SUPREME COURT OF QUEENSLAND

CITATION:	*GO & MJT Nominees Pty Ltd v Hollywells Homewares Pty Ltd & Anor* [2010] QCA 368
PARTIES:	**GO & MJT NOMINEES PTY LTD** ACN 005 354 629 (appellant) **v** **HOLLYWELLS HOMEWARES PTY LTD** ACN 128 564 232 (first respondent) **ANN FORBES (CHAIRMAN), ROSALIND HOURIGAN & ELEANOR ROBERTSON CONSTITUTING THE RETAIL SHOP LEASES TRIBUNAL** (second respondent)
FILE NO/S:	Appeal No 5768 of 2010 SC No 13459 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Retail Shop Leases Tribunal
DELIVERED ON:	21 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	28 October 2010
JUDGES:	Margaret McMurdo P, Chesterman JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	LANDLORD AND TENANT – RETAIL AND COMMERCIAL TENANCIES LEGISLATION – JURISDICTIONS, POWERS AND APPEALS OF COURTS AND TRIBUNALS – APPEALS – where appellant applied for review of a decision of the Retail Shop Leases Tribunal – where the power of the Court to review decisions of the Tribunal is limited to circumstances where the Tribunal has acted outside its jurisdiction or where there has been a denial of natural justice – whether the Tribunal's decision was based on a finding of fact not within the boundaries of the dispute – whether there was jurisdictional error – whether the appellant was denied natural justice *Judicial Review Act* 1991 (Qld), s 43 *Retail Shop Leases Act* 1994 (Qld), s 3, s 4, s 43(2), s 65(1), s 72, s 73(1), s 88(1) *Trade Practices Act* 1974 (Cth), s 52

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33, cited
Banque Commerciale SA, (In liq) v Akhil Holdings Ltd (1990) 169 CLR 279; [1990] HCA 11, cited
Craig v South Australia (1995) 184 CLR 163; [1995] HCA 58, cited
Elders Trustee & Executor Company Ltd v EG Reeves Pty Ltd (1987) 78 ALR 193; [1987] FCA 332, cited
Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd (1984) 2 FCR 82; (1984) 55 ALR 25; [1984] FCA 180, considered
Goldie v Minister for Immigration and Multicultural Affairs [1999] FCA 1277, considered
James v Australia and New Zealand Banking Group Ltd (1986) 64 ALR 347; [1986] FCA 41, cited
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, considered
Kioa v West (1985) 159 CLR 550; [1985] HCA 81, considered
Kirk v Industrial Relations Commission (NSW) (2010) 239 CLR 531; [2010] HCA 1, cited
Minister for Immigration and Ethnic Affairs v Pochi (1980) 44 FLR 41; [1980] FCA 85, cited
Wheeler Grace & Pierucci Pty Ltd v Wright [1989] ATPR 40-940, cited

COUNSEL: G A Thompson SC, with R J Clutterbuck, for the appellant
P Flanagan SC, with C J Crawford, for the first respondent

SOLICITORS: Arcuri Lawyers for the appellant
Cronin Shearer Lawyers for the first respondent

[1] **MARGARET McMURDO P:** This appeal should be dismissed with costs for the reasons given by McMeekin J.

[2] **CHESTERMAN JA:** I agree that the appeal should be dismissed with costs for the reasons given by McMeekin J.

[3] **McMEEKIN J:** This is an appeal from a decision of Alan Wilson J in which his Honour dismissed the appellant's application for the review of a decision of the Retail Shop Leases Tribunal ("the Tribunal"), the application for such review having been made by the appellant pursuant to s 43 of the *Judicial Review Act* 1991.

[4] The legislature has limited this Court's power to overturn decisions of the Tribunal. Section 88(1) of the *Retail Shop Leases Act* 1994 (Qld) ("the Act") provides:

> "Subject to subsection (2), the tribunal's hearing of the retail tenancy dispute and the tribunal's order must not be questioned in a proceeding other than a proceeding based solely on either or both of the following grounds –
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> (a) the tribunal had or has no jurisdiction, or has exceeded its jurisdiction, in the hearing or in making the order;
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> (b) there has been a denial of natural justice."[1]

[1] Reprint 4B, effective 28 August 2009.

[5] The appellant submits that both grounds mentioned by the legislation are relevant here. The Tribunal, it argues, exceeded its jurisdiction and denied the appellant natural justice. His Honour, it is claimed, erred in dismissing the application.

The Nature of the Dispute

[6] The dispute before the Tribunal concerned a retail shop lease in a shopping centre fronting Hope Island Road which, at the time of execution of the lease, was under construction. The appellant was the lessor and the first respondent the lessee.

[7] The respondent contended that it was induced to enter into the lease, and had thereby suffered loss, by certain representations made to a Ms Skippen, the guiding mind of the respondent, which were "false or misleading statements or misrepresentations" within the meaning of s 43(2) of the Act. For present purposes the material representation was that there would be two entry and exit points onto Hope Island Road.

[8] Section 43(2) of the Act, so far as is relevant, provides:

> "(2) The lessor is liable to pay to the lessee reasonable compensation for loss or damage suffered by the lessee because –
>
> (a) the lessee entered into the lease, or a renewal of it, on the basis of a false or misleading statement or misrepresentation made by the lessor or any person acting under the lessor's authority…"

[9] It was common ground for the purposes of the appeal that it had been represented to Ms Skippen that there would be a second entry/exit point onto Hope Island Road. It was common ground that she had been supplied with a plan showing two entry/exit points. It was common ground that at the time that the respondent entered into occupation of the premises only one such entry/exit point had been constructed. The second and western most one remained to be opened.

[10] The respondent claimed that the presence of the second entry/exit point was of considerable significance. The premises it agreed to lease were located at the back of the complex, without the benefit of passing traffic. The second entry/exit point would have alleviated that concern because of the potential for increased patronage from such traffic. The tribunal accepted these arguments and awarded an amount of monetary compensation to the respondent.

The Complaint on Appeal

[11] There is no suggestion that the Tribunal lacked jurisdiction to hear such a dispute.

[12] The appellant's complaint is that the Tribunal's decision required acceptance of the making of a representation which had not been part of the respondent's case, that it therefore could not have anticipated, and about which there was no evidence.

[13] It can be accepted that if the respondent was not given an opportunity to be heard on the relevant matter then the complaint of a denial of natural justice would be made out. A decision which depends for its validity on a finding of fact that was not within the boundaries of the dispute brought before the Tribunal must involve a denial of fundamental justice. We were taken to many cases in which the principle has been described. In *Goldie v Minister for Immigration and Multicultural Affairs*, the Full Court of the Federal Court put the principle in this way, which is satisfactory for present purposes:[2]

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[2] [1999] FCA 1277 at [35].

> "It is well-established that before the Tribunal is entitled to make a decision against a party on a basis entirely different than that relied on by the other party, it must give the person affected notice that it is considering whether to make a determination adverse to him on that particular basis and a reasonable opportunity to deal with the case the Tribunal is contemplating… As was pointed out by this Court in *Fletcher v Commissioner of Taxation* (1988) 19 FCR 442 at 456, the question whether procedural fairness has been denied does not depend upon denial to a litigant of the opportunity to produce evidence that might tell against the basis upon which the Tribunal decided the case: the opportunity of making relevant submissions is also an important ingredient of a fair trial." (authorities omitted)

[14] The issue is whether the decision here was made on a basis "entirely different than that relied on by the [respondent]" and so deprived the appellant of the opportunity to be heard on it.

[15] Further it can be accepted that if there was no evidence at all to support a finding of fact then that would constitute reviewable error: *Minister for Immigration and Ethnic Affairs v Pochi*;[3] *Australian Broadcasting Tribunal v Bond*.[4] That is the sense in which the appellant submits there was jurisdictional, and hence reviewable, error here.

The Appellant's Submission

[16] The appellant says that the boundaries of the dispute were governed by certain "particulars", agreed at the outset of the hearing, of the representations said to have been made. The particular relied on here appeared in a document typed by the appellant's counsel under the heading "Alleged Oral Representations". Those "particulars" included:

> "That the centre will have two entry points of (*sic*) Hope Island Road"

[17] The Tribunal found that such a representation had been made and that it was misleading in the relevant sense. That finding was expressed by the Tribunal in the following passage of its reasons:

> "At no time did the [appellant] tell the [first respondent] that the western entrance depended on government approval. We find that the agent Sara, and the site map supplied by him, materially misrepresented to the [first respondent] that the western entrance would be open from the commencement of its business. The [first respondent] had no reason to question the veracity of what the site map and Sara conveyed to Ms Skippen. In our view the failure to mention the need for official approval was a critical omission. We are satisfied that the [appellant] should have qualified its representation about the western entrance. In the absence of any such qualification, we find that the [appellant]'s representations on that point were misleading within the meaning of s 43(2). We find, further, that the [first respondent] reasonably expected to receive accurate and complete information in that regard, relying, as it did, upon the existence of the western entrance to give it necessary exposure to customers.[5]

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3 (1980) 44 FLR 41 at 67 per Deane J.

4 (1990) 170 CLR 321 at 356-360 per Mason CJ; at 368 per Deane J; at 387 per Toohey and Gaudron JJ.

5 AB 760 at [32].

[18] The appellant submits that the finding fell outside the particulars because, firstly, it requires the adoption of a temporal implication which was not stated – that the western entrance would be open from the commencement of business – and, secondly, the finding identified a failure to mention the need for official approval as constituting the misleading statement, a matter never previously raised.

[19] I respectfully identify the following errors in the submission:

(a) What the appellant identifies as particulars are not truly so, in the sense that they did not limit the boundary of the dispute;

(b) As to the first complaint, the "particular" in fact carried with it a temporal implication – it must have done to have made any sense – and in the context the respondent ought reasonably to have understood the particular in the sense adopted by the Tribunal in the formation and running of its case; and

(c) As to the second complaint, the submission:

(i) misconstrues the effect of the finding;

(ii) ignores the implications inherent in the "particular" given the circumstances; and

(iii) fails to acknowledge the evidence before the Tribunal.

Were these "Particulars"?

[20] We were referred to a number of cases concerning the effect and importance of particulars in the delimiting of the scope of the dispute. Their function cannot be doubted in the context of a dispute before a court of law. It has long been accepted that "pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision": *Banque Commerciale SA, (In liq) v Akhil Holdings Ltd*.[6] The relief available is thereby confined to that available on the pleadings. That is the rule for courts of law in which the proceedings are governed by the pleadings.

[21] But here we are not concerned with a court of law but rather a specialist Tribunal constituted by the Act and charged with disposing of disputes within its jurisdiction in a cost effective and timely way: see sections 3 and 4 of the Act.

[22] The requirements of procedural fairness in a case must be adjusted to the statutory framework governing the Tribunal in question. In *Kioa v West*, Mason J observed:[7]

> "Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. In *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, Kitto J pointed out [at pp 503–4] that the obligation to give a fair opportunity to parties in controversy to correct or contradict statements prejudicial to their view depends on "the particular statutory framework". What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting (*Reg v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552–3; *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 311, 319-321.

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6 (1990) 169 CLR 279 at 286 per Mason CJ and Gaudron J. See also, *Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (In Liquidation)* (1916) 22 CLR 490 at 517 per Isaacs and Rich JJ.

7 (1985) 159 CLR 550 at 584-585.

> In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations…"

[23] It is necessary then to consider the practices of the Tribunal itself and the circumstances of the case. Whilst the Tribunal is required to observe natural justice it is obliged to "act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it."[8] It is not bound by the rules of evidence,[9] and still less by the rules of pleading. It may inform itself "of any matter in the way it considers appropriate" and "may decide the procedures to be followed for the hearing."[10]

[24] In fact pleadings are not necessarily required in the Tribunal. Rather a directions hearing is held,[11] and in this case the parties were directed to file the statements of evidence on which they intended to rely, not pleadings. No complaint is made or could be made about that direction. So from the outset the appellant was made aware of the facts alleged against it. There was no direction that particulars be supplied.[12] Generally speaking, under such a regime, it is the statements of evidence that will set the boundary of the dispute.

[25] What occurred on this occasion was that on the morning of the hearing, the evidence in chief of the parties being already well known to them, the counsel for the appellant attempted to reduce the known evidence related to oral, and not written, representations to a set of "particulars". There was no statement of any intention from the respondent's side to abandon any point or resile from any fact set out in the statements. This attempt at particularisation was carried out in an informal way on the door of the Court, presumably with a view to assisting the Tribunal. The particulars were drafted by the appellant's counsel and hand written additions made on the respondent's side – in the hand of the client, not the solicitor. They bear all the hallmarks of hasty work undertaken with little thought given to subtleties and nice points.

[26] In those circumstances there can be no suggestion that the respondent was intending to give up a point otherwise raised on the material. I do not think that it was suggested that the respondent should be taken to have done so. I observe that if a party intends by such a course of conduct, that is the attempted reduction of its opponent's case to a written set of "particulars", to take away from its opponent points that would otherwise be available on the material filed, then it would, in my view, be proper to ensure that was the result intended by expressly raising the matter. I do not mean to imply that counsel for the appellant below entertained any such intention.

[27] A submission was made that comments by the respondent's solicitor in the course of the hearing had the effect of limiting the respondent's case. I cannot accept that. The response of the solicitor was to make plain that he was construing the representations

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8 s 72(1)(a) and (b) of the Act.
9 s 72(2)(a).
10 s 72(2)(b) and (c).
11 s 65(1).
12 AB 240-241.

in the context of the evidence of both the written and oral representations, not merely those said to be oral.[13] A significant part of the respondent's case was that the respondent had been provided with the plan that I have mentioned[14] that led Ms Skippen to believe that the two access points would be provided. It was expressly agreed that the representations in the written exhibits – of which the plan was one – were in addition to the oral representations.

[28] Hence the starting premise of the appellant's submission is not a valid one – in no sense did the appellant have cause to assume that there was some alteration or limitation of the respondent's case brought about by this attempt at summarising the representations in issue.

[29] This conclusion disposes of the appellant's complaint that the Tribunal exceeded its jurisdiction by failing to amend the "particulars" before reaching the finding complained of. The argument is that it was obliged to so amend by s 73(1), which empowers the Tribunal to make such amendments, and by s 72(3) which provides that "the tribunal must comply with this subdivision and any procedural rules prescribed by regulation". Both provisions appear in Subdivision 2 of Division 4 of the Act. However to come under that obligation the Tribunal must first have before it "particulars of the dispute". These were not properly so described.

The Implication of a Temporal Connotation

[30] That leads to the second point. As worded, the "particular" does not identify a time when the two entry points have to be supplied. By its wording it simply means at some time in the future. The effect of the appellant's submission is that they are surprised by the finding of an implication that the future time contemplated by the particular was the time of commencement of the business, that not being a matter reasonably within their contemplation.

[31] It is obvious that the "particular" agreed had a temporal implication – it cannot have been intended to mean that at some future unspecified time, unknown to the parties, perhaps long after the term of the lease came to an end, an entry point, by then irrelevant to the respondent, would be made available. That would be a nonsense. Thus the only issue is what temporal implication should have been assumed, not whether one should have been assumed.

[32] I observe at the outset that I have difficulty understanding what the appellant thought that the respondent's case was if not that the second entry point was to be provided at the commencement of the lease. It was argued that the alternative interpretation open was that an entry point would be provided at the time construction ceased, it being common ground that the centre was to be a staged construction. It was submitted that the construction was anticipated to be completed, at the time the representations were made, some 12 months after the respondent commenced business.[15] The notion that the respondent would have contemplated 12 months without passing traffic whilst being liable to pay the required rent strikes me as remarkably unrealistic, particularly given that Ms Skippen made complaint about her liability to pay rent in those circumstances in September 2008 to the respondent's Centre manager and at the hearing.[16]

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13 AB 2/45.

14 At various places, but see AB 395.

15 Mr Thompson's oral submission at T12/20.

16 AB 19/30 -20/10.

[33] A further difficulty with the appellant's claimed understanding of the case made against it is that it is far from clear, on the respondent's material, that she accepted that construction had finished or, if it had, when it had. In her statements filed in the proceedings Ms Skippen complained that while the major construction work appeared to come to an end in October 2008 significant work took place in March 2009,[17] a proposed building had never been constructed,[18] and, in relation to another building, while a car park was partially constructed none of the proposed additional retail or office space had been.[19] The evidence that emerged in the course of the hearing, to the effect that the second entry point was to be opened at some time after the hearing, might suggest that construction was, in fact, still ongoing in October 2009. The appellant's argument that the respondent intended to argue for a date that the respondent did not identify, and which is difficult to identify on the respondent's material, strikes me as inherently improbable.

[34] But putting that to one side, in context, the complaint was plainly about a time significantly before there could be any suggestion that construction had ceased, if indeed it had ceased by the time of the hearing. Once one examines the complaints made by Ms Skippen, the timing of them, and her statements filed in support then it is apparent that she was complaining of a failure to have the two entry/exit points in place at the commencement of her business.

[35] The chronology of relevant events may be summarised as follows: negotiations for the lease commenced in December 2007; the representations were made between the 18th of December 2007 and the 13th February 2008; an agreement to lease was signed in March 2008; the lease was executed on 28 June 2008; the respondent entered the premises on 15 July 2008; a Notice of Dispute was filed on 14 April 2009 with vacation of premises occurring in June 2009. By its Notice of Dispute the respondent contended that:

> "1. …(e) It was represented that there would be two entry points for the Centre from Hope Island Road, and that the exit point would be located so that car traffic would be directed through entire centre (as depicted in Centre plans - See Annexure C).[20]
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> …
>
> 4 (d) Failing to remedy the defects which restrict entry of and the flow of traffic through to the entire Centre. The design of the Centre is such that a majority of the retail premises (including the Tenant's) are not visible from the public road. As such, the success of the businesses in those premises are reliant (to a significant degree) on proper signage, and the direction of traffic from the front of the Centre through the balance of the Centre. The plans shown to the Tenant prior to the lease being entered into indicated to the Tenant that this was to be the case - with the Centre having two entry ways, and only one exit way, with traffic to be directed appropriately. <u>However, to date there is only one point for both entry and exit, and traffic flow to the part of the Centre containing the Tenant's business is non-existent</u>. The current entry and exit point was designed to be an entry point only and requires a sharp turn off a busy road, meaning that it is dangerous and discouraging to potential customers."[21] (underlining added)

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17 AB 253.9 - 254.1.
18 AB 252 - Building F.
19 AB 251.7 - Building C.
20 AB 167.
21 AB 169.

[36] In Ms Skippen's first statement she identified her complaint in these terms:[22]

> "13. From the date trading commenced from the Premises, the representations I relied upon when entering into a Lease with the Respondent failed to be met. Such failures included but are not limited to the following:
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> …
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> (B) The second entry and exit to the Centre has never been opened (see Annexure G – photos taken May 2009). The only access and egress for the Centre remains the one entry way, which although is narrow and is originally designated on the Centre plans as a one way road, is used as both an entry and an exit. To the best of my knowledge and belief, the [appellant] has never received approval from Main Roads to open the second entry and exit to the Centre." (underlining added)

[37] And further at paragraph 15(D) of her statement:[23]

> "In addition to the loss and damage suffered for the reasons described above, the Respondent adversely affected the profitability of the business trading from the Premises by:
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> …
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> *(D) Failing to remedy defects which restrict entry and flow of traffic through the Centre*
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> As the Centre is elevated, and the Premises is located at the back of the Centre screened by other buildings, the Premises are not visible from the public road. Business has been adversely affected by the lack of proper traffic flow through the Centre. Prior to signing the Offer to Lease, I relied upon plans shown to me by the [appellant]'s Representative which indicated appropriate levels of access to and through the Centre. In particular, the plans indicated the Centre was to have two entrances and one exit, with traffic flow directed past the Premises. To date, only one point for both entry and exit at the Centre has been constructed…" (underlining added)

[38] As can be seen, Ms Skippen expressly related her claim back to "the date trading commenced". The calculation of her losses put before the tribunal related to the whole period of her trading.[24] The whole tenor of her complaints and claims suggested that her case was predicated on an assumption that the two entry/exit points were to be in place from the commencement of her trading.

[39] Given these materials it was plainly open for the Tribunal to find that the respondent was complaining that it had been led to believe that the two entry points off Hope Island Road would be available when the respondent commenced business. There was evidence to support such a construction, evidence to which no objection was taken, and that obliged the appellant to meet that case in order to avoid liability.

[40] The appellant's submissions that there was other evidence that, if accepted, might have led to a different conclusion as to the meaning and effect of the representation are not to the point. We have no jurisdiction to review findings of fact. So much is clear from

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22 AB 252.
23 AB 257.
24 AB 576-577.

s 88 of the Act and the authorities dealing with jurisdictional error: *Craig v South Australia*;[25] *Kirk v Industrial Relations Commission (NSW).*[26]

The "Official Approval" Point

[41] I turn then to the complaint that the Tribunal's finding that "the failure to mention the need for official approval was a critical omission" fell outside the scope of the "particulars".

[42] There are two questions – should the appellant reasonably have anticipated that was the case it had to meet, and, if so, was there evidence on which the Tribunal could act?

[43] By its written submission, not pressed in oral submissions, the appellant argued that the finding amounted to a finding of a second representation and one not particularised. I think that misconstrues the finding. It is not the failure to mention the absence of, or inability to obtain, any official approval that was the misleading statement but rather that the misleading nature of the statements that had been made – that there would be two entry/exit points at the commencement of trading – could have been avoided had Ms Skippen been told of the absence of any proper approvals at the time of the making of the statements.

[44] From the appellant's perspective, to avoid the finding that was made it needed to lead evidence either that Ms Skippen was not told the statements that she asserted she was told, or that she was told, in a timely way, that there was no approval, or given other information equally efficacious in dispelling the misleading nature of what had been said, so as to show that when made the statements were not misleading. In putting the point that way I do not intend to reverse the persuasive onus of proof. It lay on the respondent.

[45] It was common ground, or at least not disputed, that the representation had been made. Thus the only matter that remained to be addressed was whether at the time the statement was made it was, in the circumstances, misleading.

[46] In my view the appellant's argument ignores what was necessarily implicit in the respondent's case. To recognise what was implicit it is necessary to bring into account the legal principles that apply. The parties have argued the case on the assumption that the decisions in relation to s 52 of the *Trade Practices Act* 1974 (Cth) and the meaning of "misleading" in the context of "misleading and deceptive conduct" inform the approach that should be taken to s 43(2) and its reference to "false or misleading statements or misrepresentations". I agree.

[47] Here we are concerned with future predictions. It is not enough to show merely that the prediction did not come to pass. That does not establish that false or misleading statements or misrepresentations were made: see *James v Australia and New Zealand Banking Group Ltd* (1986) 64 ALR 347 at 372 per Toohey J; *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82; 55 ALR 25. So much is trite law. That precise submission was made to the Tribunal by the appellant's counsel.[27] It has long been recognised with predictions that it is the state of mind of the maker of the statement that is the crucial thing. As the Court (Bowen CJ, Lockhart and

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25 (1995) 184 CLR 163 at 177–180.

26 (2010) 239 CLR 531 at 571. See also, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141 [163]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 81–82 [80]–[81]; [2001] HCA 22.

27 AR 715.

Fitzgerald JJ) explained in *Global Sportsman*: "A statement which involves the state of mind of the maker ordinarily conveys the meaning (expressly or by implication) that the maker of the statement had a particular state of mind when the statement was made and, commonly at least, that there was basis for that state of mind."[28]

[48] Thus, as Chesterman JA posited in the course of the oral argument, implicit in such representations is the representation that "I know of no reason why that prediction won't come true" or "I have good reasons for thinking that representation will come true". To have any complaint at all the respondent had to be taken to be asserting that what was said and done carried such implications.

[49] Nowhere in her statements does Ms Skippen expressly allege that the appellant's agent had no grounds for the representations made to her, or knew of facts that ought to have been disclosed. But the statement was a statement of the evidence she could give, not of what she had to assert legally, or prove, in order to succeed. In the hands of a competent pleader the respondent's claim would have alleged that the implied representations arising from the express oral statements that were made, and the plan that was provided, related to matters of belief, and the grounds for any belief, held by the agents of the appellant. However, in the absence of pleadings the appellant had to contend with the implications arising from the statements filed.

[50] Implicit then in the respondent's case, and I suspect, well appreciated by the appellant,[29] was the proposition that underlying the representations made was the complaint that the appellant's agents failed to reveal how tenuous the claimed availability of the second entry/exit point was.

[51] The cases show that statements might be held to be "false or misleading statements or misrepresentations" when they were made if the maker of the statement "did not believe it could be fulfilled or was recklessly indifferent to the accuracy thereof"[30] or if "relevant circumstances show the need for some qualification to be attached to that statement or the possibility of its non-fulfilment to be disclosed as a requirement of fair trading".[31]

[52] That being the well established law, it is not possible for the appellant to sensibly argue that it should not have anticipated that the circumstances in which the statement was made were relevant to the enquiry before the Tribunal. That, after all, was the whole point of the complaint.

[53] And once it is appreciated that those circumstances were relevant why should the issue of the obtaining of necessary approvals – or the inability to do so – and Ms Skippen's state of knowledge about them, and indeed the appellant's state of knowledge, not be self evidently relevant?

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28 (1984) 2 FCR 82; (1984) 55 ALR 25 at [17].

29 As an aside, I observe that Mr Norling, the accountant engaged by the respondent, was alive to this point as he explained in his report: "I understand that whether the alleged representations amount to misrepresentations is a matter of evidence and relates to whether the person(s) making the alleged representations had reasonable grounds to make those alleged representations rather than whether the alleged representations actually eventuated or not" – see AB 579.5. It would be a sad day if the accountants engaged appreciated the obvious legal issues that the statements raised and the lawyers did not.

30 *Elders Trustee & Executor Co Ltd v EG Reeves Pty Ltd* (1987) 78 ALR 193 at 242 per Gummow J.

31 *Wheeler Grace & Pierucci Pty Ltd v Wright* [1989] ATPR 40-940 at 50251 per Lee J. See also: *Famel Pty Ltd v Burswood Management Ltd* [1989] ATPR 40-962 per French J (as he then was); *Bowler v Hilda Pty Ltd* (1998) 80 FCR 191 per Heerey J; *Demagogue Pty Ltd v Ramensky* (1992) 110 ALR 608 at 617-618 per Gummow J.

[54] When one turns to the evidence presented the point becomes even more compelling.

[55] In her statements filed prior to the hearing, Ms Skippen had stated that the appellant did not have approval from Main Roads to open the second entry.[32] I have detailed the evidence in her first statement above. Then in her supplementary statement Ms Skippen responded to the appellant's material in these words:[33]

> "Also of particular interest is the statement that the inability to have a second entry and exit point was caused 'by delays in Department of Main Roads'. The Respondent has failed to provide any evidence to support this statement, and I deny its accuracy. I repeat my assertion from my earlier statement, that the Respondent has never held the necessary approvals to open this second entry and exit point <u>despite it appearing in the Centre plans</u>." (underlining added)

[56] The plain inference is that the Centre plans led her to think, in the context of other things that she had been told, that all approvals were in place when they were not, and that no-one had disabused her of that assumption. The appellant's argument was that absent an express statement by her that she was not told that the approvals had not been obtained there is no room for the Tribunal to assume that fact. With the greatest of respect I cannot accede to that view.

[57] Again it is not to the point to argue that the Tribunal might have drawn a different inference from the evidence.

[58] Ms Skippen's statement, carrying the inference that I have mentioned, required challenging by cross examination or evidence, if it was indeed the appellant's case that she was told about the lack of any approvals or given any other information that would have sufficiently qualified the representation so as to demonstrate the uncertainty attending the timely supply of the two entry/exit points and the crucial passing traffic.

[59] The appellant's evidence before the Tribunal was that the appellant had sought Main Roads approval some three years before, and that approval had become available only the week before the hearing in October 2009. The appellant did not know why the Main Roads had not progressed the matter. There was some evidence that the file had been lost.[34] Thus, at the time the representation was made in December 2007, the appellant had been waiting about two years for the approval, so far as the evidence shows did not know why it had not progressed, and presumably had no idea whether or when approval might be forthcoming.

[60] If it was the appellant's case that Ms Skippen was told, in a timely way, about this state of affairs, or if it was the case that their agents, for some reason, were reasonably not aware of it, then it was a very obvious further step to take to lead that evidence. The appellant's submission is that because it did not appreciate the case it had to meet it did not cross examine Ms Skippen about relevant matters and did not call certain witnesses. It is difficult to believe that if the appellant had the sort of evidence that I have discussed that it would not have cross examined Ms Skippen in accord with that evidence or led it at the hearing. Any competent counsel would have appreciated its significance.

[61] Further, that submission does not sit well with the intimation from the Tribunal, made in the course of the appellant's case, that the involvement of Main Roads had been "an

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32 AB 252 and 655.
33 AB 655 para 26(vii).
34 AB 97/55.

issue since the filing of the notice of dispute and one would have thought that your client might have addressed it"[35] and that the appellant might have called the agent who had dealt with Ms Skippen throughout, a Mr Sara.[36] The Chairperson expressly mentioned *Jones v Dunkel*[37] in the context of Mr Sara knowing more about "this road"[38] than the witness called, plainly an intimation that the appellant was exposing itself to adverse inferences being drawn on the subject if Mr Sara was not called.

[62] In that context I cannot see how there is any denial of natural justice in the Tribunal making the factual finding to the effect that it did or from drawing the conclusion that followed, namely that telling Ms Skippen of the true state of affairs concerning the approval would have avoided the misleading nature of the statements made. There was ample evidentiary basis for the findings made. The appellant was given every opportunity to call such evidence as it saw fit and to make submissions that it saw fit.

[63] The learned primary judge reached the same conclusion and I agree with him.

Orders

[64] I would dismiss the appeal and order that the appellant pay the respondent's costs.

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35 AB 99/22.

36 AB 99/33.

37 "… that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence": (1959) 101 CLR 298 at 308 per Kitto J.

38 AB 99/45.