case. In this regard, Count pointed to a number of matters as relevant.
- [80] Count submitted that Hope was evasive as to how, given he claimed to be an unsophisticated investor with little knowledge of financial matters, he was aware of the existence and stature of Count. He could not say where he learnt about this. Count also pointed to Hope's conduct in phoning Corbett, upon receiving the first Wattle agreement to discuss that it was inconsistent with what he has been told, rather than contacting Woodrow (to get, on Hope's version, Count's clarification).
- [81] Count submitted that when Hope rang Woodrow in mid 1996, he did so because he merely wished to find out Woodrow's own views about Corbett and was not seeking Count's views. Hope did not ask Woodrow whether he was still involved with Count and conceded that he had "no idea" whether Woodrow was still involved with Count (in fact he was not). Count pointed to Hope's claim that when he got Woodrow's response he was much comforted, because he had got Count's view and believed that all would be all right, and contrasted that claim with his failure to tell his friend McKay (to whom he had imparted his knowledge gleaned from the investigator and Woodrow) that Woodrow's opinion was of importance because it represented Count's views.
- [82] I consider that it is of note that in the initial discussions between Hope and McKay, before the August 1995 meeting, Hope made no mention of his "basic comfort" and understanding that Woodrow represented Count, nor of the importance to him of

Count's involvement. That omission is significant, given Hope's concession that it was he who had involved McKay in the August 1995 meeting. Furthermore, Hope's failure to mention his understanding as to the involvement of Count and the comfort he had derived from Count's involvement is of particular significance, given McKay's evidence (which I accept) that, before the August meeting, the two had specifically discussed the risky nature of the investment in Wattle.

[83] It is also of consequence that in mid 1996, when Hope alerted McKay to the advertisement about Corbett and relayed to him what Woodrow had told him, he again made no mention that Woodrow represented Count. Hope's explanation, given in re-examination, was that Count's involvement "would have been something that was between me and Woodrow, I guess." This is to be contrasted with Hope's earlier evidence as to the reason for his failure to mention Count to McKay being that he "thought McKay already knew". It is difficult to understand Hope's evidence, that his belief that Woodrow represented Count was "something that was between [him] and Woodrow", in light of the evidence (which I accept), that Hope was in constant contact with McKay and that the two had continuing discussions about the risk of the Wattle investment. Hope's own evidence was that the first occasion on which he mentioned his reliance on Count to McKay was when he sought to involve McKay in suing Count.

[84] Further, the evidence does not demonstrate that Hope was concerned about or showed any interest in the nature of Count's involvement in the Wattle Group; Hope saw no document concerning the Wattle scheme, which referred to Count and sought no clarification at the August meeting or any other time from Woodrow, Corbett, or any other person, as to Count's role in the Wattle Scheme. This is particularly significant given that, on his evidence, he had realised that he had been mistaken at the discussions in April 1995 as to Woodrow's (and therefore Count's) involvement in the Anscor loan proposals.

[85] In my opinion, these matters all cut across the view that Hope placed reliance on any understanding as to Count's involvement.

[86] Accordingly, I am unable to accept Hope's evidence that he relied on any representation by Count as to Woodrow's authority and that that was an inducing factor in the investments that were made or his failure to withdraw the investments. Rather, I consider that in making the investments Hope was influenced solely by the representations made as to the nature of the investment, including the lucrative returns to investors. I find that when Hope phoned Woodrow in mid 1996, he did so in order to seek out Woodrow's own views as to Corbett and not because he understood Woodrow represented Count and placed value and reliance on obtaining Count's views.

### **Is Count liable to Prospect?**

[87] It follows from my findings as to Woodrow's actual and ostensible authority that Count is not liable at common law nor under the *Trade Practices Act* 1974 for the representations concerning the Wattle Group made by Woodrow.

[88] Given the findings made, there can be no liability under s 817 of the Corporations Law, which renders a principal liable to a third party in respect of conduct engaged in by another as a representative of the principal. The term "representative" in s 817

has the meaning ascribed to “securities representative” in s 94 of the *Corporations Law*<sup>10</sup>. The conduct in question of Woodrow was not done “as” an employee or agent of Count nor in connection with Count’s business, or on Count’s behalf or benefit. Nor is there any liability under s 819 of the *Corporations Law*. Prospect argued that for the purposes of s 94(3) and s 819 of the *Corporations Law*, the advice given by Woodrow was “in connection with” the investment advice business carried on by Count. This was premised on the contention that Hope was given to understand that Woodrow was the authorised representative of Count. As is apparent, I am unable to accept that contention. Nor do I accept that Hope made the investments because he believed at the relevant time that Woodrow was acting on behalf of Count in making the representations concerning Wattle.

- [89] Furthermore, Count is not liable to Prospect for contravention of s 849 or s 851 of the *Corporations Law*. Those provisions concern recommendations made by a “securities adviser” which is defined in s 9 to include a “securities representative of a dealer”. The conduct in question was not carried out by Woodrow as a securities representative of Count. Nor can Count be liable for Woodrow’s misleading and deceptive conduct engaged in in breach of s 995(2) of the *Corporations Law*.
- [90] The plaintiff also seeks damages for contraventions of s 1018 (prohibition on offering securities of a corporation without first registering a prospectus), s 1064 (prohibition on anyone other than a public company offering for purchase a prescribed interest) and s 1065 (prohibition on offering a prescribed interest for purchase without an approved deed). There can be no liability pursuant to those provisions in Count in respect of any conduct by Woodrow, given the finding that Woodrow was acting with no actual or ostensible authority in engaging in the conduct of recommending investments in Wattle.
- [91] Accordingly, Prospect’s claims against Count fail. I shall hear submissions as to costs.

---

<sup>10</sup> See s 9 of the *Corporations Law*