SUPREME COURT OF QUEENSLAND

CITATION: *Coppo & Ors v Banalasta Oil Plantation Ltd & Ors; Borg v Pawski and Ors* [2005] QCA 96

PARTIES:
ANDREW JAMES BORG
(first plaintiff)
JASON MARK BYRNE
(second plaintiff)
ROBERT STUART CHRISTENSEN
(third plaintiff)
GLEN ANGELLO COPPO
(fourth plaintiff/first appellant)
LAURENCE ROY DIXON
(fifth plaintiff)
IAN ANTHONY GLAZEBROOK
(sixth plaintiff)
MICHAEL CHARLES GOTTKE
(seventh plaintiff/second appellant)
BRIAN KENNETH HINCHEY
(eighth plaintiff)
ROBERT MICHAEL McCLOY
(ninth plaintiff)
NANCY MARY MONTGOMERY
(tenth plaintiff)
HENRY ALEXANDER MONTGOMERY
(eleventh plaintiff)
GORDON EDWARD PARISH
(twelfth plaintiff)
GORDON JOHN REID
(thirteenth plaintiff)
JAMES MICHAEL ROACH
(fourteenth plaintiff)
GLEN ALAN SCOTT
(fifteenth plaintiff)
GASPAR SICH
(sixteenth plaintiff/third appellant)
NEIL GREGORY CAMERON
(seventeenth plaintiff/fourth appellant)
COLIN SCOTT PURDIE
(eighteenth plaintiff)
GEOFFREY DAVID RAPSON
(nineteenth plaintiff/fifth appellant)
DREW KINGSLEY WOODMAN
(twentieth plaintiff)
NIKO JOZINOVIC
(twenty-first plaintiff/sixth appellant)
v
NORTHERN RIVERS FINANCE PTY LTD

ACN 069 279 134
(first defendant)
INVESTMENT LICENCING PTY LTD
ACN 072 428 794
(second defendant)
NORTHERN RIVERS PLANTATION MANAGEMENT LTD
ACN 069 059 132
(third defendant)
DARREN PAWSKI and RALPH MARCEL NUNIS trading as SECURINVEST ACCOUNTING SERVICES
(fourth defendant)
DREW GRAHAM FRANCIS
(fifth defendant)
BASE METALS EXPLORATION NL
ACN 081 009 181
(sixth defendant)
EXPLORERS AND PROSPECTORS FINANCE LTD
ACN 081 392 841
(seventh defendant)
DARREN CHARLES HORNER
(eighth defendant)
JOHN MEARES
(ninth defendant)
BANALASTA OIL PLANTATION LTD
ACN 078 104 711
(tenth defendant/first respondent)
SAFEINVEST PTY LTD
ACN 081 664 315
(eleventh defendant)
KAREN EVANS
(twelfth defendant)
PLANTATION EQUITY PTY LTD
ACN 078 104 579
(thirteenth defendant/second respondent)

ANDREW JAMES BORG
(first plaintiff/appellant)
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(second plaintiff)
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BRIAN KENNETH HINCHEY
(eight plaintiff)

ROBERT MICHAEL McCLOY
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(twelfth defendant)
PLANTATION EQUITY PTY LTD
ACN 078 104 579
(thirteenth defendant/fourth respondent)

FILE NO/S:	Appeal No 5496 of 2004 Appeal No 5587 of 2004 SC No 191 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	8 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2004; 22 October 2004
JUDGES:	McMurdo P, Jerrard JA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**In Appeal No 5496 of 2004:**

1. **Appeal allowed**
2. **The learned primary judge's orders 4, 5, 7, 8, 107 and 108 of 28 May 2004 are set aside insofar as they concern the respondents to these appeals (the 10th and 13th defendants)**
3. **Judgment is instead entered for each appellant (the 4th, 7th, 16th, 17th, 19th and 21st plaintiffs) against the respondents (the 10th and 13th defendants) for the following amounts of loss and damage:**
   - **(i) fourth plaintiff: $9,264.19**
   - **(ii) seventh plaintiff: $14,771.37**
   - **(iii) sixteenth plaintiff: $1,113.75**
   - **(iv) seventeenth plaintiff: $990.00**
   - **(v) nineteenth plaintiff: $15,405.42**
   - **(vi) twenty-first plaintiff: $1,732.50**
4. **The counterclaim of the second respondent, Plantation Equity Pty Ltd (the 13th defendant), is dismissed**

5. The respondents to the appeal (the 10th and 13th defendants) are to pay the appellants' (the 4th, 7th, 16th, 17th, 19th and 21st plaintiffs') costs of and incidental to the trial of the appellants' claims in SC No 191 of 200 and of this appeal to be assessed

6. The second respondent, Plantation Equity Pty Ltd (the 13th defendant), is to pay the appellants' (the 4th, 7th, 16th, 17th, 19th and 21st plaintiffs') costs of the counterclaim to be assessed

In Appeal No 5587 of 2004:

1. Appeal allowed

2. The learned primary judge's orders 4, 5, 7, 8, 107 and 108 are set aside insofar as they concern the third and fourth respondents to this appeal (the 10th and 13th defendants)

3. Judgment is instead entered for the appellant (the 1st plaintiff) against the third and fourth respondents (the 10th and 13th defendants) for loss and damage in the sum of $1,237.90

4. The counterclaim of the fourth respondent, Plantation Equity Pty Ltd (the 13th defendant), is dismissed

5. The third and fourth respondents (the 10th and 13th defendants) are to pay the appellant's (the 1st plaintiff's) costs of and incidental to the trial of the appellant's claims in SC No 191 of 2000 and of this appeal to be assessed

6. The fourth respondent, Plantation Equity Pty Ltd (the 13th defendant), is to pay the appellant's (the 1st plaintiff's) costs of the counterclaim to be assessed

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – where appellants became involved in tax minimisation scheme managed by respondent companies – where scheme subsequently declared unlawful by Australian Tax Office – where appellants claimed that respondent companies falsely represented scheme as lawful – where appellants also claimed breach of s 851 *Corporations Law* (Cth) by respondent companies' agents – where respondent company brought counterclaim against appellants – where primary judge dismissed representations case against respondent companies – where basis of finding against appellants was inadequate pleading relating to agency – where found for respondent company on counterclaim – whether primary judge erred in concluding the case against the respondent companies was insufficiently pleaded – whether appeal should be allowed

Corporations Law (Cth), s 817, s 819, s 820, s 851, s 852
Uniform Civil Procedure Rules 1999 (Qld), r 149(1)(a), r

149(2), r 658(2)

Manwelland Pty Ltd v Dames & Moore Pty Ltd [2001] QCA 436; Appeal No 470 of 2001, 16 October 2001
Whisprun Pty Ltd v Dixon [2003] HCA 48; (2003) 200 ALR 447

COUNSEL: D A Savage SC for the appellant in Appeal No 5587 of 2004
T P Sullivan for the first respondent in Appeal No 5587 of 2004
D C Andrews SC, with C Wilson, for the third and fourth respondents in Appeal No 5587 of 2004
H B Fraser QC, with R Schulte, for the appellants in Appeal No 5496 of 2004
D C Andrews SC, with C Wilson, for the respondents in Appeal No 5496 of 2004

SOLICITORS: McKays for the appellant in Appeal No 5587 of 2004
Phillips Fox for the first respondent in Appeal No 5587 of 2004
Mullins Lawyers for the third and fourth respondents in Appeal No 5587 of 2004
Macrossan & Amiet for the appellants in Appeal No 5496 of 2004
Mullins Lawyers for the respondents in Appeal No 5496 of 2004

McMURDO P:
The background

[1] The appellants in each appeal, Appeal No 5587 of 2004 (Mr Borg) and Appeal No 5496 of 2004 (Messrs Coppo, Gottke, Sich, Cameron, Rapson and Jozinovic) were employees in the central Queensland mining industry. In 1999, they became involved in a tax minimisation scheme that is central to these appeals. Banalasta Oil Plantation Ltd ("Banalasta"), a respondent to both appeals, was established to make a profit from the production and sale of eucalyptus oil and associated products. Mr Horner, the salesman of the scheme,[1] was employed by the accounting firm, SecureInvest Accounting Services, whose partners were Mr Pawski and Mr Nunis ("the accountants").[2] The scheme worked in this way. The appellants entered into the Banalasta Natural Oil Joint Venture Project No 1. The joint venture agreement was for ten years. The scheme's prospectus anticipated that from 30 June 2001 participants would be making a profit on their Participation Interests;[3] participants were obliged to pay significant prescribed annual fees.[4] The financier, Plantation Equity Pty Ltd ("Plantation Equity"), a company associated with Banalasta[5] and a respondent to both appeals, advanced money to each

1 Mr Horner was originally a respondent to Appeal No 5587 of 2004, but at the request of Mr Borg his appeal against Mr Horner was dismissed late on the first day of the hearing of this appeal.

2 The accountants were also originally respondents to Mr Borg's Appeal No 5587 of 2004, but the appeal against them was compromised and by consent was dismissed with no order as to costs at the commencement of the appeal hearing.

3 The Prospectus for the Banalasta Natural Oil Joint Venture Project No 1, Appeal No 5496 of 2004, appeal book, vol 2, p 434.

4 Prospectus, p 56; Appeal No 5496 of 2004, appeal book, vol 2, p 479.

5 See, for example, the Prospectus, p 5, para 9; Appeal No 5496 of 2004, appeal book, vol 2, p 429.

appellant by way of a loan; Plantation Equity then paid the loan amount advanced to each appellant, less the accountants' fee, to Banalasta. In return each appellant acquired a capital investment and Participation Interests in the joint venture.[6] This prepaid expenditure was said to further primary and secondary industrial development and to be claimable as a tax deduction. Each appellant then claimed as a tax deduction the money lent to them by Plantation Equity, greatly reducing their annual assessable income. They used the resulting tax refunds as their first instalment to repay the loan to Plantation Equity.

[2] The Australian Taxation Office ("ATO") subsequently determined that this and similar schemes were unlawful and disallowed their claimed deductions.

[3] The appellants commenced proceedings in the Supreme Court claiming that Mr Horner falsely represented that investments in the scheme were lawfully tax deductible and approved by the ATO. They sued Mr Horner, the accountants, Banalasta and Plantation Equity for damages and to have the loans set aside. Plantation Equity brought a counterclaim against each appellant for the amount owed to it under each loan agreement. The parties all agreed that a trial should first proceed on the respondents' liability on the appellants' claims before the determination of the counterclaim and the quantum of any damages awards.[7]

[4] At trial, each appellant's principal case was what has been referred to both at trial and on this appeal as a "representations case" under the *Corporations Law* (Cth) ("the *Law*"), the *Fair Trading Act* 1989 (Qld) and the *Trade Practices Act* 1974 (Cth) arising out of all four respondents' alleged misleading or deceptive conduct through Mr Horner's misrepresentations that the scheme was approved by the ATO and would provide the appellants with lawful tax deductions. The appellant's secondary case was what has been referred to as a "recommendations case" alleging breaches of s 849 and s 851 of Ch 7, Pt 7.3, Div 4 of the *Law* arising out of Mr Horner's same representation that the investment was sound given each appellant's financial circumstances.

[5] The learned primary judge published his reasons as to the respondents' liability on the appellants' claims on 9 May 2003.[8] There is no appeal from any of his Honour's many primary findings of fact in that decision. His Honour found that none of the appellants had made out their representations case against Mr Horner, the accountants, Banalasta or Plantation Equity. As to the recommendations case, his Honour found that Mr Horner, as securities adviser, breached s 851 of the *Law* in making, without having a reasonable basis, a securities recommendation to each appellant, who may reasonably be expected to rely on it; the accountants were also liable under the *Law* for Mr Horner's breaches of s 851, not having established they were within the exemption in s 852(4) of the *Law*.[9] His Honour found that the

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6 Prospectus, p 6, para D; Appeal No 5496 of 2004, appeal book, vol 2, p 430.

7 See *Borg & Ors v Northern Rivers Finance Pty Ltd & Ors* [2003] QSC 112; SC No 191 of 2000, 9 May 2003, [405].

8 Above.

9 Section 817, s 819 and s 820 of the *Law* make principals liable for the conduct of their representatives; it is an offence for a securities adviser to make a recommendation without a reasonable basis under s 851 of the *Law*. Under s 852 of the *Law*, the advisor is liable to pay damages unless the advisor proves that the recommendation was, in all the circumstances, appropriate having regard to the information that when making the recommendation, the securities advisor had about the client's investment objectives, financial situation and particular needs (s 852(4)).

appellants' recommendations cases against Banalasta and Plantation Equity failed.[10] His Honour found that although the appellants had adequately pleaded that Banalasta and Plantation Equity were liable for Mr Horner's statements to them about the scheme in their unsuccessful representations cases, they had not pleaded that Banalasta and Plantation Equity contravened s 851 of the *Law* and nor had they claimed specific relief related to such a contravention. The learned primary judge concluded that as the case had been pleaded and conducted, the appellants could not claim that Banalasta and Plantation Equity were liable for the contraventions of s 851 by Mr Horner and the accountants. These appeals concern his Honour's dismissal of the appellants' recommendations cases against Banalasta and Plantation Equity for failing to adequately plead those cases.

[6] Although his Honour published these reasons on 9 May 2003, because the counterclaim and quantum issues were yet to be determined, no orders were then taken out. The appellants rightly considered that they could not appeal as there were then no orders from which to appeal.[11] The appellants' solicitors did, however, write to the solicitors for Banalasta and Plantation Equity on 19 May 2003 stating that in their view the primary judge had erred in not concluding on the facts he found that Mr Horner acted as the agent of Banalasta and Plantation Equity when he recommended the scheme to the appellants and that Banalasta and Plantation Equity were liable to them for the losses suffered. They asked that, after considering the judge's reasons and findings of fact, Banalasta and Plantation Equity consent to dismissing Plantation Equity's counterclaim for the appellants' outstanding amounts under the loans. The solicitors for Banalasta and Plantation Equity did not consent.

[7] On 23 May 2003, the appellants foreshadowed a request to amend their statement of claim by adding a claim for relief against Mr Horner and the accountants requiring them to indemnify the appellants against any liability, including costs, that any of them may be found to have to Plantation Equity in respect of Plantation Equity's counterclaim. That application was heard on 11 September 2003. Mr H Fraser QC, who now appears for the appellants in Appeal No 5496 of 2004, points out that the appellants' then counsel must have felt constrained by his Honour's reasons and therefore limited the extent of the amendment sought because he did not wish to dispute the authority of the judge's reasons delivered on 9 May 2003. As a result, the appellants did not apply to amend their cases against Banalasta and Plantation Equity to clearly plead a claim for damages flowing from the recommendations case. His Honour in any case refused leave to make even the more limited amendments sought, first, because the pleadings were generally precise and logical, suggesting a deliberate intention to plead the case in the way pleaded at trial; second, the application to amend was late, after the delivery of reasons and generated only because of the consequences of those reasons so that prejudice was more difficult to overcome; third, there was a public interest in achieving finality in litigation; and, fourth, there was potential prejudice because at that time Mr Horner had disappeared and could not be contacted although this point was of less concern than the other matters.[12] It seems extremely unlikely that his Honour would have

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10 *Borg & Ors v Northern Rivers Finances Pty Ltd & Ors* [2003] QSC 112; SC No 191 of 2000, 9 May 2003, [100]-[106], [404].

11 See *Pioneer Industries Pty Ltd v Baker* [1997] 1 Qd R 514; *Gerlach v Clifton Bricks* (2002) 209 CLR 478; *Paulger v Hall* [2003] 2 Qd R 294.

12 *Borg & Ors v Northern Rivers Finances Pty Ltd & Ors* [2003] QSC 376; SC No 191 of 2000, 5 November 2003, [29]-[33].

allowed any more extensive amendments to patch what his Honour believed were holes in the appellants' cases exposed in the published reasons.

[8] The counterclaim was heard on 10 November 2003. On 27 February 2004, the learned primary judge published his reasons for finding that Plantation Equity was entitled to judgment against each appellant for the amount outstanding under each loan agreement.[13] On 28 May 2004, his Honour gave reasons for awarding Plantation Equity its costs of the counterclaim on an indemnity basis.[14] On that day his Honour also made the final formal orders, consistent with his earlier reasons on the appellants' cases and the counterclaim, that Mr Horner and the accountants pay the appellants damages in respect of the scheme; that the claim against Banalasta and Plantation Equity be dismissed and that the appellants pay Plantation Equity the outstanding amounts owing under the loan agreements. These appeals are from those orders.

The grounds of appeal and the orders now sought

[9] The appellants contend the learned primary judge erred in not finding Banalasta and Plantation Equity liable under the *Law* for Mr Horner's unreasonable recommendations to them and in concluding the recommendations case against them was insufficiently pleaded. They seek orders setting aside the relevant parts of the learned primary judge's order of 28 May 2004 concerning them and ask that instead judgment be entered for each appellant for the same amount that Mr Horner and the accountants were ordered to pay in respect of each appellant on the recommendations case; and that the judgment for Plantation Equity on the counterclaim be set aside and instead the counterclaim dismissed.

[10] During the appeal hearing, the appellants also sought to amend the notice of appeal to seek an alternative order, namely, that the matter be remitted to the Trial Division with directions that each appellant is entitled to set off against the counterclaim and to the extent of any excess over the counterclaim to recover from Banalasta and Plantation Equity the sum of (a) the amount of damages awarded against Mr Horner and the accountants on the recommendations case and (b) the amount of the counterclaim less the value (if any) of any "Participation" in the joint venture acquired by each appellant. This is because it is now common ground that although the prayer for relief in the appellants' pleadings at trial asked only for a declaration to set aside each loan, the only remedy under the *Law* for a breach of s 851 is damages under s 852 so that a court cannot declare the loan agreement void. The respondents then contended for the first time that each appellant's Participation Interest under the scheme had some value which must be offset against the outstanding loan amount in assessing damages, if any.

The relevant provisions of the *Law*

[11] The appeals concern alleged breaches of s 851 of the *Law*. Chapter 7, Pt 7.3, Div 4 of the *Law* deals with liability of principals for representatives' conduct. Where a person engages in conduct as a representative of another, the principal is liable for that conduct.[15] Once it is proved that one person is the representative of another and engaged in particular conduct whilst a representative, unless the contrary is

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13 *Borg & Ors v Northern Rivers Finance Pty Ltd & Ors* [2004] QSC 029; SC No 191 of 2000, 27 February 2004.

14 *Borg & Ors v Northern Rivers Finance Pty Ltd & Ors* [2004] QSC 163; SC No 191 of 2000, 28 May 2004.

15 Sections 817 and 819 of the *Law*.

proved, it is presumed that the representative engaged in the conduct as a representative of the principal.[16] Section 851 of the *Law* relevantly provides:

> "**Adviser must have reasonable basis for recommendation**
>
> (1) A securities adviser[17] who:
>
> (a) makes a securities recommendation[18] to a person who may reasonably be expected to rely on it; and
>
> (b) does not have a reasonable basis for making the recommendation to the person;
>
> contravenes this section.
>
> …"

[12] The securities adviser is liable to pay damages for loss resulting from the unreasonable recommendation.[19]

[13] Under s 852(4) of the *Law*:

> "In the case of a contravention of section 851, the securities adviser is not so liable if it is proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the securities adviser had about the client's investment objectives, financial situation and particular needs."

It follows that otherwise principals are liable under the *Law* for the unreasonable securities recommendations made by their representatives.

The appellants' pleading

[14] In addressing the issues in these appeals it is necessary to consider parts of the appellants' 225 page second amended statement of claim. The appellants were but seven of 21 plaintiffs. The claim was made against 13 defendants, including Mr Horner, the accountants, Banalasta and Plantation Equity. It concerned not only this scheme involving Banalasta and Plantation Equity but also two other tax schemes involving other entities not relevant to these appeals.

[15] In para 10 of the 1,081 pleaded paragraphs under the heading "**PRELIMINARY MATTERS**" the appellants claimed that:

> "At all times material to these proceedings Horner:
>
> (a) was an agent of … Banalasta Oil Plantation and Plantation Equity;
>
> …"

[16] In their defence, Banalasta and Plantation Equity put in issue Mr Horner's agency.[20] Following a notice to admit facts, they later admitted that Mr Horner and the accountants were each an agent and an "authorised representative" within the

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16 Section 820 of the *Law*.

17 In s 9 of the *Law*, "securities adviser" is defined as meaning "a dealer, an investment adviser or a securities representative of a dealer or of an investment adviser." It is common ground that Mr Horner and the accountants were securities advisers under the *Law*.

18 Above, "securities recommendation" is defined as meaning "a recommendation with respect to securities or a class of securities, whether made expressly or by implication." "Securities" is defined in s 92 of the *Law*; it is common ground that the Participation Interests obtained by each appellant under the scheme were securities under the *Law*.

19 Section 852 of the *Law*.

20 See para 3(a).

meaning of the *Law* at all relevant dates.[21] The term "authorised representative" is not a term used in the *Law* but the admission plainly makes Mr Horner the representative of Banalasta and Plantation Equity for the purposes of Ch 7, Pt 7.3, Div 4 of the *Law*.

[17] Whilst Mr Borg and Mr Jozinovic's pleadings were in a different format to the pleadings of the remaining appellants, each appellant's claim pleaded the following relevant common matters: that Mr Horner was the agent of Banalasta and Plantation Equity;[22] that Mr Horner expressly and orally stated to each appellant that the appellant should invest in Banalasta; that Mr Horner did not have a reasonable basis for making that pleaded statement; that in so doing Mr Horner contravened, amongst other statutory provisions (including those relating to misleading and deceptive conduct), s 851(2) of the *Law*; and that as a result of Mr Horner's pleaded statements each appellant had suffered loss and damage comprising the penalties flowing from the scheme and the amount of each appellant's loan demand.[23] Whilst the pleadings did specifically claim that Banalasta and Plantation Equity were responsible for Mr Horner's statutory contraventions on the representations case, they did not specifically claim that they were also liable for his unreasonable recommendations under s 851 of the *Law*.

[18] Late in the trial, the appellants amended their claim, in the end without objection, to specifically plead that Mr Horner recommended that each appellant should invest in the scheme; that he had no reasonable basis to make those recommendations and that he and the accountants contravened s 851(2) of the *Law*. Each appellant's prayer for relief was also amended to add against Plantation Equity the damages claim for penalties originally made only against Mr Horner, the accountants and Banalasta "for breach of the *Corporations Law*" and other statutes.

[19] Whilst far from a model example of clarity, by the end of the trial of the appellants' claims, each appellant did plead that Mr Horner was an agent of Banalasta and Plantation Equity (Banalasta and Plantation Equity had in any case admitted that Mr Horner was their authorised representative within the meaning of the *Law* at all relevant times) and that Mr Horner made recommendations contrary to s 851 of the *Law*. They did not plead the legal conclusions which flowed from those pleaded facts: that, because of the provisions of the *Law* set out earlier and the admissions made, Banalasta and Plantation Equity were liable for their representative Mr Horner's unreasonable recommendation to each appellant insofar as it contravened s 851 of the *Law*. The amended prayer for relief included a claim against Banalasta and Plantation Equity for damages for the penalties arising from the scheme for breach of the *Law* and, against Plantation Equity, a declaration that the loan agreement was void.

The trial

[20] The then senior counsel for the appellants in his reasonably brief opening address at trial stated that the relief sought against Plantation Equity was that the loan agreement should be avoided primarily because of Mr Horner's misleading and

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21 *Borg & Ors v Northern Finance Pty Ltd & Ors* [2003] QSC 112; SC No 191 of 2000, 9 May 2003, [101].

22 As pleaded generally in para 10.

23 See, for example, in respect of the appellant, Mr Jozinovic, second amended statement of claim, paras 1054(a), (b)(ii); para 1055(a)(iii); para 1056; para 1070A and para 1078A.

deceptive conduct. He did not state that this relief was also sought in the appellants' secondary recommendations case.

[21] Each appellant gave evidence and was cross-examined. Mr Horner also gave evidence and was cross-examined. No parties led evidence to suggest that the appellants' Participation Interests in the scheme were of value or that the loan agreement should not be set aside because the appellants had received something of value or that Mr Horner's recommendations were reasonable because the appellants had received valuable Participation Interests in the scheme.

[22] The amendment to the appellants' cases on the last day of trial has already been noted. The appellants' counsel said the amendment was to "tidy up things"; that it pleaded, among other things, the absence of any reasonable basis for Mr Horner's recommendation and sought "to add against [Plantation Equity] a claim for damages under the *Corporations Law*." Counsel for Banalasta and Plantation Equity stated the obvious: that as against his clients, agency was admitted.

[23] Counsel for the appellants at trial, in his written submissions, contended that Mr Horner made a recommendation to each appellant without having a reasonable basis for it, contravening s 851 of the *Law* and that as Mr Horner was the agent and authorised representative of Banalasta and Plantation Equity they must each be liable for Mr Horner's conduct both under the general law and the *Law*. Counsel for Banalasta and Plantation Equity contended in their written submissions that there was no pleading in the case against them that Mr Horner acted as agent for Banalasta and Plantation Equity in respect of any contravention of s 851 of the *Law* and no pleading as to s 817 to s 822 of the *Law*.

[24] The learned primary judge in his reasons accepted the latter contention. His Honour considered the natural reading of the amendments to the pleadings at trial[24] was that they related only to damages against Plantation Equity for the representations case; the late amendments which pleaded the contravention of s 851 of the *Law* did not refer to the plea of agency in para 10 nor to Banalasta or Plantation Equity. His Honour also noted that the issue of agency of the tenth and thirteenth defendants so far as it extended to the contraventions of s 851 of the *Law* was not explored in evidence at trial.[25]

The contentions on the appeal

[25] The appellants concede that whilst they specifically pleaded Mr Horner's general agency on behalf of Banalasta and Plantation Equity, they did not plead the legal conclusion arising from it insofar as their recommendations claims against Banalasta and Plantation Equity under s 851 of the *Law* were concerned, whereas they did so in relation to their representations cases. They contend that they were not obliged to plead that legal conclusion because they pleaded all the necessary material facts and issues and these were litigated at trial. Mr Horner was Banalasta's and Plantation Equity's admitted representative under the *Law*. On both the representations and the recommendations cases, the provisions of the *Law* made Banalasta and Plantation Equity liable for Mr Horner's conduct unless under s 820 of the *Law* they proved Mr Horner had not engaged in the conduct as Banalasta's representative. They did not do so and are liable to pay the appellants the damages

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24 Contained in para 1070A and the like paragraphs relating to other appellants.

25 *Borg & Ors v Northern Finance Pty Ltd & Ors* [2003] QSC 112; SC No 191 of 2000, 9 May 2003, [103].

assessed against Mr Horner. They claim that Banalasta and Plantation Equity could not have adduced any additional evidence to limit their liability for Mr Horner's unreasonable recommendations because both the representations and the recommendations cases turned on Mr Horner's conduct in marketing the tax minimisation scheme, an integral part of which was Plantation Equity's loan to each appellant to finance the purchase of their Participation Interests in the joint venture.

[26] Banalasta's and Plantation Equity's primary contention is that it was inherently unfair and prejudicial for the appellants to raise s 851 of the *Law* against them for the first time during submissions after the close of evidence at the trial: they had no notice of that claim in the appellants' pleadings or during the evidence at trial. They argue that this is especially significant where provisions like s 820(2) of the *Law* place an onus upon them to establish a "defence". They contend that the appellants could have, but did not, seek leave to amend their claim against Banalasta and Plantation Equity. This denied them the opportunity of leading evidence or cross-examining on the authority of their agent Mr Horner and the belief of each appellant so that if this Court allowed the appeal, a new trial would have to be ordered. In those circumstances, they contend that the appellants should not now be permitted to succeed on appeal on a point not taken at trial: *Whisprun Pty Ltd v Dixon*.[26] They also emphasise that the damages now sought by the appellants cannot equate simply to each appellant's outstanding loan amount against Plantation Equity because each appellant obtained Participation Interests under the joint venture which have a value. They emphasise that the only evidence at the appellants' trial and the trial on the counterclaim was that Banalasta's eucalyptus oil project is operational and apparently moderately successful. The respondents, with leave of the Court, filed an affidavit, more than three weeks after the appeal hearing, from chartered accountant, Mr Bradley Hellen. Mr Hellen deposes that the Participation Interests in the Banalasta Natural Oil Joint Venture Project No 1 prospectus on the material which he has considered is prima facie likely to have had a value at the time of its acquisition by the participant but that an accurate valuation by him would take at least three months or even longer to complete.

Conclusion

[27] Undoubtedly, the appellants' second amended statement of claim could have been more tightly drafted but the claims it contained were reasonably complex, involving 21 plaintiffs, 13 defendants and three separate schemes. Mr Horner's agency on behalf of Banalasta and Plantation Equity was clearly pleaded early in the statement of claim at para 10; it was subsequently admitted and was not an issue at trial; it does not seem it could have been. All appellants then pleaded in subsequent paragraphs that Mr Horner breached s 851 of the *Law*. His Honour found that the evidence established this. The pleaded claim in para 10, that Mr Horner had capacity to bind Banalasta and Plantation Equity, applied to all subsequently pleaded facts. It then followed as a matter of law if the pleaded fact that Mr Horner breached s 851 of the *Law* were established, Banalasta and Plantation Equity were liable under the *Law* for Mr Horner's conduct. Under UCPR r 149(1)(a), the pleading must be as brief as the nature of the case permits and whilst UCPR r 149(2) allows a party to plead a conclusion of law from pleaded material facts in support of the conclusion, it does not require it. The material facts supporting a case against Banalasta and Plantation Equity for liability for Mr Horner's unreasonable recommendations under s 851 of the *Law* was sufficiently pleaded; the

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26 [2003] HCA 48; (2003) 200 ALR 447, [51]-[52].

appellants' failure to plead the legal conclusions flowing from Mr Horner's agency and his recommendations contravening s 851 of the *Law* did not prohibit the appellants from pursuing their claim against Banalasta and Plantation Equity under the *Law*.

[28] At the trial, the facts surrounding Mr Horner's unreasonable recommendations, which were also those surrounding the more clearly pleaded representations case, were well ventilated. It was not surprising that the two cases merged both in evidence-in-chief and cross-examination. Banalasta and Plantation Equity have not demonstrated that they could have raised any other matters helpful to their cases had their liability under s 851 of the *Law* been more plainly and unequivocally pleaded. In any case, for the reasons already given I am satisfied the pleadings in and the conduct of the case were sufficient notice to Banalasta and Plantation Equity that the appellants' cases against them included a claim that they were liable under s 851 of the *Law* as Mr Horner's principals.

[29] It follows that his Honour erred in rejecting the appellants' claim against Banalasta and Plantation Equity under s 851 of the *Law*.

[30] The relief sought at trial against Plantation Equity included a declaration that each loan agreement was void. Mr H Fraser QC, for the appellants, concedes that remedy cannot be granted because the only remedy for a breach of s 851 of the *Law* is damages. Under UCPR r 658(2) a judge may grant relief beyond that specifically claimed where this is appropriate. This is such a case. If the appellants are entitled to damages for the amounts outstanding under the loan agreements they should be awarded those damages even though they originally claimed an entitlement to set aside the loan agreements rather than damages. The appellants are entitled to be placed in the position they would have been in had they not acted on Mr Horner's recommendation and taken part in the scheme: *Manwelland Pty Ltd v Dames & Moore Pty Ltd*.[27] Had they not taken up the joint venture, they would not have incurred the penalties and nor would they have entered into the loan agreement. On the other hand, as counsel for Banalasta and Plantation Equity points out, the appellants would not have had the benefit, if any, of their Participation Interests in the joint venture. Banalasta and Plantation Equity did not produce any evidence on the appellants' trial or on the counterclaim to show that the Participation Interests were of any value. After the matter was raised during argument on the hearing of this appeal, they have, at the eleventh hour, produced some scant evidence from a chartered accountant, Mr Bradley Hellen, that those Participation Interests may have had some value at the relevant time. Whether the Participation Interests had any value was always relevant to the issues pleaded at the trials of both the appellants' claim and the counterclaim. Banalasta and Plantation Equity had every opportunity to adduce that evidence. They did not do so then and even after being given the opportunity at the appeal hearing, they have failed to produce any cogent evidence of it. In the absence of such evidence, this Court can safely infer the Participation Interests have no or minimal value. The appellants are entitled to damages in the sum of the outstanding amounts for their loan agreements with Plantation Equity. This means that in practical terms they are entitled to have the judgment against them on the counterclaim set aside.

[31] I propose the following orders.

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[27] [2001] QCA 436; Appeal No 470 of 2001, 16 October 2001.

In Appeal No 5496 of 2004:

1. The appeal is allowed.

2. The learned primary judge's orders 4, 5, 7, 8, 107 and 108 of 28 May 2004 are set aside insofar as they concern the respondents to these appeals (the 10th and 13th defendants).

3. Judgment is instead entered for each appellant (the 4th, 7th, 16th, 17th, 19th and 21st plaintiffs) against the respondents (the 10th and 13th defendants) for the following amounts of loss and damage:

(i) 4th plaintiff: $9,264.19

(ii) 7th plaintiff: $14,771.37

(iii) 16th plaintiff: $1,113.75

(iv) 17th plaintiff: $990.00

(v) 19th plaintiff: $15,405.42

(vi) 21st plaintiff: $1,732.50.

4. The counterclaim of the 2nd respondent, Plantation Equity Pty Ltd (the 13th defendant), is dismissed.

5. The respondents to the appeal (the 10th and 13th defendants) are to pay the appellants (the 4th, 7th, 16th, 17th, 19th and 21st plaintiffs') costs of and incidental to the trial of the appellants' (the 4th, 7th, 16th, 17th, 19th and 21st plaintiffs') claims in SC No 191 of 2000 and of this appeal to be assessed.

6. The 2nd respondent, Plantation Equity Pty Ltd (the 13th defendant), is to pay the appellants' (the 4th, 7th, 16th, 17th, 19th and 21st plaintiffs') costs of the counterclaim to be assessed.

In Appeal No 5587 of 2004:

1. The appeal is allowed.

2. The learned primary judge's orders 4, 5, 7, 8, 107 and 108 are set aside insofar as they concern the 3rd and 4th respondents to this appeal (the 10th and 13th defendants).

3. Judgment is instead entered for the appellant (the 1st plaintiff) against the 3rd and 4th respondents (the 10th and 13th defendants) for loss and damage in the sum of $1,237.90.

4. The counterclaim of the 4th respondent, Plantation Equity Pty Ltd (the 13th defendant), is dismissed.

5. The 3rd and 4th respondents (the 10th and 13th defendants) are to pay the appellant's (the 1st plaintiff's) costs of and incidental to the trial of the appellant's claims in SC No 191 of 2000 and of this appeal to be assessed.

6. The 4th respondent, Plantation Equity Pty Ltd (the 13th defendant), is to pay the appellant's (the 1st plaintiff's) costs of the counterclaim to be assessed.

[32] **JERRARD JA**: In these appeals I have had the advantage of reading the separate reasons for judgment of McMurdo P and Chesterman J, and respectfully agree with each of their Honours' reasons for judgment, and with the orders proposed by the President. If those orders were not made, the learned trial judge's error as to agency not being pleaded would result in the appellants falling between two stools, solely because there were separate hearings to determine liability on the appellants' claim and on the counterclaim.

[33] **CHESTERMAN J:** The two appeals were heard together. The seven appellants were among the 21 plaintiffs who commenced an action in the Supreme Court against some 13 defendants. The six appellants in the first appeal sought orders only against the tenth and thirteenth defendants whom they made the respondents to their appeal. The appellant in the second appeal, Mr Borg, initially sought orders against four defendants but compromised against one and discontinued against another. In the end he, too, sought orders only against the tenth and thirteenth defendants, whom I shall therefore call 'the respondents'.

[34] The points raised in both appeals are identical and the respective cases of the appellants are indistinguishable one from the other. It is convenient and appropriate to refer to their arguments collectively.

[35] The appellants (and indeed all of the plaintiffs) were coal miners in central Queensland. They subscribed for what were called 'participation interests' in a joint venture whose long term objective was to produce and sell eucalyptus oil products, and whose short term objective was to provide substantial income tax deductions for the subscribers.

[36] Subscriptions for interests in the joint venture were actively promoted. The fourth defendant, which was not involved in the appeal, SecurInvest Accounting Services, was appointed the agent by the promoter of the joint venture to obtain subscriptions. The fourth defendant employed a salesman, Horner, who was the eighth defendant. The first and second respondents were respectively the manager of the joint venture and the financier. The respondents enjoyed common shareholding and directorships.

[37] An overview of the facts which gave rise to the action can be obtained from the 'Background to the Actions' set out in the reasons of the trial judge. His Honour said:

> '1. These actions had their origins in three tax minimisation schemes marketed in the coalfields of Central Queensland … The trial concerned the cases of the … plaintiffs against the fourth and eighth defendants, the sellers of two of the schemes and the tenth and thirteenth defendants which were respectively the manager and financier of the project underlying the third scheme.
>
> 2. … The third [scheme marketed] in the year ending 30 June 1999, concerned the Banalasta Oil Plantation … to produce eucalyptus oil and related products.

> 3. The salesman who actually dealt with the respective plaintiffs… [i]n respect of Banalasta … was Mr Horner. Mr Horner was also employed by the fourth defendant in connection with selling the schemes with which he was involved.
>
> 4. The problem which led to the proceedings was that the plaintiffs had claimed, in respect of schemes in which they were involved, taxation deductions for expenditures to which they had committed themselves under the schemes. These deductions were claimed under the self-assessment taxation regime. … Notices of assessment based on disallowance of the deductions in respect of Banalasta were issued in the first instance. …
>
> 5. … [T]he case of … the plaintiffs is that each of them was persuaded by the salesman to become a party to what became known as a "mass marketed tax scheme" on the basis of recommendations and representations made by the salesman. The pleadings allege that in the case of each plaintiff representations that investments in each of the schemes were lawfully tax deductible and that each of the schemes was approved by the Australian Taxation Office ("ATO") had been made. It was also alleged ... that, in truth and in fact, investments in each of the schemes did not provide lawful tax deductions … The plaintiffs had suffered loss and damage because the recommendations were neither genuine nor made in accordance with the law and the representations were misleading and deceptive.
>
> 6. The schemes operated on the concept that a substantial amount of the moneys refunded by the ATO on the basis that the expenditure was lawfully tax deductible was paid into the schemes once the refund had been received. The effect of the schemes was that the plaintiffs who were earning … $70,000 upwards were able to reduce their taxable incomes to varying sums in the vicinity of $20,000. Some plaintiffs gave evidence that they were told that at that level of income they would be entitled to benefits from the social security system … Some … had not taken advantage of this opportunity because … it would be immoral.'

[38] The 'Banalasta joint venture' was the third scheme referred to in the reasons. The appeal is concerned only with the third scheme, that involving the Banalasta joint venture.

[39] The first respondent issued a prospectus inviting subscriptions to the joint venture. It described the first respondent as the manager of the joint venture. Other relevant terms were:

> 'Introduction
>
> …..

The purpose of the Joint Venture is to research and develop technical know-how, intellectual property, formulations and product development and to then Commercialise the results of that research.

…

1. Contractual Structure

…

The Investment Deed

… The parties to the Investment Deed are:

A. The [first respondent].
[The first respondent] is appointed Manager of the Joint Venture under the Investment Deed. It will do all things necessary to set up the Joint Venture and to run the Joint Venture Business for and on behalf of the Participants …

D. Applicants who apply to become Participants
An applicant whose application has been accepted by the Manager will become a Participant in the Banalasta Natural Oil Joint Venture Project No. 1. Participants share the profits and assets of the Joint Venture in a proportion to the number of Participation Interests held compared with the total number issued.

…

Initial Fees

At the time of application each Participant will be required to pay fees for the first year as follows:

(a) a Research Fee of $3,000 for each … Interest; plus
(b) a (sic) Annual Management Fee of $3,500 for each … Interest…

On the first anniversary … each Participant will be required to pay …

(a) a Research Fee of $3,000 …
(b) a (sic) Annual Management Fee of $4,500 …

…

Finance Options

You will be required to pay upon application Research Fees and Management Fees for the first year totalling $6,500 for each Participation Interest for which you apply. You will also be required to pay fees totalling $7,500 for each … Interest for the second year on the first anniversary of the commencement of the Joint Venture.

> A company associated with the Manager, Plantation Equity Pty Limited … is prepared to advance funds … to finance their commitment to the Project …'

[40] The draft joint venture agreement attached to the prospectus defined 'Participation' to mean:

> '…the involvement in the Project that a … Participant acquires … and … includes:
>
> (a) the … Participant's rights and interests under the Joint Venture Agreement.
>
> (b) the … Participant's rights and interests under the Investment Deed; and
>
> (c) the Participant's rights to proceeds from the Project.'

[41] Each of the appellants accepted the invitation to borrow the fees payable on subscription from the second respondent.

[42] Despite the number of parties involved in the action and the complexity of issues litigated the resolution of the appeals comes down to a relatively simple point.

[43] Oversimplifying somewhat, the plaintiffs' case against the defendants was that the salesman employed to obtain subscriptions made material misrepresentations concerning the income tax consequences of becoming subscribers, and recommended subscription in circumstances where to become a subscriber was not in the plaintiffs' financial interest. The representations and the recommendation were said to have been made by the salesman Horner, the eighth defendant, as agent for (relevantly) the respondents who were, it will be remembered, the tenth and thirteenth defendants.

[44] The misrepresentations were said to amount to contraventions of s 52 of the *Trade Practices Act* 1974 (Cth), s 995 of the *Corporations Law* (Cth) and s 38 of the *Fair Trading Act* 1989 (Qld). The recommendations were said to have been made in breach of s 851 of the *Corporations Law*. The plaintiffs claimed damages against the defendants in amounts which represented the losses which they incurred by becoming subscribers. As well they sought to have their loan agreements with the second respondent set aside.

[45] The second respondent brought a counterclaim against the plaintiffs. It sought to recover the amounts which the appellants had borrowed from it to pay their subscription fees.

[46] The appellants' case predicated upon the alleged misrepresentations failed. The trial judge was not satisfied that what Horner said contravened the Acts. No challenge is made to these findings. The trial judge found however, with respect to each of the appellants, that Horner had made recommendations to the appellants which offended the terms of s 851. Horner and his employer, the fourth defendant, were found liable to pay to the appellants the amount of the losses they sustained by reason of acting on those recommendations to become subscribers. The amounts were, mostly, modest. Importantly for the appeal the trial judge did not ascribe Horner's (and the fourth defendants') transgression in making the recommendations

to the respondents. His Honour held that the question of agency as between Horner and the respondents had not been pleaded and it was inappropriate to make any finding of agency.

[47] The appellants had advanced as an answer to the second respondent's counterclaim the latter's alleged contravention of s 51 of the *Trade Practices Act*, s 995 of the *Corporations Law* and s 38 of the *Fair Trading Act*, and the recommendations in breach of s 851 of the *Corporations Law*. The first basis of defence failed with the finding that there had been no contravention of those sections. The second basis failed because Horner's breach of s 851 could not be imputed to the second respondent. Accordingly judgment was given in favour of the second respondent on its counterclaim against each of the appellants.

[48] The appellants complain that the trial judge was mistaken when he ruled that the question of agency as between Horner and the respondents in respect of the recommendations had not been pleaded and could not support a verdict in their favour against the respondents. The point turns on what was pleaded, and is a narrow one. Should the appellant succeed on this point a complication arises with respect to what, if any, relief is appropriate. The complication arises because of the unusual course which the trial took. It is appropriate first to deal with the critical point and then to address the complications to which the appellants' success would give rise.

[49] Section 851 of the *Corporations Law* provided that:

> '(1) A securities adviser who:
>
> (a) makes a securities recommendation to a person who may reasonably be expected to rely on it; and
> (b) does not have a reasonable basis for making the recommendation to the person;
>
> contravenes this section.
>
> (2) For the purposes of subsection (1), a securities adviser does not have a reasonable basis for making a securities recommendation to a person unless …
>
> (3) …'

[50] Section 852 provided that:

> 'This section applies where:
>
> (1) (a) A securities adviser contravenes section … 851 in relation to a … recommendation to a person (… the ***client***);
> (b) the client, in reliance on the recommendation, does … a particular act;
> (c) it is reasonable, having regard to the recommendation and all other relevant circumstances, for the client to do … that act in reliance on the recommendation; and
> (d) the client suffers loss or damage as a result of that act …

> (2) Subject to subsections (3) and (4), the securities adviser is liable to pay damages to the client in respect of that loss or damage.
>
> (3) …
>
> (4) In the case of a contravention of section 851, the securities adviser is not so liable if it is proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the securities adviser had about the client's investment objectives, financial situation and particular needs.'

[51] In dealing with this aspect of the case the trial judge said:

> '[35] The contravention of s 851 was based on an alleged failure to have a reasonable basis for making a securities representation. It was submitted that the fourth defendant was an investment adviser as defined by the *Corporations Law*, that the … eighth defendant [was a] securities representative of the fourth defendant and that … Mr Horner was a securities adviser. It was submitted that there was in each instance the making of a securities recommendation defined by s 9 of the *Corporations Law* …'

[52] It may be interpolated that the submissions summarised in this passage were accepted by the trial judge and were accepted by the parties, on appeal, to be correct.

[53] The trial judge continued:

> '[46] The evidence does not suggest persuasively that any of the salesmen conducted any inquiry at the time the project was being discussed about the particular plaintiff's investment objectives beyond a desire to reduce taxation by involvement in the scheme nor as to their particular needs …
>
> [47] It was submitted that a critical omission was that each salesman had failed to ascertain each person's individual objectives, financial situation and particular needs. …
>
> [52] [Mr Horner] admitted that he did no analysis of [the plaintiffs'] personal financial situation. He believed his function was to take clients' personal details and to find out their financial situation, put it in the computer and calculate how many units they should purchase. … A passage of … cross-examination illustrates … what he saw his position to be:
>
> > "… I was there to sell the product. I wasn't there on the financial planning capacity …"'

[54] The trial judge then dealt with each of the plaintiffs' cases in turn. With respect to the appellants his Honour found that:

> '[T]here was a contravention of s 851 … [and] that it [was] not proved that the recommendation was, in all the circumstances, appropriate having regard to the [appellants'] investment objectives, financial situation and particular needs'.

[55] There followed judgment for the appellants against Horner and his employer, the fourth defendant, for the amounts which represent the appellants' losses. The amounts were subject to agreement at the trial as between appellants and the fourth and eighth defendants. On the appeal, the respondents also accepted the accuracy of the amounts.

[56] With respect to the critical issue for the appeal – whether Horner was the respondents' agent – the trial judge said:

> '[102] … [Counsel for the respondents] made the following observations:
>
> > "… There is no pleading that the fourth or eight (sic) defendants acted as agents for the tenth or thirteenth defendants in respect of any contravention of section 851 of the *Corporations Law*. …"
>
> [103] The subject was taken up in … oral submissions. [Counsel] submitted, correctly, that the issue of agency of the tenth and thirteenth defendants so far as it extended to contraventions of s 851 had not been explored during the evidence. He expressed being surprised, having regard to the form of the pleadings, that the plaintiffs were not only relying on the representations case against his clients (which was pleaded and what he had expected to meet) but also the recommendations case (which he had not). It is necessary to pay some attention to the form of the pleadings having regard to this argument.
>
> [104] Typically in relation to the Banalasta scheme, the pleadings allege that Mr Horner recommended that the plaintiff invest in it. It is then alleged that "Horner …" did not have a reasonable basis for making the recommendation. Then it is pleaded that, in those premises, "Horner … contravened s 851 …". This was contrasted with the pleading in respect of the "representations case" where there was an express pleading that Mr Horner … Banalasta and Plantation Equity all engaged in conduct that was misleading or deceptive.
>
> [105] Further, in a typical pleading, prior to a late amendment referred to in paragraph [77], the only relief sought against the thirteenth defendant was an order declaring the loan agreement void for contravention of the prohibition against misleading or deceptive conduct. When that amendment was made, it was made only to a paragraph the natural reading of which was that it related to damages based on the same conduct. …

> [106] … I am driven to the conclusion that there is substance in [Counsel's] submissions and as the case has been conducted it is not open to now allege that the tenth and thirteenth defendants are liable for contraventions by the fourth and eighth defendants of s 851.'

[57] Unhappily, the submissions made by Counsel for the respondent inadvertently misstated the effect of the pleadings. The case was a complicated one involving a large number of claims by numerous plaintiffs against thirteen defendants. The statement of claim itself runs to more than 200 pages, so it is easy to overlook pertinent parts. The analysis undertaken on the appeal demonstrates beyond question that the fact of Horner's agency *vis-à-vis* the respondents was pleaded. Some important amendments were made to the statement of claim on the tenth day of the trial. These are the ones referred to in para 105 of the reasons, quoted above.

[58] Paragraph 10 of the statement of claim, as amended, alleged:

> 'At all times material to these proceedings Horner:
>
> (a) was an agent of … Banalasta Oil Plantation and Plantation Equity;' (the respondents)

It followed the same pattern for each of the appellants. The case of the appellant Borg was said to be typical as to his paras 97 and 98 alleged that at times and places identified Horner recommended that Borg should invest in the joint venture. Paragraph 99 then alleged:

> 'Horner … did not have a reasonable basis for making the recommendations pleaded in paragraphs 97(f) and 98(a)(vi) above.'

Paragraph 115 pleaded that:

> 'In the premises pleaded in paragraph 99 … Horner … contravened s. 851(1) of the *Corporations Law*.'

Paragraph 124 drew the strands together. It alleged:

> 'As a result of the conduct of Horner referred to in paragraphs 97, 98 and 99 … for which … [the respondents] are liable, Borg has suffered loss and damage as follows:
>
> (a) The Borg Third Scheme penalties;
> (b) The Borg Loan Demand.'

[59] The import of the description of loss will be considered later.

[60] Some amendments related uniquely to the appellant Jozinovic and made the pleading of his case identical to Borg's. The amendments also added paras 1070A, 1080A, 1080B and 1080C. With these additions the framework of the pleading, in respect to the other appellants, approximated that for the appellants Borg and Jozinovic. For these others, however, there was no pleading of the allegation found in paras 124 (Borg) and 1078A (Jozinovic):

> 'As a result of the conduct of Horner referred to … for which each of [the respondents is] liable [the appellant] has suffered loss and damage...'

The paragraphs to which reference back is made are those which alleged that Horner recommended that the appellants become subscribers to the joint venture, and had no reasonable basis for doing so.

[61] The omitted paragraph in the case of the five appellants is of no consequence. The material facts pleaded, with respect to agency in their cases, were that:

- At all material times Horner was an agent of the respondents (para 10 of the statement of claim)
- Horner recommended that these five appellants should become subscribers in the joint venture (para 1080A of the statement of claim).
- Horner had no reasonable basis for making the recommendations (para 1080B of the statement of claim).
- By reason of these facts Horner contravened s 851(2) of the *Corporations Law* (para 1080C of the statement of claim).

[62] What the claim for these five appellants omitted was the specific allegation that:

(a) the respondents were liable for Horner's groundless recommendation, as a result of which

(b) the appellants suffered loss.

The lack of the first allegation is supplied by the plea in para 10 that Horner was the agent for the respondents. The first element in paras 124 and 1078A, that the respondents were liable for Horner's conduct, is a statement of an obvious conclusion from the fact that an agent committed some wrong in the course of the agency. If the statement of claim pleaded the necessary facts, as it does, the omission of the legal conclusion from those facts does not matter. The statement of claim does not, as I read it, contain any express allegation that the five appellants suffered specified loss as a result of Horner's contravention of s 851. This is the content of the second element of paras 124 and 1078A. The pleading did, however, allege that the appellants had suffered loss by reason of the fact that Horner persuaded them to become subscribers. The omitted assertion of the particular causal link between the contravention of s 851 and the loss is immaterial. The material facts were pleaded. The pleader's failure to draw a narrative connection between two of them cannot, in the era of modern pleading, be allowed to have any consequence.

[63] The Court's attention was not drawn by Counsel to the discrepancy between the framework of the pleading in respect of the appellants Borg and Jozinovic and the others. We were invited to treat the case pleaded for the appellant Borg as typical of all the appellants. The Court was not invited to distinguish in the result between appellants on the basis of how their cases had been pleaded. It is clear that the amendments made to the statement of claim were intended to make the cases of the appellants conform with respect to what was called the 'recommendations case'. The trial appears to have been conducted on that basis subsequent to the amendment, and so was the appeal.

[64] There is no doubt that the statement of claim sought to make the respondents liable for Horner's contraventions of s 995 of the *Corporations Law*. The question whether Horner was acting as the respondents' agent was always a significant issue in the litigation. Horner's recommendations to the appellants, which the trial judge

found to have been made, were advanced in the same conversations in which Horner was alleged to have made the misrepresentations complained of. It is not possible that a distinction could have been made between Horner's authority to make a recommendation that the appellants participate in the joint venture and his authority to make representations designed to induce the appellants to participate.

[65] Prior to the commencement of the trial the appellants delivered a Notice to Admit Facts to the respondents. The facts which were duly admitted by the operation of *UCPR* 189 were:

- That Horner was an 'authorised representative' as defined in the *Corporations Law* of the respondents at all relevant times set out in the statement of claim.
- That Horner was an agent of the respondents at all relevant dates set out in the statement of claim.

[66] The *Corporations Law*, in fact, speaks of 'representatives', not 'authorised representatives'. The origin of this description appears to have been the respondents' own drafting. Exhibit 27 is a disclosure statement issued by the first respondent which described Horner as its 'authorized representative'. No point about the misdescription was taken until the exchange of submissions for the appeal when it was claimed that the admission should be disregarded because the admitted fact was 'a nonsense'. The import of the admission is plain. The respondents should be held to it.

[67] Exhibit 122 is a dealers licence issued to the first respondent by the Australian Securities Commission. It empowered the first respondent to carry on a securities business in relation to prescribed interests in the joint venture. The licence, in part, contained a certification by the first respondent that Horner, in connection with that securities business, 'acts for or by arrangement with' the first respondent. It was issued pursuant to s 807 of the *Corporations Law*.

[68] The first respondent expected Horner to recommend participation in its joint venture. Its disclosure statement recited that its securities dealer's licence was limited and:

> 'Accordingly, securities recommendations provided by the Company's authorised representatives are on a limited advice basis and contained to … specific projects.'

[69] The fact that the respondents admitted that Horner was their representative has legal, statutory, consequences. Section 817 of the *Corporations Law* provided that:

> 'Where a person engages in conduct as a representative of another person (… the ***principal***), then, as between the principal and a third person … the principal is liable in respect of that conduct in the same manner, and to the same extent, as if the principal had engaged in it.'

[70] Section 820 provided that where a representative engaged in conduct while he was a representative of his principal or principals, it is presumed that the representative engaged in the conduct as a representative of his principals.

[71] The combination of the admitted facts and the statutory provisions, including s 851, is that a finding of agency was inevitable.

[72] The respondents resist the appeal on the ground that the appellants asserted in it for the first time that Horner was their agent. They complain that the point was not taken at trial where they could have met it by an appropriate challenge to the appellants' evidence, or the adduction of their own evidence. The basis for this submission is that the question of Horner's agency on the 'recommendations case' was not pleaded and therefore was not litigated. As I have demonstrated it was pleaded. It was certainly litigated. The evidence I have just rehearsed makes that plain. It could not have been otherwise. The question of agency was critical to the respondents' liability. Horner was the only connection between the appellants and the respondents. As Senior Counsel for the appellants put it 'the question of vicarious responsibility was at the heart of the case against the [respondents]. It was the only basis on which they could be made liable.' The respondents accept that they were obliged to contest at the trial the question of Horner's agency with respect to the representations alleged to be made in contravention of s 995. It is impossible to draw a distinction between his authority to make representations on behalf of the respondents and any authority to make a recommendation. The statements by Horner which were legally analysed into representations in contravention of s 995 and recommendations in contravention of s 851 occurred in the same conversations. If agency was an issue in the litigation (as it was) with respect to the representation it was inexorably in issue with respect to those parts of the conversations which, on analysis, are said to amount to recommendations.

[73] Horner was cross-examined by Counsel for the respondents. He was not asked any questions relevant to his agency, which was admittedly an issue for the 'representation' case. It must be inferred that Horner's status and capacity as agent was not challenged in relation to the case. No distinction is possible between that case and the 'recommendation' case, in terms of agency.

[74] The trial judge, in effect, found that Horner was the respondents' agent in the passages from the judgment which I have quoted. It would not have been sensible to find agency in respect of the representations but not the recommendations. His Honour did not purport to do so. The appellants lost against the respondents only because his Honour accepted the respondents' submission that agency, in that regard, had not been pleaded.

[75] A problem arises because of the nature of the relief claimed, and the course the action took. On 9 May 2003 the trial judge delivered his reasons and 'Findings of fact and liability of fourth, eighth, tenth and thirteenth defendants …'. His Honour adjourned to a future date the 'Consideration of thirteenth defendant's counterclaim, quantum, final orders and costs.' On 19 May 2003 the appellants' solicitors wrote to the respondents' solicitors to point out respectfully, that they considered that the trial judge had erred 'in not drawing the link between the breach (… found) of Section 851 … by Horner … with the liability that flows from that to the [respondents].' The letter went on to present the argument which, at greater length, was presented on appeal. The letter then invited the respondents to consent to an order dismissing the second respondent's counterclaim and relisting the matter before the trial judge so that his Honour might correct the findings as to agency.

[76] The respondents' solicitors replied on 28 May. They declined the invitation.

[77] There was another problem. The appellants had claimed against the respondents, *inter alia*, damages representing the losses they suffered by their becoming

subscribers. They also sought orders invalidating the loan agreements and exonerating them from liability to repay the loans. The juridical basis for this relief was s 87 of the *Trade Practices Act*, and/or s 1325 of the *Corporations Law*. Relief could be awarded only if the Court had found a contravention of s 52 of the *Trade Practices Act* or s 995 of the *Corporations Law*. It had not done so. Contravention of s 851 gives rise to a right to recover damages but no right to have a transaction entered into as a consequence of the contravention set aside.

[78] The consequence was that no order had been made against which an appeal could be instituted. However the trial judge had explicitly found that the respondents were not liable for Horner's contraventions of s 851. With the dismissal of the appellants' claim based upon alleged misrepresentations there was no basis, in view of the findings, on which the appellants could resist the second respondent's counter claim for moneys due pursuant to the loan agreements.

[79] The appellants' only effective remedy was to amend their prayer for relief to claim damages equal to the amounts which the second respondent sought to recover as moneys due under the loan agreement or as damages for breach of them. The problem for the appellants was that the trial judge would not entertain any such application to amend because of the finding that the second respondent was not liable for Horner's contravention of s 851.

[80] Accordingly on 28 May 2004 the trial judge entered judgment in accordance with his Honour's reasons, which had the consequences I have just described. The relevant judgments were as follows:

Borg

(i) Judgment against the fourth defendant for $1,237.50.
(ii) Judgment for the respondents in respect to the claim against them.
(iii) Judgment of the counter claim for the second respondent for $116,236.69.

Coppo

(i) Judgment against the fourth and eighth defendants for $9,264.19.
(ii) Judgment for the respondents on the claim against them.
(iii) Judgment for the second respondent on the counter claim for $54,357.59.

Gottke

(i) Judgment against the fourth and eighth defendants for $14,771.37.
(ii) Judgment for the respondents on the claim against them.
(iii) Judgment for the second respondent on the counter claim for $69,887.55.

Sich

(i) Judgment against the fourth and eighth defendants for $1,113.75.
(ii) Judgment for the respondents on the claim against them.
(iii) Judgment for the second respondent on the counter claim for $104,613.82.

Cameron

(i) Judgment against the fourth and eighth defendants for $990.00.
(ii) Judgment for the respondents on the claim against them.
(iii) Judgment for the second respondent on the counter claim for $92,989.35.

Rapson

(i) Judgment against the fourth and eighth defendants for $15,405.42.
(ii) Judgment for the respondents on the claim against them.
(iii) Judgment for the second respondent on the counter claim for $62,121.82.

Jozinovic

(i) Judgment against the fourth and eighth defendants for $1,732.50.
(ii) Judgment for the respondents on the claim against them.
(iii) Judgment for the second respondent on the counter claim for $79,162.92.

[81] The appellants seek orders that they have judgment against the respondents for the amounts given against the fourth and/or eighth defendants. The only basis on which such an order was not made after the trial was that it had not been pleaded that the respondents were the eighth defendant's principal and liable in respect of his contraventions of s 851. For the reasons given, the basis is erroneous and judgment for those amounts should have been given against the respondents.

[82] The only obstacle in giving judgment for the appellants against the second respondent for the same amounts for which judgment was given against them on the counterclaim is that no such specific relief was sought in the prayer for relief. *UCPR* 156 provides that:

> 'The court may grant general relief or relief other than that specified in the pleadings irrespective of whether general or other relief is expressly claimed in the pleadings.'

UCPR 658 provides that:

> '(1) The court may … make any order … that the nature of the case requires.

> (2) The court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim … or similar document.'

[83] The present is a case where the power should be exercised. The relief given to the appellants following the trial was limited because of the misconception as to agency with which I have been dealing in these reasons. But for that misconception, for which the inadvertence of counsel for the respondents was responsible, there would have been findings that the respondents were vicariously responsible for Horner's contraventions of s 851. The financial consequences were obvious. They were the losses suffered by each appellant as well as the amounts for which they were liable under the loan agreements. They had claimed the former amounts, but not the latter, but the rules provided a ready means by which they could recover both established heads of damage.

[84] The respondents resisted any order that they pay as damages to the appellants the amounts for which the appellants were found liable on the second respondent's counterclaim. The reason advanced by the respondents was that the amount of loss the appellants suffered by reason of becoming subscribers and borrowing money would only equal the amount due under the loan agreements if their subscriptions were of no value. The true measure of any loss was said to be the amount due under the loan agreements less the value of the participation interests subscribed for. There was no evidence of what, if any, value the interests had. Accordingly, the respondents submitted, the appellants had not proved their loss. Alternatively, the respondents submitted, the Court should remit the assessment of damages to the trial judge for a further hearing and adjudication.

[85] In my opinion the respondents' objections to the entry of judgment against them for an amount equivalent to the judgments on the counterclaim should be rejected. There are two reasons: the *first* is that, if the point had any substance, it should have been raised by the respondents in their pleading and at the trial. The appellants pleaded that they were entitled to have the loan agreements set aside by reason of the alleged contraventions by the respondents' agent of s 52 *Trade Practices Act* and s 995 *Corporations Law*. That case failed but the respondents were obliged to plead to it. *UCPR* 166 obliges a defendant to explain why it denies, or does not admit, a fact alleged against it in a statement of claim. The appellants all alleged that they had suffered loss, being the amount they were required to pay under the loan agreements, by reason of the respondents' contraventions of the *Corporations Law*. The respondents did not dispute that allegation on the basis that the appellants had received any value for the money they had borrowed to pay subscription fees. *UCPR* 150(4) required the respondents to plead, specifically, any matter which they alleged made the appellants' claim not maintainable. They did not plead that they could resist the appellants' claims for damages because the appellants got value for money.

[86] It is the respondents who are seeking to raise on appeal a new point for the first time and it is clearly a point which could have been determined by evidence. This leads to the second ground for rejecting the submissions. It is that there was no evidence called as to the value of the appellants' interests in the joint venture. The point was of considerable importance. It would have been a good answer to the claims to have the loan agreements set aside that the appellants had received something of value in exchange. At the very least the loans would have been set aside only on terms as to

proper recompense for the value obtained by the appellants. The fact that the respondents did not bother to adduce any such evidence strongly suggests that there was none.

[87] The Court invited the respondents to furnish it with an affidavit showing the nature of evidence that could be led on the point. If there were substance in the claim that the appellants received value for money justice might require that there be a retrial on the question of what damages the appellants should recover against the respondents. It was made clear that the affidavit should deal with particularity about the value of the appellants' interests in the joint venture and the basis for asserting the value. The affidavit received is from an accountant experienced in valuing partnership interests. He describes what steps he would take to determine the value of the appellants' interests. The most that is said is that the participation interests 'prima facie [were] likely to have had a value …'. It is clear that the respondents have not to date undertaken any investigation of whether in fact the interests have or had any value.

[88] It is too late now to embark upon such an investigation. The only proper inference is that no worthwhile evidence on the point was available.

[89] In my opinion the appeals should be allowed. I agree with the orders proposed by the President.