SUPREME COURT OF QUEENSLAND

CITATION:	*MacFarlane v Heritage Corporation (Aust) Pty Ltd & Ors* [2003] QSC 350
PARTIES:	**PHILIP RAYMOND MACFARLANE** (plaintiff) **v** **HERITAGE CORPORATION (AUST) PTY LTD** **ACN 097 071 433** (first defendant) **and** **ADRIAN FREDRICK HODSON** (second defendant) **and** **JASON SCOTT HODSON** (third defendant)
FILE NO:	678 of 2003
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	20 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2003 – 1 October 2003
JUDGE:	Chesterman J
ORDER:	**1. Declare that the contract exchanged between the plaintiff and the first defendant dated 31 May 2002 has been rescinded and is void *ab initio*** **2. Order that the contract dated 31 May 2002 be set aside** **3. Order that the first, second and third defendants forthwith do all things necessary and sign all necessary documents to transfer property and ownership in the vessel *Ishmael* to the plaintiff.** **4. Order that the plaintiff forthwith transfer to the defendant 189, 000 trade dollars** **5. The obligation to return the boat is not conditional upon the transfer of trade dollars to the first defendant** **6. Order that the contract of sale between the first defendant and the second and third defendants be**

set aside

CATCHWORDS: CONTRACTS – RECISSION – where members of a trade exchange contracted to exchange the *Ishmael*, a 53 foot topsail schooner, for trade dollars – where representations made to the plaintiff regarding the acquisition of real estate for trade dollars - whether contract between the plaintiff and the defendant can be rescinded and considered void *ab initio* – s 87 *Trade Practice Act* (Cth) 1974 – Whether statute gives right to avoid the contract

Shipping Registration Act (Cth) 1981
Trade Practices Act (Cth) 1974, s 52, s 75B, s 87

Alati v Kruger (1955) 94 CLR 216
Brown v Smitt (1924) 34 CLR 160
Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31
Edwards v R (1981 – 1982) 173 CLR 653
McAllister v Richmond Brewing Co (NSW) Pty Ltd 42 SR (NSW) 1987
Taco Company of Australia Inc v Taco Bell Pty Ltd 42 ALR 177
Yorke v Lucas (1983-1984) 158 CLR 661

COUNSEL: Mr A. Cooper for the plaintiff
Mr B. Cronin for the defendant

SOLICITORS: Lyon Smith Commercial Lawyers for the plaintiff
Gall Stanfield & Smith for the defendant

[1] The first defendant is a company which carries on the business of property development and speculation, as well as trading in goods and other commodities. The second and third defendants, respectively father and son, are its directors, who have in recent years made use of a number of companies for the purpose of carrying on that business.

[2] The first defendant is a member of a number of trade exchanges, in particular Contrabart Trade Exchange operated by Contrabart Trade Exchange Pty Ltd ("Contrabart"). According to the Australian Tax Office ruling IT 2668 of 13 February 1992:

> '… bartering involves the direct exchange of goods or services for other goods or services without reference to money … Bartering may also occur in the commercial field, e.g. a firm may agree to purchase goods or services from another firm provided its own products are taken in exchange, either in full or partial satisfaction of the … price …
>
> In recent times more refined forms of barter have arisen in the market place … Referred to … as counter-trading, these arrangements are typically controlled by member-only organisations where credit units have become the medium of exchange …

> The membership of the … organisations generally consists … of businesses … run for profit … often referred to as trade exchanges. Counter-trade organisations have a record keeping function with most having detailed computer records of members' transactions.'

[3] The medium of exchange used for trading goods and services between members of a trade exchange are credit units which are given various names. The name given to its units by Contrabart is 'trade dollars'. Members of the exchange who transact business express the value of their transaction in trade dollars. In a typical example a member will acquire goods and services from another member for a specified number of trade dollars. Each member will own a number of credit units which is recorded by (say) Contrabart. Each member has a separate account. As a result of the transaction, notice of which is given by a document called a transaction slip to Contrabart, the number of credit units described as trade dollars will be debited to the account of the buyer and credited to the account of the seller. Members of the trade exchanges pay it a small monthly fee and are obliged to pay a commission of 10 per cent on the acquisition of property or services. The monthly fee is payable partly in trade dollars and partly in money. The commission is payable in money, i.e. legal tender. For the purpose of calculating the amount of commission the value of a trade dollar is taken to be equivalent to a dollar, ie the unit of currency. So on the acquisition of goods for 1,000 trade dollars the commission would be $100. The commission is payable by the purchaser.

[4] In return for fees and commissions the trade exchange employs trade co-ordinators, or brokers, to facilitate the exchange of goods, services and properties between members. Contrabart publishes on a website and in paper form lists of its members by category so that a member who has a credit balance of trade dollars has information about what it may exchange them for, and those who have goods or services available advertise their wares. The task of the trade co-ordinator is to put members with particular needs in touch with other members who may be able to satisfy them.

[5] The second and third defendants are shrewd and sharp witted traders who have made good use of trade exchanges and trade dollars to profit. Their preferred method of business is to acquire valuable goods and sometimes land from relatively unsophisticated folk in exchange for trade dollars. They then sell the property for cash. Occasionally they exchange it for other properties. The second defendant described himself as an 'old horse trader from way back … always … swapping this for that … that for that.'

[6] Until 31 May 2002 the plaintiff was the owner of a 53 foot wooden hulled gaff rigged topsail schooner, the *Ishmael*. She was built in Hawaii in about 1970. Although relatively new, as her description suggests, she was built in the style of the American trading schooners of the 19th century.

[7] The plaintiff is 40 years old and of limited education though he is far from unintelligent. He left school at 15 and has worked as a station hand, deck hand and fisherman. His present occupation is arborist. He removes coconuts and dead fronds from palm trees at holiday resorts to protect tourists. His income is modest but his lifestyle was relaxed and romantic. He sailed *Ishmael* between Sydney and New Guinea calling in at island resorts which had need of his services. The plaintiff

has a wife and two young children. When in port there is a seamy side to seafaring life to which he did not wish to expose his daughter. Accordingly he decided to sell *Ishmael* and take up a life on shore. He wished to invest the proceeds of sale in real estate. He had the vessel valued and was told she was worth $150,000. He advertised her for sale at $169,000 in a publication which lists all manner of boats for sale. He indicated that he was prepared to exchange *Ishmael* for land.

[8] The first defendants has employees, called "vetters", whose function is to peruse publications of all kinds in which real and personal property is advertised for sale and which indicate that the vendor might accept an exchange of property in lieu of money. One such employee noticed the plaintiff's advertisement and made contact by telephone. An appointment was made for the third defendant to inspect *Ishmael* at her berth in Ballina. Another appointment was made for the plaintiff to speak to Messrs Hodson at the first defendant's office in Surfers Paradise. They met on 31 May 2002. Shortly afterwards they walked to Contrabart's office and spoke to Mr Lipscombe, Contrabart's managing director. There and then the plaintiff became a member of the Contrabart trade exchange and signed a contract with the first defendant to exchange *Ishmael* for 189,000 trade dollars.

[9] The plaintiff has been unable to convert his holding of trade dollars into anything of value. He seeks a declaration that the contract has been rescinded on the ground that it was induced by fraudulent misrepresentation. Alternatively he seeks orders pursuant to s 87 of the *Trade Practices Act (Commonwealth)* 1974 ("TPA") that the contract be set aside and that the defendants return *Ishmael* to him.

[10] By a written contract dated 22 June 2002 the first defendant sold *Ishmael* to the second and third defendants:

> '… for a cash amount of $47,100 … on or before 30 December 2002. In the event of any default … the seller has agreed to accept and the buyer has agreed to pay 180,000 Contrabart dollars … in lue [*sic*] of the $47,10 [*sic*] cash upon the seller given [*sic*] the purchaser no less than 14 days of written notice of demand … The vessel is sold as is and no guarantee or warranty applies …'

The bill of sale, also dated 22 June 2002, which recorded the transaction for the purposes of registration under the *Shipping Registration Act* 1981 (Commonwealth) records, incorrectly, that the plaintiff transferred the vessel directly to the second and third defendants for a price of $180,000.

[11] The representations which the plaintiff alleges the defendants made, and which were fraudulent, or misleading or deceptive in contravention of s 52 of the TPA, were that (statement of claim, paragraph 6):

> '(a) Contrabart is the best for real estate.
> (b) The plaintiff would financially profit through 'being in the Contrabart club'.
> (c) That Contrabart transaction fees were payable in Contrabart trade dollars.
> (d) Houses were easy to obtain using Contrabart trade dollars.
> (e) Contrabart trade dollars were a popular currency.

(f) Contrabart trade dollars were an especially popular currency on the Gold Coast.
(g) Contrabart dollars were so popular that one vendor had offered the second defendant $15,000 in cash if the first defendant should buy his vessel with Contrabart trade dollars.
(h) Contrabart trade dollars were equivalent in value to Australian dollars.
(i) The first defendant would help the plaintiff make the right real estate investment."

By their defence of 7 February 2003 the second defendant denied that he made any of the representations. It was pleaded that:

> 'The plaintiff on 31 May 2002 was provided with a "Contrabart membership application … form". The plaintiff executed this form in the presence of … Mr Barry Lipscombe, the managing director of Contrabart … Further Mr Lipscombe was present at all meetings between the plaintiff and the defendants and spoke to the plaintiff on a number of occasions prior to, at and after the execution of the agreement.'

[12] The defendants did not stand by that position for long. By an amended defence of 24 July 2003 the second defendant admits having made a number of representations prior to the execution of the contract to exchange *Ishmael* for trade dollars. In evidence it was accepted that the second and third defendants spoke to the plaintiff before he met Mr Lipscombe. Indeed both second and third defendants claim that they explained to the plaintiff at considerable length the mechanics and implications of trade exchanges and acquiring goods for trade dollars so that his decision to accept them for *Ishmael* was the result of a mature judgment made by one who possessed all relevant information.

[13] The admissions are that the second defendant represented:

(a) We have found that out of all of the trade exchanges, Contrabart dollars are one of the best to buy real estate.
(b) That the plaintiff could profit by using trade dollars by joining "Contrabart" as a member. It would enable him to pick coconuts … using trade dollars for business that he would not have … previously.
(c) (Real) properties are readily available by the use of trade dollars and that the marketing material put out by Contrabart showed these properties for sale on a monthly basis.
(d) Contrabart dollars are better for real estate and large commodities compared to other trade exchanges.
(e) Contrabart dollars are a more acceptable currency on the Gold Coast, Brisbane and Sunshine Coast than in areas away from the Gold Coast such as … Dubbo.
(f) The Australian Taxation Office treat a Contrabart dollar as equivalent to a trade dollar and that if you use it sensibly you will get dollar for dollar.
(g) The first defendant would help the plaintiff make the right real estate investment.'

[14] The defendants maintain their denial that the plaintiff was told:

> '(a) Contrabart transaction fees were payable in Contrabart trade dollars.
>
> (b) Contrabart dollars were so popular that one vendor had offered the second defendant $15,000 cash if the first defendant would purchase his vessel with Contrabart dollars.

The defendants maintained that the plaintiff never asked for their help with respect to investing in real estate but, had he done so, they would have given appropriate advice.

[15] The plaintiff's evidence was that he intended to put the proceeds of any sale of his boat 'into something sound' but he did not know 'too much about investing or anything else like that … real estate was what (he) was focusing on.' Apart from *Ishmael* the plaintiff and his wife owned a block of land. It is, I gather, located in north eastern New South Wales and is presently home to the plaintiff and his family. His income at the time was between $20,000 and $25,000 per year.

[16] The advertisement for the sale of *Ishmael* was published in September 2001. Issues of the magazine in which it appeared remain in circulation for lengthy periods. On 24 May 2002 one of the first defendant's vetters telephoned the plaintiff. They spoke about *Ishmael* and her condition. The plaintiff's recollection is that the employee said that 'her boss wants to buy your boat.' She explained that she worked for a developer on the Gold Coast who loved wooden boats. A day or two later the second defendant telephoned the plaintiff. He said he liked the photograph of *Ishmael*, no doubt that which approved in the advertisement, and asked if his son, Jason, could inspect her.

[17] The next day the third defendant 'rolled up and climbed aboard … in his suit … very dressed up like he'd just come from the office … and he came and looked around … and had a bit of a look but … didn't say too much.' The plaintiff thought the inspection was quite brief. That night the second defendant rang him again and said, in effect, that he had been told that *Ishmael* was an attractive boat and invited the plaintiff to come to his office in Surfers Paradise so that he could show him 'some real estate'. The plaintiff was initially reluctant because he was about to drive to the Whitsundays for a week's work. However the second defendant persuaded him to 'pop in if (he) could.' The plaintiff agreed and a meeting was arranged for 31 May at about midday.

[18] The plaintiff was impressed by the security and opulence of the first defendant's offices and the second defendant's immaculate suit. The third defendant was present at the meeting in the first defendant's office but it was the second defendant who did the talking. He was jovial and hospitable. He mentioned, for the first time, the topic of trade dollars. The plaintiff thought he was there 'to look at real estate or for a … swap of real estate.' The second defendant began talking about Contrabart and the volume of transactions made by its members. The plaintiff was familiar with Bartercard and had once heard 'some people … cashed all their Bartercard credit points in for a house … but mainly it's a water tank or a second hand car or smaller brand new goods.' The second defendant told him that the world 'was fast becoming a cashless society' and that 'a lot of us here on the Gold Coast (are) all

turning to trade … and trade dollars are a great way of attaining real estate.' The plaintiff asked if it was like Bartercard but was told that that was for 'smaller consumables. Contrabart is great for real estate. That's why I choose to use Contrabart when I'm trading with real estate.'

[19] The plaintiff recalls that the second defendant told him that Contrabart was best for real estate and that a trade dollar was equivalent in value to a dollar of currency. The precise expression used was 'one for one'. He was also told that Contrabart was 'especially popular when it comes to real estate.' The second defendant explained that Contrabart charged a fee of 10 per cent of the value of the transaction but that the fee was payable in trade dollars. The second defendant went on to say that 'he was in a good mood' and he would pay an extra 10 per cent of the boat's value to "cover" the 10 per cent transaction fee.

[20] He said, at one stage, that he was 'looking at five other wooden boats' because he needed to 'write off some money before the end of the financial year and … unload a few of his trade dollars … for taxation purposes.' One of the owners of the other five boats 'had actually offered him $15,000 if (the second defendant) would buy his boat for Contrabart dollars because (he) was so desperate to get rid of his boat.'

[21] The plaintiff said that the explanation about trade exchanges and trade dollars went 'a bit over (his) head.' The second defendant promised to 'get (him) a good bit of real estate.'

[22] The plaintiff testified that he told the second and third defendants about his financial position, that he had a boat but no money and that he was prepared to exchange his boat for land of the same value. After about half an hour's conversation the plaintiff and the second and third defendants walked to Contrabart's office which was nearby. There they met Mr Lipscombe who did little talking. The second defendant was again the main conversationalist.

[23] When in Contrabart's office the plaintiff completed and signed a 'Membership Application and Acknowledgment Form.' It set out the terms on which he applied to become a member of Contrabart's trade exchange. The application was accepted by Mr Lipscombe who signed on behalf of Contrabart. The relevant terms were:

> 'Member will pay Contrabart an initial joining fee of $795 cash …
>
> Ongoing fees: Transaction fee: 10% cash on all purchases
> Monthly fee: $15 cash and $15 trade'

The plaintiff initialled the document near where the amount of the joining fee appears and just above the line in which details of the transaction and monthly fees appear. The plaintiff did not pay the joining fee. The second defendant said that the first defendant would pay it for him. There is no satisfactory evidence it did so. Nevertheless Mr Lipscombe accepted the plaintiff as a member of Contrabart's trade exchange.

[24] The plaintiff was also given a brochure published by Contrabart explaining the nature of its business and promoting bartering as a means of transacting business. Under the heading 'What does it cost to join?' there appears detail of the joining fee, monthly fee and the transaction fee which is said to be '10 per cent of the purchase price when buying plus GST.'

[25] On the following day the plaintiff was invited to Mr Lipscombe's office where he was offered the opportunity to buy 'four small retirement … units … at Hervey Bay.' The price was $400,000, a quarter of which was payable in trade dollars. The plaintiff complained that he had no money and had been led to believe that he could 'get a 100 per cent dollar for dollar Contrabart deal on real estate, full trade, as they call it.' Mr Lipscombe calmed his fears by saying that he would arrange finance to enable the plaintiff to buy the units. The plaintiff signed the papers put in front of him by Mr Lipscombe who then told him that the fees on the transaction were 10 per cent of the purchase price payable not in trade dollars but money. This was the 'first (the plaintiff) had ever heard of any fee being in cash'. The transaction did not proceed. The reason was not precisely proved but no doubt the plaintiff's want of income discouraged any would-be financier. He did not pay the commission claimed by Contrabart. His trade dollar account with Contrabart was debited 25,200 units on 28 June 2002 being the trade dollar component of the purchase. A reversal of entries on 2 April 2003, after the plaintiff commenced these proceedings, credited his account with that amount.

[26] In the meantime the plaintiff made his own enquiries of Contrabart. He had been told that it had a website which he tried to access. He experienced some difficulty but eventually succeeded. To his dismay he saw that it listed only about 'a dozen pieces of real estate … some wine from Tasmania, a couple of haircuts and a few bits and pieces … around the Gold Coast.' The real difficulty was that the real properties advertised for sale indicated that only a small part of the price would be accepted in trade dollars. The rest was required in legal tender. The plaintiff had no money and having only a small income had no borrowing capacity. No real property was listed on the basis that it could be acquired in exchange for trade dollars only.

[27] After the failure of the attempt to buy units in the retirement village the plaintiff tried, unsuccessfully, to purchase real estate through Contrabart's listings. There were few properties and fewer still that appeared attractive to the plaintiff. Enquiries showed that the advertised properties were overpriced or that the vendors would accept only a small part of the price in trade dollars. The plaintiff could only offer trade dollars.

[28] When asked by the plaintiff during their meeting why he wanted to buy *Ishmael* the second defendant replied that it would be used as a venue for entertainment and the promotion of the defendants' business. The plaintiff asked if they would need a skipper and received an affirmative answer. An arrangement was made by which the plaintiff would sail the boat for the defendants on weekends as required for the enjoyment of the second and third defendants and/or their business associates. During a number of those outings the plaintiff spoke to the second defendant about his desire to exchange his trade dollars for real estate. The advice he was given in return was that he should not 'rush in and buy' but wait and 'we will get you a really nice bit of land or a nice house …'.

[29] His complaints to the second defendant were to no avail. Ultimately in an endeavour to provide some value for his trade dollars the second defendant purchased a prefabricated steel shed, of large dimensions, which the plaintiff might erect on his land. It was not real estate but it appeared to be the best the defendants could do. It would allow the plaintiff to improve the land he had. The transaction proceeded on the basis that the first defendant acquired the prefabricated structure

from its supplier and then supplied it to the plaintiff in exchange for trade dollars. On 30 August 2002 the plaintiff's account with Contrabart was debited 33,485 trade dollars and a similar number was credited to the account of the first defendant. The structure was never erected. The plaintiff sold it to raise money to fund this litigation. He received $16,100. The only other value obtained by the plaintiff from his credit balance with Contrabart was the repair of a gearbox in his motor car for which he exchanged 7,478 trade dollars. He met the garage proprietor on *Ishmael* when sailing her one weekend for the defendants.

[30] The plaintiff's bitter experience in trying to exchange trade dollars for something of real value was corroborated by Mr Burnham, Mr Cook and Mr Wilson. Mr Burnham is a bus operator from Bribie Island. He was approached by the second and third defendants with whom he exchanged a block of land near Rockhampton for 77,500 trade dollars and a 30 foot motor cruiser for 40,000 trade dollars. The defendants told him that trade dollars 'were the same value as the Australian dollar' and that there 'would be plenty of opportunities … to redeem those trade dollars for other goods.' Mr Burnham was interested in another, smaller boat, a car or other real estate. In the end he could find nothing of value for which he could exchange his trade dollars. Eventually the first defendant offered some shares in 'a new corporation setting up cattle sales throughout Australia … (another) one … in grain and … also a lending one. Three different companies which were to be listed on the Australian market.' In the end none of the companies were listed and Mr Burnham received nothing whatever of value for the trade dollars for which he had exchanged a block of land and a substantial boat. Mr Burnham's experience, too, was that real estate advertised in exchange for trade dollars was in remote areas or was overpriced.

[31] Mr Cook 'worked with' the first defendant as a project manager and salesman 'some years ago.' He was engaged, on terms which were not made clear, to 'find projects' for the first defendant to construct utilising trade dollars in the purchase of materials with a view to selling the improved real estate for a profit. His task as a salesman was, essentially, to 'try and move trade dollars' by purchasing 'things with trade … just about anything … cars, boats, property, houses …' If the acquisition was of real property the defendants would borrow against it to provide a cash flow and then sell the property, hopefully for a profit. The selling price was currency, not trade dollars. Items of personalty exchanged for trade dollars would be sold for cash. Mr Cook also was credited with a number of Contrabart trade dollars which he found difficult to exchange for anything of value. He has 'given them up. … They are just sitting there. I don't think I can get rid of them. I spent three months with (the second defendant) in his office trying to sell them and I couldn't get rid of them.'

[32] Mr Cook gave this evidence in cross-examination (T. 89.40-T. 90.40):

> '… You are aware, aren't you that the (defendants') trade dollars are ones which they have been able to offload -? – They're set up purposely to move the trade dollars. … Their focus is solely on moving trade dollars. They're professionals and they're very good at it. … I don't believe the average person could sell them, move them, swap them, exchange them, do anything with them.

> But then there might be another Mr Average who can for whatever skills he brings to it? – I haven't come across any of them. There are other people that do move them, but they're highly skilled in that area and I'd also say that they don't have a conscience, they don't care what happens to the other people. … I've seen people with their life savings lost, they don't lose a minute of sleep over it.
>
> What technique have you seen used to successfully trade in trade dollars? – Some of the time there are often properties which are a little bit harder to move that you would freely move on the open market and they come in, in some cases they may not be told the full detail. Everybody gets told you can … trade and in their mind it's true … but for the average person … they don't really have much chance at all in moving them.'

[33] Mr Wilson is a fisherman from Evans Head. In August 2000 he exchanged his 37 foot fishing boat valued at $100,000 for 100,000 Contrabart trade dollars. It does not appear that he dealt with the defendants. He was given a prospectus which listed about 400 products and services which he could acquire in exchange for his trade dollars. They were 'home improvements, cars, boats, all sorts of things.' At the time Mr Wilson 'needed home improvements' and could have 'done with another car.' He was unsuccessful in exchanging his trade dollars for either commodity. A car dealer listed in the prospectus as willing to exchange cars for trade dollars refused to accept them. None of the purveyors of 'home improvements' would deliver to Evans Head where Mr Wilson lived.

[34] I accept the evidence of Mr Burnham, Mr Cook and Mr Wilson. Each struck me as being completely honest in his testimony and of decent character. Each of them exchanged property of some value for trade dollars with which nothing of value could be acquired.

[35] It is difficult to summarise the second defendant's evidence. He was most reluctant ever to give a direct answer to any question. His responses were discursive, verbose and delivered rapidly. It is not surprising the plaintiff felt overwhelmed when he met Messrs Hodson in their office. Both second and third defendants were anxious to describe their business, and the first defendant's, as successful and profitable. The second defendant estimated that their turnover was between 1,000,000 and 1,500,000 trade dollars per year, nearly all being spent to acquire real estate.

[36] It emerged in cross-examination that he had been discharged from bankruptcy in 1995 and came to a composition with his creditors in 2000 in which he could offer only one cent in the dollar. His assets appear to be held by his wife. At the time of the composition the second defendant had debts of just over $4,400,000. A little over $2,500,000 was owed to Contrabart. That debt apparently arose from an advance of trade dollars by Contrabart to the defendants, or one or more of them. The advance was made to allow the defendants to acquire real property which it intended to sell for a profit. No doubt in that case the defendants would have had to purchase trade dollars or repay the trade dollar advance by the payment of money. In any event the transactions proved unprofitable and the defendants could not repay Contrabart. It may be that the properties which led to the defendants' financial difficulty were those which, in his evidence in chief, the second defendant described in terms which suggested that the defendants were successful traders of real estate.

The second defendant's answers on this point were unsatisfactory, as was nearly all of his testimony.

[37] The second defendant's evidence is that when he first spoke to the plaintiff by telephone, before Mr Jason Hodson inspected *Ishmael* in Ballina, he explained in great detail the operation of transacting business by using trade dollars. The conversation, he said, lasted about forty-five minutes. His evidence of the conversation occupies over three full pages of transcript (T.115.20-T.117.35) without the interruption of a single question. He showed an extraordinary recollection of the conversation. The essence of his account is that he told the plaintiff that the defendants were very interested in buying *Ishmael* but were not cash buyers but would offer trade dollars instead. The plaintiff asked what he would do with trade dollars and was told 'you use them to buy property with … The quickest way is you deal through the trade exchange … They charge you 10 per cent but … they will do the work for you. … If I bought the boat for 150 then you would have $150,000 credit on this account but you can only use it in trade dollars … The most realistic thing to spend it on would be real estate … The trade exchange will send you … a purchaser's request form. That … will say … "what do you want to spend your trade dollars on?". You will say "… I want a block of land …". … They will source it for you … When you say "yes I want that deal" then you will sign a normal real estate contract and it will say that you are paying x amount in cash and x amount in trade dollars. At settlement … you've got to pay the trade exchange ten per cent in cash.'

[38] The second defendant claimed that then he asked how much the plaintiff wanted for his boat. He was told it was advertised for $169,000 but he would accept $150,000. The second defendant then said he would pay 169,000 trade dollars instead of $150,000 but the 'bad news' was that the plaintiff would have to pay $16,900 to the trade exchange. He went on:

> 'But you're still getting your 150. What you will end up with is $169,000 worth of equity in real estate in real money but you will have to pay $16,900 but you don't pay them that until they have spent your trade dollars …'

[39] The plaintiff said he would think about the proposal and discuss it with his wife. He rang back about an hour later to say that 'we would look at a deal like that'. The arrangement was then made for the third defendant to drive to Ballina.

[40] The second defendant said that he spoke by telephone to his son at the conclusion of his inspection of *Ishmael* and then rang the plaintiff. He told him that Mr Jason Hodson had liked the boat and that if he wanted 'to do a deal' the defendants were 'happy to do a deal … on trade dollars'. He offered to make an appointment with the managing director of the trade exchange so that the plaintiff could meet him and have the 'whole thing' explained. If having received an explanation he felt 'comfortable' they would do the deal. The next day the plaintiff telephoned him. He said that he had spoken to a friend who had bought a property with trade dollars and had made inquiries about that process. They made an arrangement to meet on 31 May at midday in his office. He said he wanted 'to go through it again so you fully understand it before we go to (Contrabart's) office.' The second defendant claims also to have expressed concern that the plaintiff's wife accompany him so that she too 'was happy' to exchange *Ishmael* for trade dollars.

[41] They met the next day as arranged. The plaintiff came alone. The second defendant expressed concern that Mrs MacFarlane had not come. He said it 'would have been better if she (had) come.' He said the defendants were 'a hundred per cent interested in the boat' but he wanted to explain the mechanics of transacting business in trade dollars. He showed the plaintiff a copy of the Contrabart application form and explained its terms. He explained the 'bad news' that there was a transaction fee of 10 per cent on all purchases 'in cash when you've spent your money' i.e. trade dollars. However he pointed out that the plaintiff would have accepted $150,000 for *Ishmael* and that the first defendant was paying '169 so really, you know, you're getting ten per cent more'. In fact the contract was for 189,000 trade dollars. He pointed out that the joining fee was to be paid in cash but repeated his promise that the first defendant would pay it. He drew attention to the monthly fee. The explanation was detailed and, again, the second defendant could recall exactly what was said.

[42] Having completed his explanation the second and third defendants took the plaintiff to Contrabart's office where he was introduced to Mr Lipscombe, its managing director. The second defendant had rung Mr Lipscombe to advise him that they were coming. Having introduced the plaintiff to Mr Lipscombe the second defendant went on:

> 'We are very interested in the boat. We are happy to do the deal. We've come to a price of $169,000 … I told him I'd pay him 169 not 150 because that will give him equity in properties which will cover his fees … I've been through the paperwork with him so he knows what the paperwork is … I've explained … that you're the people who look after him not us and I've explained to him that basically for 189 – for $169,000 the only thing … he can spend this on … fast would be real estate … and that's … what he wants anyway.'

He then addressed the plaintiff and advised him that if he did not 'feel comfortable' when he finished talking to Mr Lipscombe he should not 'do the deal.'

[43] Mr Lipscombe apparently felt the need to have the plaintiff confirm that he wanted real estate in exchange for his boat. The plaintiff told him he wanted 'just properties … really doesn't matter just whatever.' He asked Mr Lipscombe what was available and he was shown a list of two or three pages of properties which indicated that the asking price was expressed partly in currency and partly in trade dollars. Mr Lipscombe inquired of the plaintiff what he did for a living and, when told, suggested that he could obtain additional business 'through just members who've got coconut trees that need plucking … hotels or resorts or this or that.'

[44] According to the second defendant he went out of his way to tell the plaintiff in Mr Lipscombe's presence that he could not buy a property using only trade dollars. Rather he had 'to understand that the best deal you are going to get is 50/50. It's normally 60/40 … The chance of finding somebody with a freehold property and just happens to be conditioned to trade dollars is pretty slim … People don't mind accepting part trade dollars …' The second defendant claimed he said to Mr Lipscombe that he had 'already explained' to the plaintiff that 'he can't buy property on full trade.' Mr Lipscombe corroborated the point. It might be noted that the second defendant's very full account of his conversation with the plaintiff

on the telephone and in his office before moving to Contrabart's office did not include any such warning.

[45] Mr Lipscombe said, in effect, that the better the property in terms of location the smaller would be proportion of trade dollars the vendor would accept as consideration. A property 'out in the sticks' might sell on the basis that the vendor would accept 80 per cent of the price in trade dollars or even all of it. Mr Lipscombe then suggested that the plaintiff should spend his 169,000 trade dollars over four properties to 'build up' his portfolio. The plaintiff then said to the second defendant that he would 'do the deal' but wanted 189,000 trade dollars. The second defendant agreed but sounded a note of caution. He told the plaintiff he should ring his wife and confirm that she supported the transaction. The plaintiff rejected the suggestion. He said he made 'the decisions in the house.' The application form was then filled out by Mr Lipscombe and signed by the plaintiff. The contract to exchange *Ishmael* for trade dollars had been prepared and was signed by the plaintiff at the defendants' office to which they returned.

[46] The boat was delivered about nine days later. The plaintiff sailed her to the Gold Coast from Ballina. Thereafter he acted as skipper on weekend outings arranged by the second and third defendants. The second defendant denied that on those occasions the plaintiff complained that he had been unable to exchange his trade dollars for real estate or asked for assistance in doing so. He professed to know nothing about the plaintiff's attempt to buy units in a retirement village though he had said that Mr Lipscombe had mentioned such units as a prospective acquisition when they met in his office.

[47] The following exchanges occurred in cross-examination:

> '… On 31 May you told Mr MacFarlane that Contrabart dollars are one of the best to buy real estate …? – As far as the trade exchange goes … money is the best thing to buy real estate with if you want a bargain … If you go to an auction and buy property with money … it obviously has to be a better deal than buying property on trade dollars. That statement in relation to compared to trade exchanges.
>
> You told Mr MacFarlane during the meeting … properties are readily available by the use of trade dollars? - … there is always properties for sale on Contrabart.
>
> You told Mr MacFarlane that trade dollars were a popular currency. Is that correct? – Trade dollars are a popular currency yes, they are.
>
> Well did you say that to Mr MacFarlane? – I wouldn't say things like that. … I wouldn't use the word popular, popular currency. …
>
> You said that Contrabart dollars are a more acceptable currency on the Gold Coast, Brisbane and the Sunshine Coast? – They are more readily acceptable compared to a place like Dubbo.
>
> I'm asking you what you told Mr MacFarlane? - … I would have said to him if you wanted to buy a property in Dubbo and use trade dollars they wouldn't know what you are talking about but on the

> Gold Coast, Brisbane and Sunshine Coast … it is a widely known currency …
>
> Did you tell … Mr MacFarlane that Contrabart dollars are a more acceptable currency on the Gold Coast, Brisbane and the Sunshine Coast? – Yes they are more acceptable there than in places like Dubbo or in Adelaide or in Broome …
>
> You say that you told Mr MacFarlane … that if you use trade dollars sensibly you will get dollar for dollar? – That's correct.' (T.161.40-163.25)

[48] The plaintiff rejected the suggestion that the second defendant had spoken to him at length on the telephone about trade dollars. He believed the conversation was short as he said in evidence in chief. He accepted that he had initialled the application form adjacent to where it described the transaction fee as being ten per cent payable in cash. He was adamant that he had not read the form and that he was told that the transaction fee was payable in trade dollars. The plaintiff denied that the second defendant told him that he would not be able to purchase real property for trade dollars only but would have to provide half or more than half of the consideration in money. He denied that he was advised to buy four or five properties 'using about 40,000 worth of trade dollars for each property.' He pointed out, accurately one might think, that he had no money and no worthwhile borrowing capacity. His only means of acquiring realty was the exchange of the trade dollars he was to get for *Ishmael*. He denied being given or shown any listings of real estate when in Contrabart's office on 31 May. His evidence was that he was sent some copies of listings later, but inquiries showed none of the entries to be available in exchange just for trade dollars. Some were overpriced and some were not, in fact, for sale. He said also that after some difficulty he obtained access to Contrabart's website and was alarmed to see how few properties were advertised. That led him to speak to the second defendant who assured him that he should not worry because, in due course, a property would become available. He denied that it was his suggestion that the consideration for the exchange of *Ishmael* should be increased to 189,000 trade dollars. He insisted that that increase was the second defendant's suggestion and was explained as being 'an extra 10 per cent … to cover the loss when (the plaintiff) changed over for real estate.'

[49] The plaintiff also rejected the proposition that the second defendant had suggested he ring his wife for her opinion before he agreed to the transaction. He said, with confessed embarrassment, that he had said he wanted to talk to his wife before committing to the exchange. The second defendant's response was to offer him a telephone but also to inquire whether, as a man, he needed to consult his wife. The plaintiff said he accepted the challenge, to his regret.

[50] The plaintiff adhered to his evidence that the second defendant had said to him that Contrabart dollars were so popular that one vendor had offered him $15,000 cash if the first defendant would buy his boat for Contrabart dollars. It was pointed out to him that such a statement was illogical. He agreed but maintained it had been said to him. It was suggested that such a statement was so silly that the plaintiff could not have placed any reliance on it. His answer was:

> 'Listen, it wasn't said like that. It was actually said in referral to "I've got five boats here. I've just got to pick one … I'm going to make a deal today. One guy … has offered me 15,000 to take his wooden boat and … you can either sign up or forget about it. I'm going to get one of these other boats.'

[51] The third defendant gave evidence that when he inspected *Ishmael* and first met the plaintiff he 'went through most of what (he) normally tells people regarding the trade dollars and a discussion of what the purpose of using it is and what the benefits are of using it right through the procedure of what the costs of it all were and that sort of thing.' He said he gave the plaintiff the brochure which became Exhibit 5. He ascertained that the plaintiff had 'a basic understanding' of bartering and new about Bartercard. He explained to him the 'negatives' of barter, they being the ten per cent transaction fee and the monthly fees. He told the plaintiff that the transaction fee was payable in money and they spoke about acquiring real estate with trade dollars.

[52] It should be observed that it was not put to the plaintiff in cross-examination that the third defendant had explained to him that the offer to acquire *Ishmael* would be for trade dollars or that he explained the concept of doing business by barter and Contrabart in particular.

[53] The third defendant said he next met the plaintiff in the first defendant's office on 31 May. He remembered these things being said:

- Compared to other trade exchanges the second defendant found Contrabart the best for purchasing real estate.
- Houses as well as land and larger properties were easy to obtain through the Contrabart system.
- Contrabart trade dollars were a popular currency.
- (In effect) that Contrabart trade dollars are an especially popular currency on the Gold Coast.

[54] Mr Lipscombe's evidence was that he first met the plaintiff on 31 May in his office. He was introduced by the second defendant. Mr Lipscombe asked him if he knew anything about 'trade exchanges' and 'then proceeded to explain how the trade worked.' I interpolate to point out that this was the fourth occasion on which the detail of the mechanics of a trade exchange and the measurement of value by trade dollars had been explained to the plaintiff. The third defendant had done it at Ballina; the second defendant on the telephone at length and again in his office only minutes before Mr Lipscombe embarked upon his exposition. Mr Lipscombe does not suggest that the plaintiff protested or showed any familiarity with the topic. On the contrary the plaintiff 'indicated he didn't know anything about trade.' Mr Lipscombe took care to ensure that the plaintiff understood that he would not be able to buy real property using only trade dollars; normally only about 20 or 30 per cent of the price would be payable in those dollars. He suggested buying four or five properties 'putting 30,000 or 40,000 trade dollars into each property.' He told him that the ten per cent transaction fee required payment in cash and that half of the monthly fee was payable in cash. Mr Lipscombe told the plaintiff that he

should use any trade dollars exactly as he would spend money; 'for example if in the cash world they are going to get the house painted they would normally go out and get two or three quotes. … Do exactly the same in the trade world. Go and get your two or three quotes, bring your quotes … and we'll get the trade co-ordinators and they will find a painter to do that job … for around … that price …' He explained that Contrabart employed trade co-ordinators who would contact members of the exchange to find out what they wanted and let them know what is available in their areas of interest.

[55] The plaintiff's application form was completed in Mr Lipscombe's office. He went through the form with the plaintiff and drew his attention to the charges – the '10 per cent cash fee and the monthly fees.' He made it clear to the plaintiff that he could not 'come in the next day and spend 189,000 (trade dollars) on a property' unless 'he was going to trade up against something a lot … dearer … to go and spend it just on a property worth 189,000 we wouldn't be able to get him one.' The reason was that the vendor would in most cases have to discharge a mortgage for which money would be required. He made that quite clear to the plaintiff. He inquired, however, whether the plaintiff had a borrowing capacity and was told that he had 'a very good business going' so that obtaining finance should not be difficult.

[56] Mr Lipscombe affirmed the accuracy of statements that:

- Contrabart is best for real estate because it had 'gone out primarily looking for developers and builders in real estate and taking that direction.' Houses are easy to obtain using Contrabart dollars because 'houses and units are fairly readily available.'

- Contrabart is a popular currency because 'people spent 95,000,000 in 2001 so it must be reasonably popular.'

- Contrabart is popular on the Gold Coast because Contrabart had 'been there since 1985 on the Gold Coast.'

[57] It emerged in cross-examination that the picture of prosperity painted by Mr Lipscombe for Contrabart was not a true depiction. Until about a year ago Contrabart's business was conducted by Contrabart Pty Ltd. It is now conducted by two companies, Contrabart Trade Exchange Pty Ltd and Contrabart Management Pty Ltd. The first mentioned company was put into liquidation early in 2003 on the ground of its insolvency. In addition to its trade creditors it owed the Australian Tax Office $1,470,000 on an assessment which issued following an extensive investigation into its affairs. Following upon that misfortune Mr Lipscombe incorporated the second and third named companies and carried on business as before.

[58] Mr Lipscombe confirmed the plaintiff's evidence that Contrabart's website was difficult to access despite the engagement of a consultant working full time to develop the site. He reluctantly conceded that at present only 11 parcels of realty are listed on Contabart's website. It will be recalled that his evidence had been that Contrabart's primary business focus was on the exchange of trade dollars for realty.

[59] The defendants owe Contrabart about $3,500,000 consequent upon an advance of trade dollars by way of "overdraft". Contrabart has taken security in the form of a bill of sale over some motor vehicles and a boat. As well it took an assignment of $600,000 worth of shares which may or may not be in the same companies in which Mr Burnham became a shareholder. The first defendant does not pay a 10 per cent transaction fee on its trade dollar dealings. It pays less than 10 per cent and may pay nothing. Mr Lipscombe would not say which. There is a distinct inference, which he resisted, that Contrabart issues trade dollars to the first defendant gratuitously to increase the available pool of trade dollars to encourage trade in them.

[60] Mr Lipscombe's explanation of how trade dollars can be exchanged for real estate confirmed the evidence that it is properties that lack saleability which are traded. He said:

> 'There's so many properties out there for sale that it makes the sale go through a lot quicker by taking the trade rather than sitting there for 12 months waiting to sell … You could have a developer there with 10 units left in a high rise development which are … hard to sell because … the last 10 normally takes them 12 months to sell … The sales can be done in the cash world but they take a lot longer … than it would in the trade world.' (T.232.35-233.1)

[61] I have no hesitation in preferring the evidence of the plaintiff to that of the second and third defendants and Mr Lipscombe. I scarcely believed a word any of those three gentlemen said. Apart from the matters I have mentioned in my recital of their evidence it is impossible to reconcile their testimony with the initial stance pleaded in the defence. I have no doubt that the defendants' business consists of preying upon people like the plaintiff (and for that matter Mr Burnham and Mr Wilson) who can be persuaded to exchange items of valuable property for trade dollars, the value and utility of which are grossly exaggerated in the negotiations. I formed the distinct impression that the defendants' evidence was evasive and, indeed, deceitful.

[62] Counsel for the defendants submitted that the plaintiff's evidence of representations concerning the payment of commission to Contrabart in trade dollars, and the vendor who offered to pay $15,000 if the first defendant would buy his boat, cannot be accepted. The submission is that the first representation was shown to be wrong by the document which the plaintiff must have seen because he initialled it adjacent to the relevant information. As to the second representation it is said to be so illogical, indeed absurd, that it would not have been made and certainly would not have been believed. Despite the force of the submissions I accept the plaintiff's evidence. In my judgment the second and third defendants would assess the gullibility and, perhaps, the cupidity of a prospective customer and say whatever they believed they could get away with.

[63] The course of the negotiations offers some support for the making of the first questioned representation. The asking price for *Ishmael* was $169,000. The defendants offered 169,000 trade dollars which was increased to 189,000 trade dollars to cover the commission which would be payable by the plaintiff when he spent his trade dollars to acquire property. It is true that the increase of 20,000 trade dollars does not exactly represent 10 per cent either of the initial asking price or the final price but it is close. Whether it was the plaintiff or the second defendant who suggested the increase (and I accept the plaintiff's evidence on the point) it is, I

think, clear that the parties were working on the basis that the additional 20,000 trade dollars would be expended in paying commission to Contrabart.

[64] The attack on the second representation depends upon the plaintiff having an understanding that trade dollars were not as valuable or as versatile as an equivalent number of dollars. A representee with that knowledge would not believe a representation that a vendor had offered to pay $15,000 as an inducement to take his boat in exchange for trade dollars. However I am satisfied that the second and third defendants went to some length to persuade the plaintiff that trade dollars were as good as money. There is no doubt the defendants were anxious to acquire *Ishmael*. The third defendant described her to his father as 'an absolute ripper'. If they thought they had convinced the plaintiff that trade dollars were as good as currency I do not find it difficult to believe that they would have made the representation about the anxious vendor.

[65] The critical representations (which I find were made) were that:

- Contrabart trade dollars were best (for buying) real estate.
- Houses (or other forms of real property) were easy to obtain using trade dollars.
- Contrabart trade dollars were equivalent in value to currency.
- Trade dollars were a popular trade currency.

The fourth representation is really an adjunct to the second and third. Although the plaintiff has not pleaded any implications arising from the terms of the representations there is no doubt that they conveyed, and were intended by the defendants to convey, the impression that if the plaintiff accepted trade dollars for *Ishmael* he would have no difficulty in acquiring real estate for those trade dollars and that, for that purpose, trade dollars were as good as and were equal in value to the same number of dollars.

[66] I do not accept the defendants' evidence that the representations were qualified. In particular I do not believe the defendants' evidence that they told the plaintiff that Contrabart trade dollars were better than the trade dollars of other trade exchanges for buying real estate. I am satisfied that the conversation was about trade dollars, not a particular brand of that commodity. Nor do I accept that the defendants explained that trade dollars were equivalent in value to currency if one were careful and traded shrewdly. As I have said I accept that the representations were made in the unqualified terms that the plaintiff described. The defendants seem to accept that they said that houses (or properties) were easy to obtain using trade dollars and that trade dollars were a popular currency, especially on the Gold Coast.

[67] It is quite clear that each of the representations was wrong. Each has to be heavily qualified if it is to be accurate. Contrabart (or any other) trade dollars are not best for real estate. Money, whether the buyer's own or borrowed for the occasion, is better. This was conceded by the second defendant and Mr Lipscombe. A vendor accepts trade dollars when, because of some feature of his property, it is difficult to attract a purchaser who will offer money.

[68] It is not easy to acquire houses or land with trade dollars. A limited number of vendors will accept part of the price in trade dollars. The more valuable a property the smaller the percentage of the price that will be accepted in trade dollars as part consideration, and the more likely it is that the vendor will insist on being paid the full price in money. The fact that at present Contrabart's website advertises only 11 properties is proof enough of the falsity of the representation. The printed lists of available properties (Exhibits 7, 8 and 9) show only about three dozen properties for which trade dollars could be outlaid as part of the consideration. The choice is extremely limited. It was even more limited for the plaintiff who had only trade dollars with which to acquire property. To utilise his trade dollars he had to buy four or more properties, borrowing the balance of the consideration on each of them. He had no worthwhile borrowing capacity and could not obtain finance. This is accepted by the defendants. They knew his financial position when they assured him that he could acquire real property with trade dollars. Trade dollars are not equivalent in value to currency. The qualification the defendants sought to add to the representation is an admission that in the terms in which it was made it was false. For the reason discussed with reference to the first representation this one too was misleading.

[69] A trade dollar is not equal in value to a dollar. There are in the evidence two clear examples of the comparative value of trade dollars to dollars. The first is the contract (Exhibit 20) by which the second and third defendants agreed to buy *Ishmael* from the first defendant. It will be recalled that the price was $47,100 or 180,000 trade dollars. The arithmetic suggests that the defendant's thought a trade dollar was worth about 26c. The other evidence is found in Exhibit 22, the acquisition of the steel shed by the first defendant from ASI Building Systems. The consideration was $33,485 for which the supplier accepted 25,000 trade dollars and the balance in shares, the value of which was not proved. The plaintiff sold the shed in the same condition in which it had been delivered by ASI. He received $16,000 for it. On this occasion the comparison shows a trade dollar to be worth about 50c.

[70] Mr Cook's evidence is also relevant on this point. It was that the defendants sought to make profits by acquiring assets for trade dollars and selling them for money. Contrabart's insistence upon being paid its transaction fee in money, not trade dollars also indicates that there was no equivalence in value between the two.

[71] I am satisfied that the second and third defendants knew that the representations were false. This is all but conceded. I mentioned that the falsity of some of the representations is proved by the qualifications the defendants sought to put on them. I rejected their evidence that they expressed those qualifications to the plaintiff. The only acceptable inference is that the second and third defendants knew when they spoke to the plaintiff that the representations would be false without the qualifications. They made the representations in the unqualified terms I have found.

[72] The second defendant accepted that properties were not easily obtainable using trade dollars only. He told the plaintiff that they were. The terms of Exhibit 20 show that the second and third defendants knew that trade dollars were not equivalent in value to dollars. They told the plaintiff they were. The second and third defendants knew that trade dollars were only acceptable as part consideration for real estate and only in those cases where the property had no interest for buyers who had money or could

borrow it. They told the plaintiff that Contrabart trade dollars was "best for real estate." Accordingly I am satisfied that the representations were made fraudulently.

[73] The plaintiff seeks relief under the TPA. Section 52 prohibits a corporation, in trade or commerce, engaging in conduct that is misleading or deceptive,. There is no doubt that the first defendant acquired *Ishmael* from the plaintiff in trade or commerce. Acquisitions of that kind were its business. It was not an isolated, domestic sale but part of the ordinary course of the first defendant's trading activity.

[74] Section 75B provides that a reference to a person involved in a contravention of s 52 shall be read as a reference also to any person who:

(a) has aided, abetted, counselled or procured the contravention
(b) has induced the contravention
(c) has been knowingly concerned in the contravention or
(d) has conspired with others to effect the contravention.

The plaintiff seeks to make the second and third defendants liable for the first defendant's contravention pursuant to s 75B. They will only be so liable if they intentionally assisted (aided, abetted, counselled or procured) the first defendant to contravene s 52. In terms that means that the second and third defendants made the representations on behalf of the first defendant knowing that the contents of the representations were wrong. See *Yorke v Lucas* (1983-1984) 158 CLR 661. Likewise the second and third defendant's cannot have been knowingly involved in the first defendant's contravention unless they knew of the falsity of the representations. See *Edwards v R* (1981-1982) 173 CLR 653.

[75] There is no doubt that false representations made by a corporation in the course of negotiations leading to the formation of a contract in order to induce the other party to make the contract constitute misleading and deceptive conduct. See *Taco Company of Australia Inc v Taco Bell Pty Ltd* 42 ALR 177. The plaintiff was, as I have found, both misled by the representations and deceived by them into believing that Contrabart trade dollars were "best for real estate"; easily exchangeable for real estate and worth an equivalent amount in dollars. The deception occurred in trade and commerce.

[76] The second and third defendants were the directors of the first defendant. They were its agents for the purpose of transacting business with the plaintiff. The second defendant made the representations while the third defendant sat in silence. He must, by that conduct, be taken to have endorsed the second defendant's conduct and to have corroborated the representations. It is clear that misleading and deceptive conduct for the purposes of s 52 may occur despite the absence of what might be called a positive misrepresentation. It is sometimes said that silence may be a contravention of the section.

> 'But in any case where a failure to speak is relied upon the question must be whether in the particular circumstances the silence constitutes or is part of misleading or deceptive conduct … The question is whether in the light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive. Conduct

> answering that description may not always involve misrepresentation …'

Per Gummow J in *Demagogue Pty Ltd v. Ramensky* (1992) 39 FCR 31 at 40, 41. The only sensible construction to put on the third defendant's conduct is that, by his silence, he was expressing his agreement with what the second defendant said. He was a director of the first defendant. The second defendant was exposing the company to liability by reason of his misrepresentations. The third defendant knew as much about the facts as the second defendant. It is to be expected that he would have spoken to correct the misrepresentations if he was not complicit in making them, to protect the company if not the plaintiff. The second and third defendants were both involved in the first defendant's contravention. They both knew the representations were false.

[77] Section 87 of the TPA empowers the court, in the circumstances which I have just described, to make such order as it thinks appropriate against the defendants if satisfied that the order concerned will compensate the plaintiff for the loss suffered by reason of the defendants' contravention. In particular the court may set aside the contract between the plaintiff and the first defendant or "of a collateral arrangement relating to such a contract" on such terms as appear appropriate. An order may be made against any person who was involved in the contravention.

[78] The plaintiff claims as his remedy rescission of the contract of 31 May 2002 and consequential orders that the defendants return *Ishmael* to him. The remedies are sought under the general law as a consequence of the defendant's fraud, and pursuant to s 87.

[79] The defendants resist the claim for rescission. They would, it seems, prefer to suffer a judgment for damages against them. Given the second defendant's proclivities for not paying creditors there is obvious wisdom in the plaintiff's choice of remedy. The defendants advance two reasons against an order for rescission and return of the vessel.

[80] The first is that the plaintiff did not purport to rescind the contract until the commencement of proceedings. Paragraph 10 of the Statement of Claim of 20 January 2003 alleged that by written notice of the same date "and by filing this action" the plaintiff rescinded the contract. There is no evidence that the notice was given. The claim was, of course, served and does contain an intimation that the plaintiff had rescinded the contract and sought consequential orders from the court. There is evidence that in January 2003 the plaintiff attempted to recover possession of *Ishmael*. He went on board and tried to sail her to his home port. He was prevented by officers of the Water Police. There is no evidence that he informed the defendants that his act was not one of piracy but of self-help by way of rescission. Rescission is, in this context, an act of the injured party. It requires no particular form. The commencement of legal proceedings can be a sufficient intimation of the plaintiff's election to rescind the contract. That is what happened in *Alati v Kruger* (1955) 94 CLR 216. Despite the lapse of seven months between contract and institution of proceedings, the defendants have not pleaded that the plaintiff had affirmed the contract.

[81] The second objection taken by the defendant's is that "the vessel is no longer in the same state in which it was at the date of purchase as (the defendants) have expended

the sum of …$47,000 in improving and renovating the vessel." Paragraph 8A, added to the amended defence on 24 July 2003, set up particulars of the improvements and renovations. They consist of:

(a) repairing one radio and installing another one
(b) slipping the vessel to allow the hull to be cleaned and coated with anti-fouling paint
(c) supplying and fitting new parts to a water pump, an alternator, a starter motor and repairs to the gear box
(d) washing, polishing and detailing paintwork
(e) replacing the propeller which fell of the shaft
(f) replacing a battery
(g) "miscellaneous other work which cannot presently be particularised as a result of stolen invoice but to the value of $20,000"

[82] The second defendant's evidence concerning the repairs and improvements was farcical in its incomprehensibility. It was pointed out that, as pleaded, most of the work appeared to be routine maintenance necessary to keep of the vessel in a sea-worthy state. He was asked to identify invoices which related only to work that might properly be described as alterations or improvements. The invoices became Exhibit 18, but an examination of them shows that the work to which they relate is of the nature of maintenance and repair. When this was pointed out to the second defendant he said that some joinery work had been done to build bulkheads around a toilet to provide privacy. There was, however, no invoice for this work because it had been stolen. He hinted that the plaintiff was the thief. This allegation had not been put to the plaintiff. He did not explain what benefit the plaintiff might obtain from stealing invoices nor why replacements could not have been obtained from the supplier who had performed the work and would no doubt wish to be paid. Exhibit 19, an invoice from OZ Gold Carpentry, of 9 May 2003 for a total of 20,750 trade dollars for 7 items of work only one of which related to the boat was produced on the second day of the trial. The item was: "boat renovations $8,200". No sensible explanation was offered for the absence of an invoice showing in detail what work had been done. There was no evidence explaining why a claim had been made for $20,000 for work which could not be particularised, though the second defendant was able to describe it at length if not intelligibly. (The evidence in chief is that T139.25-140.25. The cross examination used to be found between T169.10-T171.30). The second defendant had been in possession of OZ Gold's statement since May, before the defence was amended, but did not explain why the amount for which he had an invoice did not appear in paragraph 8A and why an amount for which he had no invoice was included. It emerged that the invoice had not been paid. It will be satisfied by the provision of "a small boat" which will be supplied when the carpenter has performed work to the value of between 25,000-30,000 trade dollars.

[83] I am unable to find with any precision what improvements the defendants made to *Ishmael*, the cost of making them, or with extent to which any improvement enhanced her value. The value of any improvements made to the property by the defendants before they had notice of rescission should normally be the subject of a monetary adjustment between the parties consequent upon the rescission. (See *Brown v Smitt* (1924) 34 CLR 160; *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187 at 192). The insufficiency of the evidence prevents the adjustment in this case.

[84] The costs which were proved of maintaining, repairing and replacing defective equipment can be ignored. There is no suggestion that they did anymore than maintain the vessel in a seaworthy condition and prevent a depreciation in her value. If *Ishmael* had not been so maintained, the defendants would have been liable to the plaintiff for the diminution in value, or the cost of restoring value. A consequence of rescission was that property in *Ishmael* reverted to the plaintiff. The defendants' possession of the boat made them liable in conversion and hence liable to any loss of value of the chattel while in their possession. This is the opinion of the authors of *Equity, Doctrines and Remedies* 3rd ed by Meagher, Gummow and Lehane, para 2403, relying upon *Prosser and Keaton on Torts* 5th ed at paras 94 and 105.

[85] Whatever difficulty might have been encountered in a suit in equity "to adjudicate upon the validity of a purported disaffirmance as an act of avoiding the transaction *ab initio* and give effect to it and make appropriate consequential orders" (see *Alati v Kruger* at 224) in a case where the defendants had been in possession of the property for 16 months during which money was expended on the property, may be ignored when making orders pursuant to s 87. The exercise of power given by the section is unfettered save by the requirement that any order be required to compensate the plaintiff in respect of the defendant's contravention of s 52 which has caused the plaintiff loss. *Alati v Kruger* itself suggests that there is no real difficulty in equity in allowing the plaintiff to rescind a contract consequent upon the defendant's fraudulent misrepresentations as long as the plaintiff is able to restore the property he obtained pursuant to the contract and to make any necessary adjustment in favour of the defendant to allow for the fact that by their expenditure they increased the value of the property which is to be restored to the plaintiff. No doubt similar adjustments should be made when making orders pursuant to s 87 in order to avoid over-compensating a plaintiff.

[86] In this case I am not persuaded that any allowance should be made in the defendant's favour. There is no satisfactory evidence of any improvements and no evidence of any enhancement of value. To the extent that the defendant's are out of pocket by reason of expenditure on maintenance and repairs they had the benefit of the use of the vessel for 16 months. The plaintiff must restore to the first defendant the trade dollars which he obtained in exchange for his boat. He has spent some of those trade dollars but maintains the balance in his account with Contrabart. He will have to acquire sufficient trade dollars to allow him to refund the full amount. The evidence leaves me confident that he will be able to purchase trade dollars to effect restitution.

[87] As I understood the defendants' submissions it was not argued that the plaintiff could not rescind the contract of exchange with the first defendant by reason of the fact that it had sold *Ishmael* to the second and third defendants. The right to rescind may well be lost where a defendant has sold the property acquired pursuant to the fraud to a third party, at least if the transaction is genuine and the third party gives value. In such a case the defendant would not be able to restore the subject matter of the contract to the plaintiff. The position may well be different in circumstances where the transfer was to the defendants' agents who committed the fraud on its behalf, especially if they did not give value for the transfer. The evidence did not reveal whether the second and third defendants had actually paid the first defendant either $47,100 or 186,000 trade dollars.

[88] Whatever the difficulties to which these circumstances might have given rise under the general law, there is no doubt that in the circumstances in this case s 87 allows the court to make orders compelling the second and third defendants to restore *Ishmael* to the plaintiff. S 87(1) provides that:

> '… where … the court finds that a person who was a party to the proceeding has suffered … loss or damage by conduct of another person that was engaged in … in contravention of (s 52) the court may … make such order … as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention …'

Subsection 2 sets out examples of the kinds of order that may be made. They include:

> '(a) An order declaring the whole or any part of a contract made between the person who suffered … loss … and the person engaged in the conduct or … involved in the contravention … or of a collateral arrangement relating to such a contract, to be void and, … to be have been void *ab initio* …
>
> (c) An order directing the person who engaged in the conduct or a person who was involved in the contravention … to … return property to the person who suffered loss …'

[89] The contract between the defendants for the sale of *Ishmael* fits the description of 'a collateral arrangement relating to' the contract of exchange between the plaintiff and the first defendant. I would apprehend that the term 'collateral arrangement relating to such a contract' should be given an expansive construction and the connection between contract and arrangement should allow for a broad connection between the two so as to allow an ample scope of operation for the section. There is no doubt that the terms of s 87(2)(c) permits the making of an order that the second and third defendants return *Ishmael* to the plaintiff.

[90] Such an order should, of course, only be made where it is appropriate in all the circumstances and will do justice between the parties. In my judgment that is the situation here. No real distinction can be drawn between the legal personalities of the first defendant on the one hand and the second and third defendants on the other. It was their private company which they used as a means of engaging in misleading and deceptive conduct. The defendants can make whatever adjustments are appropriate between themselves as a result of the order I propose to make.

[91] Accordingly I declare that the contract exchanged between the plaintiff and the first defendant dated 31 May 2002 has been rescinded and is void *ab initio*. If it be necessary I make an order setting aside the contract. I further order that the first, second and third defendants forthwith do all things necessary and sign all necessary documents to transfer property and ownership in the vessel *Ishmael* to the plaintiff. I order that the plaintiff forthwith transfer to the first defendant 189,000 trade dollars. The obligation to return the boat is not conditional upon the transfer of trade dollars to the first defendant.

[92] If the contract of exchange between the plaintiff and the first defendant dated 31 May 2002 had been rescinded, or is set aside *ab initio* by this order, it must follow that the first defendant had no property in *Ishmael* so that no title in the boat passed to the second and third defendants pursuant to the contract of sale of 22 June 2002. Because the second and third defendants were involved in the contravention of s 52 by the first defendant, and to put things beyond doubt, I order that the contract of sale between the first defendant and the second and third defendants be set aside. There is no doubt that the court has power to make such an order. (See *Demagogue* at 43).