SUPREME COURT OF QUEENSLAND

CITATION:	*Stewart v White* [2011] QCA 291
PARTIES:	**DOUGLAS IAN STEWART** (appellant) **v** **WARREN HOWARD WHITE** (respondent)
FILE NO/S:	Appeal No 4037 of 2011 SC No 2183 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	15 September 2011
JUDGES:	Margaret McMurdo P, Muir JA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – WHERE ECONOMIC OR FINANCIAL LOSS – CARELESS ACTS OR OMISSIONS – where the respondent client entered into a joint venture agreement with the appellant mortgage broker to purchase three parcels of land for investment purposes – where the respondent relied upon representations made by the appellant that the venture would be profitable – where the joint venture agreement contained exclusion clauses – whether the agreement covered liability for pre-contractual negligent advice or representations concerning the profitability of the proposed venture TRADE AND COMMERCE – TRADE PRACTICES ACT (1974) CTH AND RELATED LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – FALSE REPRESENTATIONS GENERALLY – where the appellant was the sole director of a company – where the company was held liable at first instance for misleading and deceptive conduct – where the appellant was held to be liable for being knowingly concerned in the company's misleading and deceptive

conduct pursuant to s 75B(1)(c) of the *Trade Practices Act* 1974 (Cth) – where the appellant submitted that the primary judge's findings were insufficient to ground liability – whether the primary judge failed to make a finding of fact – whether the appellant knew that there was no reasonable grounds for making the representation

Trade Practices Act 1974 (Cth), s 51A, s 52, s 53A, s 75B

Australian Competition and Consumer Commission v Michigan Group Pty Ltd [2002] FCA 1439, considered
Business & Professional Leasing Pty Ltd v Dannawi [2008] NSWSC 902, cited
Canada Steamship Lines Ltd v The King [1952] AC 192, cited
Darlington Futures Ltd v Delco Australia Pty Ltd (1986) 161 CLR 500; [1986] HCA 82, cited
Davis v Pearce Parking Station Pty Ltd (1954) 91 CLR 642; [1954] HCA 44, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Hatt v Magro (2007) 34 WAR 256; [2007] WASCA 124, cited
HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] 2 Lloyd's Rep 61; [2003] UKHL 6, cited
King v GIO Australia Holdings Ltd (2001) 184 ALR 98; [2001] FCA 308, cited
Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd [1994] FCA 940; (1994) ATPR 41-315, cited
Quinlivan v Australian Competition and Consumer Commission (2004) 160 FCR 1; [2004] FCAFC 175, considered
Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd [2005] QCA 389, considered
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, cited
Wheeler Grace & Pierucci Pty Ltd v Wright [1989] FCA 127; (1989) ATPR 40-940, cited
Yorke v Lucas (1985) 158 CLR 661; [1985] HCA 65, considered

COUNSEL: R J Anderson for the appellant
C Wilson for the respondent

SOLICITORS: Morgan Conley Solicitors for the appellant
Cogill Woods Legal Services for the respondent

[1] **MARGARET McMURDO P:** This appeal should be dismissed with costs for the reasons given by Muir JA at [6]-[24] of his reasons and for the additional reasons given by Margaret Wilson AJA.

[2] The interaction between s 52(2) and s 75B(1)(c) *Trade Practices Act* 1974 (Cth) in this case meant that the respondent, Warren Howard White, had to prove the appellant, Douglas Ian Stewart, was directly and knowingly concerned in the contravention by

Douglas Ian Stewart Financial Services Pty Ltd ("the company") of s 52. Section 51A(2) *Trade Practices Act* had no application in the case against the appellant under s 75B(1)(c): *Quinlivan v Australia Competition and Consumer Commission*.[1]

[3] The primary judge found:

> "In the circumstances where the only spokesperson for the company and the only person who was acting on its behalf at the time is the [appellant], and where he, obviously, had actual knowledge of the actions of the company through him as its agent, I am satisfied that s 75B is applicable in this case. [The appellant] was directly and knowingly concerned in the contravention by the company of s 52."[2]

[4] Applying the well-established principles to an appeal of this kind which is by way of rehearing,[3] I agree with the inference drawn by the primary judge that the appellant, the alter ego of the company, knew the company had no reasonable grounds for making the representation, through him, to the respondent. This inference was consistent with the appellant's evidence that he had no experience in the purchase and sale of properties of the kind involved in this case, and that he obtained no valuations or did any research on the question. It was also consistent with the judge's finding that the appellant falsely denied making the critical representation. It is not suggested in this appeal that this finding should be overturned. The most sensible inference is that the appellant made the false denial because he was knowingly concerned in making, on behalf of the company, the critical representation, without reasonable grounds for making it (s 52(2)).

[5] I agree with the order proposed by Muir JA.

[6] **MUIR JA: Introduction** The appellant was the second defendant in a proceeding in the Supreme Court commenced by the respondent plaintiff against the appellant and a company controlled by the appellant, Douglas Ian Stewart Financial Services Pty Ltd ("Financial Services"). The respondent claimed against Financial Services damages for negligently given financial advice and for misleading and deceptive conduct in breach of ss 52 and 53A of the *Trade Practices Act* 1974 (Cth) ("the Act"). A claim for damages for negligence in relation to the advice was made against the appellant. It was claimed also that the appellant incurred liability to the respondent under the Act by being knowingly concerned in Financial Services' misleading and deceptive conduct. The respondent succeeded against the appellant and Financial Services on all of his claims and on 15 April 2011 the primary judge gave judgment for the respondent against the appellant and Financial Services in the sum of $297,336.89.

[7] The appellant appeals against the judgment on grounds that:

(a) the primary judge erred in not finding that on the proper construction of a joint venture agreement dated 16 March 2004 entered into between the appellant, the respondent and a Mr Astill, the appellant had no liability to the respondent; and

(b) the primary judge erred in finding that the appellant was knowingly involved in the conduct of Financial Services within the meaning of s 75B of the Act.

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1 (2004) 160 FCR 1; [2004] FCAFC 175, [15].

2 *White v Douglas Ian Stewart Financial Services Pty Ltd & Anor* [2011] QSC 81, [61].

3 See *Warren v Coombes* (1979) 142 CLR 531, 551; [1979] HCA 9 and *Fox v Percy* (2003) 214 CLR 118, 127; [2003] HCA 22.

Relevant facts

[8] None of the primary judge's findings of fact were challenged by the appellant. It is thus convenient to explain the factual background to the issues raised by the appellant by reference to facts extracted from the primary judge's reasons.

[9] In 2002, the respondent, the owner and operator of a small business, approached the appellant, who was known to him as a mortgage broker, for assistance with a loan for the purpose of acquiring a parcel of commercial land and the erection on it of sheds. The appellant assisted in the obtaining of the loan. Between December 2002 and September 2003, the appellant assisted the respondent with other applications for finance or extensions of finance facilities. In about October 2003, at a time when the respondent's business was not prospering, the respondent asked the appellant "if he had anything he could recommend or suggest in the sense of something which would make money". The appellant told the respondent of the Pacific Pines development which, he explained, was a development in which investors could purchase parcels of land on which they could build houses for re-sale at a profit. The appellant told the respondent that it was "a fantastic opportunity" and that he would "realise a great profit and that at that stage he was really only offering this to close friends, clients."

[10] The appellant made further representations in connection with the proposed purchase of three parcels of land in the Pacific Pines development including that:[4]

> "• [The respondent] would realise a great profit.
>
> ...
>
> • To realise a good profit he would have to purchase three properties.
> • There would be a return in the vicinity of $100,000 per property.
> • The profit would be realised within 12 months."

[11] The representations were relied on by the respondent who purchased three allotments in the development. On 16 March 2004 he entered into a joint venture agreement in respect of the land with the appellant and Mr Astill.

[12] The three allotments were acquired at market value and the respondent incurred a loss of $297,336.89 on their re-sale.

The joint venture agreement

[13] The joint venture agreement recited that, "This agreement sets out the rights and obligations of the parties with respect to the Venture." Clause 1.1 was an acknowledgement that the appellant had "sourced for the benefit of the Client, a vacant block of land" described in Item 2 of the Schedule. The "Client" was the respondent. The land described in the Schedule was the three parcels of land ultimately purchased.

[14] Mr Astill's role was described in the joint venture agreement as assisting in "the obtaining of financial accommodation for the purchase of the property and the construction of a house." The construction of the houses was to be the responsibility of the respondent who assumed an obligation to sell each parcel of land once construction of the house on it had been completed "at a price as agreed upon between the parties".

[15] Clause 5 of the joint venture agreement relevantly provided:

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[4] Reasons at [12].

> "5.5 The parties acknowledge that in the event that the property market drops and the sale of the completed property may not cover the costs of the Venture or the profit is not mutually acceptable to all parties, that is, all costs involved with the purchase of the land and the construction of the house ("the Venture costs"), then the Client is entitled to rent the property to a third party until such time as the property market recovers or there is sufficient equity in the completed property for the Venture to be profitable.
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> 5.6 The parties acknowledge that the Client is entitled to the rent collected from the completed property and the Client undertakes to pay any rent received towards the repayment of the mortgage secured by the completed property.
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> 5.7 The parties agree that sufficient equity in the completed property for the Venture to be profitable is the net profit after all costs of $50,000.00.
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> 5.8 In the event that the property market does not recover and the completed property is:
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> (a) sold for a loss and the Venture costs are not completely recovered; or
>
> (b) has a value, by the date that is 3 years from the date of this agreement, that is not sufficient to cover the Venture costs
>
> then the Client does not have any recourse to Stewart or Astill for the failure of the Venture.
>
> 5.9 The parties acknowledge that Stewart and Astill are not liable for any loss of profit from the Venture."

The primary judge's findings

[16] The primary judge held, at least by inference, that the appellant and through him Financial Services, owed the respondent a duty to take reasonable care not to cause loss through giving misleading information or advice. He held that the appellant and, inferentially, Financial Services were in breach of such duty as there was "no evidence to support in any way the representation made by [the appellant] as to the increase in value" of the three parcels of land. The argument that the appellant was protected from liability by clauses 5.8 and 5.9 of the joint venture agreement was rejected. His Honour concluded that the language of the agreement was not apt to protect the appellant from liability for pre-contractual tortious acts on his part.

[17] It was found that the appellant was the sole director of Financial Services, that the conduct of Financial Services was that of the appellant and that Financial Services had failed to discharge the onus on it of showing that there were reasonable grounds for making the representation as to the profit to be obtained from the sale of the land.

Ground 1 – Did the terms of the joint venture agreement relieve the appellant from liability?

[18] Counsel for the appellant argued that Clauses 5.8 and 5.9 had the effect of limiting the appellant's liability in accordance with their terms. He submitted that the provisions

must be construed according to their natural and ordinary meaning in the light of the contract as a whole[5] and that the words "does not have any recourse" and "are not liable for any loss of profit" are clear on their face and have a broad application. Consequently, it followed that the primary judge erred in restricting the effect of Clauses 5.8 and 5.9 of the joint venture agreement to losses occurring other than by the negligence of the appellant. It was further submitted that there is no requirement, for an exclusion clause to be effective, that it must expressly refer to negligence or breach of duty.[6]

[19] The primary judge held that the provisions of the joint venture agreement relied on by the appellant did not extend to any breach of duty which occurred prior to the entering into of the agreement. This conclusion, with respect, was correct.

[20] An exclusion clause is to be construed "according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentem in case of ambiguity."[7]

[21] Under the joint venture agreement, the respondent had an obligation to construct dwelling houses on the land at his cost and to sell them after completion of construction. The net profits were to be shared in the proportions: respondent 50 per cent, appellant and Astill 25 per cent each. The obvious role of Clauses 5.8 and 5.9 was to ensure that the appellant and Astill, although each entitled to 25 per cent of the profits of the joint venture, had no obligation to share the losses. In other words, those provisions, along with others, defined the extent of contractual rights and obligations.

[22] It would require a strained construction of Clause 5.8 to extend its concluding words to cover tortious liability for pre-contractual representations by the appellant. There is no hint in the wording of the joint venture agreement that the appellant did more to earn his joint venture interest than merely locate the subject land for the respondent. Clause 5.8 does not refer to advice or representations given or made. Moreover, the words "recourse…for the failure of the Venture" are not particularly apt to cover liability for negligent advice or representations concerning the profitability of the proposed venture, without which the joint venture agreement would not have been entered into in the first place.

[23] As the primary judge recognised, Clauses 5.8 and 5.9 appear to be concerned with "the working of the venture itself." That view of Clause 5.8 is strengthened by the opening words of Clause 5.8 which limit the operation of the provision to circumstances in which "the property market does not recover." Those words appear to relate to the circumstance of the property market dropping envisaged by Clause 5.5. Whatever the meaning of the introductory words of Clause 5.8 it is apparent that they were intended to confine the operation of the clause in a way which is inconsistent with its operating as a broad exemption clause.

[24] The appellant failed to make good this ground of appeal.

Ground 2 – Was the appellant liable under s 75B of the *Trade Practices Act*?

[25] In view of my conclusions in respect of the first ground, it is not necessary to decide the second ground and I will content myself with the following observations.

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5 *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500.

6 *Davis v Pearce Parking Station Pty Ltd* (1954) 91 CLR 642 at 649-51; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61 and *Canada Steamship Lines Ltd v The King* [1952] AC 192.

7 *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510.

[26] Section 51A of the Act relevantly provides:

> "(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
>
> (2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation."

[27] Section 75B of the Act relevantly provides:

> "(1) A reference in this Part to a person involved in a contravention of a provision of Part IV…shall be read as a reference to a person who:
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> …
>
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention…"

[28] It was argued on behalf of the appellant that the primary judge's findings were insufficient to support a finding of liability by application of s 75B of the Act. The relevant findings of the primary judge were said to be that the appellant made representations as the spokesman of Financial Services and thus had actual knowledge of the actions of Financial Services. It was contended that, to be liable under s 75B, the respondent had to prove that the appellant knew that Financial Services had no reasonable grounds for the subject representation made by him as its agent.[8] It was argued also that as there was no such allegation in the pleadings the respondent was unable to establish accessorial liability.

[29] The argument advanced on behalf of the respondent in counsel's written outline of submissions was as follows. The primary judge's finding that the appellant was knowingly concerned in the contravention of s 52 by Financial Services was open on the evidence. "The appellant conceded at trial that he had undertaken no research nor obtained any valuation of the properties in question, to support the representation that each property would increase in value by $100,000.00 within 12 months. The absence of any investigation by the appellant into the value of the properties recommended to the respondent gave rise to the primary judge's conclusion that the appellant had actual knowledge that the representation as to the increase in value of the acquired properties was without foundation and false."

[30] The submission overstated the primary judge's findings. His Honour held:

> "[49] The representation which is of importance relates to the increase in value. There was no evidence to support in any way the representation made by [the appellant] as to the increase in value. In making that representation, [the appellant] breached the duty which he owed to [the respondent]."

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8 *Yorke v Lucas* (1985) 158 CLR 661.

In addressing the question of the appellant's accessorial liability the primary judge said:

> "[58] Section 51A of the *Trade Practices Act* places an onus upon [Financial Services] to demonstrate that it (through the state of mind of the [appellant]) had reasonable grounds to make the representation concerning the increase in value of the house and land packages. In the absence of any reasonable grounds for making the representation, it is taken to be misleading. No evidence was adduced to the contrary and so, as it was a prediction as to a future matter, it is deemed not to have had reasonable grounds to make the representation.
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> ...
>
> [61] The [respondent] seeks to make the [appellant] liable under the *Trade Practices Act* pursuant to this provision. In the circumstances where the only spokesperson for the company and the only person who was acting on its behalf at the time is the [appellant], and where he, obviously, had actual knowledge of the actions of the company through him as its agent, I am satisfied that s 75B is applicable in this case. [The appellant] was directly and knowingly concerned in the contravention by the company of s 52."

[31] The representation on which the respondent relied was that "the properties…would realise a profit of at least $100,000 each within 12 months of purchase, notwithstanding the time necessary to construct the dwelling houses." The representation was of the nature of a prediction. As such, at least as a general proposition, it would fall within s 52 only if it was established that the appellant knew it to be false or made it with reckless disregard of its truth or falsity.[9]

[32] In *Global Sportsman Pty Ltd v Mirror Newspapers Ltd*,[10] Bowen CJ, Lockhart and Fitzgerald JJ said:

> "Many statements, for example, promises, predictions and opinions, do involve the state of mind of the maker of the statement at the time when the statement is made. Precisely the same principles control the operation of s. 52(1) with respect to the making of such statements. A statement which involves the state of mind of the maker ordinarily conveys the meaning (expressly or by implication) that the maker of the statement had a particular state of mind when the statement was made and, commonly at least, that there was basis for that state of mind. If the meaning contained in or conveyed by the statement is false in that or in any other respect, the making of the statement will have contravened s. 52(1) of the Act.
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> …
>
> An expression of opinion which is identifiable as such conveys no more than that the opinion expressed is held and perhaps that there is basis for the opinion. At least if those conditions are met, an

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9 *James v ANZ Banking Group Ltd* (1986) 64 ALR 347; *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 and *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1.

10 (1984) 2 FCR 82 at 88.

expression of opinion, however erroneous, misrepresents nothing." (citations omitted)

[33] The respondent's statement of claim did not allege that the appellant did not genuinely hold the opinion he gave or that there was no basis for the opinion. It was merely alleged, with a view to invoking s 51A of the Act, that there were no reasonable grounds for the making of the representation. The relevant allegations were:

> "29. …the oral and written representations were made negligently in that at the time of the representations:
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> …
>
> (c) the [appellant] had no reasonable basis for representing that the properties would increase by a value of $100,000 each within 12 months of the [respondent's] purchase of the properties;
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> ...
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> 31. Further, or in the alternative,…the oral and written representations were made by [the appellant]:
>
> (a) as agent for [Financial Services];
>
> (b) in trade and commerce within the meaning of the *Trade Practices Act* 1974 (Cth)…;
>
> (c) without any reasonable grounds for the making of the oral and written representations, within the meaning of section 51A of the Act;
>
> …
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> 33. In the premises pleaded in paragraph 29 herein, the [appellant] was knowingly concerned in [Financial Services'] breach of the Act."

[34] In rejecting the argument that "knowingly" in s 75B(1)(c) qualified only the words "concerned in", Mason ACJ, Wilson, Deane and Dawson JJ said in *Yorke v Lucas*:[11]

> "Moreover, the wider context of the whole section leads to the same conclusion. We have already indicated why par. (a) requires knowledge. Paragraph (b), which speaks of inducing a contravention by threats, promises or otherwise, and par. (d), which speaks of conspiring with others to effect a contravention, both clearly require intent based upon knowledge and there is force, we think, in the observation made in the judgment of the Full Court below that there is –
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> > ' ... no reason why Parliament would have intended that a section which renders natural persons liable for a contravention by a corporation should require some mental element or absence of innocence in every case to which it refers except one which itself requires in its first limb that the person was 'knowingly' concerned in the contravention.'
>
> **In our view, the proper construction of par. (c) requires a party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention.**" (emphasis added) (citations omitted)

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[11] (1985) 158 CLR 661 at 670.

[35] In *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd*,[12] Keane JA, McMurdo P and McPherson JA agreeing, said:

> "To establish liability in Selby in respect of his statements as to how the proposed deal would be carried out, including the statement to the effect that RSP would receive the same purchase price using 'trade dollars' as it would using legal currency, it would be necessary to establish that Selby knew that Promotions had no reasonable basis for making the representations which were found to have been made by him on its behalf. It is now well settled law that, in order to establish liability pursuant to s 75B of the TPA against a person on the footing that the person was knowingly concerned in a contravention of the TPA by a corporation, it is necessary for the plaintiff to show that the alleged accessory had actual knowledge of the 'essential matters' of fact which gave rise to the contravention by the corporation. Section 51A does not dispense with this requirement. Just as s 52 applies only to corporations so s 51A serves to facilitate proof of a contravention of s 52 by a corporation. The reversal of the evidentiary onus effected by s 51A(2) does not apply where accessorial liability is alleged under s 75B.[13]" (some citations omitted)

[36] In *Quinlivan v Australian Competition & Consumer Commission*,[14] to which Keane JA referred in *Robertson*, it was said with reference to ss 52(1), 51A, 75B and 80 of the Act:

> "From the interaction of these provisions three conclusions emerge. First, s 51A does not detract from the *Yorke* principle that actual knowledge of the essential elements of the contravention is required if s 75B or s 80 is to apply. Where the contravening conduct involves misrepresentation, whether as to a future matter or not, this principle requires actual knowledge by the accessorial respondent of the falsity of the representation. This is an essential matter which must be alleged and proved: *Su v Direct Flights International Pty Ltd* [1999] FCA 78 at [38], *Fernandez v Glev Pty Ltd* [2000] FCA 1859 at [18]."

[37] Their Honours went on to observe:[15]

> "Thirdly, it is implicit in s 51A(1) that where a corporation *does* have reasonable grounds for making a representation with respect to a future matter then there will be no contravention of s 52. This is a concession in favour of representors; in the case of a misleading representation where no future matter is involved it does not matter whether the corporation had reasonable grounds or not: *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511 at 513-514.
>
> Accordingly, where s 75B or s 80 accessorial liability is in issue in relation to a representation with respect to a future matter, the existence or otherwise of reasonable grounds will be relevant. If reasonable grounds exist, there will have been no contravention and thus no question of accessorial liability will arise. However, as

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12 [2005] QCA 389 at para [36].

13 *Quinlivan v Australian Competition & Consumer Commission* (2004) ATPR 42-010 at 48,843.

14 (2004) ATPR 42-010 at para [10].

15 At paras [14] and [15].

> against the accessorial respondent, the onus will be on the applicant to show the respondent had actual knowledge that:
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> - the representation was made and
> - it was misleading or
> - the corporation had no reasonable grounds for making it
>
> (See *Australian Competition and Consumer Commission v Michigan Group Pty Ltd* [2002] FCA 1439 at [303].)"

[38] In *Australian Competition & Consumer Commission v Michigan Group Pty Ltd*,[16] Dowsett J stated the test for accessorial liability by application of ss 51A(1) and 75B in terms virtually identical to that stated in the passage quoted immediately above. The approach in *Quinlivan* and *Michigan* was adopted in *Business & Professional Leasing Pty Ltd v Dannawi*[17] and *Hatt v Magro*[18].

[39] The above decisions accept that the relevant essential element of the contravention, which had to be shown to be within a defendant's knowledge to ground liability by operation of s 75B(1)(c), to adopt the language of the joint reasons in *Yorke v Lucas*, was the absence of reasonable grounds for the representation. That was the thrust of the argument advanced by counsel for the appellant and counsel for the respondent did not contend to the contrary.

[40] It was pleaded that Financial Services had no reasonable grounds for making the subject representation but the primary judge made no express finding to that effect except by application of s 51A(2) of the Act. Such a finding, however, is implicit in the findings that "there was no evidence to support in any way the representation" and that the appellant had "actual knowledge" of Financial Services' actions. I understand the "no evidence" finding to mean that there was no factual basis for the representation rather than meaning that no relevant evidence was adduced on the trial. That finding was made in respect of the negligence claim and not in addressing proof for the purposes of s 51A. There was evidence to support the implicit finding that the appellant was aware that there were no reasonable grounds for making the subject representation. Counsel for the appellant however makes the point that the primary judge did not find that the appellant knew that Financial Services had no reasonable grounds for making the representation. If there was such a finding it must be found in paragraph [61] of the reasons.

[41] Counsel for the respondent submitted, by reference to paragraph [61], that as the knowledge of the appellant was that of Financial Services and vice versa, the finding was effectively a finding that the appellant knew that he, and consequently Financial Services, had no reasonable grounds for making the representation. I am unable to accept that submission. It does not seem to me that the primary judge did more than assume that a finding that the appellant was knowingly concerned in Financial Services' contravention of s 52 was an inevitable consequence of his findings that Financial Services was deemed "not to have had reasonable grounds to make the representation" and that, as the appellant made the representations, he knew what was said.

[42] I consider it likely, however, that the evidence justifies a finding by this Court that the appellant knew that there were no reasonable grounds for making the representation.

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16 [2002] FCA 1439 at para [339].

17 [2008] NSWSC 902.

18 (2007) 34 WAR 256.

[43] The appellant said in evidence-in-chief that a $300,000 increase in price for the properties noted on a piece of paper shown by him to the respondent was "just an arbitrary figure". In cross-examination, he admitted that he had no experience in the purchase and sale of properties in developments like Pacific Pines, that he obtained no valuations and that he undertook no research into the development. The appellant also, according to the primary judge's findings, falsely denied making the subject representation. That, together with the other evidence I have mentioned, assists the conclusion that the appellant knew that there were no reasonable grounds for making the subject representation.

[44] I do not accept counsel for the appellant's contention that the issue under consideration was not raised in the pleadings. Although the pleader failed to allege knowledge of the absence of reasonable grounds for making the representation, it seems to me that the issue was sufficiently raised. The absence of reasonable grounds for the representation was relevant to both the negligence and trade practices claims and it was plain that the respondent was relying on ss 51A(1) and 75B(c) to establish its trade practices claim against the appellant. Nevertheless, the lack of clarity in the pleadings and the fact that the primary judge had the opportunity of assessing the witnesses and the evidence as the trial progressed would, to my mind, make it more desirable that the question under consideration be remitted to the primary judge for his determination were that necessary. Remittal is unnecessary because of the conclusion reached in relation to ground 1.

Conclusion

[45] For the above reasons, I would dismiss the appeal with costs.

[46] **MARGARET WILSON AJA**: There were two issues in this appeal –

(i) whether on the proper construction of the joint venture agreement the appellant was liable to the respondent; and

(ii) whether the appellant was knowingly involved in conduct of the corporation Douglas Ian Stewart Financial Services Pty Ltd which the trial judge found was conduct in contravention of s 52 of the *Trade Practices Act* 1974 (Cth).

The joint venture agreement 16 March 2004

[47] The trial judge found that, before the joint venture agreement was made, the appellant negligently represented that each of the three properties would increase in value by $100,000 within 12 months. He found that there was no evidence to support the representation in any way.[19] His Honour held that the appellant's liability for that negligence was not excluded by clause 5.8 or clause 5.9 of the joint venture agreement.[20]

[48] The appellant submitted that the trial judge erred in his interpretation of the joint venture agreement. I respectfully concur with the reasons of Muir JA for concluding that his Honour's decision in this regard was correct.

***Trade Practices Act* 1974 s 75B**

[49] The appellant was the corporation's sole director and secretary, and he acted as its agent at all material times. As Muir JA has recounted, he did not undertake any

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19 Reasons, [49].

20 Reasons, [38] and [39].

research into the Pacific Pines development or obtain any valuations of any of the properties there. He conceded that the $300,000 increase in value which he put before the respondent was an arbitrary figure and that he did not have any experience in the purchase and sale of properties in such a development. The trial judge found that he falsely denied making the representation.[21]

[50] The representation was made by the corporation by its agent the appellant. It was a representation with respect to a future matter. In finding, as against the corporation, that the making of the representation was misleading conduct in contravention of s 52 of the *Trade Practices Act* 1974 (Cth), the trial judge relied on s 51A(2) which provided –

> "(2) **[Representations respecting future matters]** For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation."

[51] The claim against the appellant was based on accessorial liability pursuant to s 75B(1)(c) of the *Trade Practices Act* – that he was directly knowingly concerned in the contravention of s 52. As against him, s 51A(2) was not applicable. In *Quinlivan v Australian Competition & Consumer Commission*[22] the Full Court of the Federal Court said –

> "15 ...where s 75B ... accessorial liability is in issue in relation to a representation with respect to a future matter, the existence or otherwise of reasonable grounds will be relevant. If reasonable grounds exist, there will have been no contravention and thus no question of accessorial liability will arise. However, as against the accessorial respondent, the onus will be on the applicant to show the respondent had actual knowledge that:
>
> - the representation was made and
> - it was misleading or
> - the corporation had no reasonable grounds for making it"

(See *Australian Competition and Consumer Commission v Michigan Group Pty Ltd* [2002] FCA 1439 at [303].)

[52] Counsel for the appellant did not challenge the trial judge's finding that the corporation had no reasonable grounds for making the representation. I did not understand him to be submitting that in this case it had not been proved against the appellant that the corporation had no reasonable grounds for making the representation. But he submitted that the respondent had neither pleaded nor proved that the appellant had actual knowledge that the corporation had no reasonable grounds for making the representation.

[53] Paragraphs 31 and 33 of the amended statement of claim were as follows –

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21 Reasons, [24].

22 (2004) 160 FCR 1; [2004] FCAFC 175 at para 15.

"***Trade Practices Act***

31. Further, or in the alternative, the recommendation and the oral and written representations were made by the second defendant:

    (a) as agent for the first defendant;

    (b) in trade and commerce within the meaning of the *Trade Practices Act* 1974 (Cth) ("the Act");

    (c) without any reasonable grounds for the making of the oral and written representations, within the meaning of section 51A of the Act;

    (d) in breach of section 52 of the Act, being misleading or deceptive or likely to mislead or deceive for the reasons pleaded in paragraph 29 herein;

    (e) in breach of section 53A of the Act, being false or misleading as to the price and characteristics of the land, for the reasons pleaded in paragraph 29 herein.

...

33. In the premises pleaded in paragraph 29 herein, the second defendant was knowingly concerned in the first defendant's breach of the Act."

[54] I respectfully agree with what Muir JA has said about the lack of clarity in the pleading, which suggests that the pleader may not have adverted to what needed to be proved. But the issue could be distilled from the pleading.

[55] In the circumstances of this case, where the appellant acted as the alter ego of the corporation, it was open to the trial judge to infer that that he knew the corporation had no reasonable grounds for making the representation.

Conclusion

[56] I agree with the order proposed by Muir JA.