SUPREME COURT OF QUEENSLAND

CITATION:	*Venerdi P/L v Anthony Moreton Group Funds Management Ltd & Ors* [2013] QSC 219
PARTIES:	**VENERDI PTY LTD** ACN 109 688 940 (plaintiff) v **ANTHONY MORETON GROUP FUNDS MANAGEMENT LIMITED** ACN 105 568 803 (second defendant) AND **ANTHONY MORETON GROUP PTY LTD** ACN 097 778 446 (second defendant) AND **ANTHONY JAMES HAZELL** (third defendant)
FILE NO:	BS 11573 of 2011
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	23 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2013
JUDGE:	Jackson J
ORDER:	**The court orders that:** **1. The counterclaim be struck out.** **2. The first defendant file and serve any amended counterclaim on or before 13 September 2013.** **3. The defendants' pay the plaintiff's costs of and incidental to the application to be assessed.**
CATCHWORDS:	TRADE PRACTICES – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – ENFORCEMENT AND REMEDIES – ACTION FOR DAMAGES – ASSESSMENT OF AVAILABILITY OF DAMAGES – PARTICULAR CASES – OTHER CASES – where a supplier engaged in trade or commerce contracts with an acquirer on standard terms including an exclusory

and disclaimer clause – where supplier engaged in misleading or deceptive conduct comprising representations and liable to acquirer for acquirer's loss or damage – where the exclusory and disclaimer clause provided that acquirer did not rely upon any of the supplier's representations – where the supplier relies on the exclusory and disclaimer clause as misleading or deceptive conduct by acquirer and counterclaims for loss or damage of supplier's liability to acquirer – whether supplier's liability to acquirer constitutes recoverable loss or damage

Acts Interpretation Act 1901 (Cth), s 15AA
Australian Consumer Code, s 18
Australian Securities & Investment Commission Act 2001 (Cth), s 5A(3), s 12DA, s 12GF, s 12GM
Trade Practices Act 1974 (Cth), s 52, s 82, s 87

Bateman v Slatyer (1987) 71 ALR 553, cited
Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592; [2004] HCA 60, cited
Byers v Dorotea Pty Ltd (1986) 69 ALR 517; ATPR 40-760, cited
Campbell v Back Office Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25, cited
Clark Equipment Australia Ltd v Covcat (1987) 71 ALR 367; [1987] ATPR 40-768, cited
Collins Marrickville v Henjo Investments Pty Ltd (1987) 72 ALR 601, cited
Dibble v Aidan Nominees Pty Ltd (1986) ATPR 40-693, cited
Downey v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 199, cited
Equuscorp Pty Ltd v Haxton (2012) 286 ALR 12; [2012] HCA 7, cited
Florida Hotels Pty Ltd v Mayo (1965) 113 CLR 588; [1965] HCA 26, cited
Galloway v Mapmakers Pty Ltd (Burchett J, unreported, 5 September 1985), cited
Hammond v Bussey (1880) 20 QBD 79, cited
Hansen v Patrick [2012] QSC 45, cited
Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (1988) 39 FCR 546; [1988] FCA 40, cited
Hope v RCA Photophone of Australia Pty Ltd (1937) 59 CLR 348 at 362-363; [1937] HCA 30, cited
Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 296 ALR 3; [2013] HCA 10, cited
I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd (2002) 210 CLR 109; [2002] HCA 41, cited
Kenny & Good Pty Ltd v MGICA (1992) Pty Ltd (1999) 199 CLR 413 at 22; [1999] HCA 25, cited
Mark Bain Construction Pty Ltd v Avis [2012] QCA 100, cited
Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494;

[1998] HCA 69, cited
Miller v Miller (2011) 242 CLR 446; [2011] HCA 9, cited
Nelson v Nelson (1995) 184 CLR 538; [1995] HCA 25, cited
P J Berry Estates Pty Ltd v Mangalone Homestead Pty Ltd (1984) 6 ATPR 40-489, cited
Petera Pty Ltd v E A J Pty Ltd (1985) 7 ATPR 40-805 at 46,887, cited
Richardson v Mellish (1824) 2 Bing 229; [1924] EngR 715, cited
S Pearson & Son Ltd v DublinCcorporation [1907] AC 351, cited
Scarborough & Ors v Klich & Ors [2001] NSWCA 436, cited
University of Western Australia v Gray (2010) 185 CLR 335; [2010] FCA 586, cited
Waltip Pty Ltd v Capalaba Shopping Cenrte Pty Ltd (1989) ATPR 40-975, cited
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514; [1992] HCA 55, cited
Warwick Entertainment Centre Pty Ltd v Alpine Holdings Pty Ltd (2005) 224 ALR 134; [2005] WASC 174, cited
Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410; [1978] HCA 42, cited

COUNSEL: AJH Morris QC and V Brennan for the plaintiff
G Beacham for the defendants

SOLICITORS: McMahon Clarke for the plaintiff
DLA Piper Australia Lawyers for the defendants

[1] **JACKSON J**: It is common for a commercial supplier engaged in trade or commerce to enter into a contract with an acquirer on standard terms which contain a provision that all of the terms of the contract are contained in the standard terms and that the acquirer has not relied on any representation or promise that is not contained in those terms ("exclusory and disclaimer clause"). It is also common that a contract comes into being by the acquirer making an offer on the standard terms that the supplier accepts.

[2] At common law, such a term constitutes an effective defence to a claim by the acquirer for damages based on negligent misrepresentation,[1] or a collateral warranty.[2] But it is ineffective as a defence to a claim for damages for the tort of deceit.[3]

[3] Under statute, such a supplier will be subject to the prohibition against engaging in conduct which is misleading or deceptive or likely to mislead or deceive or cognate norms of conduct, under what used to be s 52 of the *Trade Practices Act* 1974 (Cth) ("TPA") or its offshoots, including s 18 of the *Australian Consumer Code* and

---

1 For example, *Kenny & Good Pty Ltd v MGICA (1992) Pty Ltd* (1999) 199 CLR 413 at 22; [1999] HCA 25.

2 *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348 at 362-363; [1937] HCA 30.

3 *S Pearson & Son Ltd v DublinCcorporation* [1907] AC 351 at 354, 356, 360, 362, and 365-366; S*carborough & Ors v Klich & Ors* [2001] NSWCA 436 at [74].

s 12DA of the *Australian Securities Investment Commission Act* 2001 (Cth) ("ASIC Act").

[4] Existing case law establishes that an exclusory and disclaimer clause is not a defence to an acquirer's claim for damages under s 82 of the TPA for contravention of s 52 of the TPA. Such a clause can only operate as a matter of fact, on the question whether the supplier's conduct was misleading or deceptive or likely to mislead or deceive or the question whether the acquirer's loss or damage was suffered by the supplier's contravening conduct. Unless the clause operates in either of those two ways, the supplier will be liable on the acquirer's claim if it is otherwise made out.

[5] But can the supplier set up the acquirer's representation or promise in the exclusory and disclaimer clause as misleading or deceptive conduct by which the supplier has suffered loss or damage constituted by the supplier's liability to the acquirer on the acquirer's claim? Or can the supplier set up the acquirer's claim as a breach of contract and claim damages for that breach measured by the supplier's liability on the acquirer's claim?

[6] On the basis that the answer to those questions is "no", the plaintiff, Venerdi Pty Ltd, applies to strike out paragraphs of the counterclaims of the first defendant, Anthony Moreton Group Funds Management Pty Ltd, the second defendant, Anthony Moreton Group Pty Ltd, and the third defendant, Anthony Hazell.

Claims for damages for misleading or deceptive conduct and negligence

[7] The plaintiff's claim in the proceeding is for damages under section 12GF or 12GM of the ASIC Act which confer a right to damages for contravention of s 12DA of that Act upon a person who suffers loss or damage by misleading or deceptive conduct in relation to financial services. Contraventions of s 12DA are alleged against each of the defendants. Each of the defendants is also subject to a claim for damages as a person involved in the contravention or contraventions of another defendant. A second claim is made against the first defendant for damages for negligence.

[8] There are five representations or sets of representations alleged to have been false when made or to have been made without reasonable grounds. Unhelpfully, the pleading alleges that "all conduct on the part of" each defendant "alleged in this pleading" was misleading or deceptive conduct. In truth, the misleading or deceptive conduct alleged is narrower than that.

[9] The background is that on or about 22 June 2007, the plaintiff made an investment in a managed investment scheme described as the AMG scheme of which the BQ Marina Syndicate and the BQ Subdivision Syndicate are sub-schemes. The initial investment made was of $1,596,418.33 for units in the BQ Subdivision Syndicate ("the investment"). The plaintiff alleges, *inter alia*, that prior to making the investment the first defendant represented that:

(a) Mr Paul Brinsmead and associated entities had net worth (excluding Resort Corp Group assets) advised by Mr Brinsmead as approximately $4.76 million comprising principally property and property interests;

(b) Mr Peter Madrers and associated entities had net worth (excluding Resort Corp Group assets) advised by Mr Madrers as approximately $5.835 million;

(c) on the basis of the information provided by Resort Corp the manager was satisfied that in the event of default there would be sufficient surplus funds after enforcing the relevant securities (including the above guarantees) to return the capital invested to investors under the BQ Subdivision facility;

(d) both Mr Brinsmead and Mr Madrers were of substance and have assets well in excess of the sum of $4.5 million which will be lent to the project by the syndicate, that Peter Madrers has a big double block at Kingscliff and a house at the Gold Coast which is worth $6 million and Brinsmead has a property at Kingscliff and residence at the Gold Coast as well and those assets will more than cover the debt.

[10] Each of the relevant representations is alleged to have been either false or made without reasonable grounds. The plaintiff alleges that it made the investment in reliance upon each of them.

[11] The conduct of the first defendant in making the relevant representations by the information memorandum is alleged to have been misleading or deceptive or likely to mislead or deceive. The conduct of the second defendant is alleged to have been misleading or deceptive or likely to mislead or deceive. The relevant conduct of the second defendant is not clearly identified. The third defendant's conduct in representing the substance of both of the directors, as set out above, is alleged to have been misleading and deceptive. The third defendant is alleged to have acted as the agent of the first defendant.

[12] The first defendant is also alleged to have owed a duty of care as responsible entity and manager when issuing the information memorandum containing a number of the representations, in making representations to the plaintiff as an investor and in providing advice to the plaintiff as an investor. It is alleged that the first defendant breached the duty of care in failing to state that it did not advise or recommend in favour of an extension of the time for repayment of the BQ Subdivision facility from 17 December 2007 to 16 March 2008.

[13] It seems that in about late April 2009 the plaintiff gave consent for the first defendant to permit Mr Brinsmead and Mr Madrers to execute and carry into effect personal insolvency agreements pursuant to Pt X of the *Bankruptcy Act* 1966 (Cth), possibly as part of the process by which Resort Corp executed a deed of company arrangement in about June 2009. The plaintiff alleges that the first defendant gave advice that the personal insolvency agreements would not affect the first defendant's ability to enforce the guarantees on behalf of the AMG scheme and that such advice was negligent.

[14] Apart from its receipt of a commission or fee upon entering into the transaction, and a payment made on or about 8 September 2009, the plaintiff alleges that it has lost the amount of its investment plus the opportunity to invest the funds in alternative investments which would have generated substantial profits totalling $679,660.99.

A counterclaim for damages for misleading or deceptive conduct and breach of contract

[15] By counterclaim in the proceeding the defendants allege that the plaintiff made representations to the first defendant in the application form for the investment, namely that the plaintiff had:

(a) made its own assessment of Mr Brinsmead of Mr Madrers, and their associated entities, and their capacity to support Resort Corp;

(b) access to all information that it believed was necessary or appropriate; and

(c) impliedly, not relied upon any representations made by the first defendant in investing in the BQ Subdivision Syndicate.

("the reliance disclaimers")

[16] The first defendant further alleges that the plaintiff contractually warranted those matters to the first defendant, by signing the application form to invest in the scheme and returning it to the first defendant ("the reliance exclusion clause").

[17] The defendants allege that "if the plaintiff makes good the allegations set out in the statement of claim (which is denied) then" the reliance disclaimers were false. It further alleges that the reliance disclaimers were misleading or deceptive or likely to mislead or deceive and if they had not been made the first defendant would not have permitted the plaintiff to invest in the BQ Subdivision Syndicate.

[18] In the result, each of the defendants alleges that it has suffered "loss or damage" by the plaintiff's misleading or deceptive conduct because any liability which they have to the plaintiff would not have arisen if the plaintiff had not been permitted to invest in the BQ Subdivision Syndicate.

[19] Accordingly, the defendants seek relief by way of damages under s 12GF or other orders which relieve them from liability under s 12GM of the ASIC Act or similar relief under ss 82 and 87 of the TPA.

[20] Secondly, the first defendant alleges that the loss it suffered was also suffered by reason of the plaintiff's breaches of the reliance exclusion clause as breaches of contract. The first defendant claims damages for breach of warranty (contract).

[21] There are two questions. First, can there be a claim for damages or other relief for loss or damage caused by misleading or deceptive conduct of the plaintiff where the loss or damage is liability in damages to the plaintiff for misleading or deceptive under the ASIC Act? Secondly, can there be a claim for damages for breach of contract for the same liability?

[22] If the plaintiff is right in the contention that they can't, it would be appropriate to strike out the counterclaim in its entirety with leave to replead. Leave to replead would recognise that it may be possible for the first defendant to formulate a counterclaim based on the reliance exclusion clause in answer to the plaintiff's claim for damages for negligence.

Exclusory and disclaimer clause as a defence

[23] The plaintiff's submission in support of the application focussed on the established propositions articulated by the Court of Appeal in this State that:

> "exclusory and disclaimer clauses cannot override the statutory prohibition against misleading and deceptive conduct or prevent the grant of appropriate statutory relief where loss or damage is, as a matter of fact, caused by contravention of the statute."[4]

[24] As the first of those alternatives was put more recently by the High Court of Australia:

> "It is as well to add, however, that, of itself, neither the inclusion of an entire agreement clause in an agreement nor the inclusion of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent the provision of misleading information before a contract was made constituting a contravention of the prohibition against misleading or deceptive conduct by which loss or damage was sustained. As pointed out earlier, by reference to the reasons of McHugh J in *Butcher*, whether conduct is misleading or deceptive is a question of fact to be decided by reference to all of the relevant circumstances, of which the terms of the contract are but one."[5]

[25] However, that statement, and like statements made in other cases, were made in the context of reliance upon an exclusion clause or disclaimer as a defence to a claim for damages for misleading or deceptive conduct.

[26] In some of those cases, the question was whether the relevant conduct was misleading or deceptive or likely to mislead or deceive, viewed in its entirety, including the context of an exclusory and disclaimer clause. That is, as a factual matter relevant to whether the conduct was in fact contravening conduct.

[27] In others of those cases, the question was whether the claimed loss or damage was suffered by the contravening conduct, having regard to the exclusory and disclaimer clause. That is, as a factual matter relevant to the issue of causation of loss or damage.

[28] However, the present case is not concerned with the operation of an exclusory and disclaimer clause as a defence. The defendants may seek to achieve the same practical outcome as if that were so, but the model or theory of their case is not to set up the reliance disclaimers or reliance exclusion clause as a defence. Instead they rely on them as conduct which was misleading or deceptive as the basis of a claim for damages brought by way of counterclaim. The damages claimed are the amount of the liability to the plaintiff, because that is alleged to be loss or damage suffered by the plaintiff's contravening conduct in making the representations or promises contained in the reliance disclaimers.

---

4 *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 at [82]; see also *Warwick Entertainment Centre Pty Ltd v Alpine Holdings Pty Ltd* (2005) 224 ALR 134 at [59]; [2005] WASC 174 and *Mark Bain Construction Pty Ltd v Avis* [2012] QCA 100 at [49].

5 *Campbell v Back Office Investments Pty Ltd* (2009) 238 CLR 304 at [130]; [2009] HCA 25.

[29] Only one of the cases found by the parties considered a problem of that kind: *Hansen v Patrick*.[6] In that case North J struck out the counterclaim and said:

> "… It is difficult to see how the detriment resulting in damages or loss can be made out in the circumstances. If the plaintiffs' claim is successful then the defendants will be liable. If it is unsuccessful, the defendants will be entitled to compensation for any costs."

[30] The question was also raised in *Waltip Pty Ltd v Capalaba Shopping Cenrte Pty Ltd*.[7] Pincus J said:

> "These authorities plainly enough dispose of the deed, so far as it is relied on as a defence. But what of the cross-claim?
>
> It could happen that a person who wishes to sell property suspects that his agent has misrepresented it in a particular way and inquires of a prospective purchaser on that subject. Suppose that the purchaser deliberately lies and claims that the agent has told him nothing, and the vendor agrees to sell the property on the basis of that assertion. That would give the vendor a cause of action in deceit and would, under the general law, presumably prevent the purchaser from undoing the transaction on the basis of misrepresentation by the agent. Of course, a deliberate lie on such a point would be improbable. Where the prospective tenant is a company acting in the course of its business, in an appropriate case the landlord may possibly have a cause of action under sec. 52 of the *Trade Practices Act*, on the basis of the tenant's non-fraudulent but misleading conduct, consisting in statements as to what was relied on by the tenant in agreeing to take a lease. The question would be whether such a suit was contrary to public policy: cf. *Johnson* v. *Moreton* (1980) A.C. 37 at pp. 58-62, 68. But the respondent, in order to succeed in its cross-claim, must show that it was truly and not merely theoretically misled."[8]

[31] Pincus J appears to have identified two points: first, that the cross-claim may be repelled in law as contrary to public policy, secondly, that even if such a claim were possible, the cross-claimant would have to prove that it was in fact misled and could not merely rely on a statement in the contract that it was misled.

[32] The defendants' submissions accept the limited effect of a contractual disclaimer as a means of avoiding liability as a matter of defence. They also accept that the ineffectiveness of disclaimers in that context may be attributed to the policy of the Act.[9] Thus, the defendants concede that the first defendant's counterclaim for damages for breach of contract cannot be set up as a counterclaim for the loss or damage constituted by the first defendant's liability to the plaintiff under ss 12DA and 12GF or 12GM of the ASIC Act.

---

6 [2012] QSC 45.
7 (1989) ATPR 40-975.
8 At 50-662.
9 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [160]; [2004] HCA 60; *Campbell v Back Office Investments Pty Ltd* (2009) 238 CLR 304 at [130]; [2009] HCA 25.

[33] However, the defendants submit that the rest of the counterclaim does not seek to enforce a provision of a contract and that their representational characterisation of the reliance disclaimers does not offend the policy of the ASIC Act. They rely upon a statement made in a case of high authority as to the scope of the right to compensation conferred by s 82 of the TPA, *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*,[10] where Gleeson CJ said:

> "Sections 82 and 87 of the Act are in Pt VI, which deals with enforcement and remedies. It is important to bear in mind, when considering their operation, that they have potential application to a wide range of conduct proscribed by the Act and, in the case of s 87, to remedies that may be sought in a wide range of circumstances. We are at present concerned with their operation in the case of a claim for damages incurred by reason of a carelessly made false and misleading representation. It would be wrong to regard that as the paradigm case in which the sections were intended to apply. It is simply one of a number of different circumstances in which each provision might be invoked."

[34] As will appear, another passage from the same reasons is apt to this case:

> "The relationship between conduct of a person that is in contravention of the statute, and loss or damage suffered, expressed in the word 'by', is one of legal responsibility. Such responsibility is vindicated by an award of damages. When a court assesses an amount of loss or damage for the purpose of making an order under s 82, it is not merely engaged in the factual, or historical, exercise of explaining, and calculating the financial consequences of, a sequence of events, of which the contravention forms part. It is attributing legal responsibility; blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the judge assessing damages, but by the judge's concept of principle and of the statutory purpose."[11]

[35] Reference to authorities for the width of the operation of s 82 could be multiplied. The cases as to the operation of s 87 of the TPA (and the analogous s 12GM of the ASIC Act) are to the same effect.

Public policy

[36] Notwithstanding the first defendant's concession that its contractual counterclaim cannot be set up against the plaintiff's claims under ss 12DA and 12GH or 12GM of the ASIC Act, it is still appropriate to identify why that is so as a first step in the analysis of the disputed questions. One way of formulating the question is whether the claim is not maintainable because the reliance exclusion clause is "treated by the

---

10 (2002) 210 CLR 109 at [12]; [2002] HCA 41.

11 At [26].

courts as unenforceable because it is a 'contract associated with or in furtherance of illegal purposes'".[12]

[37] Although, as already mentioned, all but two of the previous cases have considered the operation of an exclusory and disclaimer clause as a defence to a claim for damages for misleading or deceptive conduct, the bases in principle of those cases draw on a number of different principles or explanations. The current authors of Heydon, *Trade Practices Law – Competition and Consumer Law*, at paragraph [160.1170] opine that there are no less than six explanations or approaches to be distilled from the case law.

[38] Among them is the approach of the Full Court of the Federal Court in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*.[13] Lockhart J said, in obiter dictum:

> "There are wider objections to allowing effect to such clauses. Otherwise the operation of the Act, a public policy statute, could be ousted by private agreement. Parliament passed the Act to stamp out unfair or improper conduct in trade or commerce; **it would be contrary to public policy for special conditions such as those with which this contract was concerned to deny or prohibit a statutory remedy for offending conduct under the Act**. There are various judgments of judges of this Court where this approach has been adopted and they are collected in the judgment of the trial judge, so I will not repeat them."[14] (emphasis added)

[39] As previously stated, an exclusory and disclaimer clause will not operate to negate the conclusion that conduct was misleading or deceptive conduct or to repel the conclusion that loss or damage was suffered by the conduct, unless it has that effect as a matter of fact. That is, the provisions of the TPA at least wholly invalidate the contract. It will not operate as a defence, either by the law of contract, or as an estoppel, in contrast to its effectiveness as a defence to a claim for damages for breach of contract or negligence.

[40] Thus, the principle of public policy operates to preclude reliance on the contract to defeat the statutory remedy. That appears to mean that the contract is unenforceable as in furtherance of an illegal purpose, namely to exclude the operation of the provisions of the TPA. The language deployed in *Henjo* set out above suggests that interpretation.

[41] If that is right, the question is whether public policy also operates to preclude reliance on the exclusionary and disclaimer clause as the basis of a counterclaim for damages for misleading or deceptive conduct under the ASIC Act or the TPA. It

---

12 *Equuscorp Pty Ltd v Haxton* (2012) 286 ALR 12 at [23]; [2012] HCA 7.

13 (1988) 39 FCR 546 at 561; [1988] FCA 40.

14 At 561. The cases referred to by Wilcox J in *Collins Marrickville v Henjo Investments Pty Ltd* (1987) 72 ALR 601 at 613 were *P J Berry Estates Pty Ltd v Mangalone Homestead Pty Ltd* (1984) 6 ATPR 40-489 at 45,638; *Petera Pty Ltd v E A J Pty Ltd* (1985) 7 ATPR 40-805 at 46,887; *Galloway v Mapmakers Pty Ltd* (Burchett J, unreported, 5 September 1985), *Dibble v Aidan Nominees Pty Ltd* (1986) ATPR 40-693 at 47,619, *Byers v Dorotea Pty Ltd* (1986) 69 ALR 517; ATPR 40-760 at 48,230; and *Bateman v Slatyer* (1987) 71 ALR 553.

would seem that *Henjo* supports that view, as do S*carborough v Klich*[15] and *Clark Equipment Australia Ltd v Covcat*,[16] all cases decided at intermediate appellate court level.

[42] Since *Henjo*, there have been a number of High Court cases that have considered the relevant principles of public policy, although in other contexts. Most recently, that was done in the context of contravention of the prescribed interest provisions of the Companies Code in *Equuscorp Pty Ltd v Haxton.*[17] Earlier cases upon the principle include *Miller v Miller*,[18] *Nelson v Nelson*[19] and *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd*.[20]

[43] There is, however, a point of distinction between those cases and the operation of an exclusory and disclaimer clause as the basis for a claim for damages for misleading or deceptive conduct under the ASIC Act or the TPA. In those cases, there was an illegality in the circumstances, in most instances a statutory offence, associated with the contract in question or the claim in question. The question was whether the illegality had the effect of precluding the claim made under contract or for common law or equitable relief under the civil law.

[44] Thus in *Yango*, the question was whether a breach of statutory prohibition against the unlicensed carrying on of a banking business invalidated a contract of loan made by the contravenor. In *Nelson*, the question was whether an illegal purpose of circumventing a statutory restriction upon who could obtain a loan on advantageous terms from a Commonwealth agency, by placing a property in another person's name, invalidated a resulting or constructive trust of which the contravenor was the beneficiary. In *Miller*, the question was whether an initial joint illegal purpose as between a passenger and a driver of a stolen car precluded the passenger from making a claim for damages for personal injuries suffered by the passenger as a result of the driver's negligence. And in *Equuscorp*, the question was whether a party to a contract made as a result of a prohibited offer of a prescribed interest invalidated not only the contractual obligation to repay the loan but also a claim for money had and received on a failure of consideration by the lender.

[45] In each of those cases, there was an illegality in the circumstances which potentially engaged the principle of public policy precluding the plaintiff's claim. In the present case, there is no express prohibition in this context in the ASIC Act or TPA of a contractual exclusory and disclaimer clause. If the principle of public policy operates in the circumstances of the present case, it does so in the absence of any overt illegality, but because to give effect to the contractual term would cut down the statutory norm prohibiting the first defendant from engaging in conduct which is misleading or deceptive or likely to mislead or deceive.

[46] Since 1824, and it has been often repeated since, judges have been warned against riding the "unruly horse" of public policy illegality.[21] However, in my view, intermediate appellate courts in this country have already engaged public policy as

---

15 [2001] NSWCA 436 at [74] and [91].
16 (1987) 71 ALR 367 at 371; [1987] ATPR 40-768.
17 (2012) 286 ALR 12 at [23]-[38]; [2012] HCA 7.
18 (2011) 242 CLR 446 at [24]-[29]; [2011] HCA 9.
19 (1995) 184 CLR 538 at 550-568; [1995] HCA 25.
20 (1978) 139 CLR 410 at 433; [1978] HCA 42.
21 *Richardson v Mellish* (1824) 2 Bing 229 at 252; [1924] EngR 715.

the principle which repels giving effect to the operation of an exclusory and disclaimer clause, except as a factual element going to the answers to the questions of misleading or deceptive conduct or causation.

[47] Consistently with that approach, in my view, the conclusion should also be reached that public policy precludes giving effect to a counterclaim based on the reliance exclusion clause as a claim for damages for breach of contract which is not maintainable because the representation and agreement is "treated by the courts as unenforceable because it is a 'contract associated with or in furtherance of illegal purposes'". The first defendant's concession on this point was rightly made.

Loss or damage by contravening conduct?

[48] The question which remains is whether the defendants reliance on ss 12DA and 12GF or 12GM of the ASIC Act (or ss 52 and 82 or 87 of the TPA) by reason of the reliance disclaimers can be maintained? Can a defendant's liability to a plaintiff for loss or damage suffered by misleading or deceptive conduct in contravention of s 12DA of the ASIC Act be "loss or damage" that the defendant suffered "by" the plaintiff's misleading or deceptive conduct in contravention of s 12DA (or s 52)? The answer to that question is a question of construction of the relevant provisions of the ASIC Act and TPA.

[49] In the discussion which follows, I put to one side the example given by Pincus J in *Waltip* of a purchaser who deliberately lies and claims that the agent has told him nothing which is not this case.

[50] Centrally, the meaning to be given to the expression "loss or damage" in ss 12GF or 12GM (or ss 82 or 87) is informed by the text of the section in its context in the ASIC Act (or the TPA). Further, the "the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation."[22]

[51] In my view, such liability is not itself "loss or damage" within the meaning of ss 12GF or 12GM of the ASIC Act (or ss 82 or 87 of the TPA). There are a number of reasons why that conclusion should be accepted. Since the question does not appear to have been fully dealt with previously, it will be appropriate to mention a number of aspects. But I will state the most important reasons, in my view, at the outset.

[52] First, the case theory of the defendants' counterclaim relies on what is described as the "no-transaction" category of case,[23] meaning that if the plaintiff's alleged misleading or deceptive conduct had not been engaged in, the first defendant would not have entered into the transaction comprised in the plaintiff's investment in the BQ Subdivision Syndicate, so that the defendants would have avoided their liabilities to the plaintiff for its loss on making that investment. Such a case theory treats the opportunity to avoid the loss by not entering into the transaction as the interest which is the subject of economic loss of the defendants that was potentially protected by the reliance disclaimers and the consequential liability to the plaintiff as the relevant loss or damage. The precise identification of the interests and the loss or damage assists consideration of whether the loss or damage is loss or

---

22 *Acts Interpretation Act* 1901 (Cth), s 15AA and ASIC Act, s 5A(3).

23 An expression accepted by McHugh JA in *Kenny & Good Pty v MGICA (1992) Pty Ltd* (1999) 199 CLR 413 at [33]; [1999] HCA 25.

damage within the meaning of the Act.[24] Although in some contexts, a contingent liability will be treated as loss or damage once crystallised, the defendants' liability to the plaintiff for damages under s 12GF of the ASIC Act is not of the same kind as, for example, a contingent liability on a guarantee.

[53] Secondly, s 12GF(1B) of the ASIC Act operates to reduce the damages that the plaintiff may recover to the extent that the court thinks just and equitable having regard to the plaintiff's share in the responsibility where the plaintiff suffered the loss as a result partly of the plaintiff's failure to take reasonable care. If the defendants' liability to the plaintiff itself could constitute loss or damage for the purpose of a counterclaim or cross-claim for misleading or deceptive conduct based on an exclusory and disclaimer clause then the operation of s 12GF(1B) could be affected.

[54] Thirdly, having regard to the purpose of s 12DA, if the defendants' liability to the plaintiff itself could constitute loss or damage for the purpose of a counterclaim or cross-claim for misleading or deceptive conduct based on an exclusory and disclaimer clause then the scope of the statutory protection which was intended to be granted by ss 12DA and 12GF or 12GM would be considerably reduced. In principle, any commercial supplier who engages in misleading or deceptive conduct within the scope of s 12DA could be effectively protected by a contractual clause which represented (or promised) that the acquirer did not rely on any pre-contractual conduct engaged in by the supplier, so long as the supplier would not have entered into the relevant transaction without that representation (or promise) having been made.

[55] The last of these reasons had an effect on the approach and reasoning of the courts to an exclusory and disclaimer set up as a defence, as appeared in the passage earlier set out from *Henjo*.

[56] The purpose of s 12DA is to protect people who are the subject of conduct engaged in by persons in trade or commerce. The protected people will include consumers, but they also include some who themselves are engaged in trade or commerce. The specific context of s 12DA and s 12GF is conduct in relation to financial services. "Financial services" for the purposes of s 12DA are defined in s 12BAB of the ASIC Act to include providing financial product advice or dealing in financial products, within the defined meanings of those expressions in s 12BAB.

[57] It is not necessary to further expose the terms and scope of those provisions in these reasons. They extend to the business of buying and selling many on and off market securities and other financial products and giving advice about them. The purpose of s 12DA is to establish a norm of conduct required of those who do business in the course of those relations and to provide the basis for a remedy of compensation to a person who suffers loss or damage because of a contravention of that norm under ss 12GF or 12GM.

[58] Sections 52 and 82 of the TPA operated in a cognate, if wider, context. Thus, cases decided about the operation of s 82 of the TPA will thus inform the consideration of the meaning of ss 12GF and 12GM of the ASIC Act in the present case.

---

[24] *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 296 ALR 3 at [25]-[27]; [2013] HCA 10.

[59] From at least *Wardley Australia Ltd v Western Australia*[25] the High Court of Australia has emphasised that the operation of s 82 is a matter of statutory interpretation which may be developed by reference to, but is not dependent on, the concepts or rules of damages at common law.

[60] Thus in *Wardley*, it was said of the applicable measure of damages under s 82(1) that:

> "…it would not be right to conclude that the measure of damages recoverable under the sub-section necessarily coincides with the measure of damages applicable in an action for deceit or in an action for negligent misrepresentation. The measure of damages recoverable under s. 82(1) can only be fully ascertained after a thorough analysis of those provisions in Pts IV and V of the Act for contravention of which the statutory cause of action may be maintained."[26]

[61] In *Marks v GIO Australia Holdings Ltd*[27] it was said that:

> "…s 82 provides, in effect, that the loss or damage that may be recovered by action is the amount of the loss or damage suffered 'by conduct of' another person that was done in contravention of Pt IV or V. It contains no stated limitation of the kinds of loss or damage that may be recovered and contains no express indication that some kinds of loss or damage are to be regarded as too remote to be recovered. Indeed, s 4K may be seen as expanding the kinds of loss or damage that are dealt with in s 82";[28]
>
> "…we are mindful that the object of the Act is said to be 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection' (s 2). No narrow construction of the Act should be adopted. But neither should the words of the Act be stretched beyond their limit";[29] and
>
> "the TP Act is a fundamental piece of remedial and protective legislation which gives effect to 'matters of high public policy' It is to be construed so as 'to give the fullest relief which the fair meaning of its language will allow.' Section 82 applies across a spectrum of diverse legal norms created by Pts IV and V. A number of these will have no direct analogue in the general law. Given the objective of the legislation that is not surprising. However, it does emphasise the need for caution against treating a provision such as s 82 'as a mere supplement to or eking out of' pre-existing law."[30]

---

25 (1992) 175 CLR 514; [1992] HCA 55.
26 At 526.
27 (1998) 196 CLR 494; [1998] HCA 69.
28 At [34].
29 At [56].
30 At [99]-[100].

[62] Although references of this kind could be multiplied in later High Court cases, those already made serve well enough to recall two obvious points already made about s 82: first, the question as to its operation is a matter of interpretation of the section in its context; secondly, the interpretation to be given to the section is informed by the purpose of the legislation.

[63] However, I note that the references set out above were made in the context of reasoning that the meaning of s 82 should not be confined by common law concepts, whereas the question in the present case is whether s 82 or the analogous sections should be read as restricted so as not to include a particular species of putative loss or damage because of the purpose of the Act. Secondly, although it may be accepted that the TPA has a "high public purpose", still it may be questioned, in my view, whether that public purpose is any higher than the public purpose served by the common law causes of action for the tort of deceit or negligence, at least in the context of claims for damages for misleading or deceptive conduct.

[64] I noted previously that an exclusory and disclaimer clause does not operate as a defence to an action for damages for deceit in making pre-contractual representations. However, it will operate as a defence to a claim for damages for negligence.

[65] The defendants submitted that "damages or a liability owed by the plaintiff to another person may be recoverable as a loss", referring to *McGregor on Damages*, 18th ed, at [17-056]ff. The references there are to damages at common law, but the proposition may be accepted. There are many cases where a plaintiff's damage can be its liability to a third party. A simple example, involving claims for damages for breach of contract, is where there is a string of contracts for the supply of a chattel by sales from A to B, B to C and C to D. When the goods are ultimately delivered and they are defective, the liability by way of damages passes up the string, each buyer who on-sold suffering loss in the amount of their liability to the next buyer, subject to the rules as to remoteness of damage.[31]

[66] The defendants next submitted that such a liability can constitute "loss or damage" under the TPA, relying on *University of Western Australia v Gray*.[32] That too may be accepted, in my view, without going into the detail of whether *Gray* is a particularly relevant authority on the point.

[67] The defendants further submitted that damage in the form of a liability to a third party that a plaintiff may recover can include loss which was caused by the plaintiff's own wrongful act. That proposition was supported by reference to *Florida Hotels Pty Ltd v Mayo*.[33] In that case, the plaintiff's claim was to recover its liability to a person injured when a building slab collapsed. The plaintiff was liable to the injured person in negligence. The defendant was liable to the plaintiff for breach of contract in failing to properly supervise the work on the slab. The plaintiff recovered its liability to the injured person as damages for breach of contract against the defendant. So understood, the case does not advance the argument much in the present case. The loss or damage claimed here is not the

---

31 For example, *Hammond v Bussey* (1880) 20 QBD 79.

32 (2010) 185 CLR 335; [2010] FCA 586 at [1612].

33 (1965) 113 CLR 588 at 598-599; [1965] HCA 26.

liability of a plaintiff to a third party for damages, where the plaintiff's wrong has caused the third party loss.

[68] However, I accept that there is no general rule precluding a plaintiff from recovering damages against a defendant for contravention of ss 52 and 82 of the TPA or their offshoots where the plaintiff's loss is the plaintiff's liability to a third party under those sections.

[69] The distinguishing feature of the present case is that the liability which each of the defendants wishes to set up as their loss or damage against the plaintiff is the defendant's liability to the plaintiff for their misleading or deceptive conduct. The effect of doing so is not to transfer the defendant's responsibility to a third party for that loss who caused it as between the defendant and the third party. It is to extinguish the plaintiff's claim for loss or damage by the set-off of or satisfaction of judgments. Allowing the defendants' claims, in effect, destroys the value of the plaintiff's statutory right to damages. In my view, that liability of the defendants to the plaintiff is not "loss or damage" within the meaning of ss 12GF or 12GM of the ASIC Act or ss 82 or 87 of the TPA.

Conclusion

[70] For those reasons, the counterclaim should be struck out, with leave to the first defendant to replead a counterclaim based on the reliance exclusion clause in relation to the plaintiff's claim against the first defendant for damages for negligence.