SUPREME COURT OF QUEENSLAND

CITATION:	*Charter Pacific Corporation Ltd v Belrida Enterprises P/L & Ors* [2003] QCA 375
PARTIES:	**CHARTER PACIFIC CORPORATION LIMITED** ACN 003 344 287 (plaintiff/respondent) **v** **BELRIDA ENTERPRISES PTY LTD** ACN 010 154 355 (first defendant) **THOMAS QUINN** (second defendant) **MICHAEL JOHN COVENTRY and LYNETTE HELEN COVENTRY as trustees of the MIKE AND LYN COVENTRY FAMILY TRUST** (third defendants/first appellant) **BARRY TABE as trustee of the TABE FAMILY TRUST** (fourth defendants/second appellant) **ANDREW COVENTRY** (fifth defendant/third appellant) **MICHAEL JOHN COVENTRY and LYNETTE HELEN COVENTRY as trustees of the MIKE AND LYN COVENTRY FAMILY TRUST** (first cross-claimants) **BARRY TABE and ANDREW COVENTRY as trustees of the TABE FAMILY TRUST** (second cross-claimants) **v** **CHARTER PACIFIC CORPORATION LIMITED** ACN 003 344 287 (first defendant by counter-claim) **KEVIN JOHN DART** (second defendant by counter-claim) **BRYAN GERRARD DART** (second defendant by cross-claim)
FILE NO/S:	Appeal No 8944 of 2002 SC No 784 of 1994
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 September 2003
DELIVERED AT:	Brisbane

HEARING DATE: 12 May 2003

JUDGES: McMurdo P, Jerrard JA and White J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **Appeal and cross appeal dismissed with costs in each to be assessed**

CATCHWORDS: ADMINISTRATION OF PROPERTY – PROOF OF DEBTS – WHAT DEBTS PROVABLE – DAMAGES – where appellants' claim for unliquidated damages could have been brought in contract or by an alternative cause of action – proper construction of s 82(2) *Bankruptcy Act* 1966 (Cth) – where legislation requires the contract or promise to constitute an essential element of the cause of action to satisfy the term "by reason of" – whether appellants' claim arose "by reason of" a contract or promise under s 82(2)

PROCEDURE – COURTS AND JUDGES GENERALLY – DECISIONS OF PARTICULAR COURTS – STATE AND TERRITORY SUPREME COURTS – EFFECT OF DECISIONS OF SUPREME COURT OF ANOTHER STATE – where learned trial judge's interpretation of s 82(2) *Bankruptcy Act* 1966 (Cth) accorded with intermediate appellate authority – where this court, as intermediate appellate court, is bound to follow the interpretation placed on a provision of uniform national legislation by another such court unless plainly wrong – whether interpretation of s 82(2) set out in *Aliferis v Kyriacou* [2000] 1 VR 447 should be followed

CORPORATIONS LAW – CORPORATE FINANCE – SHARES – VALUATION – where appellants argue that the learned trial judge did not perform the task of ascertaining the value of the options in accordance with well established principles – where expert evidence given as to valuation techniques and principles – where learned trial judge relied on principle of "blockage" in prescribing a value to the shares – whether error disclosed in reasoning of learned trial judge

Bankruptcy Act 1861 (Imp), s 153
Bankruptcy Act 1869 (Imp), s 31, s 39
Bankruptcy Act 1966 (Cth), s 82, s 86, s 153
Corporations Law, s 995(2), s 1005

Aliferis v Kyriacou [2000] 1 VR 447, followed
Australian Competition and Consumer Commission v Kritharas (2000) 105 FCR 444, discussed
Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485, followed
CCA Systems Pty Ltd v Communications and Peripherals (Australia) Pty Ltd & Anor (1989) 15 ACLR 720, applied
Chittick v Maxwell (1993) 118 ALR 728, discussed

Emma Silver Mining Company v Grant (1880) 17 Ch D 122, discussed
Gould v Vaggelas (1985) 157 CLR 215, referred to
Gye v McIntyre (1991) 171 CLR 609, explained
In re Edwards; Ex parte Baum (1874) LR 9 Ch App 673, distinguished
Jack v Kipping (1882) 9 QBD 113, discussed
Johnson v Skafte (1869) LR 4 QB 700, discussed
Re D H Curtis (Builders) Ltd [1978] 1 Ch 162, referred to
Re H.B. Harvey (1972) ACLC 27,386, referred to
Re Pyramid Building Society (in liq) (1991) 6 ACSR 405, considered
Re Sharp; Ex parte Tietyens Investments Pty Ltd (in liq) & Anor[1998] FCA 1367, 26 October 1998, referred to
Reid v Interarch Australia Pty Ltd [2000] FCA 1328, 19 September 2000, discussed
Tilley v Bowman Ltd [1910] 1 KB 745, referred to

COUNSEL: D A Savage SC, with M Hoch, for the appellants
B D O'Donnell QC for the respondent

SOLICITORS: McCarthy Durie Ryan Neil for the appellants
McCullough Robertson for the respondent

[1] **McMURDO P:** I agree with Jerrard JA that both the appeal and cross-appeal should be dismissed for the reasons he gives.

[2] I wish only to add these brief additional comments as to the appeal. The appellants' contention as to the meaning of s 82(2) *Bankruptcy Act* 1966 (Cth) ("the Act") is based largely on statements made by Young J in *Chittick v Maxwell*[1] cited with approval by Weinberg J in *Re Sharp; Ex parte Tietyens Investments Pty Ltd*.[2] Young J found that Maxwell acted fraudulently in his dealings with his parents-in-law and was therefore not released by the bankruptcy from his liability to pay equitable compensation to them under s 153(2)(b) of the Act; his Honour allowed the Chitticks' claim on this basis, despite finding that their claim in negligence against Maxwell arose out of a contract or promise and was therefore within the words "by reason of a contract, promise or breach of trust" in s 82(2) of the Act. Young J's observations as to s 82(2) of the Act were not critical to the reasoned result in the case.

[3] Vincent J in *Re Pyramid Building Society (In Liq)*[3] seems to have reached his conclusion, that the words "by reason of" in s 82(2) of the Act require only the establishment of an appropriate nexus between the damages claimed and the contract or promise, independently of Young J's observations, or indeed of any other authorities.

[4] By contrast, after a comprehensive review of the authorities, including *Chittick* and *Re Sharp,* the Victorian Court of Appeal in *Aliferis v Kyriacou*[4] unanimously held

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1 (1993) 118 ALR 728, 738-739.
2 [1998] FCA 1367.
3 (1991) 6 ACSR 405, 410.
4 [2000] 1 VR 447.

that claims like the appellants' for unliquidated damages, which could be brought either in contract or by an alternative cause of action, did not arise "by reason of" a contract or promise unless the contract or promise under s 82(2) of the Act constituted an essential element of the cause of action. As Jerrard JA has demonstrated, this is not so here.

[5] To succeed in the appeal, the appellants have the difficult task of convincing this Court that *Aliferis v Kyriacou* was plainly wrong. Despite the valiant efforts of their counsel, they have not mounted this high barrier.[5]

[6] I agree with the orders proposed by Jerrard JA.

[7] **JERRARD JA:** This appeal was from a judgment delivered on 30 August 2002 following trial proceedings which commenced on 24 January 2000 and concluded on 1 June 2001. The judgment under appeal runs to 247 pages and 827 paragraphs. The trial itself lasted 157 sitting days. On the hearing of the appeal the appellant abandoned all bar grounds (a) and (f) of the notice of appeal, (the latter as re-worded by leave), with the consequence that not a single inference or finding of fact in the judgment was challenged. Each of the grounds of appeal which were argued raises a discrete matter, the first being one of law and the second that of the value of unexercised options in the respondent/plaintiff which had been held by two of the appellants.

[8] The first ground argued, (a), was that the learned judge erred in finding that the bankruptcy of Michael Coventry and Andrew Coventry, who were respectively the male third defendant/first appellant and the fifth defendant/third appellant, did not discharge the right of action against them successfully prosecuted by the plaintiff/respondent. That ground raised as a central issue the proper construction of s 82(2) of the *Bankruptcy Act* 1966 (Cth). The second ground (f), in whatever form it was expressed, raised the argument that the learned trial judge had not correctly ascertained the value of options to buy shares in the plaintiff/respondent, which options had been held by the successful cross claimants, the first and second appellants (who had been third and fourth defendants respectively). Those cross claimants had been restrained by order made early in the proceedings from exercising those options, and as it turned out, until after the date for exercise had passed. Those cross-claimants succeeded on the plaintiff's undertaking as to damages given when the injunctive orders restraining the cross claimants were made.

Background

[9] The plaintiff/respondent Charter Pacific was a company whose joint managing directors were Kevin and Bryan Dart. In late 1992 they controlled about 11% of its shares. By that time that company included in its business that of commercial investment in technology. In late 1992 the appellants Michael and Andrew Coventry were the directors of a company Evtech Pty Ltd, which company was promoting the commercial development of computer technology described as a Cell-U-Comm System, which in turn comprised a modem, an interface, software known as Electro Comm and a power pack.[6] That system was described in the

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5 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492-493.

6 Further amended statement of claim at AR 487 and amended Defence and Counter Claim at AR 522, 523

pleadings as one which facilitated the sending and receipt of data and faxes through both or either the public switch phone network and the mobile analogue cellular network; and as an advance over existing technology. Significant in it was the modem described as an IMS modem[7], with IMS being a company owning the rights to that modem.[8] A Mr Morgan had hand made a number of those by August 1992[9]; and what was being developed as Cell-U-Comm was described as an "office in a briefcase".[10] By late October 1992 Andrew and Michael Coventry sought equity funding for Evtech for its modem venture and advertised for investors.[11] That resulted in the Darts meeting with Andrew Coventry in late October 1992, and by 10 December 1992 an agreement had been reached between Evtech, a company Bundaway Pty Ltd owned by the Darts[12], the third and fourth defendants, and a company Belrida Enterprises. The agreement then reached was that the third and fourth defendants and Belrida (the first defendant, which entered into a compromise with the plaintiff in 1994) would transfer half their A Class shares in Evtech to Bundaway. Negotiations and dealings between the parties continued and on 24 March 1993 a (the first) Deed was entered into between the first, third, and fourth defendants, Evtech, and Charter Pacific.[13] The Deed was intended to supersede the December 1992 agreement. Andrew Coventry was not a party to the Deed.

[10] The effect of the Deed, when carried out was that Charter Pacific became the owner of one half of the A Class shares in Evtech[14]. Those A Class shares carried all the voting rights and powers concerning the sale of the other shares.[15] By that Deed, as varied on 27 April 1993[16], Charter Pacific was to lend $400,000.00 to Evtech by 7 July 1993, and by 12 July 1993 it had in fact lent Evtech sums totalling $402,000.00.[17]

[11] By the date of the variation of that first Deed, Evtech had been licensed (on 13 April 1993) by IMS to exploit commercially that modem.[18] Nevertheless, in a finding not challenged on appeal, the learned trial judge held that the Evtech shares acquired by Charter Pacific had no real or market value[19]. Evtech never repaid the $402,000.00 advanced, nor paid any interest on it,[20] and the project of marketing Cell-U-Comm was a failure. The learned trial judge described that $400,000.00 as being really venture capital, and held that the loan itself had no market value as an asset of Charter Pacific.[21] Charter Pacific's successful claim against the defendants was that misrepresentations by them had misled it into acquiring those shares in Evtech and lending that money. The trial judge found that statements which were misrepresentations had been relied on by Charter Pacific[22] when that first Deed had

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7 Reasons for judgment at [259]
8 Reasons [50]
9 Reasons [59]
10 Reasons [47]
11 Reasons [73]
12 Reason [81]
13 Reasons [118], and the Deed is at AR 15
14 Reasons [667]
15 Reasons [44]
16 Reasons [279]
17 Reasons [280] and [746]
18 Reasons [152]
19 Reasons [763]
20 Reasons [746]
21 Reasons [750]
22 Reasons [610]

been made and settled (settlement was on 27 May 1993)[23], although those misrepresentations were not the dominant consideration in the minds of Charter Pacific's joint managing directors. The learned judge also held the fact that those misrepresentations were no longer the dominant consideration was of no avail to the defendants, it being sufficient the misrepresentations played some part, even if only a minor part, in contributing to the formation of the (relevantly) first Deed[24].

[12] Charter Pacific entered into a second Deed on 13 August 1993, at a time when there were already problems evident with the Cell-U-Comm System. By that second Deed, Charter Pacific obtained sufficient shares in Evtech to give it control of it. The learned judge found that Charter Pacific had a number of reasons for entering into that second Deed, which included that it did not want to share future profits with the Coventrys, and a long held desire to control Evtech.[25] The judge found that this was not done to mitigate losses Charter Pacific was then suffering. He also found that by the time of that second Deed Charter Pacific's Directors, the Darts, were no longer influenced by the various misrepresentations made to them between October 1992 and April 1993; and that the Darts still thought by August 1993 that it was possible to market the modem and generate a profit.[26] The judge held that, the plaintiff having already invested heavily in Evtech, for it to have written off that investment would have adversely affected Charter Pacific's share price, and that it was reasonable for Charter Pacific to continue (after August 1993) to fund Evtech, and to believe that with a little more work the problems with the modem might be solved.[27] By November 1993 Charter Pacific had advanced a further $204,634.30 to Evtech on top of the $400,000.00 originally advanced by agreement. At or around that time Charter Pacific realised that a new model of the modem would be needed; and although it thereafter expended further sums on the failed venture, the learned judge did not allow those as damages. The damages awarded to the plaintiff against the defendant were $604,634.30.

[13] In mid 1994 litigation began. Part of the consideration in that first Deed for Charter Pacific gaining half the A Class shares in Evtech from the first, third, and fourth defendants was that each would obtain 400 options in Charter Pacific. These were delivered in late May 1994. On 1 June 1994 Charter Pacific obtained interlocutory injunctions restraining those defendants from dealing in those options. The injunctions remained in force until after the expiry date of those options on 10 November 1997.[28] That matter is the basis of the cross-claim by the third and fourth defendants enforcing the Charter Pacific undertaking as to damages. The learned trial judge gave judgment for each of the third and fourth defendant/cross-claimants in the sum of $397,000.00, plus interest, calculated at a rate specified by His Honour, on $360,000.00 as from 1 June 1994, and $37,600.00 from 29 July 1994. Under the cross claimant's appeal, it is common ground that the learned judge was correct in determining he should value the options as at 1 June 1994, but the appellants complain about the method adopted.

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23 Reasons [623]

24 Reasons [610] citing *Gould v Vaggelas* (1985) 157 CLR 215 at 236

25 Reasons [664]

26 Reasons [767]

27 At [766]-[767]; clearly with *Gould v Vaggelas* at 223, 255/6 and *Kenny & Good v MGICA* (1999) 199 CLR 413 at [123] in mind.

28 Reasons [710]

[14] The plaintiff Charter Pacific succeeded in obtaining its judgment for $604,634.30 against the third, fourth, and fifth defendants with interest calculated from 1 June 1994 at the rate specified by His Honour. The judgment makes clear[29] that those damages were awarded pursuant to a claim based on s 1005 of the *Corporations Law* against those defendants, on the basis of their having, in contravention of s 995(2) of that law, engaged in conduct that was misleading or deceptive in carrying on the negotiations related to the dealing in Evtech shares and Charter Pacific options. The learned judge found it unnecessary to determine claims brought by Charter Pacific against the third and fourth defendants for damages for breach of warranties and for contractual indemnities pursuant to the provisions of the first Deed, because the judge considered that the sums recoverable under those claims would be the same amount as that allowed for damages under s 1005.

The First Ground of Appeal

[15] The manner in which the plaintiff pleaded its claims for damages, or alternatively indemnification against loss, resulting from breaches of warranties by the third and fourth defendants provided one of the grounds upon which Andrew and Michael Coventry argue that their bankruptcy provides a complete answer to the plaintiff's claims against them. It was common ground that on 9 March 1994 Andrew Coventry was made bankrupt, and discharged from that bankruptcy on 21 April 1997. Michael Coventry was made bankrupt on 22 August 1994 and discharged on 22 September 1997. Those defendants pleaded that the claims made against them were claims for breach of contract, or claims for misrepresentation inducing a contract, and as such were claims which arose by reason of a contract for the purposes of s 82(2) of the *Bankruptcy Act*.[30] They then pleaded that by reason of their discharge from bankruptcy they were discharged from operations of law by the plaintiff's claim against them pursuant to s 153(1) of the *Bankruptcy Act*.

[16] Section 82(1) of that Act relevantly provides that all debts and liabilities "present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy", are provable in that bankruptcy. Section 82(2) provides:

> "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy."

The Coventrys argue that the claims litigated against them were for provable debts not arising otherwise than by reason of a contract or promise.

The Pleading Argument

[17] The plank of that argument relying on the pleadings went as follows. The plaintiff relevantly pleaded[31] that in the negotiations between the plaintiffs and defendants in or about October to December 1992, the second, fifth, and male third defendant acted on behalf of the first, third, and fourth defendants. Then it was pleaded that in the course of those negotiations and up until the entry into the first Deed the third and fourth defendants made various representations to the plaintiff, which were

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29 Reasons [724]-[725]

30 AR 557, para 32 of the amended defence and counter claim

31 At AR 488 para 5 of the further amended statement of claim

pleaded in detail in paragraph 6 of the further amended statement of claim. One representation, 6(y), was that Evtech owned the technology in the system. Then it was pleaded (by paragraph 7) that the plaintiff was induced by those representations to enter into and to complete the (first) Deed of Sale of shares dated 24 March 1993 with the first, third, and fourth defendants.

[18] The argument then went to paragraph 8 of the pleadings, whereby it was pleaded that the terms of that deed were that those defendants would transfer to the plaintiff one half of its or his A Class ordinary shares in Evtech, and the plaintiff would issue those defendants with 400,000 options in it, exercisable at a price of 50c per share on or before 10 November 1997; and further that by the terms of that Deed each of the first, third, and fourth defendants represented and warranted to the plaintiff that, as at the date of the first Deed, all of the information that had been given by or on behalf of those defendants and the directors or officers of Evtech to the "Purchaser" or its solicitors was true and accurate in all respects (pleading 8(f)). It was then pleaded by 8(g) that in that Deed each of those first, third, and fourth defendants represented and warranted to the plaintiff that all the information known to those defendants relating to Evtech which was material had been disclosed to the plaintiff.

[19] The argument then pointed to the further pleading in 8(h) that each of those defendants represented and warranted further specific matters, including that Evtech was the owner of all the technology used by the company, including the Electro Com Computer software. Those matters warranted by the Deed seem an enlargement of the representation pleaded in 6(y).

[20] The argument then pointed to the pleading in 9A of the statement of claim that, in breach of the warranty pleaded in 8(h), those matters warranted were not true. Then came the pleading in 9B, that the representations pleaded in 6(y) and 8(h) were misleading and deceptive. Then came a pleading in paragraph 17 that the representations in 6, 8(f), 8(g), 8(h), were misleading and deceptive, and attention was drawn to the further pleading in paragraph 20 that in making those representations the third and fourth defendants were engaging in conduct that was misleading or deceptive in connection with the dealing in securities; and to the pleading in paragraph 22 that each of the third and fourth defendants was in breach of the warranty contained in the first Deed pleaded in paragraph 8(f), and that contained in the first Deed pleaded in 8(g). Then came the pleading (in para 28) that had the plaintiff not relied on the defendants' representations and warranties, it would not have entered into the first Deed and advanced money to Evtech.

[21] Finally, the appellants Coventry pointed to the pleading in paragraph 31 that the plaintiff suffered loss by reason of the (defendants') representations and the breach of the warranties; and to the claims for damages for "misrepresentations, misleading and deceptive conduct and/or breaches of contract", and the alternative claim for an indemnification. Those appellants then went to clause 6.1 of the Deed (at AR 24) whereby the appellants (and first defendant) warranted in the terms set out in schedule 2 of the Deed, which schedule (at AR 33) included in Clauses (c) and (d) warranties as to the accuracy of information supplied, and as to the supply of all material information, as pleaded in the statement of claim in 8(f) and (g).

[22] The appellants Coventry submitted that those pleadings and that Deed established that there was no possibility of an action, whether it be in tort, contract, or the statutory claim that succeeded, that was not based on a representation which was

both a representation and a warranty to be found in the contract. Those appellants described the Deed as a contract, it being an agreement for consideration contained in a Deed for the sale of shares in Evtech to Charter Pacific by the first, third, and fourth defendants.

[23] The appellants Coventry submitted that the plaintiff's claims were completely concurrent and co-extensive in contract and for the statutory claim, and this demonstrated that those claims were demands not arising otherwise than by reason of a contract or promise. It was submitted there was no reported case in which claims joined in one action and prosecuted down to judgment had been held maintainable in the face of bankruptcy because one claim, but not the other, arose under a contract. The argument placed stress on the proposition that the same evidence was led in support of both, and the same damages were sought. Those appellants submitted that failing to recognise the validity of their argument would result in litigants being able to prove in bankruptcy for unliquidated damages on a contract, and then "top up" on the dividend received by suing for that top up amount on a non-provable claim. The submission regarded that result as self-evidently objectionable.

[24] That part of those appellants' argument suffered from the defect that the plaintiff had made no claim in either bankruptcy; and further that the careful findings by the learned trial judge suggested those claims for breach for warranty would have failed had judgment been given on them. This is because the learned judge had considered in detail each of the pleaded representations in paragraph 6, and found 10 to amount to misleading or deceptive conduct.[32] The judge found that the representation pleaded in 6(y) was not misleading or deceptive[33]; and the extensive reasons for judgment leading to that conclusion by inference find adversely to the plaintiff on the inaccuracies pleaded in paragraph 9A in respect of the breach of warranty pleaded in paragraph 8(h).

[25] Regarding the warranty pleaded in 8(f), the reasons for judgment show the learned judge considered the relevant representations (made in November and December 1992) were made to the Darts as directors of Bundaway, **not** as directors of the plaintiff ("the Purchaser") and accordingly the warranty in schedule 2 of the first Deed, at (c)[34], did not cover the plaintiff. Likewise the warranties that there had been no non-disclosure of material information, pleaded in 8(g), were in essence dealt with by the learned judge when determining the plaintiff's claims on non-disclosure in respect of the pleaded representations. As described in the reasons for judgment at [633], the learned judge found the "plaintiff" (sic) (presumably the defendants) "was" under no obligation to disclose other information available concerning the relevant representations, or alternatively that Bryan Dart was not misled. It appears the plaintiff failed to establish any breach of the warranties pleaded at 8(g) causing loss or damage to it.

[26] The appellants Coventry submitted that they would have been entitled to advance their appeal based on s 82(2) with equal force had there either been no pleading by the plaintiff of any claim based on the pleaded breaches of warranties; or even if the contract, as the appellants described it, had by enforceable agreement restricted any claim by the plaintiff to damages to a nominal sum of, say, $5,000.00, and had the

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32 The judge summarised those findings in reasons [584] and footnote 211

33 Reasons [572]

34 Reproduced at AR 33

plaintiff obtained judgment on the statutory claim in the amount for which it did. The appellant contended this was because, irrespective of what was actually pleaded or any limitations in the contract not affecting or limiting the statutory claim, that statutory claim nevertheless arose by reason of the contract. Those appellants submitted the correct approach was to inquire "how factually does the claim arise?", and that in these appeals Charter Pacific's statutory claim arose by reason of misleading and deceptive conduct inducing the making of a contract for the sale of shares in Evtech. They submitted that contract, induced by those representations, was an essential element of the cause of action, since absent proof of the making and performance of the contract, the "dealing" described in s 995 of the *Corporations Law* would not be made out. It was also submitted that a claim for inducing someone to enter into a contract was a claim arising under the contract for the purpose of s 82(2), and that there was authority to support that view.

The Appellant's Authorities

[27] The appellants particularly relied on the decision in *Jack v Kipping* (1882) 9 QBD 113, as explained in *Gye v McIntyre* (1991) 171 CLR 609. With respect to the appellants those decisions may afford them less support than they contend. In *Jack v Kipping* the plaintiff was the trustee in bankruptcy of one Kelly, and that trustee was suing Mr Kipping, a debtor to the bankrupt for unpaid monies owing on the sale of shares by the bankrupt to Mr Kipping. Mr Kipping sought to set off against the plaintiff's claim the amount already paid in part payment for those shares, which shares Mr Kipping pleaded were valueless, and which he had been induced to buy by statements fraudulently made by the bankrupt. The set off relied on s 39 of the *Bankruptcy Act* 1869 (Imp) which relevantly provided that:

> "Where there have been mutual credits, mutual debts, or mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sums due from the one party shall be set off against any sum due from the other party, and the balance of such account and no more shall be claimed or paid on either side respectively…"

[28] In a short judgment of the court, Cave J held[35]:

> "…that a contract of sale and purchase is in its nature mutual, imposing reciprocal obligations on the vendor and purchaser, and consequently that claims arising out of that contract are mutual dealings within the statute.
>
> It seems to us that it would be inequitable to hold that, where a purchaser has had an article which turns out to be worthless palmed off on him by fraudulent misrepresentations, and the vendor has become bankrupt, he should be compelled to pay the agreed price to the trustee, and be left to recover back as much as he can in the shape of a dividend. It is said that such a fraudulent misrepresentation is a tort; but we think that it is not a personal tort, but a breach of the obligation arising out of the contract of sale."

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35 At QBD 116

[29] The judgment did not describe what that obligation was. Its compelling reasoning as to the unfairness which would follow from any other result was based on the conclusion that it was a case of mutual dealings as described in s 39, rather than based on excluding the provisions of s 31 of that same Act, which provided that:

> "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a promise shall not be provable in bankruptcy."

[30] The High Court decision in *Gye v McIntyre* provides[36] a definitive analysis of *Jack v Kipping*. *Gye v McIntyre*, like *Jack v Kipping*, was a case about the right of Mrs McIntyre, the judgment creditor of the bankrupted Mr Gye, to set off the judgment in her favour against Mr Gye and another for a debt, against Mr Gye's judgment in his favour against her for damages for deceit. Both judgments were obtained in the New South Wales Supreme Court.

[31] The High Court decision upheld that of the Full Federal Court (Pincus, Gummow, and von Doussa JJ) that Mrs McIntyre could so set off the judgment debts. Hers arose from her having lent money to Mr Gye and another to purchase a hotel, pursuant to a contract in which the latter persons were induced to enter by fraudulent misrepresentations made about its profitability by Mrs McIntyre. She was not the vendor. She got judgment for her debt, and Mr Gye for damages for the fraud. The unanimous judgment of the High Court treated the matter as one concerned with the right of set off permitted under s 86 of the *Bankruptcy Act* 1966 (Cth), which section corresponded to s 39 of the *Bankruptcy Act* 1869 (Imp).

[32] Their Honours held that the expression (in s 86) "a person claiming to prove a debt in the bankruptcy" should be understood as including a person who, but for the set off under s 86, would be entitled to prove a debt in the bankruptcy[37]. They held further that in s 86 the word "mutual" conveyed the notion of reciprocity rather than that of correspondence[38], and that it did not mean "identical" or "the same". Likewise they held that the word "dealings" was used in a non-technical sense in s 86[39], and that the word encompassed, as a matter of ordinary language, commercial transactions and the negotiations leading up to them. Where a fraudulent misrepresentation was made in the course of such negotiations, the fraudulent misrepresentation was itself part of the relevant "dealings".

[33] This view enabled their Honours to hold[40] that the claims of the parties in each of the judgments in that case were claims in respect of mutual dealings for the purpose of s 86, notwithstanding the fact that Mrs McIntyre was not a party to the actual contract of sale of the property. Dealing with an argument based on s 82(2), they explained that the main rationale for the exclusion in that section of most non-contractual unliquidated claims, including unliquidated claims in tort, from debts provable in bankruptcy seemed to lie in the desirability of avoiding uncertainty and delay in a bankruptcy administration. They held that whatever view was taken of the validity of that rationale[41], there was no convincing reason why a liquidated claim of a bankrupt's creditors could not be set off against an unliquidated claim in

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36 At CLR 632
37 At CLR 621
38 At CLR 623
39 At CLR 625
40 At CLR 626
41 At CLR 628

tort of the bankrupt which vested in the trustee. Importantly for the present appeal, their Honours rejected an argument that the decision in *Jack v Kipping* was authority for the view that a set off of claims was precluded unless they "arise out of" a contract. They held that *Jack v Kipping*, properly understood, recognised that a claim **against** the bankrupt can be set off under s 86 only if it would, but for the set off, be provable in the bankruptcy, and the case was not authority for a more general proposition that claims (or unliquidated claims) could not be set off under the section unless they arose from contract.[42] Their Honours accepted the explanation of *Jack v Kipping* proffered by Vaughan Williams J in *Re Mid-Kent Fruit Factory*[43], that the misrepresentation in *Jack v Kipping* itself constituted part of the "mutual dealings" for the purposes of the set off provision:

> "…the claim of the trustee, being for the price of goods, the misrepresentation which led to the purchase of the goods was a mutual dealing as between the purchaser and the bankrupt vendor."

[34] Vaughan Williams J had explained that was the only reason the claim for damages for misrepresentation, which "was in one sense a claim in respect of a tort", was allowed to come within the mutual credits clause. Their Honours then held that there was no persuasive authority supporting a general proposition that only claims arising from contract could be set off, and agreed with the view of Brightman J in *Re D.H Curtis (Builders) Ltd*[44] that the (UK legislation corresponding with) s 86 should not be construed as being so confined. Thus analysed, the decision in *Gye v McIntyre* does not support the view that the set off permitted in that case and in *Jack v Kipping* means that the claims in damages for misrepresentation set off in those two cases arose out of a contract. It seems significant that the unsuccessful appellant Gye maintained that the claims could not be set off; his judgment was for damages for misrepresentation. There appears to have been an underlying assumption in the joint judgment that it did not arise out of a contract.

[35] Other decisions to which the appellants referred did support their argument. In *Re Pyramid Building Society (in liq)* (1991) 6 ACSR 405, Vincent J dealt with claims by non-withdrawable shareholders of three building societies in liquidation where those shareholders claimed they had acquired their shares in reliance on false or misleading representations made by servants or agents of the relevant building society, and wanted to maintain an action against those societies for damages, and prove in the liquidation.

[36] The learned judge held that the argument that the shareholders claims could not be classified as having arisen by reason of a contract or promise did not pay sufficient attention to the language of s 82(2). The judge considered that the expression "by reason of" indicated that it was not necessary to establish more than an appropriate nexus between the damages claimed and the contract or promise. While the claim has to be causally connected to a contract or promise,[45] so that it could be said to have arisen by reason of the contract or promise, it was not required that a breach of contract or undertaking be proved. He held that there seemed to be a reasonable possibility that a number of shareholders could sensibly argue that, in reliance upon the conduct and statements of representatives of the group, those shareholders had

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42 At CLR 631

43 [1896] 1 Ch 567 at 571-572

44 [1978] 1 Ch 162 at pp 169-176

45 This approach gives a construction consistent with that given to "arising out of" in *Dickinson v Motor Vehicle Insurance Trust* (1987) 163 CLR 500 at 505

entered into contracts for the purchase of shares; and could well have a basis for contending that their demands for unliquidated damages arose from the contract into which they had entered or in consequence of promises made to them.[46]

[37] That judgment was not a final decision on the merits, but it did hold that those claims for unliquidated damages were provable. Although His Honour cited no authority, his reasoning supports the appellants. They likewise rely on the decision of Young J in *Chittick v Maxwell* (1993) 118 ALR 728, in which that learned judge was hearing a case against a (former) solicitor whose plaintiff (former) parents-in-law had, by agreement with him, built a home on land owned by the solicitor. Those parents-in-law were people without legal training and relied on the solicitor Mr Maxwell to "draw up a document … to make it all legal and protect you," as he promised to do (at ALR 731). The solicitor did draft a Deed, described in the evidence as hopelessly inadequate, and after the solicitor and his wife had separated, and after the ex-parents-in-law were forced out of their home by the action of a mortgagee from the solicitor, those parents-in-law sued the solicitor; who in the meantime had entered into a composition with his creditors.

[38] The learned judge found the solicitor was liable to those plaintiffs for breach of a fiduciary duty owed to them, and also liable in "tortious negligence". The judge held that latter claim succeeded because the plaintiffs were led by the solicitor to rely on his special skill and judgment and that he owed them a duty of care, (ALR 737) but that the claim had been released by the operation of s 153(2)(b) of the *Bankruptcy Act,* because it "arises out of a contract or promise in the sense that it was a failure to fulfil the promise to protect."[47] His Honour held it did not matter that there was no cause of action in contract, (because there was no promise for consideration), it being sufficient that there was "a claim at law or in equity, and that that claim" was "for damages arising out of a contract or promise" (at ALR 739).

[39] That learned judge did refer to authority, including *McPherson: The Law of Company Liquidation* 3rd Edition page 379, and accepted the submission that when considering whether a claim for unliquidated damages arose by reason of a contract, promise, or breach of trust, one "looks to the underlying transaction rather than to the form of action"; there was the promise even though made without consideration that the solicitor would protect the plaintiffs by the use of appropriate legal skill (at AR 735) That learned judge's "underlying transaction" approach supports the appellant's argument.

[40] However, the conclusion that the solicitor was liable in "tortious negligence" was based on the duty of care owed by the solicitor to the plaintiffs who relied on his special skill and judgment, rather than in reliance on that promise made without consideration, which actually could add nothing to the plaintiff's claim in negligence. I consider it a too expansive view of the expression "arising by reason of a … promise" to hold that the claim for damages in negligence arose because of the promise which, in the negligence claim, could only be evidence of the reason for reliance and demonstrate the importance of the solicitor's duty.

[41] The learned author of *McPherson: The Law of Company Liquidation* 3rd Edition wrote at p 379, at the passage cited by Young J:

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46 At ACSR 410 and 411

47 At ALR 738 and 739

> "The tendency is to give a narrow interpretation to the exclusionary aspect of s 82(2) and the following claims have been held to fall outside its scope: claims in respect of secret profits for breach of fiduciary duty, for profits made by infringing a patent, for damages in respect of misrepresentation inducing a contract, or rectification of the share register, and for contribution against a joint tortfeasor. In addition there is a general principle that a person with alternative remedies in contract and tort may elect to waive the tort and prove in contract…"

Young J also cited *Ex parte Llynvi Cole & Iron Co*; *Re Hide* (1871) LR 7 Ch App 28 at 31-2 where James LJ said of the *Bankruptcy Act* 1869 (Imp) that:

> "Every possible demand, every possible claim, every possible liability, except for personal torts, is to be the subject of proof in bankruptcy…"

[42] Young J further cited *Britter v Sprigg* (1900) 26 VLR 65, where the Victorian Full Court, dealing with the *Insolvency Act* 1890 (Vic), held the wrongful receipt by a director of a building society of monies of the society by way of commission was a provable debt, because[48]:

> "We think the relationship of a director to this company is on this principle contractual. It is therefore within sec 114."

The principle referred to was that which the Victorian Court extracted from the decision in *Emma Silver Mining Co v Grant* (1880) 17 Ch D 122, which the Victorian court held was that the obligation of a director who was in a fiduciary position and who received a secret commission might be considered that of a contractor. The actual decision of Jessel M.R. in *Emma Silver Mining Co* was that when a promoter of a company formed to purchase a gold mine had received part of the purchase price as a secret commission, for which commission he was successfully sued by the company, that sum of money:

> "…does arise from a contract – that is to say, a contract of agency, or promotion, or trusteeship – call it what you like. Under that contract he became liable for the sum he received in that character; and he is liable to account for it by reason of that contract. It seems to me a clear case arising from contract."[49]

[43] The 4th Edition of *McPherson on The Law of Company Liquidation* relevantly repeats (at page 551) what appeared in the 3rd Edition at p 379. The authorities cited in both editions for the proposition that claims for damages in respect of misrepresentation inducing a contract fall outside the exclusionary aspect of s 82(2) (and thus are provable in bankruptcy) are *Jack v Kipping*, *Tilley v Bowman* [1910] 1 KB 745, and *Re H.B. Harvey* (1972) ACLC 27,386.

[44] *Tilley v Bowman Ltd* and *Re H.B. Harvey* are both instances of single judge decisions in which the learned judges followed and applied *Jack v Kipping*, in allowing the set off of a claim for damages based on fraud against a claim by a bankrupt suing on a contract induced by the bankrupt's fraud. They are each examples of the variety of set off approved in *Gye v McIntyre*, with the

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48 At VLR 82

49 At 17 Ch D 130

misrepresentation which lead to the contract being treated as a "mutual dealing" between the parties.

[45] The appellants also obtained some support from the judgment in *Re Sharp; Ex parte Tietyens Investments Pty Ltd (in liq)* [1998] FCA 1367, in which case Weinberg J heard applications for leave to commence proceedings against three solicitors who were undischarged bankrupts. The solicitors had operated a mortgage lending practice making loans on behalf of clients/investors through Tietyens Investments Pty Ltd, and the draft statement of claim against those solicitors claimed for breaches of statutory duty contrary to s 232 of the *Corporations Law*, and for breaches of duties under common law and equity as directors and fiduciaries. His Honour held that the claims were based in part at least upon the contractual relationship which existed between those three individuals and the persons who ultimately lost their investment money, and therefore arose "by reason of a contract"[50].

[46] The learned judge regarded Young J in *Chittick v Maxwell* as having explained the operation of s 82, and considered Young J's analysis provided a cogent rationale for the modern tendency to give a narrow interpretation to the exclusionary aspect of s 82(2). That approach also supports the appellants.

The Respondent's Argument

[47] The respondent's principal argument was that both the historical and preferred meaning which should be accorded to s 82(2) is that what is required in order that the demand for liquidated damages not be provable is that a contract or promise not be an element of the cause of action. The respondent submitted that the section was concerned with damages for breach of the bankrupt's contract or promise; and it also submitted that none of the damages it was awarded resulted from breach of any promise by Michael Coventry, who was a party to the Deed.

[48] Those damages reflected the money it lent as it promised; all Michael Coventry had promised to do was to assign his Evtech shares and take Charter Pacific options, and the respondent argued it suffered no loss by acquiring worthless shares in Evtech in exchange for options to acquire shares in itself.[51] The respondent also submitted Andrew Coventry could gain no benefit from s 82(2) since he had made no relevant promise. The appellants had argued that while the defence available under s 82(2) was more obviously available for Michael Coventry, it was also available for Andrew, since the evidence and judgment established that he too made representations inducing entry to the Deed.

[49] The decision upon which the respondent chiefly relied was that of the Victorian Court of Appeal in *Aliferis v Kyriacou* [2000] 1 VR 447, in which in separate judgments each member of the court held for the construction advanced by the respondent. In *Aliferis v Kyriacou* the plaintiff had issued proceedings in both contract and tort against a solicitor claiming unliquidated damages for the negligent performance of a retainer. The solicitor then entered into a Deed of Arrangement under Part (X) of the *Bankruptcy Act* 1966 (Cth), but the plaintiff did not participate in that. The plaintiff then sought to proceed with the claim for damages and the Court of Appeal held that the claim based on a tortious duty of care did not arise

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50 At page 7 of the judgment

51 *Pilmer v Duke Group* (2001) 180 ALR 249 at [53], [63]-[64]

"by reason of" a contract even if the fact or existence of a contract was pleaded for the purposes of establishing that tortious duty of care.

[50] Brooking JA described the history of s 82(2) from its genesis in s 153 of the *Bankruptcy Act* 1861 (Imp), which had provided that:

> "If any bankrupt shall at the time of adjudication be liable, by reason of any contract or promise, to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the court acting in prosecution of such bankruptcy to direct such damages to be assessed by a jury…"

Brooking JA took the view that the reference in that section and in s 31 of the subsequent *Bankruptcy Act* 1869 (Imp) to a contract or promise, was a reference to contracts and promises the breach of which was recognised by the law as a wrong. He considered that meant the reference was to simple contracts (contracts by parole) and promises made by Deeds. He acknowledged that an alternative approach available as a matter of textual construction was to hold that "contracts" meant those recognised by the law as binding, and that "promise" meant (binding) promises contained in simple contracts or contracts by Deed. Senior Counsel for the respondent in these appeals appears to have followed the preferred usage of Brooking JA, since he repudiated the description of "contract" to describe the agreement under Deed, and submitted that the issue was whether the demand arose out of a promise in the Deed. If any decision by this court on that point is necessary, I consider that a "contract or promise" means a contract or promise which is binding for whatever reason.

[51] The view taken by Brooking JA led readily to the conclusion that liability "by reason of any contract or promise" in section 153 of the 1861 Act meant that a contract or promise was an element of the cause of action; and that similarly a demand arose by reason of a contract or promise (in s 31 of the 1869 Act) where a contract or promise was an element of the cause of action. His Honour referred to the consideration given to the 1869 version by the Court of Queens Bench in *Johnson v Skafte*[52], in which Lush J held that the section was intended to apply to express contracts for breach of which damages had not been ascertained as at the date of bankruptcy, as opposed to actions founded on relationships from which the law implied a contract.

[52] Brooking JA also considered the judgment of Hayes J in *Johnson v Skafte*, wherein that learned judge had described the state of the law prior to the 1861 Act, in which unliquidated damages which could be ascertained only by a jury could not be proved in a bankruptcy, and those discharged from bankruptcy could still be sued on mercantile contracts. Brooking JA, after some further historical examination, concluded that s 153 of the 1861 Act was concerned with claims for damages for breach of the bankrupt's contract or promise, and held (at VR 452) that the words in s 82(2) should not be given a meaning different to that which was borne by the early Imperial predecessors. This led to his conclusion that a demand arose otherwise than by reason of a contract or promise if there was no actual contract, whether express or tacit, which was an element of the cause of action. His Honour accordingly respectfully disagreed with the reasoning and view taken by Young J in

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52 (1869) LR 4 QB 700

Chittick v Maxwell, Weinberg J in *Re Sharp*, and Vincent J in *Re Pyramid Building Society*.

[53] Phillips JA held that if the plaintiff sought to pursue her claim in contract for breach of an implied term to exercise due care, that claim would be one "arising…by reason of contract". This was because His Honour, like Brooking JA, was of the opinion that the term "implied contract" used by Lush J in *Johnson v Skafte* referred to that which was then thought to underlie the common counts such as for money had and received, quantum meruit, and the like. He held that "implied contract" did **not** mean an implied term in an actual contract.

[54] Phillips JA then held (at VR 455) the plaintiff had had a right to elect between two remedies, one of which was presumably barred and the other not. The fact that she had not sought to participate in the Deed of Arrangement meant that she had not hitherto made an election inconsistent with her proceeding with the claim in tort.

[55] Charles JA also dealt with the issue of election[53]. His Honour cited the 11th Edition of *Williams on Bankruptcy* at page 139, which in 1915 said of the relevant UK section (by then s 30(1) of the *Bankruptcy Act* 1883 (Imp)) that:

> "Unliquidated damages in all cases of mere tort are, however, still not provable, but if the demand arises from a contract, it is not the less provable, because the action for the demand might properly be shaped in tort … The claimant, however, in such cases as put to his election between his remedies, and if he proceeds with and fails in his action for the tort, he will not be allowed to prove in respect of the breach of contract; nor if he gets judgment in contract will he be allowed afterwards to proceed in tort…"

[56] That passage of *Williams on Bankruptcy* cited *Parker v Norton* (1796) 6 TR 695; 101 ER 777, and *In re Edwards; Ex parte Baum* (1874) LR 9 Ch App 673. I respectfully observe that those cases are authority for the proposition for which Charles JA cited them, namely[54]:

> "It has thus been maintained now for over 200 years that if a claimant has concurrent remedies, and chooses to pursue a claim in negligence against a bankrupt, that claim may be maintained, but is not provable in the bankruptcy."

[57] I respectfully so observe because the appellants were disposed to argue that *Ex parte Baum* assisted their cause, with which submission I disagree. It was a case in which a creditor had brought an action against his debtor, in which he had joined counts in contract for breach of promise in not accepting certain bills of exchange with counts in tort for misrepresentations contained in a letter written by the debtor and which had induced the plaintiff to discount those bills, drawn on the defendant. The debtor had filed a petition for liquidation and the necessary majority of creditors had agreed to a composition. The defendant sought to restrain the plaintiffs from proceeding further, and it was held that the Court of Bankruptcy had no jurisdiction to restrain the action for misrepresentation, since damages for that claim were not provable. Mellish LJ wrote that:

> "I agree that if a Plaintiff joins claims which are provable with claims which are not provable, the Court of Bankruptcy is not

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53 At VR 459 [36] – [37]

54 At VR 459 [37]

> prevented from restraining the proceedings in respect of the claims which are provable: but, on the other hand, the Court cannot take advantage of the insertion of claims which are provable to restrain the Plaintiff from enforcing claims which are not provable, and which he ought not to be restrained from enforcing."

[58] The decision in that case is inconsistent with the view that claims for damages for such misrepresentations arise by reason of a contract or promise. The respondent was disposed to argue that it had made an election not to proceed on its claims for breaches of warranty, but that submission is not maintainable. The respondent's reply and answer in paragraph 11 (at AR 574) had merely pleaded that the claims against the third and fifth defendants were not provable debts as defined in the *Bankruptcy Act* 1966, and it pursued the warranty claims. Despite that I consider, with respect, that the respondent had made its critical election by its conduct when it did not attempt to prove any claim in the appellant's bankruptcy. The fact that it subsequently pleaded at considerable length and prosecuted, in conjunction with its non provable claim, a claim which did arise from contract and from which the contracting defendants were discharged by reason of s 153, merely wasted its resources and those of others.

[59] Returning to the judgment in *Aliferis v Kyriacou*, Charles JA likewise respectfully declined to follow *Chittick v Maxwell*, *Re Sharp; Ex parte Tietyens Investments*, while acknowledging the support therein for the submission that the exclusionary aspect of s 82(2) (that is, the words of exception commenced in "arising otherwise than") should be narrowly construed. Charles JA considered the proper test, leaving breach of trust to one side was whether a contract or promise constituted an essential element of the cause of action (at VR 463); and he distinguished between a contract as an essential element on the one hand, and the orthodox need on the other to plead and prove the fact of a contract (of retainer) for the purpose of delineating and defining the scope of the solicitors' duty of care in negligence.

[60] The construction preferred in *Aliferis* is consistent with other judgments at first instance in the Supreme Court of New South Wales and in the Federal Court. The decision in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 requires that this court, as an intermediate appellate court, not depart from an interpretation placed on a provision of uniform national legislation by another such court unless convinced that interpretation is plainly wrong.

[61] Those other first instance decisions include the following. In *CCA Systems Pty Ltd v Communications and Peripherals (Australia) Pty Ltd* (1989) 15 ACLR 720, Giles J heard a claim by an unpaid plaintiff who had supplied computer equipment to a company which had gone into liquidation. The claim was brought against an officer of that company for damages for misrepresentation in breach of the *Fair Trading Act*. That officer had entered into a composition with his creditors. Giles J held (at ACLR 731) that the claim under the *Fair Trading Act* 1987 was not a provable debt, and rejected the argument that it arose by reason of a contract or promise because the representations were made in order to bring about the contract for the sale of the goods by the plaintiff to the company, now in liquidation, and its promise to pay for the goods. His Honour did not accept that the plaintiff's claim in reliance on the *Fair Trading Act*:

> "…was by reason of the sale: the claim was by reason of the making of the representations."

[62] That succinct observation itself provides a complete answer to the appellant's argument in this appeal. The relevant representations were pleaded as being made "in or about October to December 1992", and the Deed containing the promises in consideration of each other was in March 1993. The misrepresentations relied on were made months before, and the pleaded claim which succeeded under s 1005 was by reason of the making of those representations. The learned judge rejected[55] the respondent's claim that the execution or completion of the first Deed by it was induced by the conduct of the third and fourth defendants in executing the Deed with the warranties (reproducing the representations) contained in it; and the respondent did not attempt to establish any case on the basis that the representations were misleading or deceptive at the time of making or completion of the first Deed but not when they were originally made[56]. Further, the plaintiff did not plead that the making of the representations by signing the Deed was conduct which was misleading and deceptive.[57]

[63] The respondent placed some reliance on the decision of McLelland CJ in Equity in *Re NIAA Corporation Ltd (in liq)*, (unrep, NSWSC, 2 December 1994). That learned judge was hearing an application by two debtors being sued by a company in liquidation for the recovery of an alleged debt, said to be the unpaid balance of loans made by the company to the applicants. Those applicants wished to cross claim in respect of the misappropriation by an intermediary of funds received on the company's account, not only from the applicants but from others. The applicants contended those funds so received should be taken in reduction of their respective liabilities, and proposed to claim damages from the company for its negligence in failing to advise the applicants not to pay that intermediary amount in reduction of the loan accounts with the company, and for failing to warn them that the intermediary was not remitting to the company amounts received, and also for misleading and deceptive conduct in permitting the intermediary to act as such. The learned judge held that the loan contract between the company and the applicants was no more than a circumstance against the background of which, and in connection with the obligations established by which, the alleged negligence and misleading and deceptive conduct of the company was said to have taken place. He considered that association was insufficient to satisfy the statutory formula that the claim arose "by reason of" that contract.[58] The case is of limited assistance, since there was no suggestion that any misleading or deceptive conduct by the company had induced the applicants to enter into the contract on which they were being sued.

[64] More relevant is the judgment of Hely J in *Reid v Interarch Australia Pty Ltd* [2000] FCA 1328, in which proceedings an argument was made to His Honour concerning s 82(2), to the effect that it was not necessary that a contract be an element of the cause of action. The learned judge held that s 82(2) was concerned with claims for damages for breach of the bankrupt's contract or promise, and not with contracts or promises of third parties (at paragraph 17 of the judgment), and it was insufficient to satisfy the section that the existence of a contract was an essential part of the factual substratum underlying the claim brought. He also held

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55 At reasons [631]

56 See reasons [627]

57 As noted by the learned trial judge in reasons [625]

58 At page 3 of the judgment

it was appropriate that he follow the decision of the Victorian Court of Appeal in *Aliferis v Kyriacou*.

[65] In *ACCC v Kritharas* (2000) 105 FCR 444, Katz J helpfully summarised (at FCR 450) the facts in *Reid v Interarch.* These were that the applicant alleged that it contracted with a corporate respondent to have the latter perform certain services for it, and the corporate respondent had subsequently falsely represented to it that those services had been performed; but, in reliance on that representation, it had wasted expenditure and an individual respondent had been involved in the making of the relevant representation by the corporate respondent. It was the individual respondent's submission before Hely J that the applicant's claim against him arose by reason of a contract, so that the claim was provable. In rejecting that argument, Katz J noted (at FCR 448) that there existed a formidable body of authority for including within s 82(2) claims for damages under s 82 of the *Trade Practices Act*[59], and considered (at FCR 451) that he should follow the decision of Hely J in *Reid v Interarch*.

[66] The construction determined upon in *Aliferis v Kyriacou* has the advantages of historical consistency, consistency with the right of election long recognised to exist, and it is a result consistent with the analysis of Giles J in *CCA Systems*, which analysis I find persuasive, and which I consider inconsistent with the appellant's "underlying transaction" approach. A problem with that approach is that it assumes what the argument seeks to prove, namely that claims for misrepresentations necessarily arise out of a (subsequent) underlying transaction rather than out of the negotiations leading to it. The appellant's alternative way of putting its case, namely its version of what constitutes an essential element of a cause of action, elevates a matter of normally necessary evidence (of how damage was suffered) into an essential element of the cause of action. This court should follow the decision in *Aliferis* and the appeal by the Coventrys must fail.

Cross Appeal on Quantum

[67] The first and second appellants in their cross appeal argue only about the value fixed by the learned judge as at 1 June 1994 of the options to acquire shares in Charter Pacific, which those cross appellants were unable to exercise. The cross appellants accept that the learned judge was correct in his determination that his obligation was to ascertain the value of the options as at 1 June 1994. On that date a parcel of 10,000 options was traded on the market at $1.40, and the cross appellants say the learned judge should have valued each of their parcels of 400,000 at that value instead of the 90 cents value found by His Honour.

[68] The cross appellants expressed their complaint in different ways, but the final version of their proposed amended notice of appeal was that:

> "(f) In adopting the discounted valuation, the learned Judge did not perform the task of ascertaining the value of the options as at 1 June 1994, in accordance with well established principles, but rather determined as the price at which a vendor desiring to sell 800,000 could have obtained on that date".

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[59] That approach accords with the remarks of McPherson AJA (in NSW) in *Heydon v NRMA Ltd* [2000] NSWCA 374 (at [440]), that provisions like s 82 (of the *Trade Practices Act*), although statutory in origin, have been described as tortious in character: as in *Giepel v Peach* [1917] 1 Ch 108 at 114.

The submissions supporting that ground complained that the learned judge had valued the cross claimants options on the assumption the cross claimants' were desiring to sell all those options on 1 June 1994, and that this approach involved an error of law made manifest in the sentence (in reasons [821]) that:

> "A vendor endeavouring to place parcels of options of this size would have been obliged to accept a discount on the market price. That effect, called "blockage", has been recognised in a number of cases."

[69] The appellants complain about the contents of both those sentences. They say the first misstated the appropriate principle they concede the learned judge had earlier correctly stated, that being described by Griffiths CJ in *Spencer v The Commonwealth*[60] in these terms:

> "In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, *i.e.*, whether there was in fact on that day a willing buyer, but by inquiring "What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?"

[70] With due respect to the argument, typically ably presented by senior counsel for the cross appellants, it really does no justice to the learned judge. The cross appellants led no evidence before the judge suggesting that they were in a financial position to take up those shares and hold them for any period of time, and the reasons for judgment show that the learned judge was attempting to determine what a person or persons willing to buy 800,000 options from the cross claimants would have had to pay for them on 1 June 1994 to the cross claimants, assuming those cross claimants to be willing to sell for a fair price but not desirous of selling.

[71] The judge ascertained that by relying on expert evidence called from a Mr Willis. The cross appellants did not call any contradictory evidence as to the value of the options. The evidence of Mr Willis was presented both by a report (at AR 444 and in the witness box). His report made several observations. One was that it was not realistic, and it was simplistic, to use the market's last sale price of the listed option on the day preceding the valuation date because:

- the market for options in Charter Pacific was extremely illiquid. Total trading by volume was only 31,600 in May 1994 and only 29,000 for the for the first 16 days of June 1994;

- the option prices occurring in the period April to August 1994 bore little relationship to the underlying share price. On some days the trades were significantly below a fair value in relation to the share price, while on some others the trades were significantly in excess of any normal relative value;

- a large parcel of options would be expected to sell at a discount to either the theoretical fair value or the market value of the options. This occurs because the presence of continued selling in the markets encourages potential buyers to bid at increasingly lower levels.

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60 (1907) 5 CLR 418 at 432

[72] His report advised that the alternate means of selling a large parcel of stock or options, by offering it for sale to a single buyer or groups of buyers, was therefore usually achieved by offering the parcel at a substantial discount to the prevailing market price. This reflected the price depressing nature of a large available parcel of options. The evidence concerning the quantum of tracking in options was born out by the tables at AR 460-465, which set out the trading in those options from 4 January 1993 up to 23 December 1994. There were some sales of amounts over 100,000 options (there were three of those in September 1993 and one on 27 September 1994) but amounts commonly traded (trades did not occur on all days) in a day were often less than 10,000. The price at which options were traded fell steadily after 1 June 1994 from $1.40 until 20 July 1994, when they briefly revived to $1.55, and thereafter fell until reaching 90 cents in early December 1994 and reviving to $1.10 on 23 December 1994. The evidence did not go beyond that date.

[73] Mr Willis considered it would be unrealistic to "dribble" the options onto the market and expect to receive $1.40, and explained in oral evidence that:

> "Even more volumes like (4,000 or 5,000 at a time) would have an impact. I might say I've traded in the securities of Charter Pacific in the past, experienced that same problem with even small volumes". (Transcript 6171)

The learned judged pressed Mr Willis during the latter's evidence as to what would be realised from trickling perhaps 3,000 options at a time on to the market place over a (say) 12 month period, and received the answer (at 6172) that Mr Willis thought the result wouldn't "be all that different" from the figures Mr Willis suggested would be returned from a sale to one, or to a group, of buyers. The learned judge then inquired (6173) what Mr Willis would advise if a seller told him he wished to realise the options in the best way, and Mr Willis's strong advice would be not to "go down the path of a slow trickling of stock into the market" (6173), but to attempt the placement to the small number of buyers he had suggested. His expert opinion was that a price of 90 cents per option was achievable by that method: he also drew attention to the fact that the sales would occur in a very well informed market, aware of these holders of a large number of options.

[74] Michael Coventry cross-examined Mr Willis, and the transcript of the cross examination provided to the Court did not show any challenge to that opinion of the result achievable by that method of sale of the 800,000 options, nor any criticism of the methodology by which the figure was arrived at, nor any suggestion that any higher or different figure was achievable. I consider with respect that the question asked by the learned judge concerning a seller who wanted to realise the options "in the best way" did not invalidly assume a vendor either obliged or desirous of selling, but rather a vendor willing to sell but wanting a fair price. That was the correct test.

[75] The cross appellant's other complaint was that Mr Willis ought not to have taken notice of the "blockage" effect of possession of a very large parcel of options in a market in which much smaller numbers were traded, because the cases in which that "blockage" effect had been recognised were "revenue" cases involving valuations of shares for taxation purposes (such as estate duty, gift duty and sales tax), and not "damages" or "compensation" cases. The cross appellant contended, and the

respondent did not submit otherwise, that their research did not show evidence of that "blockage" effect being recognised in "damages" cases.

[76] It was not suggested that there was any authority for the proposition that that "blockage" effect should **not** be acknowledged in "damages" cases where relevant. With due respect to senior counsel for the cross appellants, I consider his submission really invited the courts to adopt the judgment of Williams J in *Kent v Federal Commissioner of Taxation* (*Martins case*)[61]. Williams J there said:

> "Evidence was also given that it would be difficult to sell such a large parcel of shares, and several of the expert witnesses contended that their value as a whole should be reduced on this account. But the object of estimating the price that would be agreed upon between the reasonably willing vendor and a reasonably willing purchaser is to ascertain the full value of the property to the owner, and the Court therefore assumes a hypothetical purchaser or purchasers who will be ready and willing to purchase the whole parcel. Even if there is one purchaser, he must still pay this full value."

[77] Gibbs J in *Gregory v Federal Commissioner of Taxation* (at 123 CLR 571) was unable to agree with those remarks. His Honour wrote:

> "No doubt the Court assumes the existence of a hypothetical purchaser who is ready and willing to purchase the whole parcel of shares, at their real value. The question to be determined however is whether the real value of the holding is reduced by its size. This seems to me to be a question of fact and not of law. In some cases the size of the holding may increase the value, as where the parcel of shares is sufficient to carry a special resolution: (citation omitted). If, however, in fact the size of a parcel depreciates its real value, there is no principle of law that requires a fictitious and excessive value to be attributed to it for purposes of estate duty."

[78] Those observations of Gibbs J were followed by Stephen J in *Estate of Bruce-Smith v Federal Commissioner of Taxation* (1973-1974) 130 CLR 340 at 347. Those comments by each of those judges do not reveal any failure to appreciate the distinction remarked upon by Dixon J (as he then was) in *Commissioner of Succession Duties (SA) v Executor Trustees and Agency Co of South Australia Ltd* (1947) 74 CLR 358 at 373, where His Honour noted that there were some differences of purpose in valuing property for revenue cases and in compensation cases. His Honour wrote that in the second, the purpose is to ensure that the person to be compensated is given a full money equivalent of his loss, while in the first it is to ascertain what money value is plainly contained in the asset so as to afford a proper measure of liability to tax. Dixon J himself wrote that that difference could not change the test of value, but observed that it was not without effect upon a court's attitude in the application of the test. This was because in the case of compensation, doubts are resolved in favour of a more liberal estimate; and in a revenue case, of a more conservative estimate.

[79] The problem for the cross appellant is that they did not suggest any more liberal estimate, nor suggest any means or time by which their very large holding of

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61 Unreported 22 October 1945, referred to by Gibbs J in *Gregory v Federal Commissioner of Taxation* (1970-1971) 123 CLR 457 at 571

options could have been realised by them for $1.40 per option rather than 90 cents; nor any means of valuing those options other than calculating what price a vendor willing but not anxious to sell could have achieved. The learned trial judge found that that figure was 90 cents and his reasoning discloses no error. Accordingly, the cross appeal should likewise be dismissed.

[80] I would order that both the appeal and the cross appeal be dismissed with costs in each to be assessed.

[81] **WHITE J**: I have had the considerable advantage of reading the reasons for judgment of Jerrard JA and agree with his Honour for the reasons he gives that both the appeal and cross appeal should be dismissed with costs to be assessed.