SUPREME COURT OF QUEENSLAND

CITATION:	*Donne Place P/L & Ors v Conan P/L* [2005] QCA 481
PARTIES:	**DONNE PLACE PTY LTD** ACN 104 145 940 (plaintiff/first defendant by counterclaim/appellant) **VICTOR MARK McINMAN** (second defendant by counterclaim/appellant) **KAREN ELIZABETH McINMAN** (third defendant by counterclaim/appellant) **v** **CONAN PTY LTD** ACN 085 375 328 (defendant/respondent)
FILE NO/S:	Appeal No 5273 of 2005 DC No 44 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	23 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2005
JUDGES:	McMurdo P, Keane JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. The appellant is to pay the respondent's costs of the appeal to be assessed on the standard basis**
CATCHWORDS:	CONTRACTS - GENERAL CONTRACTUAL PRINCIPLES - DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH - CONDITIONS - CONDITIONS AND WARRANTIES - where the appellant Donne Place Pty Ltd had contracted with the respondent to purchase a restaurant business located in Noosa - where the respondent gave contractual warranties that it had obtained all licences and permits necessary for the running of the business and was not in contravention of any licence or permit that had been obtained - where the respondent also warranted that there were no outstanding lawful requisitions issued with respect to the business by any relevant authority - where the respondent held a permit from the Noosa Council to discharge trade waste on the basis that a new grease arrestor was installed - where it was impossible to install the grease arrestor and the Council was content to charge a

'noncompliance charge' in lieu - where the respondent had paid this charge each year for five years leading up to the sale of the business - whether the Council could be said to have given its 'approval' to the continued discharge of trade waste by the respondent - whether the terms of the trade waste permit issued by the Council constituted a legal impediment to the running of the business - whether the respondent was in breach of the contractual warranties that it had given - whether the appellants were entitled to terminate the contract for any such breach

CONTRACTS - VENDOR AND PURCHASER - DISCLOSURE OF MATERIAL FACTS - HOW FAR CAVEAT EMPTOR APPLIES - where it was alleged that the respondent had engaged in misleading and deceptive conduct by failing to reveal that it had not complied with a condition of the trade waste permit that had been issued to it by the Noosa Council - whether the appellants could have possessed a reasonable expectation that disclosure would be made - whether, in light of all the relevant circumstances, the conduct of the respondent had been misleading or deceptive

DAMAGES - MITIGATION OF DAMAGES - WHAT MATTERS MIGHT BE CONSIDERED - where the respondent resold the business to a new purchaser after the appellants purported to terminate their contract with the respondent - where the learned trial judge held that this termination actually amounted to a repudiation of the contract and that the respondent was entitled to an award of damages reflecting the difference between the price that had been set between the parties and the price actually obtained by the respondent upon a successful sale - where the appellants contended that the respondent had failed to take appropriate action to mitigate its damage - where it was asserted that the lower price obtained by the respondent from the subsequent purchaser was the result of the respondent causing the departure of the restaurant's chef and disclosing the breach of the trade waste permit - whether the appellants were able to establish that the respondent had failed to properly mitigate its loss

Sewerage and Water Supply Act 1949 (Qld), s 3
Standard Sewerage Law (Qld), s 24, s 51
Trade Practices Act 1974 (Cth), s 52, s 87
Water Act 2000 (Qld), s 469, s 470

Dubois v Ong & Anor [2004] QCA 185; Appeal No 8429 and Appeal No 11260 of 2003, 28 May 2004, cited
Lam v Ausintel Investments Australia Pty Ltd (1989) 97 FLR 458, applied

COUNSEL: S J Keim SC, with L Alford, for the appellants
R P S Jackson for the respondent

SOLICITORS: McKenzie Lawyers for the appellants
Sykes Pearson & Miller for the respondent

[1] **McMURDO P:** This appeal should be dismissed with costs for the reasons given by Keane JA.

[2] **KEANE JA:** By a written agreement dated 23 June 2003, but not finally concluded until 26 June 2003, Donne Place Pty Ltd ("the appellant") agreed to purchase from Conan Pty Ltd ("the respondent") the business known as Michel's Restaurant ("the Business") conducted at premises on Hastings Street, Noosa. Mr and Mrs McInman (who are also appellants) guaranteed the performance of the appellant's obligations as purchaser. The contract price was $230,000. A deposit of $10,120 was paid by the appellant. The contract provided for completion on 1 August 2003.

[3] By letter dated 1 August 2003, the appellant purported to terminate the contract on the footing that the respondent was in breach of cl 8.1(b) and cl 19.1 of the Standard Conditions of Sale contained in the contract. The respondent treated the appellant's purported termination as a repudiation of the contract by the appellant.

[4] Both parties commenced proceedings with a view to vindicating the stances they had adopted. These proceedings were consolidated before trial. On 3 June 2005, the learned trial judge gave judgment for the respondent for $68,276.80 in damages, and dismissed the appellant's claim to recover its deposit.[1]

[5] The appellant contends that the learned trial judge erred in failing to conclude that it was entitled to terminate the contract, either pursuant to cl 8.1(b) and cl 19.1, or by reason of s 52 and s 87 of the *Trade Practices Act* 1974 (Cth) ("the TPA"). In order to appreciate the arguments advanced on the appeal, it is necessary to set out the relevant terms of the contract and the factual circumstances in which the contract came to be applied. It will then be possible to summarise the arguments agitated by the appellant and to discuss the merits of those arguments.

The Contract

[6] The contract was substantially in the terms of the standard form contract for the conveyance of leasehold businesses adopted by the Real Estate Institute of Queensland. The Standard Conditions of Sale were relevantly as follows:

> "8.1 Vendor's Statements
>
> The Vendor states and assures the Purchaser that except as otherwise disclosed in this Contract:
>
> …
>
> (b) to the best of the Vendor's knowledge and belief the Vendor has applied for or obtained all licences, permits[,] patents, certificates, consents or other approvals from any competent authority necessary for the proper carrying on of the Business and that there is not, and at the date of Completion there will not be, any subsisting contravention of any licence, permit, patent, certificate, consent or other approval obtained by the Vendor in relation to the premises for the carrying on of the Business;
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> …

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1 *Donne Place Pty Ltd v Conan Pty Ltd* [2005] QDC 217; DC No 44 of 2003, 3 June 2005.

(e) that the Vendor will execute all such documents and give such other assistance as the Purchaser may reasonably require to enable all right title and interest held by the Vendor in the Business and the Business Assets mentioned in items J, K, L(a) and M to vest in the Purchaser on Completion, free from … any restriction;

…

8.2 Where there is a breach of clause 8.1 the parties agree that:

(a) the Purchaser may terminate this Contract by notice in writing to the Vendor and may sue the Vendor for damages for the loss suffered arising from the breach; or

…

8.3 Purchaser's Statements

The Purchaser states and assures the Vendor that:

(a) the Purchaser has entered this Contract after satisfactory personal inspection and investigation of the premises, Business, stock-in-trade, licences and other Business Assets and the Purchaser has perused such records of financial transactions relating to the Business as the Purchaser has desired to inspect;

…

19.1 The Vendor warrants that at the date of this Contract to the best of the Vendor's knowledge and belief there are no unsatisfied lawful demands, requisitions, notices, orders or other communication to which attaches any legal impediment (each a 'Requisition') in respect of the Business or the premises by any local authority or other competent authority having jurisdiction in respect of the use and occupation of the Business or the premises. Any Requisitions issued prior to the date of Completion by a court, local authority or competent authority having jurisdiction in respect of the use and occupation of the Business or the premises shall be fully complied with by the Vendor at the Vendor's cost and expense prior to the date of Completion and any work performed by or on behalf of the Vendor to satisfy any such Requisitions shall be carried out in a proper and workmanlike manner.

19.2 If the cost of complying with all such Requisitions exceeds the amount nominated in Item W, then the Vendor may by notice in writing to the Purchaser terminate this Contract, unless the Purchaser elects to pay the difference.

19.3 If the Purchaser does not elect to pay the difference under Clause 19.2 the Purchaser may terminate this Contract by notice in writing to the Vendor and in that event all Deposit and other monies received by the Vendor or the Stakeholder on account of the purchase price shall be refunded to the Purchaser in full.

…

31.1 The Vendor's right to terminate this Contract or to affirm this Contract accrues where the Purchaser breaches this Contract by failing to:

(a) pay the balance of the purchase price at all or in the manner required by clause 6; or

…

31.3 If the Vendor terminates this Contract under clause 31.1 the Vendor may:

(a) forfeit the Deposit (or that portion of it which has been paid) and sue the Purchaser for damages (or both); or

(b) resell the Business, Business Assets and stock-in-trade as owner and if the re-sale is completed within two (2) years after the date of termination of this Contract may recover any shortfall in the purchase price together with all expenses and any other consequential loss suffered by the Vendor in such resale as liquidated damages from the Purchaser.

…"

[7] The relevant provisions of the Items Schedule to the contract were as follows:

"K LICENCES, PERMITS, PATENTS, CERTIFICATES AND CONSENTS:

Liquor Licence, Department of Workplace Health and Safety Registration; Food and Hygiene Regulations Licences from Noosa Shire Council; Trade Waste Certificate from Noosa Shire Council

…

W REQUISITIONS:

Amount to be limited to: $5,000.00"

Factual background

[8] Immediately before the contract was made, the respondent held a Permit To Discharge Trade Waste, valid from 1 July 2002 to 30 June 2003, issued by the Noosa Council ("the permit"). On its face, it purported to be issued by the Council pursuant to the *Sewerage and Water Supply Act* 1949 (Qld) and the *Standard Sewerage Law* (Qld).[2] In truth, the permit was a trade waste approval issued pursuant to s 469 of the *Water Act* 2000 (Qld) ("the Act").[3] The permit gave permission for the discharge of trade waste from the Business into the Council's sewer. The issue of such permits occurred under the Trade Waste Policy ("the Policy") adopted by the Council in May 1996. It was common ground that the Business could not be operated if the trade waste from the Business could not be discharged into the Council's sewer.

[9] Section 469(1) of the Act authorised the Council to give a trade waste approval to "a person". In conformity with the evident limitation on the Council's powers to grant an approval only to an identified person, the permit stated on its face that it could not be "transferred or assigned".

[10] By s 470 of the Act, the Council was authorised to give a trade waste approval on conditions. A condition of the permit was: "New Arrestor Required". In this regard, the permit provided:

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[2] This legislation has now been repealed: See *Plumbing and Drainage Act* 2002 (Qld), s 147. The *Standard Sewerage Law* was a regulation made under s 3 of the *Sewerage and Water Supply Act* 1949 (Qld) to "make provision with respect to sewerage, sanitary conveniences and stormwater drainage".

[3] Section 1048B of the *Water Act* 2000 (Qld) provides that any trade waste approval given under the *Standard Sewerage Law* is to be taken, from the commencement of s 1048B, to be a trade waste approval granted under s 469 of the *Water Act* 2000 (Qld). Section 1048B commenced on 19 April 2002: See Proclamation, Subordinate Legislation 2002 No 69.

> "**A new minimum 1000 litre grease arrestor is to be installed**. The new arrestor is to … comply in all respects with the Noosa Trade Waste Policy.
> **Council reserves the right to apply Clause 7.6 of the Trade Waste Policy (Non Compliance Charges) from 30 October 1997 where the Sewer Admission Limits are exceeded or there is a failure to comply with the Permit Conditions**." (emphasis in original)

[11] On 25 June 2003, the Council issued an Approval to Discharge Trade Waste valid from 1 July 2003 to 30 June 2004 ("the approval"). It was expressed to be issued pursuant to the Act. It contained the same operative provisions as the permit that had been in effect until 30 June 2003.

[12] It is common ground that the cost of installing the grease arrestor was in excess of $10,000.

[13] The learned trial judge found as a fact that the respondent was not aware that approval of 25 June 2003 had issued when the contract was signed.[4] That finding is not challenged by the appellant.

[14] The learned trial judge accepted the evidence of Mr Harris, the Council's Trade Waste Officer, that, because the installation of the new grease arrestor was difficult or impossible, the requirement for the installation of the grease arrestor was not enforced by the Council and, instead, a noncompliance charge of $1,200 per annum (for 2003) was imposed pursuant to cl 7.6 of the Policy. This had been the position during the five years that the respondent had owned the Business.

[15] Mr Harris' evidence was that, subject to there being no substantial change in the way the business was operated, it was likely that the noncompliance charge would continue to be levied and the Council would not seek to enforce its requirement for installation of the grease arrestor if the appellant applied for and was granted an approval. The appellant had not applied for a trade waste approval, but Mr Harris' evidence was to the effect that it is likely that, if it had applied, the appellant would have been granted an approval on the same conditions as applied to the approval granted to the respondent.

[16] The learned trial judge held, on the basis of his acceptance of Mr Harris' evidence, that:

> "installation of the grease arrestor would not be required and instead a non-compliance charge would continue to be levied for the foreseeable future. [The appellant] could have applied for such a permit prior to settlement but did not do so. On the evidence of Mr Harris, I accept that the Council would have issued a permit to [the appellant] in similar terms to that issued to Michel's Restaurant (i.e. [the respondent]) and subject to the same non-compliance charge.
> It follows, in my view, that there was no legal impediment to running the business by reason of the Notice. There was therefore no lawful basis for [the appellant] to terminate the contract arising from the Notice dated 25 June 2003."[5]

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4 *Donne Place Pty Ltd v Conan Pty Ltd* [2005] QDC 217; DC No 44 of 2003, 3 June 2005 at [11].

5 *Donne Place Pty Ltd v Conan Pty Ltd* [2005] QDC 217; DC No 44 of 2003, 3 June 2005 at [12] - [13].

The arguments on appeal

[17] The appellant disputes the relevance of Mr Harris' evidence but not its accuracy. Mr Harris' evidence seems largely to reflect the practical operation of the law relating to the disposal of private trade waste through Council infrastructure. As I have mentioned, the Council had adopted a Policy to deal with such matters in May 1996. It was adopted pursuant to s 3 of the *Sewerage and Water Supply Act* 1949 (Qld) and s 24 and s 51 of the *Standard Sewerage Law* (Qld). Under s 470 of the Act, the Council was authorised to give a trade waste approval on conditions, and the Council's Policy explains the purpose of the reference in the permit and the approval to cl 7.6 of the Policy. Clause 14 of the Policy provided that "[i]n an existing situation where a grease arrestor is required for pre-treatment but can not [sic] be installed due to specific site constraints, a non compliance [sic] charge (clause 7.6) will apply". Clause 7.6 sets out a formula for calculating noncompliance charges where the Council has agreed to accept waste in excess of the general limits. The legal effect of the permit or approval can be understood by reference to the scheme established by the Act, the Policy and the decision of the Council reflected in the document evidencing the permit or approval. There is, therefore, some force in the appellant's contention that Mr Harris' evidence as to the "attitude" of the Council to the permit or approval adds little of relevance to an understanding of the scheme of rights and duties involved in the grant of a trade waste approval. As will be seen, however, Mr Harris' evidence was relevant in another significant respect.

[18] The appellant submits that the Council's attitude to noncompliance with the condition of the permit or approval as to the installation of the grease arrestor is irrelevant to the legal conclusions for which it contends. The appellant argues that, as a matter of law, there was a subsisting contravention of the permit at the date of the contract which became, in the absence of any relevant change, a subsisting contravention of the approval current at the date of completion. The appellant argues that whether or not the Council chose to take action as a result of that contravention was irrelevant to whether there was, in truth, a contravention of the permit or approval. Hence it is said that the respondent was in breach of cl 8.1(b) of the contract both at the date of the contract and at completion. The appellant also submits that there was a legal impediment to the continued carrying on of the Business as at the date of completion and, hence, a breach of cl 19.1. Next, the appellant contends that, because the relevant provisions of the contract involved the making of representations by the respondent for which there was no reasonable basis, these breaches of contract also involved contraventions of s 52 of the TPA. The appellant also contends that a letter dated 11 June 2003 from the solicitors for the respondent was misleading and deceptive in that it stated that: "Our client is of the attitude that there should not be any requisitions as he understands the restaurant is kept to a high standard". Finally, the appellant also argues that, in any event, the respondent failed to mitigate the damages suffered by it as a result of the loss of the sale to the appellant. I will deal with these arguments in turn.

Was the respondent in breach of cl 8.1?

[19] As to whether the respondent was in breach of cl 8.1(b), the appellant contends that the issue is whether, at either the making or completion of the contract, there was a contravention of the permit or the approval "in relation to the premises for the carrying on of the Business". In this regard, it is true that the respondent had not complied with the condition as to the installation of the grease arrestor, but it does not follow that the respondent was in breach of cl 8.1(b) of the contract.

[20] It may be accepted that the evidence of Mr Harris that the Council would continue to allow the use of its facilities for the disposal of the respondent's trade waste is not apt to establish that there was not a "contravention" of the permit; but the evidence of Mr Harris was also relevant to establish, as a fact, that the Council had chosen to exercise the right, referred to in the permit and the approval, and contemplated by cl 14 of the Policy, to impose a noncompliance charge as the price of its agreement to accept the respondent's trade waste. When the Council agreed to accept the respondent's trade waste in return for the fee, the effect of the permit in the events which had happened was that the respondent was entitled to continue to dispose of its trade waste through the Council's facilities because the Council had agreed to an alternative mode of compliance on the part of the respondent with its obligations under the permit. The fee was payable, not as a sanction for noncompliance with the condition as to the installation of the grease arrestor, but as the price of the Council's agreement to allow the respondent's trade waste to be disposed of through the Council's infrastructure notwithstanding the absence of the grease arrestor.

[21] To put the point somewhat differently, under the relevant provisions of the Act the question whether or not a business was to have permission to discharge trade waste, and the conditions on which such discharge could occur, was wholly a matter for the Council. It should be remembered that there is no requirement that any approval given under s 469 of the Act must be in writing. The section only refers to "giving an approval to discharge trade waste". There is nothing to suggest that the word "approval" should not be given its ordinary and natural meaning.

[22] The *Macquarie Dictionary* defines "approval" as being "the act of approving" or as meaning "sanction; official permission". It goes on to define "approve" as being "to pronounce or consider good" or as meaning "to confirm or sanction officially; ratify".[6] It has previously been held that an "approval" requires a positive act of assent, confirmation or approbation.[7] It has also been held that, in order to find that a body has given its approval to some arrangement it is necessary for that body to "have had full knowledge of it, and deliberately and intentionally signified their approval of it".[8]

[23] The decision by the Council to allow the respondent to discharge trade waste into the sewer system in return for payment of the noncompliance charge was made by the Council in conformity with the terms of the Policy that the Council had adopted to deal with such circumstances. These are sufficient manifestations of the Council's agreement to approve the respondent's continued discharge of trade waste into its sewer system despite the failure to install a grease arrestor. The respondent was not in contravention of that approval so long as it made the required payments.

[24] Accordingly, there was, in my opinion, no "contravention" of the permit or the approval either at the date of contract or completion. Where noncompliance with a condition of a permit is allowed upon payment of a fee on terms contemplated by other provisions of the permit, the noncompliance with the first-mentioned

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6 A Delbridge, JRL Bernard, D Blair, S Butler, P Peters & C Yallop (eds), *The Macquarie Dictionary* (3rd ed, 1997) at 97 - 98. Other dictionaries provide similar definitions: see, eg, JA Simpson & ESC Weiner (eds), *The Oxford English Dictionary* (2nd ed, 1989) at 587 - 588. See also *McDonald's System of Australia Pty Ltd v McWilliam's Wines Pty Ltd (No 2)* (1979) 28 ALR 236 at 248.

7 *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50 at [540]; (2003) 128 FCR 1 at 133.

8 *Davis v Corporation of Leicester* [1894] 2 Ch 208 at 234.

condition cannot be regarded as a contravention of the permit. Noncompliance with one of two alternative ways of performing a person's obligations under a contract is not a breach of the contract if the other mode of performance is observed. Equally, there has been no breach of the permit where there has been noncompliance with one acceptable mode of performance of the obligations created thereby, but performance in conformity with the other acceptable mode of performance. For the reasons I have given, the respondent had the Council's approval at all relevant times.

[25] This conclusion makes it unnecessary to determine the correctness of the respondent's argument that the appellant was precluded by cl 8.3 of the contract from seeking to rely upon the existence of the condition as to the installation of the grease arrestor in the terms of the permit or approval as itself establishing a contravention of cl 8.1(b) of the contract. It may be said, however, that there is force in the respondent's argument. The effect of cl 8.3(a) of the contract is to establish as between the appellant and the respondent the convention that the appellant is aware of the terms of the permit and, hence, of the condition. The clause deems a purchaser to have undertaken a satisfactory inspection of, among other things, the "Business Assets" of the Business to be sold. The definition of "Business Assets" contained in cl 3.1 and cl 3.2 of the contract expressly refers to "permits". The appellant's pleaded case, and the case advanced by it at trial, was that the existence of the condition in the permit or approval constituted the relevant "contravention" on the respondent's part for the purposes of cl 8.1(b). To the extent that this was the substance of the appellant's case of breach of contract, cl 8.3(a) deemed the appellant to be aware of the condition when it entered into the contract. Mr R P S Jackson of Counsel for the respondent protested that the case advanced on appeal for the appellant involved a departure from the case agitated at trial in that the appellant now sought to assert that the "contravention" subsisted in the non-performance of the condition. There is force in Mr Jackson's protest. As I have said, however, it is not necessary to resolve these arguments or to determine their consequences.

[26] Further, looking at the matter more broadly, one may say that, so far as the operation of the Business by the appellant required the obtaining of a trade waste approval from the Council, the provisions of cl 8.1(b) were irrelevant. Clause 8.1(b) is concerned, in terms, only with approvals or permits obtained by the vendor in relation to the premises for the "carrying on of the Business". This provision cannot be understood, either as a matter of law or commercial common sense,[9] as obliging the vendor to obtain approvals or permits which can only be obtained, as a matter of law, by the purchaser.

[27] Further, s 469 of the Act provides that a trade waste approval may only be given to "a person" rather than as an attachment to premises. No doubt this limitation on the grant of a trade waste approval to particular persons is intended by the legislature to ensure that there can be no trade in these approvals, and that they are given only to those persons who satisfy the local government that they are appropriate permittees. As a result, the trade waste approval obtained by the respondent stated on its face that it was not assignable. These factors meant that, insofar as it was considered

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[9] Which may be the same thing in the present case given that, where a commercial contract is involved, the law "generally favours a commercially sensible construction": see the comments of Lord Steyn in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 77 recently referred to with approval by the Victorian Court of Appeal in *MLW Technology Pty Ltd & Anor v May* [2005] VSCA 29; No 2085 of 2002, 28 February 2005 at [76] - [81].

desirable for the appellant to obtain a trade waste approval in order to carry on the Business, the responsibility for that necessarily lay with the appellant. That this was so was obvious; and Mr McInman did not seek to contend otherwise.

[28] The only arguably relevant provision of the contract in this regard was cl 8.1(e) under which the respondent was obliged to provide the appellant such assistance as it might reasonably require of the respondent to obtain a trade waste approval being a Business Asset mentioned in Items Schedule K. There has never been any suggestion that the appellant made any request for assistance from the respondent in this regard, or that the respondent refused to act upon such a request.

Was the respondent in breach of cl 19.1?

[29] I turn then to consider the arguments which arise in relation to the appellant's contention that the respondent was in breach of cl 19.1 of the contract.

[30] The first point to be made here is that, in relation to the first sentence of cl 19.1, the warranty is expressed in terms of the vendor's belief. The appellant's case never went so far as to suggest that the respondent did not believe at the date of contract that there were no unsatisfied requisitions to which attached "any legal impediment in respect of the Business".

[31] To the extent that the second sentence of cl 19.1 may be said to be expressed so as to cast an obligation upon the vendor to ensure that a particular state of affairs existed at settlement, the issue for determination here is whether the respondent's obligation to pay the noncompliance charge to the Council in order to ensure that the trade waste of the Business might be disposed of via the Council's infrastructure was an "unsatisfied lawful demand … to which attaches any legal impediment in respect of the Business or the premises". In other words, the issue was whether there was money payable by the respondent, but unpaid by it, in consequence of which the Council might lawfully refuse to permit the continued use of its sewerage infrastructure to dispose of the trade waste of the Business. As to this issue, the appellant could succeed only if it could show that, at the date of completion, there was an amount of the noncompliance fee then payable but unpaid, which might have the consequence that the Council's permission to use its infrastructure would be withdrawn. In this regard, the appellant failed to plead or prove the facts necessary to enable it to make out a case of breach of cl 19.1.

[32] Once again, if the issue is considered more broadly, it may be said that, in any event, a contravention of the permit or approval obtained by the respondent was not apt to attach a legal impediment to the Business or the premises to be conducted by the appellant following completion of the contract. Nothing done or undone by the respondent in relation to the non-assignable approval could have given rise to an impediment to the conduct of the Business by the appellant.

[33] Insofar as it may be objected that this broader view of the matter minimises the protection intended to be afforded to a purchaser by cl 19, there are, in my view, two answers to this objection. The first is that cl 8.3(a) established, as between vendor and purchaser, that the purchaser was aware of the terms of the permit and, importantly, that it was not assignable by the vendor. Indeed, in the present case, Mr McInman, a director of the appellant, had actually obtained a permit for the restaurant business previously operated by the appellant. As a result, Mr McInman had actual knowledge of the need to obtain such a permit and of the fact that such

permits were not transferable. So much is clear from the following exchange which took place during the course of his cross-examination:

> "But you would have read this at the time and you would have know [sic] that the - as the approval couldn't be transferred, if you wanted to discharge trade waste, you had to get a permit?-- Yes.
> You would have known that from your previous experience in Riva [the restaurant formerly owned by the appellant], wouldn't you?-- Yes."

[34] Secondly, this limitation on the assignability of the trade waste approval was a consequence of the Act, not the result of some private dealings between the vendor and the Council or any deficiency in the respondent's performance of its contractual obligations. That the respondent was not, and could never be, in a position to confer on the appellant the benefit of an approval to dispose of trade waste through the Council's facilities was the consequence of the nature of an approval as a creature of the Act and not the result of any breach of contract by the respondent.

Has the TPA been contravened?

[35] It is to be emphasised at the outset of the discussion of the appellant's case in relation to the operation of the TPA that the appellant's case, as pleaded and proved, was not that the appellant had been misled into signing the contract by the respondent's failure to disclose that the disposal of trade waste from the Business depended upon a permit or approval a condition of which was the installation of a grease arrestor which had not been installed. The appellant's case was more elaborate than that. No doubt, these elaborations were regarded as necessary because of the obvious difficulty in the contention that a failure on the respondent's part to say anything at all about the arrangements for waste disposal and the terms on which that might be effected could not be regarded as misleading and deceptive in the context of a negotiation between vendor and purchaser where the familiar maxim *caveat emptor* is the primary rule.[10] The contract itself marks out the extent to which that rule has been modified as between the parties. For this reason, it was inevitable that the appellant's case of misleading and deceptive conduct, including the appellant's complaint about the letter of 11 June 2003 to which reference has been made, would become, as it has done, enmeshed in the context of the contractual scheme. As a result, the appellant's arguments on appeal in relation to the contravention by the respondent of s 52 of the TPA largely depended on the contention that the respondent was also in breach of its contractual obligations. For the reasons I have already given, that argument must be rejected.

[36] The appellant also advanced an argument that the respondent had been guilty of misleading and deceptive conduct by silence. Before examining the law as to when silence will amount to contravention of s 52 of the TPA it may be useful to identify the precise terms in which the appellant put its case at trial, in terms of its pleadings and how it was understood by the trial judge, and what was said to be its grounds of appeal. The appellant's pleadings contained the following concerning alleged breaches of s 52 of the TPA:

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[10] The effect of legislation such as the TPA is not to oust this rule completely but to ensure that it "should not be relied upon to reward fraud and deception": *Federal Trade Commission v Standard Education Society* (1937) 302 US 112 at 116 quoted by Murphy J in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 215. It must also be recognised that the TPA applies in this way whether or not the "fraud or deception" complained of was intentional.

> "10. The Notice and Permit Condition was an unsatisfied requisition or order (each a 'Requisition') by the local authority to which attaches a legal impediment, which the Defendant was required to disclose prior to the date of the contract of 26 June 2003.
> 11. The Defendant failed to disclose this Requisition.
> 12. The failure to disclose the Requisition:
> (a) was a breach of Clause 19 …
> (b) was a breach [sic] Clause 8.1(b) …
> (c) …
> (d) was misleading and deceptive conduct under s 52 of the *Trade Practices Act* …
> 16. In addition to the breaches of the contract, the Plaintiff holds the Defendant in breach of:
> (a) Section 52 of the *Trade Practices Act 1974* for misleading, deceptive conduct by the Defendant's silence in failing to disclose the Requisition; and
> (b) Section 52 of the *Trade Practices Act 1974* for misleading and deceptive conduct by the written representations made on 11 June 2003;
> which induced the Plaintiff to execute the contract to its detriment."

[37] The representations made on 11 June 2003 had earlier been pleaded in paragraph 5(b) of the Statement of Claim to have been as follows:

> "by letter from solicitors, Sykes Pearson & Miller of 11 June 2003 represented that $500.00 was an adequate sum to be inserted in Item W, Clause 19 Standard Conditions as "there should not be any requisitions, as he understands the restaurant is kept to a high standard".

[38] It is difficult to see how what was alleged goes any further than to claim that it was misleading and deceptive on the part of the respondent not to disclose the existence of the permits that had been given by the Council in order to authorise the discharge of trade waste. The learned trial judge summarised the effect of the appellant's submissions in relation to its action for breach of s 52 as follows:

> "Donne Place asserts that the contract should be declared void ab initio (pursuant to *Trade Practices Act (Cth)* 1974 [sic] s.52) … The basis for Donne Place's submission is that Conan resisted agreeing to the inclusion of the sum of $5,000.00 in Item W of the Schedule to the contract and further that Conan purposefully withheld disclosure of the Notice."[11]

[39] At the hearing of the appeal, the Court asked to be provided with a copy of the outline of argument submitted by the appellant in the court below. It is clear that the summary of submissions made by the learned trial judge is accurate.

[40] In the relevant ground of appeal, the appellant summarised its complaint about the handling of its s 52 action by the learned trial judge as follows:

> "That the learned trial Judge erred in fact and in law in failing to find that the Defendant/Respondent engaged in conduct that was misleading and deceptive and was likely to mislead and deceive in

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11 *Donne Place Pty Ltd v Conan Pty Ltd* [2005] QDC 217; DC 44 of 2003, 3 June 2005 at [17].

> failing to bring to the attention of the Appellants the condition (in the first and second permits) and the fact that the new grease arrestor had not been installed and, in that context, making the representation comprised by clause 8.1(b) of the Contract, and in making the representation in a letter dated 11 June 2003 in which it was stated '*that there should not be any requisitions*' …" (italics in original)

[41] It can be seen that it is only in the appellant's notice of appeal that any reference is made to there having been a failure to disclose that the permit condition had not been satisfied as opposed to nondisclosure of the condition itself. The definition of "conduct" contained in s 4(2) of the TPA means that the prohibition contained in s 52 extends to omissions as well as positive acts. To this end, the positive representations alleged to have been made in cl 8.1(b) of the contract and the letter of 11 June 2003 are only said, to adopt the language used by the appellant in its notice of appeal, to be misleading **in the context** of the respondent's silence. The critical question remains "whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive".[12]

[42] Where the complaint is of nondisclosure, it is necessary to determine whether the context is such as to give rise to a "reasonable expectation" that disclosure would be made.[13] The enquiry is whether, in all the circumstances, a person in the appellant's position would have been entitled to expect or infer that the respondent would disclose to it that a condition of the trade waste permit it had received from the Council had not been fulfilled.[14]

[43] The starting point for this exercise is the circumstance that the appellant and the respondent were undertaking arms length negotiations for the commercial sale of a business. The nature of this interaction between the parties must necessarily impact on what each could reasonably be expect to be told by the other. As Gleeson CJ, when still Chief Justice of New South Wales, said with the concurrence of Samuels AJA and Meagher JA in *Lam v Ausintel Investments Australia Pty Ltd*:[15]

> "… where parties are dealing at arms' length in a commercial situation in which they have conflicting interests it will often be the case that one party will be aware of information which, if known to the other, would or might cause that other party to take a different negotiating stance. This does not in itself impose any obligation on the first party to bring the information to the attention of the other party, and failure to do so would not, without more, ordinarily be regarded as dishonesty or even sharp practice."

[44] This approach was applied in this Court in *Dubois v Ong & Anor*,[16] a case dealing with, among other things, a dispute over whether or not one party knew that another

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12 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 41. See also *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 at [109]; (2004) 218 CLR 592 at 625.

13 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 32; *Warner v Elders Rural Finance Ltd* (1993) 41 FCR 399 at 401 - 402. The trend of recent authority confirms that the "reasonable expectation of disclosure" test is the appropriate standard to apply: See *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd* [2005] NSWSC 20 at [181]; (2005) 215 ALR 625 at 655.

14 See, eg, *Eastern Gardens Pty Ltd v Stone and Anor* [2005] SASC 157; SCCIV–02–701, 20 April 2005 at [34] - [35].

15 (1989) 97 FLR 458 at 475.

16 [2004] QCA 185; Appeal No 8429 and Appeal No 11260 of 2003, 28 May 2004.

party was proceeding on an erroneous assumption that it was to be indemnified with respect to certain costs, Muir J, with whose reasons Williams JA and Mullins J agreed, commented that:[17]

> "In the normal course of commercial dealings at arms length, such as those under consideration where lessor and lessee have separate legal representation and conflicting interests, it may be thought unusual that one party would have an expectation that the other would alert it to any legal deficiencies or weaknesses which the other party may perceive in the first mentioned party's documentation. Nor would a party normally come under an obligation to disclose any such information or perception."

[45] In the present case, if the appellant had walked in off the street and offered to purchase the respondent's restaurant there and then for a certain price, there would have been no misleading and deceptive conduct involved in the respondent agreeing to the sale, whether or not the respondent thought that the price being offered was a fair one. Whatever might have led the appellant to determine on the price it would be offering in such a scenario, it could not be said to have been any conduct of the respondent.

[46] In this case there were considerable negotiations between the parties. They resulted in an elaborate charter concerning the parties' expectations. Any "expectation" held by the appellant about what it was to be told about the various permits required for the operation of the Business can be placed no higher than the content of the contractual warranties extended by the respondent pursuant to cl 8.1 and 19.1 of the contract because the respondent did nothing that might have led the appellant to expect anything else.

[47] Insofar as it was argued that there was a misrepresentation by silence on the part of the respondent in failing to qualify its contractual promises, for the reasons I have given the respondent's contractual promises, when properly understood, did not require any qualification or explanation to prevent them from being misleading.

[48] Significantly, so far as the broader view of the case is concerned, the appellant did not suggest that he had been misled into believing that an effective permit or approval was assignable by the respondent. Had the appellant made such a suggestion, the respondent might have been entitled to complain that the assurance given by the appellant in cl 8.3(a) was itself misleading and deceptive conduct on the part of the appellant. Be that as it may, however, there was nothing misleading or deceptive in the respondent saying nothing about the arrangements in relation to the disposal of trade waste. Absent something more, such as a statement of a half-truth, the failure of the vendor to disclose these circumstances could not have been regarded as misleading. The contract made elaborate provisions for disclosure. Those provisions were complied with by the respondent.

[49] In summary, in relation to the issues relating to contravention of the TPA, the artificiality, and the overreaching nature, of the appellant's complaint can be seen in the circumstance that the appellant was always obliged to make its own arrangements with the Council in relation to the disposal of trade waste from the Business. Nothing which the respondent did, or did not do, in terms of disclosing

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17 [2004] QCA 185; Appeal No 8429 and Appeal No 11260 of 2003, 28 May 2004 at [40].

its arrangements with the Council was apt to mislead the appellant in this regard or to hinder it in making those arrangements.

Did the respondent act properly to mitigate its loss?

[50] The respondent resold the Business for $175,000 to a new purchaser by a contract made on 9 January 2004. The award of damages was calculated pursuant to cl 31.3(b) of the contract. The appellant contends that the circumstances of this resale involved a breach by the respondent of its obligation to mitigate the loss suffered by it as a result of the appellant's breach of contract. The appellant also contends that the price obtained by the respondent on resale reflected a diminution in the value of the business which was caused not by the loss of the sale to the appellant but by the voluntary actions of the respondent in causing the departure of the restaurant's chef, and in disclosing to the subsequent purchaser the full circumstances of the arrangements for disposal of trade waste from the Business.

[51] It should be said immediately that it is doubtful whether either of these contentions have any relevance to the right conferred on the respondent by cl 31.3(b) of the contract. It may be accepted that the terms of cl 31.3(b) contemplate that the respondent will act in good faith in reselling the Business so that a resale effected recklessly by the respondent would be outside the terms of the provision; but it is difficult to see how the terms of cl 31.3(b) leave room for the operation of any other limitations on the express right to recover the "shortfall in the purchase price". It is not necessary, however, finally to resolve this question because the appellant is, in my view, unable to establish a factual basis for its contentions.

[52] The learned trial judge did not accept that the respondent had been guilty of any failure to mitigate its loss or resale. And, importantly, the appellant adduced no evidence to suggest that $175,000 was not the true market value of the Business when the respondent sold it, or that a greater price would have been achieved had the disclosure of the full circumstances of the arrangements for the disposal of trade waste not been made in the resale contract. That being so, the appellant had no basis on which to suggest that a greater price on resale could have been achieved had the resale been approached differently.

[53] To the extent that the appellant contends that the respondent "voluntarily" created a chain of events that led to the resignation of the restaurant's chef, the learned trial judge made no finding to that effect. One may readily accept that the evidence on this topic was not so clear as to oblige him to do so. On the other hand, the evidence showed that, when staff left after the original contract was made and the appellant refused to complete the contract, the respondent advertised for new staff, and that Mr Conan, the respondent's director, himself oversaw the operation of the restaurant prior to its resale. That is conduct consistent with reasonable efforts to preserve the value of the business as a going concern. Further, as to the contention that the respondent "voluntarily" incurred the diminution in the value of the business consequential on the departure of the chef, the appellant has failed to show that, in fact, any loss flowed from that circumstance.

[54] A contract-breaker who seeks to assert that the innocent party has failed to mitigate its loss bears a burden of proof which is not easily discharged.[18] In relation to this aspect of the appellant's case, it simply failed to discharge that onus.

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[18] *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 37 ALJR 289 at 292; *AHR Constructions Pty Ltd v Maloney* [1994] 1 Qd R 460 at 467.

Conclusion and orders

[55] In my opinion, the appellant has not demonstrated any error requiring the decision of the learned trial judge to be set aside.

[56] The appeal should be dismissed. The appellant should pay the respondent's costs of the appeal to be assessed on the standard basis.

[57] **ATKINSON J:** I agree with the reasons for judgment of Keane JA and the orders proposed.