SUPREME COURT OF QUEENSLAND

CITATION:	*Byrne v Cooke & others* [2010] QSC 76
PARTIES:	**JOAN ELIZABETH BYRNE** (plaintiff) **v** **PETER ELLIS COOKE** **(**first defendant) and **PLANWEALTH PTY LIMITED** **ACN 010 035 560** (second defendant) and **HILLROSS FINANCIAL SERVICES LIMITED** **ACN 003 323 055** (third defendant)
FILE NO:	BS 10335 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	19 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	18 January 2010
JUDGE:	Daubney J
ORDERS:	**1. The application is refused.** **2. Costs reserved.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM - where plaintiff is the widow and executrix of the estate of the deceased – where plaintiff alleges that the defendant advised the deceased to make certain investments and enter into certain loan agreements – where it is alleged that the defendant made a number of misrepresentations and that acting on in reliance on these misrepresentations, the deceased entered into certain transactions – where it is alleged that this conduct constitutes misleading and deceptive conduct under the *ASIC Act* or alternatively the *Trade Practices Act* – where the relevant provisions of these Acts require 'conduct by' the defendants causing loss or damage to the plaintiff - where the defendants have applied under the

Rules for an order that the amended statement of claim be struck out as disclosing no reasonable cause of action – where this application is made on the basis that the act which gave rise to the loss is the defendants misrepresentation and that the deceased, not the plaintiff, acted in reliance on the misrepresentation – where the defendants contend that the causal link between the conduct of the defendants and the loss suffered by the plaintiff does not survive in the pleaded case – whether the statement of claim should be struck out on the basis that it discloses no reasonable cause of action

Australian Securities and Investments Commission Act 2001 (Cth), s12DA, s 12GM
Trade Practices Act 1974 (Cth), s 52, s 87
Uniform Civil Procedure Rules 1999 (Qld), r 171

Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3) (2006) 67 NSWLR 341, applied
Chappel v Hart (1998) 195 CLR 232, cited
Dey v Victorian Railway Commissioner (1949) 78 CLR 62, cited
Digi-Tech (Australia) Ltd v Brand [2004] NSWCA 58, cited
Ford Motor Company of Australia Limited v Arrowcrest Group Pty Ltd [2003] FCAFC 313, cited
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, cited
Henville v Walker (2001) 206 CLR 459, cited
Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd [2008] NSWCA 206, applied
Janssen-Cilag Pty Ltd v Pfizer Pty Ltd (1992) 37 FCR 526, applied
Marks v GIO (1998) 196 CLR 494, cited
Travel Compensation Fund v Tambree (2005) 224 CLR 627, cited
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, cited

COUNSEL: AJ Greinke for the plaintiff
RS Ashton for the first, second and third defendants

SOLICITORS: Shannon Donaldson Province Lawyers for the plaintiff
Moray & Agnew Solicitors for the first, second and third defendants

[1] The plaintiff, who is the widow and executrix of the estate of Murray Andrew Byrne ("the deceased"), has sued:

(a) the third defendant, Hillross Financial Services Limited ("**Hillross**"), the holder of an Australian Financial Services Licence,

(b) the second defendant, Planwealth Pty Limited ("**Planwealth**"), an authorised representative of Hillross, and

(c) the first defendant, Peter Ellis Cooke ("**Cooke**"), an authorised representative of Hillross and a director of Planwealth.

[2] By the amended statement of claim filed on 11 November 2009, the plaintiff pleads that in May 2006, Cooke advised the deceased to invest in a number of agricultural managed investment schemes, and to enter into loan agreements with a number of financiers, including Agripay Pty Ltd, to fund these investments. It is alleged that Cooke made a number of misrepresentations about features and attributes of the schemes and that, acting in reliance on Cooke's advice and the misrepresentations, the deceased adopted the strategy, recommended by Cooke, of borrowing money and investing in the schemes.

[3] It is further alleged that the conduct of Cooke, and through him Planwealth and Hillross, in advising on the strategy and making the misrepresentations was conduct in trade or commerce, or conduct in relation to financial services, which was misleading and deceptive or likely to mislead or deceive and thereby in breach of s 12DA of the *Australian Securities and Investments Commission Act* 2001 ("*ASIC Act*") or alternatively in breach of s 52 of the *Trade Practices Act* 1974 ("*TPA*").

[4] The amended statement of claim then pleads:

> "20 As a result of Murray adopting the Strategy and entering into the investments and loan agreements, on or about 30th June 2006 the plaintiff executed a personal guarantee under a written loan agreement ("**the Guarantee**") under which Murray agreed to borrow monies from Agripay Pty Ltd ACN 087 971 006 ("**Agripay**").
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> **Particulars**
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> *20.1 Under the policies of Agripay as set out in the Adviser Information Pack applicable at that date a guarantee was required from an applicant for finance where any of the applicant's assets were held in joint names.*
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> *20.2 The policies of Agripay required the plaintiff to provide a guarantee for the obligations of Murray if Murray were to borrow monies from Agripay.*
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> *20.3 Peter Cooke knew the policies of Agripay, having read and understood the applicable Adviser Information Pack.*
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> *20.4 Peter Cooke orally requested the plaintiff execute the Guarantee in order that Murray borrow monies from Agripay in order to make the investments recommended by him.*
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> *20.5 But for Murray entering into the investments and loan agreements, the plaintiff would not have been required to enter into the Guarantee.*

Loss and Damage

21 By entering into the Guarantee, the plaintiff became liable to Agripay in relation to monies outstanding by Murray.

22 In Supreme Court proceeding BS10085 of 2007 Agripay claims against the plaintiff monies alleged to be owing to Agripay under the Guarantee, on the grounds set out in the statement of claim filed in that proceeding.

23 The plaintiff as second defendant has defended the claim on the grounds set out in the amended defence and counterclaim filed in that proceeding.

23A On 5 August 2009 Justice PD McMurdo entered judgment against Murray in Supreme Court proceeding BS10085 of 2007 for the sum of $786,492.39 including interest of $207,393.00.

24 The plaintiff has suffered, or is likely to suffer loss and damage as a result of the conduct of the defendants pleaded above in that:

24.1 the plaintiff is or may be liable to Agripay under the Guarantee for the amount entered under the judgment and interest thereon.

24.2 the plaintiff has incurred and continues to incur legal costs in the defence of Agripay's claims;

24.3 the plaintiff may become liable to an order for costs in favour of Agripay in the proceeding;

24.4 even if successful the plaintiff is unlikely to recover her legal costs incurred in the Agripay proceeding."

[5] The relief claimed by the plaintiff is as follows:

"1 An indemnity or compensation pursuant to section 12GM of the *ASIC Act* in relation to:

1.1 the plaintiff's liability to Agripay under the Guarantee;

1.2 any order as to costs in the proceeding brought by Agripay;

1.3 the plaintiff's costs incurred in the proceeding to the extent such costs are not recovered if successful.

2 Alternatively an indemnity or compensation pursuant to section 87 *TPA* in relation to:

2.1 the plaintiff's liability to Agripay under the Guarantee;

2.2 any order as to costs in the proceeding brought by Agripay;

2.3 the plaintiff's costs incurred in the proceeding to the extent such costs are not recovered if successful.

3 Interest thereon pursuant to section 47 *Supreme Court Act 1995* (Qld)."

[6] Section 12DA(1), which is found in Part 2 Division 2 Subdivision D of the *ASIC Act*, provides:

> "A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive."

[7] Section 12GM, being the provision of the *ASIC Act* under which the plaintiff claims relief, confers on the Court the power to make a wide range of remedial orders if "the Court finds that a person ... has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in contravention of a provision of this Division".

[8] The similarity between s 12DA(1) of the *ASIC Act* and s 52(1) of the *TPA* is apparent, while it is also clear that s 12GM of the *ASIC Act* is the cognate equivalent of s 87 of the *TPA*. Importantly, it is a precondition of the grant of relief under both s 12GM of the *ASIC Act* and s 87 of the *TPA* that the plaintiff suffer damage "by conduct of" the defendants.

[9] The defendants have now applied under *Uniform Civil Procedure Rules* r 171(1)(a) for an order that the amended statement of claim be struck out as disclosing no reasonable cause of action. In so doing, the defendants properly acknowledge the high hurdle they face on such an application – such a strike-out application will succeed only in very clear cases, and it must be demonstrated that the pleaded case is manifestly groundless or so clearly untenable that it could not possibly succeed.[1] The defendants submit, however, that this is such a case because, in effect, the case pleaded by the plaintiff is:

(a) that the defendants acted in contravention of the *ASIC Act* and the *TPA* by making misrepresentations to the deceased;

(b) that the deceased, and not the plaintiff, acted in reliance on those misrepresentations;

(c) that the act which gave rise to the loss was the plaintiff's execution of the Guarantee, but there is no plea that she acted in reliance on the misrepresentations.

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[1] *Dey v Victorian Railway Commissioner* (1949) 78 CLR 62 at page 91; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.

[10] The defendants contend, in brief, that the causal link between the conduct of the defendants and the loss suffered by the plaintiff does not survive in this pleaded case, and it is therefore hopeless.

[11] The following propositions are germane to a consideration of this application:

- The suffering of loss or damage "by conduct" done in contravention of s 12DA of the *ASIC Act* or s 52 of the *TPA* "clearly expressed the notion of causation without defining or elucidating it";[2]

- A practical or commonsense concept of causation should be applied in cases of this kind (although, as discussed later, this proposition should now be approached with some caution);[3]

- Whilst causation must be established, there is no general requirement that relief lies only in cases in which the plaintiff personally relies on the defendant's contravening conduct;

- A plaintiff may claim relief if the contravener's conduct caused other persons to act in a way that led to loss or damage to the plaintiff.[4] This has been referred to in the authorities as "indirect causation".

[12] The defendants argue that, by her pleading, the plaintiff would seek to proceed under this rubric of "indirect causation", but contends that this is not available in the case advanced. The defendants submit:

(a) The authorities draw a distinction between, on the one hand, a case where misleading conduct induces an innocent party to act to the detriment of the plaintiff; and, on the other, where an act of the plaintiff is necessary to complete the chain of causation. In the former case it is not necessary to prove that the plaintiff relied upon the misrepresentations, but in the latter it is necessary to prove that.

(b) The authorities stand for the proposition that, where the plaintiff is a passive victim of misleading conduct because someone else has relied upon the contravening conduct and acted to the plaintiff's detriment, the causal link is satisfied. But where, as here, it is alleged that the plaintiff herself acted to her own detriment by reason of the conduct of a third party whose conduct was brought about by the defendants' misleading conduct, the plaintiff's conduct is itself a necessary link in the chain of causation and must itself be shown to have been induced by the misleading or deceptive conduct.

[13] In advancing these submissions, the defendants relied particularly on *Digi-Tech (Australia) Ltd v Brand*,[5] in which the New South Wales Court of Appeal referred

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2 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525.

3 *Wardley* at 525; *Ford Motor Company of Australia Limited v Arrowcrest Group Pty Ltd* [2003] FCAFC 313 at [106].

4 *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at 529-530*; Ford Motor Company of Australia Ltd v Arrowcrest Group Pty Ltd* (supra) at [123].

5 [2004] NSWCA 58

to a number of authorities in which the "indirect causation theory" had been identified and applied, and said:

> "[155] *Stockland (Constructors) Pty Ltd v Retail Design Group (International) Pty Ltd* followed the approach of *Janssen-Cilag*. *Stockland*, like *Janssen-Cilag*, was not a case where the plaintiff claimed damage caused by entering into a transaction induced by misleading conduct. In both cases the misleading conduct had caused others to act to the direct prejudice of the plaintiff. That is to say, the chain of causation was as follows: firstly, misleading conduct by the defendant; secondly, an innocent party is induced by the misleading conduct to act in some way; thirdly, the innocent party's act, by its very nature, causes the plaintiff loss. On this basis, no act of the plaintiff contributes to the loss. The chain of causation is complete without there needing to be any act or omission on the part of the plaintiff.
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> [156] The *Janssen-Cilag* and *Stockland* category of claim is materially different to that which occurs when plaintiffs suffer loss because they, themselves, are induced by misleading representations to perform some act or omission by which they are prejudiced. The difference lies in the fact that in the first category of case no conduct on the part of the plaintiff forms a link in the causation chain. In the second category, the inducement of the plaintiff and his or her act or omission causing loss is an essential part of the chain. Without such inducement and a consequential act or omission on the part of the plaintiff there is indeed no linking chain between the misleading conduct and the plaintiff's loss."

[14] These matters were further explained in *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd*.[6] Giles JA said at [12] – [13]:

> "[12] The appellants' reliance on the reference in [156] of *Digi-Tech (Australia) Pty Ltd v Brand* to the category of claim 'when plaintiffs suffer loss because they themselves are induced by misleading representations to perform an act or omission by which they are prejudiced' was in my view misplaced. Their Honours were contrasting the kinds of claim, and were not restricting what followed to where there was direct inducement of the plaintiff; they were identifying the kind of claim in which inducement of the plaintiff played a part. The distinction drawn in *Digi-Tech (Australia) Pty Ltd v Brand* is between cases where conduct on the part of the plaintiff 'forms a link in the causation chain' (at [156]) and where it does not. Where it does, there must be reliance on the misleading conduct in the manner next explained. Where it does not, there may be recovery if the act of the innocent party induced by the misleading conduct 'by its very nature, caused the plaintiff's loss' (at [155]), but that is where the plaintiff passively suffers loss from another's act (as in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 at 529-530, where consumers were led by the misleading conduct to buy less of the plaintiff's product).
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> [13] In saying that in a case of 'misrepresentations inducing a transaction' reliance on the misrepresentation was required for proof of causation (at [159]), from the facts before them and their Honour's discussion they meant a case where the plaintiff was not a passive sufferer from another's act, but was someone who made a decision to enter into the transaction to

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6 [2008] NSWCA 206

> which the representation was material. Their Honours did not mean direct inducement, but that the decision and the materiality to it of the representation was a link in the causal chain."

[15] In that same case, Ipp JA said, at [617] – [618]:

> "[617] The approach adopted in *Digi-Tech* is to be distinguished from cases such as *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* [1992] FCA 437; (1992) 37 FCR 526 where a person, by misleading conduct, induces another to act to the prejudice of the plaintiff. In the *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* category of case the plaintiff is a passive victim of misleading conduct. No action or omission by the plaintiff affects the loss it suffers. By contrast, in the *Digi-Tech* category of case, the plaintiff acts or refrains from acting to his or her prejudice by reason of conduct of a third party brought about by the defendant's misleading conduct; the plaintiff's conduct is a necessary link in the chain of causation.
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> [618] The rationale of *Digi-Tech* is that loss incurred by plaintiffs in acting (or refraining from acting) to their prejudice can only be loss caused 'by' conduct contravening s 52 if the plaintiffs are misled by that conduct. Likewise, in my view, such plaintiffs can only succeed in cases based on a contravention of s 995 if, in fact, they are misled. I stress that by 'such plaintiffs' I mean plaintiffs who claim to have suffered loss brought about by their own actions or omissions coupled with misleading conduct by the defendants. As was noted in *Digi-Tech*, were it otherwise, such plaintiffs could succeed on the ground that, by making false representations, the defendants engaged in misleading conduct, even though the plaintiffs well knew the truth of the representations or were indifferent to them. As I have noted, different considerations apply to the *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* category of case."

[16] These cases, clearly enough, do draw the distinction suggested by the defendants between:

(a) a plaintiff as a "passive victim of misleading conduct" (to adopt the terminology of Ipp JA), and

(b) a plaintiff who does a loss-causing act by reason of the conduct of a third party whose conduct was brought about by the defendants' misleading conduct. In such a case, it must be shown that the plaintiff was induced to act that way by the defendants' misleading conduct.

[17] I would, however, be most reluctant on a summary determination to shut the present plaintiff out from pursuing the relief claimed on the basis that there is a bright and irreducible line drawn between these two paradigms. My reluctance is informed by two considerations:

(a) The prospect or at least the possibility, that the present case does not fall neatly within one or other of the paradigms, and

(b) The necessity for the trial judge, when considering causation, to have regard to the purposes of the *ASIC Act* and the *TPA*, as related to the circumstances of the particular case. In this regard, Giles JA in *Ingot Capital Investments*

observed, at [14], that "since *Wardley Australia Ltd v Western Australia* there has been some withdrawal from the common law practical or common sense concept of causation, and emphasis on the purpose to which the question of causation is directed". His Honour referred in that regard to *Travel Compensation Fund v Tambree* (2005) 224 CLR 627, in which Gummow and Hayne JJ said at [45]:

> "It is now clear that there are cases in which the answer to a question of causation will differ according to the purpose for which the question is asked. As was recently emphasised in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*, it is doubtful whether there is any 'common sense' notion of causation which can provide a useful, still less universal, legal norm. There are, therefore, cases in which the answer to a question of causation will require examination of the purpose of a particular cause of action, or the nature and scope of the defendant's obligation in the particular circumstances.'

Giles JA also referred to the following statement by Gleeson CJ in *Travel Compensation Fund*, at [30]:

> "In recent cases, this Court has pointed out that, in deciding whether loss or damage is 'by' misleading or deceptive conduct, and assessing the amount of the loss that is to be so characterised, it is in the purpose of the statute, as related to the circumstances of a particular case, that the answer to the question of causation is to be found."

[18] In *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)*,[7] Beazley JA, with whom Ipp and Tobias JJA agreed, said, at [37] "that notwithstanding what the High Court said in *Wardley Australia Ltd*, the issue of causation for the purposes of s 82 (and for s 87) has continued to give rise to difficulties and been the subject of further consideration in the High Court". Her Honour then considered in some detail the statements on causation which had been made in the High Court in *Marks v GIO*,[8] *Henville v Walker*,[9] *Chappel v Hart*[10] and *Travel Compensation Fund v Tambree*[11]. After considering these cases, her Honour said, at [54] that it is apparent that there is "not a single immutable test for causation for the purposes of s 82". Her Honour continued:

> "*Marks v GIO* and *Henville v Walker* both involved an express positive representation. In the case of *Marks*, the representation was likely to have been deliberate. In *Henville v Walker*, the representation appears to have been negligent. However s 52 is not confined to deliberate or negligent misrepresentations. Contravening conduct includes both express misrepresentations and non-disclosure and there may be a contravention of the section even though the conduct is innocent."

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7 (2006) 67 NSWLR 341.
8 (1998) 196 CLR 494.
9 (2001) 206 CLR 459.
10 (1998) 195 CLR 232.
11 (2006) 224 CLR 627

[19] In the case being considered by Beazley JA, a contractor had entered into a contract for construction of a spillway. The principal had represented in the tender documents that no plans were available of an outlet drainpipe, when in fact, there was such a plan. This was, therefore, a case of a negative representation. In the circumstances of that case, her Honour said:

> "56 In order to establish its entitlement to damages, the appellant has to establish that it suffered a loss *by conduct* which contravenes the Act. The contravening conduct has been established – the respondent in stating in the tender documents that there was no plan of the outlet pipe made a negative representation which was misleading. It was misleading for the simple reason that there was a plan of the outlet pipe. If that misrepresentation was simply excised form the contract so that the appellant bore the risk that additional work might be required, as the respondent contends, then the misleading conduct would be neutralised. However, the appellant did not agree to bear the contractual risk in the face of a misrepresentation. But in any event s 82 does not operate so simplistically. As Gleeson CJ said in *Travel Compensation Fund v Tambree*, the question of causation is to be found in the 'purpose of the statute' as 'related to the circumstances of the particulars of the case'.

[20] Beazley JA then observed that the purpose of the statute, inter alia, is to provide relief for persons who suffered loss by contravening conduct.

[21] These considerations on causation reinforce my reluctance to terminate the plaintiff's claim summarily. It is clear on the face of the amended statement of claim that the plaintiff's case is that the deceased was induced to enter into the principal transaction in reliance on the misrepresentations by the defendants. It is equally clear, however, that the plaintiff's case is that the misled deceased, in order to enter into the principal transaction, needed to have a collateral guarantee supplied by the plaintiff for the benefit of the financier. That raises questions of the degree to which the obtaining of the Guarantee was integral to the principal transaction. It may, for example, be found that the execution of the Guarantee by the plaintiff was not a transaction which was practically or causally disconnected from the allegedly tainted principal transaction, but rather that the deceased's agreement to enter into the loan transaction was the act which resulted in detriment to the plaintiff by her, as part of that transaction, being required to execute the Guarantee. Moreover, the amended statement of claim expressly avers not only that the financier's policy required such a collateral guarantee to be provided by the plaintiff in order for the deceased to borrow money, but that Cooke knew this policy and orally requested the plaintiff to execute the guarantee to enable the deceased to borrow the money in order to enter into the investments which Cooke had recommended. The circumstances, when examined at trial, may well reveal that the misleading and deceptive conduct was not just the reason for, but the cause of, the loss suffered by the plaintiff.[12]

[22] Accepting that part of the purpose of each of the *ASIC Act* and the *TPA* is to provide relief for persons who have suffered loss by contravening conduct, I do not think it

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12 *Henville v Walker* (supra), per McHugh J at [103].

can be said with the necessary high degree of certainty required for an application to strike out that a judge, examining this factual matrix, and having regard to the purpose of the statutes, would inevitably find that the plaintiff has not established a causal link between the contravening conduct and the loss she claims to have suffered by that contravening conduct.

[23] In those circumstances, I would refuse the application. The costs of the application will be reserved.