

SUPREME COURT OF QUEENSLAND

CITATION: *Foxworth P/L & Ors v Polwood P/L & Ors* [2006] QCA 570

PARTIES: **FOXWORTH PTY LTD**
ACN 010 516 855
(plaintiff/appellant)
AUSSIE PEAT PTY LTD
ACN 085 498 933
(plaintiff/second appellant)
v
POLWOOD PTY LTD
ACN 010 708 148
(defendant/respondent)
LEA CHARLES RAMPTON
(defendant/second respondent)

FILE NO/S: Appeal No 7268 of 2006
SC No 5291 of 2002

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 22 December 2006

DELIVERED AT: Brisbane

HEARING DATE: 29 November 2006

JUDGES: Williams JA, Helman and Philippides JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Appeal dismissed with costs**

CATCHWORDS: TRADE AND COMMERCE – TRADE PRACTICES AND RELATED MATTERS – CONSUMER PROTECTION – MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT – CHARACTER AND ATTRIBUTES OF CONDUCT – GENERALLY – where plaintiffs allege defendants made representations inducing entry into Deed – where representations alleged to be fraudulent or innocently false – whether representations made – whether representations induced entry into Deed – whether relief under *Trade Practices Act 1974* (Cth) is available

Copyright Act 1968 (Cth)

Patents Act 1990 (Cth)

Trade Practices Act 1974 (Cth), s 52, s 82, s 87

COUNSEL: A B Crowe SC, with A M Musgrave, for the appellants
M P Amerena, with J Fenton for the respondents

SOLICITORS: Hawthorn Cuppage & Badgery for the appellants
Deacons for the respondents

- [1] **WILLIAMS JA:** The pleadings as they were finally settled during the course of the trial raised many issues for resolution by the trial judge. The trial lasted some nine days, and the oral evidence and exhibits occupy some eight volumes of record. The trial judge delivered a detailed judgment addressing all of the issues raised in the course of the proceeding. This appeal relates to that part of the judgment which deals with claims made under s 52, s 82, and s 87 of the *Trade Practices Act 1974* (Cth). Insofar as the judgment dealt with issues involving the *Patents Act 1990* (Cth) and *Copyright Act 1968* (Cth), an appeal has been lodged by the present respondents to the Full Court of the Federal Court.
- [2] At the outset of the hearing in this Court senior counsel for the appellant conceded that what was in issue was whether or not, given the finding at first instance of misrepresentation inducing the appellant Foxworth Pty Ltd ("Foxworth") to enter into the Deed, damages should have been awarded pursuant to s 82 of the *Trade Practices Act* measured by the loss that the appellants assert they sustained. The only other issue from the appellants' point of view was the return of a \$30,000.00 deposit.
- [3] The respondents have filed a notice of contention, and counsel for the respondents acknowledge that the only issue thereby raised was whether or not representations with respect to the Peat patent induced the appellants to enter into the Deed.
- [4] It is not necessary for purposes of the appeal to detail how and why additional parties to those who were initially involved came to be joined in the proceeding.
- [5] The Deed was executed on or about 4 November 1998. Therein Foxworth was described as the Licensee and the respondent Polwood Pty Ltd ("Polwood") the Licensor. It is convenient to quote the background from findings recorded in the reasons for judgment of the trial judge:
- "It was recited in the Deed, which was entered into in early November 1998, that:
- A. The Licensor has developed a process of manufacturing a product described by the Licensor as 'processed premium peat' derived from pine bark (the Process).
 - B. The Licensor has patented the Process under Patent No 682200 in Australia (the Peat Patent).
 - C. The Licensor has for several years conducted the business of processing and selling the peat for profit (the Business).
 - D. The Licensor owns plant and machinery utilised in the manufacturing process (the Equipment).

Under the Deed, Polwood granted a licence to Foxworth to operate the Business and to utilise 'the assets'. The term of the licence was three years. It thus expired in November 2001. Foxworth was required to pay Polwood \$75,000.00 in consideration of the grant of the licence and the option and Foxworth agreed 'to contribute an

amount of up to \$30,000.00 for the maintenance and/or replacement of items of equipment.’ Polwood was required to consult with Foxworth concerning the expenditure of such monies. Provision was made also for payment by Foxworth of an annual licence fee

The following clauses have relevance to the issues for determination:

- 4.2 That the right to use the Process, the Patent and the business name shall cease immediately on the expiration or early termination of the licence agreement . . .
- 4.3 The Licensor and the Licensee agree that any improvements to the existing premises or any developments of any new process or product arising out of the operation of the business by the Licensee shall be jointly owned by the parties in the proportion of 85 per cent Licensee and 15 per cent Licensor, provided that the Licensee exercises the option.
- 8.1 The Licensor warrants that Patent No 682200 will remain in force until 20 July 1999 and provided that this agreement continues in existence then the Licensor will take all steps to ensure the renewal of the Patent at the Licensee's expense. The Licensor warrants that the Patent adequately protects the Process within Australia under the current legislation regulating patents. . . .
- . . .
- 8.5 Continued profitability. The Licensor is not aware of any fact or circumstance which would have a materially adverse effect on the profitable operation of the business by the Licensee.

Under cl 15.1, Polwood granted Foxworth an option ‘to acquire an interest equating to 85% of [Polwood's] legal and beneficial ownership of the assets.’ It was to be exercised ‘by delivering to [Polwood] an offer to purchase in the form provided in Annexure B to this agreement.’ Clause 15.3 further provided: ‘Upon the proper exercise of the option the Licensor shall without delay execute the attached agreement, it being the intention of the parties that they will then create a binding legally enforceable contract.’

Annexure B to the Deed took the form of an agreement for the sale and purchase of ‘an 85 per cent interest in the Process, the Peat Patent, the equipment and the business and the trademark . . .’

Clause 3.01 of Annexure B provided for a payment of the purchase price by a deposit of \$30,000.00 to Swanwick Murray Roche Solicitors as stakeholders on or before the signing of the sale and purchase agreement and for the payment of the balance ‘in the manner directed by the vendor’. The completion date was stipulated as the date 30 days from the date of the contract.

By clause 16.1, the Ramptons, in consideration of payment of wages of \$500.00 net per week to Rampton and \$250.00 net per week to Mrs Rampton, covenanted to ‘provide every assistance and

instruction to the Licensee in respect of the Process and in the operation of the business.’

Clause 17 contained an acknowledgement by Foxworth that Polwood had developed the ‘orchid bark process,’ that the licence did not confer any rights on Foxworth in respect thereof and that Polwood was entitled to continue to carry on the orchid bark business provided that it did not interfere with or adversely effect the operation of Foxworth business or ‘adversely effect or restrict or limit services of’ the Ramptons in Foxworth’s business.”

- [6] After the execution of the Deed the parties generally conducted themselves as contemplated by the terms thereof. It is sufficient to say that in the course of so doing a further peat manufacturing unit was constructed principally by the appellants. That became known as the Peachester Sterilisation Unit ("PSU"). An order has already been made for the return of that unit to the appellants and that is not the subject of this appeal. Dispute between the parties with respect to the PSU did occupy a deal of time at the trial, but is not necessary to deal with that evidence in any detail.
- [7] It should be noted that the learned trial judge found much of the evidence of Power, the principal witness for the appellants, "implausible" and he went on to say that "significant parts of his evidence were inconsistent with the evidence of other witnesses whom I consider to be more reliable." The learned judge then said: "This lack of confidence in the reliability of Power's evidence causes obvious difficulties for the plaintiffs' claims, which rely to a major extent on that evidence." Significantly the learned trial judge regarded "Mrs Rampton's evidence as generally reliable".
- [8] Again relevant facts for purposes of the appeal are best recorded by quoting from the judgment of the learned trial judge:
- "The solicitors for Foxworth wrote to Polwood on 23 October 2001 enclosing a signed contract in the form of Annexure B to the Deed, stating that it was enclosed ‘in exercise of the Option contained in the Deed’. The letter stated that a deposit of \$30,000.00 was being held in the solicitors' trust account and requested that Polwood sign the contract and return it by facsimile. A copy of the contract was executed by Polwood, but before the date for completion Foxworth received advice from a patent attorney that the peat patent did not protect the process and would be ‘ineffective in preventing a competitor from copying the process’. The patent attorney advised also that the orchid bark patent was currently in force and related ‘to a method and apparatus and has claims similar in scope to that of [the patent].’

By letter dated 5 December 2001 from its solicitors, Foxworth purported to terminate the contract of sale arising out of its exercise of option. The letter asserted that Foxworth entered into the Deed in reliance upon representations that the patent protected the process of manufacturing the peat products and that Foxworth had obtained ‘clear evidence’ that this was not so. Polwood’s solicitors wrote to Foxworth’s solicitors on 6 December 2001, noting their

understanding that settlement under the contract was due on 5 November and that Polwood had executed a deed of assignment of the peat patent. The letter alleged that Foxworth was in default under the contract through not having settled and demanded that settlement take place no later than 12 December. Settlement did not take place on or before that date and thereafter both parties treated the contract as at an end."

- [9] The learned trial judge went on to set out accurately the principles applicable to a misrepresentation claim and then analysed the evidence against that background. He recognised there was "logical force" in the appellants' contention that patent protection was important; but against that there was credible evidence that Power did not regard the patent as important. Having considered all of the relevant evidence the learned trial judge concluded:

"Despite the foregoing I find that the existence of the peat patent was of some relevance to Power, albeit slight, at the date of the Deed. Foxworth's legal advisors considered the peat patent sufficiently important to include a warranty in relation to it in the Deed. It is likely that Power placed some weight on the warranty as conferring contractual rights. It is rather less likely that he sets store by any statements made by Rampton about the peat patent's scope or efficacy. There is little, if anything, in the evidence to show that prior to the date of the Deed, Power reposed any confidence in Rampton's judgment, veracity or knowledge, particularly in relation to matters of legal nature. . . .

Not without hesitation, I find that the subject representation was an inducing cause of the Deed. It was made with the intention that it be relied on and, despite the matters just discussed, I consider it more probable than not that it was a factor, albeit minor, in Power's decision to enter into the Deed.

I find, however, that the representation was not an inducing cause of the contract. Much had happened between the date of the representation and the exercise of the option. Power had perused the peat patent, McRae had considered it and its application to the manufacturing process, so had Kemp. It is likely that Kemp had discussed the contents of the peat patent with Power in relation to the intended role of the PSU in the manufacturing process."

- [10] The respondents abandoned the ground of contention that the learned trial judge erred in concluding that the representation as to the peat patent was misleading and deceptive conduct for the purposes of s 52 of the *Trade Practices Act*. But they persisted with the other ground of contention, namely that the learned trial judge erred in law in finding that such representation was an inducing cause of Foxworth entering into the Deed.
- [11] It is sufficient to say that the learned trial judge carefully analysed all the relevant evidence before making the finding of fact which he did. Though he said he made the critical finding "not without considerable hesitation", nevertheless it is a finding of fact based largely on credibility. As already noted the learned trial judge did not

regard Power as a credible witness generally, but in this regard, taking into account all relevant evidence, he came to the conclusion that Power should be accepted.

- [12] In my view there is no basis for overturning the finding made by the learned trial judge that the representation was an inducing cause of the Deed. As the judge noted it is of real significance that a warranty was included in the Deed with respect to the patent.
- [13] There is also no inconsistency between the finding that the representation as to the patent was an inducing cause of the Deed but not of the subsequent contract. As was pointed out in the judgment much had occurred between the date of the representation and the exercise of the option resulting in the contract.
- [14] The critical question then becomes whether or not the appellants have proved any loss consequent upon the misrepresentation. Again it is best to quote from the judgment:

"In my view, restitution in integrum in respect of the Deed is impossible and it would not be timely, just or fair to grant Foxworth the relief it is seeking.

The term of the licence granted by the Deed expired before 5 December 2001, the date on which Foxworth purported to rescind the contract. Foxworth did not purport to rescind the Deed at any time, unless it is to be taken as having done so by its claim in an amended statement of claim for a declaration that the Deed and the contract are void ab initio.

Foxworth had or was entitled to have the benefit of the licence for the whole of its three year term. It claims that the peat business was loss making and that the losses of some \$229,000.00 were sustained over the licence period. Assuming that to be so, it does not necessarily follow that Foxworth did not benefit materially from entering into the Deed.

By entering into the Deed, Foxworth obtained the Confidential Information as later described. That information set Foxworth on the course of improving the process and the plant used in the peat process, which lead to the construction of the PSU. Both parties, for good reason, regard the intellectual property rights in respect of the PSU to be extremely valuable. I consider it probable that the value of these rights and of the Confidential Information greatly outweigh any trading losses sustained in the operation of the peat business.

...

For the above reasons I conclude that it would be inappropriate to set the Deed aside ab initio. For many of the same reasons I am unable to conclude that Foxworth, or Aussie Peat for that matter, suffered 'loss or damage by [the] conduct' of Polwood or the Ramptons of which the plaintiffs complain. In that regard I consider it probable that Foxworth would have entered into the Deed had the representations not been made.

The defendants contend that the relationship of Licensor - Licensee between Foxworth and Polwood gave rise to fiduciary and confidential obligations... The information to which the obligation of confidentiality is said to attach and which is said to have been imparted to Kemp and/or Power ('the Confidential Information') comprises: the concept of a steaming tube being two tubes joined at right angles into which materials would be fed and through which materials would be conveyed by two augers; the information that such steaming tube concept would be a preferable method of producing peat products and would have specified advantages over the tub and separator including increased pressure and heat ensuring greater penetration of the bark by water and dolomite, water retention, heat retention and more consistent saturation by more effective submersion of the bark as a result of the rotation of the augers.

...

The defendants' argument derives some assistance from the terms of the Deed. Notwithstanding the warranty in cl 8.1 as to the peat patent, it was thought necessary to impose an obligation of confidentiality on Foxworth in cl 7. . . .

...

The Confidential Information did not consist of trite or obvious statements made in the course of casual conversation. The steaming tube concept was the product of long thought and experimentation by Connick and Rampton. It arose out of a depth of knowledge gained in devising the plant for Polwood's business and in refining its product. Furthermore, the information was divulged in circumstances in which Rampton, Kemp, Connick and Power understood that Power would undertake or was undertaking to improve the throughput and processes of the peat business.

...

Foxworth was given the entrée to the peat business and Polwood's related trade secrets principally with a view to assessing over the term of the licence whether 85 per cent of the business was worth acquiring. Foxworth was given the right to use, in effect, Polwood's intellectual property for the duration of the licence. . . .

...

The more significant part of the Confidential Information imparted to and used by the plaintiffs was largely conceptual in nature. It is doubtful that Polwood for itself would have acted on the steaming tube dual auger concept. The plaintiffs did act on it and in developing the PSU, expended much time, energy and inventive skill. Polwood has had the benefit of the defendants' endeavours and has made use of its opportunities by constructing a similar machine and developing a business relationship with Bettergrow.

The evidence in the case, and the allegations, did not focus on establishing the financial benefit obtained by the plaintiffs from the Confidential Information or an appropriate sum to be paid to the defendants by way of compensation for its misuse. . . .

I have concluded that the application of the springboard doctrine is sufficient to do justice to the circumstances of this case. By virtue of

patent applications in respect of the PSU or replica PSU made by both sides, the relevant information is now in the public domain."

- [15] In my view the conclusion that the appellants obtained significant benefits consequent upon exercising rights conferred by the Deed cannot be challenged. Entry into the Deed provided the appellants with the necessary knowledge and experience to develop the PSU which, as already noted, has by order of the court been returned to the appellants. The appellants regard the PSU as being extremely valuable.
- [16] The submission on behalf of the appellants is that trading losses amounting to \$229,573.00 were incurred during the currency of the Deed, but that has to be reduced by \$91,451.00 because of the return of the PSU. That, the appellants contend, leaves a balance of trading loss at \$138,122.00. They also claim capital losses in the sum of \$134,311.00 and interest on all components of the alleged losses.
- [17] It is significant, as counsel for the respondents submitted that the learned trial judge concluded that it was probable that Foxworth would have entered into the Deed even if the patent representation had not been made.
- [18] In my view it is not necessary to canvass the various authorities referred to in the course of oral submissions. It is sufficient for me to say that it has not been demonstrated that there was any error in principle in the approach the learned judge at first instance adopted. The appellants have not made out a case for recovery of damages consequent upon the misrepresentation.
- [19] The appellants claim for the return of the \$30,000.00 deposit paid on the exercise of the option depends upon them having a right to rescind the contract. At trial the appellants claimed such a right based on the proposition that the appellants had been induced to enter into the contract by the continuing misrepresentation with respect to the peat patent. But as recorded above the learned trial judge found that the "representation was not an inducing cause of the contract". In support of that finding the learned trial judge referred to evidence of what had transpired between the date of the Deed and the time when the option was exercised.
- [20] Counsel for the appellants relied heavily on the timing of certain events. The contract was signed on 23 October 2001. Power went to see a patent attorney on 29 November 2001 and purported rescission was on 5 December 2001. Counsel submitted that the logical inference to be drawn was that the rescission was the consequence of advice received from the patent attorney. That depended largely on an acceptance of the evidence of Power. But as already noted, the trial judge was not impressed by Power's credibility generally.
- [21] Again the appellant faces the difficulty of asking this Court to reverse findings made after a careful review of evidence, and when the trial judge was not prepared to regard the critical witness as credible. Essentially the learned trial judge found that "in exercising the options [Power] did not have regard, whether consciously or subconsciously to the alleged representations", being the alleged representations as to the peat patent. As the learned trial judge found earlier: "The probability is that, after Foxworth exercised the option, Power recalled McRae's advice about difficulties with the peat patent, or possibly other undisclosed advice in that regard,

and decided to consult a patent attorney with a view to obtaining grounds of avoidance of the contract."

[22] In the circumstances the appellants have not demonstrated that the learned trial judge erred in concluding that Foxworth did not lawfully terminate the contract and that in consequence Polwood was entitled to the deposit.

[23] It follows that the appeal should be dismissed with costs.

[24] **HELMAN J:** I agree with the order proposed by Williams JA and with his reasons.

[25] **PHILIPIDES J:** I agree for the reasons stated by Williams JA that the appeal should be dismissed with costs.