SUPREME COURT OF QUEENSLAND

CITATION:	*Robertson Street Properties P/L v RPM Promotions P/L & Ors* [2005] QCA 389
PARTIES:	**ROBERTSON STREET PROPERTIES PTY LTD** ACN 058 675 577 (plaintiff/respondent) **v** **RPM PROMOTIONS PTY LTD** ACN 103 249 118 (first defendant) **SIMON MOSLEY** (second defendant) **ARLO SELBY aka ARLO SUN and aka ARLO SELVEY** (third defendant) **MARK LEONARD SEABROOK** (fourth defendant/appellant) **OSIER PTY LTD** ACN 010 254 252 (fifth defendant) **LESLIE GEORGE WILSON** (sixth defendant) **ROBERTSON STREET PROPERTIES PTY LTD** ACN 058 675 577 (plaintiff/first respondent) **v** **RPM PROMOTIONS PTY LTD** ACN 103 249 118 (first defendant) **SIMON MOSLEY** (second defendant/second respondent) **ARLO SELBY aka ARLO SUN and aka ARLO SELVEY** (third defendant/appellant) **MARK LEONARD SEABROOK** (fourth defendant/third respondent) **OSIER PTY LTD** ACN 010 254 252 (fifth defendant/fourth respondent) **LESLIE GEORGE WILSON** (sixth defendant/fifth respondent)
FILE NO/S:	Appeal No 4264 of 2005 Appeal No 4294 of 2005 SC No 3802 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 October 2005

DELIVERED AT:	Brisbane
HEARING DATE:	7 October 2005
JUDGES:	McMurdo P, McPherson and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**In each appeal:** **1. Appeal allowed** **2. The judgment below is set aside as against the appellant** **3. The respondent Robertson Street Properties Pty Ltd ACN 058 675 577 is to pay the appellant's costs of the appeal to be assessed on the standard basis** **4. No order as to the costs below**
CATCHWORDS:	TRADE AND COMMERCE - TRADE PRACTICES AND RELATED MATTERS - CONSUMER PROTECTION - MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT - CHARACTER AND ATTRIBUTES OF CONDUCT - KNOWLEDGE OR INTENTION - where Robertson Street Properties Pty Ltd ("RSP") had sold land to RPM Promotions Pty Ltd - where the appellants Selby and Seabrook had also been involved in this sale - where RSP sued, among others, Selby and Seabrook for damages alleged to have been suffered as a result of contraventions of s 52 *Trade Practices Act* 1974 (Cth) in which both Selby and Seabrook had been knowingly involved - where the learned trial judge had made no finding that Selby was aware of facts that showed there was no reasonable basis for any representations made by him to RSP - whether the learned trial judge had made the findings of fact required to conclude that Selby had been knowingly concerned in contraventions of s 52 *Trade Practices Act* 1974 (Cth) TRADE AND COMMERCE - TRADE PRACTICES AND RELATED MATTERS - PROCEDURE - GENERALLY - PLEADING - where the appellant Selby was not represented at the trial - where findings were made against Selby that were not supported by RSP's pleadings - whether the absence of Selby from the trial meant that these findings were not open to the learned trial judge TRADE AND COMMERCE - TRADE PRACTICES AND RELATED MATTERS - CONSUMER PROTECTION - MISLEADING, DECEPTIVE OR UNCONSCIONABLE CONDUCT - CHARACTER AND ATTRIBUTES OF CONDUCT - CAUSAL CONNECTION BETWEEN CONDUCT AND LOSS - where the damages claimed by RSP against the appellants Selby and Seabrook was the unpaid balance of the purchase price to be paid by RPM to RSP - where RSP had already received 4.25 million dollars from RPM in return for the land - where RSP led no evidence

to prove that the land was worth more than this amount - where the remainder of the purchase price contained in the contract was made up of "trade dollars" - where no evidence had been led as to the precise value of "trade dollars" - whether RSP had been able to prove that it had suffered loss as a result of the alleged misconduct of Selby and Seabrook - whether this was a suitable case for a new trial on the issue of damages

Trade Practices Act 1974 (Qld), s 51A, s 52, s 75B, s 82

Banque Commerciale SA, en Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279, applied
Marks v GIO Australia Holdings Ltd [1998] HCA 69; (1998) 196 CLR 494, cited
Murphy v Overton Investments Pty Ltd [2004] HCA 3; (2004) 216 CLR 388, distinguished
Quinlivan v Australian Competition and Consumer Commission [2004] FCAFC 175; (2004) ATPR 42-010, cited
Regan v New York & NER Co (1891) 60 Conn 124; 22 A 503, cited
Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd (1977) 16 ALR 23, cited
The Waterways Authority v Fitzgibbon [2005] HCA 57; S513, S98 and S131 of 2005, 5 October 2005, cited
Wenham v Ella (1972) 127 CLR 454, distinguished
Yorke v Lucas (1985) 158 CLR 661, cited

COUNSEL:

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M M Stewart SC, with S S Monks, for the appellant in Appeal No 4294 of 2005
L Stephens for the respondent in Appeal No 4264 of 2005 and for the first respondent in Appeal No 4294 of 2005
No appearance for the second, fourth and fifth respondents in Appeal No 4294 of 2005

SOLICITORS:

Tucker & Cowen for the appellant in Appeal No 4264 of 2005 and for the third respondent in Appeal No 4294 of 2005
John M O'Connor & Company for the appellant in Appeal No 4294 of 2005
Tobin King Lateef for the respondent in Appeal No 4264 of 2005 and for the first respondent in Appeal No 4294 of 2005
No appearance for the second, fourth and fifth respondents in Appeal No 4294 of 2005

[1] **McMURDO P:** I agree with the orders proposed by Keane JA and with his reasons.

[2] **McPHERSON JA:** The plaintiff sued various defendants for damages for misleading conduct arising out of a contract for the sale of a building on land belonging to the plaintiff in Fortitude Valley. In accordance with the contract the land was duly transferred to the purchaser, which was the first defendant in the proceedings; but the plaintiff claimed it had not been paid the agreed price in full and sought damages in the amount of $500,000 as compensation for its loss under s 82 of the *Trade Practices Act 1974*. According to the contract of sale, or an agreement collateral to it, part of the purchase money was payable in what were called "Ozecard trade dollars". The statement of claim alleges that, contrary to the agreement, the Ozecard trade dollars "did not have an equal value to one dollar in Australian currency". Clearly enough the allegation was intended to be read as meaning that a single Ozecard trade dollar did not have a value equal to one Australian dollar, but something less than that value.

[3] When the matter came to trial in the Supreme Court, the learned trial judge found misleading conduct proved and awarded damages in the amount claimed of $500,000 and interest against each of the third defendant Selby and the fourth defendant Seabrook, who are now the appellants in this Court. At the trial, Seabrook but not Selby, who did not appear, was represented by counsel and solicitors. Rule 476(1) of the Uniform Civil Procedure Rules provides that if a defendant does not appear when the trial starts, "the plaintiff may call evidence to establish an entitlement to judgment against the defendant, in the way the court directs". No express direction having been given by the court here, the plaintiff was left to establish its entitlement to judgment against Selby from the evidence led by the plaintiff at the trial against Seabrook. To that extent the appeals of both appellants against the judgments stand or fall together.

[4] Common law courts have always had an aversion to giving judgment against absent parties, much preferring instead that they be present or represented before them. Their attitude towards the plaintiff's pleadings in such a case is exemplified in the remarks of Brennan J in *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279, at 288, which are referred to in the reasons of Keane JA in this appeal. So also in the United States, a plaintiff in proving damages against an absent defendant is confined to the cause of action stated in his pleadings, which "cannot be enlarged by evidence". See *Freeman on Judgments* (5th ed), vol 3 §1294, at 2686. Special damages, the editor of that text continues at 2687, "though claimed in the prayer, are improperly allowed if not pleaded": see *Regan v New York & N E R Co* (1891) 22 A 503, 504 (Conn).

[5] It is to my mind doubtful if the damages claimed here were adequately pleaded. But whether or not they were, the plaintiff failed to prove them. Stated in its most elementary form, the plaintiff was required to prove how much worse off it was by having acted on the defendants' misleading conduct, assuming it to have been proved. What it parted with was its land and building in return for payment of money in the form of Australian dollars totalling $4,250,000 and a fistful of Ozecard trade dollars or "vouchers" for the same. The learned trial judge considered that the latter were worthless, which is probably true, although direct evidence to that effect seems to be lacking. But they represented only one of two components proof of which was needed to establish the plaintiff's loss. The other was the market value of the land and building parted with by the plaintiff in consequence of the misleading conduct. As to that, no evidence at all was led at the trial.

[6] There were various ways in which market value might have been proved. Commonly it is done by expert evidence of recent sales of comparable buildings in the area. The most persuasive proof would have been evidence of a recent sale of the subject land itself. Even a less recent sale of the land might have served if appropriately adjusted to allow for movements in market conditions. Alternatively, the value of the building might have been arrived at by capitalising its potential market rental value.

[7] Counsel for the respondent plaintiff was, however, disposed to dismiss such outcomes as artificial abstractions, and to stress that what his client had lost was the value of an opportunity of receiving the balance of the purchase moneys of $500,000 in Australian dollars. In *Ella v Wenham* [1972] Qd R 90, affirmed sub nom *Wenham v Ella* (1972) 127 CLR 454, the court was able to equate the value of land, forming part of the consideration, with the value apportioned to it in the contract. Here, however, we have no reliable guide to the value of what the plaintiff parted with. The contract cannot be used for that purpose because the stated price was not payable solely in Australian dollars, but in a combination of $A and so-called Ozecard trade dollars. Whether, if the plaintiff in negotiations leading to the contract had insisted on payment of the whole of the purchase money in currency of the realm, a contract would have eventuated at the same price or at all, and whether with the same purchaser or another, it is impossible now to say. We do not make the parties' contract. What has not been demonstrated is that the plaintiff would have received more than the $4,250,000 it did in return for its land and building. In short, it failed to prove the market value of what it parted with, which was an essential element in its cause of action under the Act.

[8] On this and other issues on the appeal, including the submission that there should be a new trial whether or not limited to the question of damages, I agree with the reasons of Keane JA, which I have had the advantage of reading. The appeals should be allowed; the judgments against the third and fourth defendants should be set aside; and judgment dismissing the plaintiff's claim should be given in favour of each of those defendants. I agree with the orders as to costs proposed by Keane JA for the reasons he has given.

[9] **KEANE JA:** In Appeal No 4294 of 2005, the appellant is Mr Arlo Selby ("Selby") and the respondent is Robertson Street Properties Pty Ltd ("RSP"). There are other respondents to this appeal, but the only other respondent who needs to be mentioned at this point is Mr Mark Seabrook ("Seabrook"). In Appeal No 4264 of 2005, Seabrook is the appellant while RSP is the only respondent. In the proceedings below, RSP was the plaintiff in an action against Selby and Seabrook. That action arose out of the sale by RSP to RPM Promotions Pty Ltd ("Promotions") of freehold land comprising commercial and retail premises at 168 Robertson Street, Fortitude Valley ("the land").

[10] In that action, RSP claimed, inter alia, against Promotions, Selby and Seabrook $500,000 damages for contravention of s 52 of the *Trade Practices Act* 1974 (Cth) ("the TPA") and, in the case of Selby and Seabrook, also for their knowing involvement in the contravention of s 52 of the TPA. The sum claimed was alleged by RSP to represent the loss of the "balance of the proceeds of sale namely $ 500,000.00", payable by Promotions under the contract of sale in respect of the land. RSP claimed that it had suffered this loss as a result of being induced by

misleading and deceptive conduct on the part of, inter alia, Promotions, Selby and Seabrook to make and complete the contact of sale with Promotions.

[11] Seabrook was the only defendant to the action who contested RSP's claim at trial. The trial proceeded in the absence of Selby. Promotions was in liquidation and the claim against it was discontinued with the consent of its liquidator.

[12] After the trial of the action, the learned trial judge upheld RSP's claim and gave judgment for RSP against Seabrook and Selby jointly and severally for $500,000 and interest in the sum of $97,273.97.

[13] In order to understand the arguments advanced on appeal by Selby and Seabrook, it is necessary first to refer in some greater detail to the facts of the case as found by the learned trial judge.

The judgment

[14] The contract of sale between RSP and Promotions was dated 17 January 2003. It provided for completion on 28 February 2003. The contract was signed by Seabrook on behalf of Promotions. Prior to 11 February 2003, Seabrook was the sole director of Promotions. Thereafter, Simon Mosley was its sole director. Mr Mosley remains Promotions' only shareholder. He was named as a defendant in the action but his whereabouts are unknown.

[15] The learned trial judge also found that Selby was unable to be located. A firm of solicitors, Compass Legal Solutions ("CLS"), were on the record as his solicitors, but it appeared that they had lost contact with him. Nevertheless, CLS remained his address for service. Information that the trial would proceed on the dates fixed was sent to Selby at the address of CLS.

[16] Osier Pty Ltd ("Osier") was another defendant in RSP's action. Its only shareholder is a Mr Leslie Wilson who was also a defendant to RSP's action. An action by Osier against RSP was consolidated with RSP's action. Osier did not appear at the trial. The nature of its claim against RSP will be explained directly.

[17] The contract of sale of the land was in the form of a standard REIQ contract for the sale of Commercial Land and Buildings. The purchase price was $6,950,000. Attached to the contract for the sale of the land was an undated document entitled "Deed of Variation Contract of Sale" between RSP and Promotions ("the deed of variation"). Clause 2.2 of the deed of variation provided:

> "The Seller has agreed to accept payment of the Contract Price in the following manner:-
>
> (a) The amount referred to in Item 5 is to be paid by the Buyer to the Seller by way of cash or Trade Dollars on the date nominated in Item 7; and
>
> (b) The amount referred to in Item 6 on the Settlement Date."

[18] The amount referred to in item 5 of the Schedule to the deed of variation for purposes of clause 2.2(a) of the deed of variation was:

"(A)	CASH	$4,000,000-00
(B)	TRADE	$2,950,000-00
TOTAL		$6,950,000-00"

[19] The date nominated in item 7 of the Schedule for the purposes of clause 2.2(a) of the deed of variation was "at settlement as per contract or as agreed".

[20] Clause 1.2(g) of the deed of variation defined the term "Trade Dollars" to mean:

> "the Trade Dollars capable of being Traded on any Registered Trade Exchange with **ONE TRADE DOLLAR** having an equal value to **ONE DOLLAR IN AUSTRALIAN CURRENCY**."

[21] Her Honour found that there is no such institution as a "registered trade exchange". There was, however, as will be seen, a trade dollar exchange known as "OzeCard Trade Exchange" conducted by a company associated with CLS. I shall refer to this exchange as "Ozecard".

[22] The Schedule to the deed of variation also contained an item 8. This item was not an appendage to an operative provision of the deed. It does, however, identify the role of Osier in the transaction. Item 8 reads:

> "OSIER PTY. LTD A.C.N: 010 254 252 as the marketing agent has Undertaken [sic] and guaranteed to cash convert the trade dollars on behalf of the seller for a cash minimum of $750,000. Of which $250,000-00 to be paid into the seller's solicitors trust account at settlement, $250,000-00 within 30 days and the balance within 45 days from settlement."

[23] The learned trial judge held that "trade dollars" are not Australian currency but a form of credit employed in counter-trade transactions.

[24] The learned trial judge found that Richard Fraser ("Fraser") and Paul McDonald ("McDonald"), the directors of RSP who acted on its behalf in relation to the sale of the land, relied on representations made by Mosley, Selby and Seabrook in making the contract and deed of variation.[1] These representations were made in the course of negotiations which began late in 2002 and continued until the contract was signed. When those negotiations commenced, Fraser made it clear to those negotiating on behalf of RSP that RSP was looking for a price of $4,500,000 for the land. Over the course of the negotiations, the parties arrived at a "price" of $4,750,000 for the land and certain equipment described as the Western Computer assets. That "price" was ultimately expressed in the manner set out above.

[25] As to these representations, the learned trial judge found:

(a) that in early negotiations it was proposed on behalf of Promotions that Promotions would be willing to pay $4,400,000 in cash and $100,000 in "trade dollars". Selby represented to Fraser that RSP would receive the same amount using "trade dollars" as part of the purchase price of $4,500,000 as with a normal sale. Selby had said that the "trade dollars" would be sold to a "sister company", Osier, and that RSP would receive $100,000 for the "trade dollars" with no cost to RSP. Selby said to Fraser that the arrangement about "trade dollars" would be covered in the "side agreement", that this way of

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1 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [43].

doing the purchase had been accepted by the Australian Tax Office ("the ATO") and that his group had done it before;[2]

(b) that Seabrook represented to Fraser, when Fraser raised with him concerns as to the lawfulness of the use of "trade dollars", the tax implications of their use and whether RSP would receive the same amount as it would receive if the sale was in Australian dollars, that the ATO valued one "trade dollar" the same as one Australian dollar, that he, Seabrook, had an ATO ruling confirming that, provided the purchase and sale occurred in the same tax year, the profit on the sale of the land could be offset by the capital loss on the sale of the "trade dollars", and that the end result would be that the vendor would be in exactly the same position as selling the land for cash;[3] ("the first Seabrook representation")

(c) that Seabrook did not tell Fraser that the "trade dollars" had, to Seabrook's knowledge, to be extracted from the Ozecard Trade Exchange before they could be exchanged for cash, and that there would be significant costs incurred by RSP in the conversion of "trade dollars" to cash. This, the learned trial judge found, constituted a misrepresentation by silence;[4] ("the representation by silence")

(d) that Seabrook procured the making by an accountant, Donnelly, to Fraser of a representation that he, Donnelly, had been advised "that the trade dollars would be converted to cash for $750,000".[5] ("the second Seabrook representation")

[26] The learned trial judge found that these representations were misleading and deceptive. Her Honour held that, in so far as the representations which she found to have been made were representations as to future matters:

> "… there were no reasonable grounds for making the representations. In so far as the representations were as to present matters they were false. Mr Seabrook's knowledge of Ozecard 'trade dollars' … meant that he must have well known that there would be a conversion cost involved which the plaintiff would have to bear and that this would reduce the net amount of cash received by the plaintiff".[6]

Her Honour concluded that Selby was "liable under the TPA for his misleading and deceptive conduct consisting of the Selby representations" and Seabrook was liable "under the TPA for his misleading and deceptive conduct consisting of the first and

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2 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [6] - [10].

3 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [13].

4 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [14], [18].

5 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [37] - [39].

6 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [39].

second Seabrook representations and the representation by silence". Her Honour also concluded that:

> "The loss suffered by Robertson Street Properties was the amount of $500,000.00 and that is the amount of damages which [Seabrook] and [Selby] should be ordered to pay to the plaintiff."[7]

[27] On 26 February 2003, CLS, who were Promotions' solicitors, sent to RSP's solicitors an Ozecard membership application for RSP to complete and return to Ozecard. McDonald and Fraser signed the application form. The application form contemplated the possible payment of fees, but McDonald and Fraser did not believe that RSP's entitlements under the contract would be adversely affected by any charges by Ozecard as they were satisfied that the substance of the representations made to them was that no such fees would have to be paid.[8]

[28] Settlement of the contract occurred on 28 February 2003. RSP received a cheque for approximately $4,000,000 (allowing for appropriate adjustments for rates and land tax), the first payment of $250,000 for the "trade dollars" and Ozecard "vouchers" for 2,950,000 "trade dollars".

[29] On the same day, a director of Ozecard wrote to the solicitors for RSP saying that a voucher for 2,950,000 trade dollars from Promotions was to be placed into the account of RSP. The letter said:

> "These funds will be deposited into your clients [sic] account immediately upon receipt of the trade cash fees of $295,000 has [sic] been paid to Ozecard Trade Exchange."[9]

[30] A short time later, Wilson, on behalf of Osier, wrote to RSP's solicitors saying that Osier had deposited $250,000 into the solicitor's trust account in accordance with their agreement with RSP. That letter went on to demand that:

> "… these funds are not released to [RSP] until such time as these trade dollars, namely T$2.95 million are available to be cash converted fees paid by my company.
> Please advise in writing when these fees have been paid to Ozecard, so we can continue to honor [sic] our agreement with your client".[10]

[31] The learned trial judge accepted that the attempt by Osier to impose a trust for itself on the funds paid by it into the trust account of RSP's solicitors was ineffectual.[11] Her Honour's conclusion in this regard is not in issue on this appeal.

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7 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [78].

8 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [54] - [56].

9 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [62].

10 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [63].

11 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [64].

[32] There was further correspondence between the parties, but the "trade dollars" constituting the balance of the purchase price were never paid to, or their value realised by, RSP. In the upshot, her Honour found that RSP received $500,000 less than the amount that was promised to it in the contract and deed of variation, and that this was the amount of damages which Seabrook and Selby should pay RSP pursuant to s 82 of the TPA.[12]

The appeals

[33] As I have mentioned, her Honour held that the loss suffered by RSP by reason of the misleading and deceptive conduct of Selby and Seabrook and compensable by an award of damages under s 82 of the TPA was $500,000. It may be noted in this regard, that the measure of damages recoverable pursuant to that section is usually calculated so as to restore the injured party to the position that party would have been in had the misleading conduct not occurred.[13] In this case, that would mean ascertaining the difference between the true value of the land and the money actually received by RSP in exchange for the land. Only by ascertaining the difference between these two sums could the loss suffered by RSP as a result of the contravening conduct be established. That exercise was not undertaken in this case. This point is significant in relation to the disposition of these appeals, both in relation to Selby and Seabrook. Before dealing further with this point, it is necessary to address an argument advanced by Selby in relation to her Honour's conclusion that he was liable to RSP "for his misleading and deceptive conduct consisting of the Selby representations".

Selby's liability under s 75B

[34] In support of Selby's appeal, it is contended that the judgment against him cannot stand because his liability to RSP arose only pursuant to s 75B of the TPA as a party knowingly concerned in Promotions' contravention of s 52 of the TPA. It is submitted that, while her Honour found that Seabrook was knowingly concerned in Promotions' contravention,[14] her Honour neither made, nor was able on the evidence to make, the findings of fact necessary to establish that Selby was knowingly concerned in Promotions' contravention of s 52 of the TPA.

[35] While RSP was able to rely upon s 51A of the TPA against Promotions to establish that the representations found to have been made by Selby and Seabrook on behalf of Promotions were misleading, because Promotions had failed to show that there was a reasonable basis for those statements, that theory of liability could not avail RSP in its attempt to establish liability in Selby pursuant to s 75B of the TPA given the findings of fact made by the learned trial judge. In this regard, the first point to be made is that Selby's statement that "his group" had carried out these sorts of transactions in the past with ATO approval was not a statement about a future matter. It was a statement of present fact. RSP had pleaded that Selby did not have reasonable grounds for making the statements he did, but her Honour made no finding to that effect. RSP did not seek a finding to that effect; and the evidence on the point was scanty. There was some evidence of an admission made in Selby's

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12 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [75], [78].

13 *Marks v GIO Australia Holdings Ltd* [1998] HCA 69 at [41] - [42]; (1998) 196 CLR 494 at 512.

14 *Robertson Street Properties Pty Ltd v RPM Promotions Pty Ltd & Ors*; *Osier Pty Ltd v Robertson Street Properties Pty Ltd* [2005] QSC 095; SC No 3802 and SC No 2723 of 2003, 28 April 2005 at [19].

presence by Robert Quast, an associate of Selby, after the sale had been completed to the effect that this was the first trade dollar transaction in which the "Selby group" had been involved. This evidence was not referred to by the learned trial judge. Counsel for RSP did not urge the court to act on that evidence preferring to contend that Selby and his "group" had previously been involved in transactions where "trade dollars" were employed, so that there was a basis for the contention that Selby knew that there would be a cost associated with the conversion of "trade dollars" to legal currency.

[36] 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.[15] 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.[16]

[37] At trial, the learned trial judge did not make a finding that Selby was aware of facts that showed that there was no reasonable basis for his representation that the use of "trade dollars" as part of the consideration would have produced sufficient legal currency to bring the amount received by RSP up to $4,750,000. A crucial step on the way to finding Selby liable under s 75B of the TPA was thus not taken.

Selby's absence at trial

[38] There is a further problem in RSP's claim against Selby. In Selby's absence, RSP could obtain against him only such a judgment as was strictly supported by its pleading against him. That this is so is established by the decision of the High Court in *Banque Commerciale SA, en Liquidation v Akhil Holdings Ltd*.[17] RSP had not pleaded against Selby that he had made the representation that the end result of the use of trade dollars would be the same as selling the building for cash until it amended its statement of claim to make such an allegation after the trial had commenced; and so it was not open to RSP to seek a finding against Selby that he had made such a representation. This gap in the pleadings could possibly have been remedied had Selby, or his representatives, been present at the trial[18] but that did not occur and, as Brennan J said in *Akhil Holdings*,[19] the general rule is that "the court

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15 *Yorke v Lucas* (1985) 158 CLR 661 at 667; *Australian Competition and Consumer Commission v Michigan Group Pty Ltd* [2002] FCA 1439; Q105 of 2000, 26 November 2002 at [303]; *Quinlivan v Australian Competition and Consumer Commission* [2004] FCAFC 175 at [15]; (2004) ATPR 42-010 at 48,844; *Downey & Anor v Carlson Hotels Asia Pacific P/L* [2005] QCA 199; Appeal No 8852 of 2004, 10 June 2005 at [35].

16 *Quinlivan v Australian Competition and Consumer Commission* [2004] FCAFC 175 at [11] - [13]; (2004) ATPR 42-010 at 48,843.

17 (1990) 169 CLR 279 at 286 - 287, 288 - 290, 302 - 304.

18 Cf *El-Mir v Risk* [2005] NSWCA 215; CA 40661 of 2003, 24 June 2005 at [78] - [82].

19 (1990) 169 CLR 279 at 288.

does not allow substantive amendments to pleadings so as to allow the plaintiff further or other relief against an absent defendant …". It follows that the finding that was made against Selby in this regard was not open.

[39] On behalf of RSP it is contended that this representation was merely the "other side of the coin" of representations that there would be no cost to RSP in converting "trade dollars" to legal currency; but that contention does not withstand scrutiny. The contract provided for the payment of "2,950,000 trade dollars", and the effect of the representation by Selby, which was added by late amendment, upon RSP's expectations under the contract was that these 2,950,000 trade dollars would produce $750,000 in legal currency. Obviously there could be significant costs incurred in the process of conversion without casting doubt on the accuracy of the late-pleaded representation which her Honour found Selby had made and which she found was an operative inducement to RSP.

[40] I am, therefore, constrained to hold that the learned trial judge erred in concluding that Selby was knowingly concerned in Promotions' contravention of s 52 of the TPA.

Proof of loss

[41] It is more difficult for Seabrook to displace the finding that he was knowingly concerned in misleading and deceptive conduct by Promotions, but it is not necessary to resolve that question because Seabrook, like Selby, is entitled to succeed on another basis.

[42] Seabrook contends that the judgment below cannot be sustained against him because of the absence of a causal nexus between the misconduct of Promotions, Selby and Seabrook and the loss suffered by RSP of the kind required by s 82 of the TPA.[20]

[43] On behalf of Seabrook, it was urged that the learned trial judge's conclusion that Seabrook's misleading conduct caused RSP's loss could not stand because RSP had, by making an offer to sell the land whereby $100,000 of the price was payable in "trade dollars" before Seabrook's misconduct occurred, shown that it was willing to deal in "trade dollars". In my respectful opinion, that argument does not cast doubt on her Honour's conclusion that Seabrook's misleading conduct was an operative inducement to RSP's decision to agree to the contract in which $750,000 of the purchase price was to be payable in "trade dollars".

[44] Both Selby and Seabrook argue that the values of contractual guarantees for the payment of the balance of the purchase price of $500,000 should have been taken into account by the learned trial judge in determining the actual loss suffered by RSP. Her Honour plainly regarded those rights as valueless. Whether or not her Honour was right to so regard them need not be resolved because there is a more serious flaw in RSP's claim to recover the $500,000 balance of the unpaid purchase price as damages pursuant to s 82 of the TPA.

[45] RSP's pleaded case against Selby and Seabrook for damages as compensation for loss suffered as a result of the contravention of s 52 of the TPA sought to claim from them the unpaid balance of the price payable by Promotions under the contract of sale of the land. It is well settled that the remedy provided by s 82 of the TPA

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20 *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 at 525.

requires a precise identification of the loss or damage suffered as a result of the particular conduct found to contravene s 52 so that an order may be made for the recovery of damages as compensation for that loss.[21] When it has been shown on the balance of probabilities that **some** loss has been caused by the contravening conduct, the value of what has been lost may be assessed.[22]

[46] In the present case, RSP pleaded that as a result of, inter alia, the misconduct of Selby and Seabrook, RSP lost the unpaid balance of the purchase price. That assertion is plainly unsustainable on the evidence and findings of fact made by the learned trial judge. Nothing in the misconduct alleged and found against Selby and Seabrook could be said to support a finding that it was that misconduct which caused Promotions to fail to pay the balance of the purchase price. The learned trial judge was not invited by RSP to make any such finding; and no such a finding was made by, or was open to, her Honour.

[47] RSP might have sought to plead and prove a case that it was induced by Promotions' misconduct in which Seabrook was knowingly involved to part with the land for less than the land was worth as a result of being induced to accept "trade dollars" rather than actual currency.[23] RSP did not plead such a case; and it certainly did not seek to prove that the land was worth more than the $4,250,000 it actually received from Promotions in return for a transfer of the land or that someone else was willing and able to pay such a price.

[48] The respondent sought to sustain the judgment by contending that, by reason of the misconduct of, inter alios, Selby and Seabrook, RSP lost the opportunity to sell the land to someone else for $4,500,000, and that "her Honour by her assessment of damages at $500,000 implicitly found that there was a 100 per cent probability that that would have occurred". That contention cannot be accepted. Her Honour made no such finding, explicitly or implicitly. The case pleaded on behalf of RSP raised no possibility of such a finding. RSP's pleadings do not mention the phrase "loss of opportunity". In these circumstances, it is hardly surprising that there was no evidence actually directed to the issue and that there was no finding upon that issue by the learned trial judge. The issue of lost opportunity is not addressed at all in the reasons for judgment. That is because it formed no part of RSP's case.

[49] While it may be said that the contract price is evidence of the true or market value of an asset, RSP cannot point to the contract here as establishing the true market value. That is because trade dollars form a substantial component of the purchase price and RSP is confronted by the dilemma that the "trade dollars" are either worthless, and there is no evidence that Promotions, or any other person, would have been willing and able to pay "real dollars" to the amount of $4,750,000, or the trade dollars are worth something which has not been quantified, in which event

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21 *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514; *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* [1999] HCA 25; (1999) 199 CLR 413; *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459; *Murphy v Overton Investments Pty Ltd* [2004] HCA 3; (2004) 216 CLR 388; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54 at [34] - [36]; (2004) 217 CLR 640 at 656 - 657.

22 *Sellars v Adelaide Petroleum NL & Ors* (1994) 179 CLR 332 at 351 - 355.

23 Cf *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 7, 13 - 14; *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* (1984) 157 CLR 149 at 160, 171 - 172; *Sellars v Adelaide Petroleum NL & Ors* (1994) 179 CLR 332 at 351 - 355.

RSP's claim must fail for want of proof of an essential element of the measure of its loss.[24]

[50] For these reasons, the judgment for damages of $500,000 plus interest cannot stand against either Selby or Seabrook.

[51] Counsel for RSP contended that if the appeal were to be allowed, the matter should be sent back for retrial so that damages could be assessed according to law. In my view, that course is not acceptable. There is no reason in RSP's pleading or in the evidence to suggest that the application of the correct approach to the assessment of damages could result in an award of damages in its favour.[25] Ordering a retrial is not something to be done lightly. As has recently been reiterated in the High Court, ordering a new trial is "a most deplorable result" because, inter alia, parties have a "legitimate expectation that the trial [would] determine the issues one way or another".[26] In any event, for a retrial to have any utility amendments would need to be made to the appellant's pleadings and, consonant with the approach in *Akhil Holdings*, it would be inappropriate for that to occur at this late stage.

[52] The conclusion that the judgment cannot be sustained against Selby or Seabrook is not one from which one can take any satisfaction. Seabrook was found to have made misleading statements and to have given evidence which her Honour rejected as untruthful. I am not persuaded that her Honour erred in either respect. Nevertheless, even those who engage in reprehensible conduct cannot be made liable for losses suffered by others beyond the extent required by law. The sense of dissatisfaction at this result is lessened by the absence of any evidence showing that the payments actually received by RSP for the land were less than the land was actually worth.

Conclusion and orders

[53] In each case, the appeal must be allowed. The judgment below should be set aside as against Selby and Seabrook.

[54] Because Selby and Seabrook were obliged to appeal to this Court in order to have the judgments against them set aside, they should be paid their costs of the appeal by the respondent.

[55] In relation to the costs below, however, it is my view that there should be no order as to costs. In this regard, Seabrook was found to have engaged in misleading and deceptive conduct and to have given false evidence to the court. Selby did not participate in the trial and so did not incur the costs that would have been involved had he chosen to do so. The other costs which he incurred are not likely to be substantial.

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24 *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd* (1977) 16 ALR 23 at 37. See also *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 at 245 - 246, 250; *Ray Teese Pty Ltd v Syntex Australia Ltd* [1998] 1 Qd R 104 at 110, 115. Cf *O'Neill v Medical Benefits Fund of Australia Ltd* [2002] FCAFC 188 at [32] - [33]; (2002) 122 FCR 455 at 467.

25 Cf *Murphy v Overton Investments Pty Ltd* [2004] HCA 3 at [74] - [75]; (2004) 216 CLR 388 at 415 - 416.

26 *The Waterways Authority v Fitzgibbon* [2005] HCA 57; S513, S98 and S131 of 2005, 5 October 2005 at [36], [40].