SUPREME COURT OF QUEENSLAND

CITATION:	*Actron Investments Queensland Pty Limited v DEQ Consulting Pty Ltd & Anor* [2018] QCA 147
PARTIES:	**ACTRON INVESTMENTS QUEENSLAND PTY LIMITED** ACN 124 426 455 (appellant) **v** **DEQ CONSULTING PTY LTD** ACN 065 711 248 (first respondent) **MICHAEL HENRY** (second respondent)
FILE NO/S:	Appeal No 885 of 2017 SC No 2188 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 306
DELIVERED ON:	29 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2017
JUDGES:	Fraser and Morrison JA and Atkinson J
ORDERS:	**1. Allow the appeal.** **2. Set aside the order made in the trial division that the proceeding against the second and third defendants is dismissed.** **3. Remit the matter to the trial division for further consideration.** **4. Direct that the parties have leave to make written submissions about costs in accordance with the practice direction.**
CATCHWORDS:	TRADE AND COMMERCE – COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION – CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – MISLEADING OR DECEPTIVE CONDUCT GENERALLY – MISLEADING OR DECEPTIVE: WHAT CONSTITUTES – where the appellant purchased a commercial lot in a community titles scheme which included a corporate headquarters/warehouse – where the floor was a floating concrete slab – where the first

respondent (through the second respondent) issued a Form 15 Compliance Certificate - Design under the *Standard Building Regulation* 1993 (Qld) by reference to the *Building Code of Australia* (2006) – where this form was relied upon and used by the building certifiers as conveying the engineering opinion that the anticipated loads would be resisted by the floating concrete slab without undue settlement – where the building certifier was entitled to rely on the Form 15 for this purpose –where the floating slab subsided due to marine clays in the subsurface shrinking and swelling, and settlement occurred because of the consolidation of compressible marine clays – where the appellant claimed damages against the first respondent pursuant to s 82 *Trade Practices Act* 1974 (Cth) for misleading and deceptive conduct in contravention of s 52 *Trade Practices Act* 1974 (Cth) – where the appellant claimed damages against the second respondent for being "a person involved in the contravention" in terms of s 75B of that Act – whether the settlement of the floating slab was "undue" – whether the first respondent's communication of the Form 15 was misleading conduct in contravention of s 52 *Trade Practices Act* 1974 – whether the second respondent possessed the knowledge required to render him liable as a party to the first respondent's contravention

Building Code of Australia (2006)
Standard Building Regulation 1993 (Qld)
Trade Practices Act 1974 (Cth), s 52, s 75B, s 82

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304; [2009] HCA 25, cited
Yorke v Lucas (1985) 158 CLR 661; [1985] HCA 65, applied

COUNSEL: S Couper QC, with A F Fernon, for the appellant
R J Douglas QC for the respondents

SOLICITORS: Low Doherty & Stratford Lawyers for the appellant
HBM Lawyers for the respondents

[1] **FRASER JA:** In order to identify the main issues in this appeal it is necessary to outline the background against which those issues arise.

Outline of the case

[2] By a contract dated 22 March 2007 the appellant ("Actron") purchased from Efstathis Property Developments Pty Ltd ("Efstathis") for the price of $3.175M plus GST a Commercial Lot in a Community Title Scheme improved by what was described in marketing materials as an "architecturally designed, single free-standing corporate headquarters/warehouse". The building was then new. Its floor was a floating concrete slab.

[3] Actron completed its purchase of the property and installed pallet racking in the building in about May or June 2007. Thereafter Actron used the property as a warehouse for storing air conditioning units and parts pending sale or installation.

Subsequently the slab subsided. The appellant used two forklifts for moving bulky items from the racking. An employee of Actron noticed that the forklifts got stuck in areas of the ramp exit to the carpark area. The effects of the subsidence worsened over time. Between 12 to 18 months after the problem first arose, the forklifts were getting stuck on joins in the concrete at the back of the warehouse, the pallet racking on the back wall was leaning forward towards the roller doors, and shims had to be placed under other racks to address their lean. The trial judge referred to an opinion expressed by the employee in October 2012 that the slab was "absolutely totally unsafe".[1] Another employee observed that the expansion joints in the warehouse were lifting and in one spot the slab had dropped up to 200 mm; the forklift (whether loaded or unloaded) could not be driven over any of the expansion joints; some of the racking had to be packed up by at least 50 mm with metal shims; and five or six out of the 40 or 50 bays of racking had to be taped off because they were not usable.[2] Another employee observed severe cracking and chunks taken out of the concrete by the forklifts, a severe lean on the racking at the rear of the warehouse, and "massive" movement in the slab after the 2011 flood.[3] Upon expert investigation it was found that the measured floor slab settlement at the time of that measurement was 160 mm.[4]

[4] Actron subsequently removed the pallet racking and re-installed some of it in temporarily leased premises to enable rectification of the concrete slab. The floating slab was replaced by a slab supported by pilings. Actron then re-installed the pallet racking and was able to resume the conduct of its business from the property.[5] Actron incurred $1,067,203.50 in the rectification work and associated costs.

[5] Actron brought proceedings in the Trial Division against five defendants. DDS Project Management Pty Ltd ("DDS") built the warehouse under a design and construction contract with Efstathis. A1 Express Plan Approval Services Pty Limited ("A1 Express") and/or Mr Kennedy was engaged by DDS to perform building certification work and lodge an application for the development in accordance with the *Integrated Planning Act* 1997 (Qld). Actron settled with those three defendants before the trial.

[6] The other two defendants were the first respondent ("DEQ"), a consultant civil, structural and geotechnical engineering company, and the second respondent, Mr Henry, a director of DEQ and a registered engineer. DEQ contracted with DDS to prepare preliminary drawings for an industrial warehouse building on the property, incorporating a concrete slab on ground, and to perform other structural and civil engineering works and inspections during construction. On behalf of DEQ, Mr Henry performed relevant work under that contract, including engineering design. He also issued a "Form 15 Compliance Certificate – Design" and a "Form 16 Compliance Certificate – Construction". DEQ, by Mr Henry, gave the Form 15 to DDS, which gave it to A1 Express and Mr Kennedy. Under the letterhead of A1 Express, Mr Kennedy subsequently issued a Development Application Decision Notice on 2 March 2007, approving the building works for the proposed use "industry/warehouse". That document stated that the development application was

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1 Reasons [74].
2 Reasons [76].
3 Reasons [78].
4 Reasons [114].
5 Reasons [24].

assessed with the application of Building Classification 8. The building could be lawfully occupied only after the issue of a Certificate of Classification. After other documents were supplied by DDS to A1 Express and Mr Kennedy, a Certificate of Classification (Class 8) issued for the building.

[7] Actron's claim against DEQ and Mr Henry, as it was argued at the end of the trial, invoked two quite different kinds of claim. First, Actron claimed damages for breach of a duty of care in tort for the design of the slab and the issue of the Form 15 and/or Form 16. Actron has not appealed against the trial judge's rejection of that claim. Secondly, Actron claimed, as against DEQ, compensation pursuant to s 82 of the *Trade Practices Act* 1974 (Cth) for misleading and deceptive conduct in contravention of s 52 of that Act and, as against Mr Henry, compensation pursuant to s 82 upon the ground that he was "a person involved in a contravention" in terms of s 75B of that Act. Actron has appealed against the trial judge's rejection of those claims.

[8] Actron's case upon the alleged contravention of s 52 as it was advanced in final submissions at the trial, was that DEQ, by Mr Henry, engaged in misleading conduct by issuing the Form 15. As the trial judge recorded,[6] at the relevant time the *Building Act* 1975 (Qld) required building assessment work to be carried out by reference to the *Building Code of Australia* (2006) ("BCA") and that building assessment work was generally to be carried out by a building certifier. Under the *Standard Building Regulation* 1993 (Qld) in force when Mr Henry issued the Form 15, a building certifier is empowered to decide that an individual was competent to perform functions that helped the certifier to perform building certification functions for building design or specification. Such an individual is described as a "competent person". Mr Henry was admittedly a "competent person" in relation to his issue of the Form 15.[7]

[9] In the Form 15 Mr Henry certified "that the item/s described below, if installed and carried out in accordance with the information contained in this certificate, including any referenced documentation, will comply with the Standard Building Regulation". The "item/s described below" are "Structural Elements Detailed on DEQ Saunders Drawings 06 0603 S01 to S12 P1". The "referenced documentation" comprises the same drawings. The floating slab is one of the structural elements detailed on those drawings. The Form 15 identifies as the "Basis of Certification" various Australian Standards, including "AS3600 – Concrete Structures Code" ("AS3600"). After construction of the building, Mr Henry on behalf of DEQ certified in a Form 16 Compliance Certificate – Construction under the *Standard Building Regulation* that the specified components had been built generally in accordance with the development approval, DEQ's drawings, and the *Standard Building Regulation*.[8]

[10] It is uncontroversial in this appeal that the *Standard Building Regulation* required compliance with the *Building Code of Australia*, which in turn required compliance with AS3600. Clause 16.1 of AS3600 provides that section 16 "gives additional design considerations for in situ concrete slabs cast on the ground for industrial,

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6 Reasons [84].

7 See Reasons [84]-[88]. The trial judge referred to the relevant provisions in the *Building Regulation* 2006 (Qld) ("the *Regulation*"), and observed that there was no material difference between the *Standard Building Regulation* 1993 (Qld) and the equivalent provisions in the *Regulation*.

8 Reasons [7].

commercial and residential uses…" Clause 16.2.1 provides that the foundation "shall be investigated and suitably modified, where necessary, to ensure that the sustained and any intermittent service loads, can be resisted by the slab without undue differential or uniform settlement."

[11] When Mr Henry, on behalf of DEQ, designed the floating slab, as a reasonable engineer in his position would have known and as Mr Henry in fact knew, the subsurface in the area in which this building was constructed was likely to include marine clays which were apt to expand or contract seasonally, according to the amount of moisture in the clays, during the 40 year design life of the building. Actron claimed that DEQ's conduct in giving the Form 15 to DDS was misleading conduct because, contrary to Mr Henry's certification in the Form 15, the construction of the floating slab in accordance with the DEQ drawings would not comply with the *Standard Building Regulation*. That was contended to be so because, as a result mainly of contraction or expansion in the underlying marine clay, the floating slab would settle by an amount that was "undue" in terms of cl 16.2.1 of AS3600. That contention was denied by Mr Henry in evidence and it was rejected by the trial judge. Actron's challenge to that aspect of the trial judge's decision lies at the heart of this appeal.

[12] The date for completion of Actron's contract with Efstathis was the later of 16 April 2007 or seven days after the seller provided the buyer with a copy of the Certificate of Classification. Clause 5.1 of the special conditions of that contract provided that either party was entitled to terminate the contract if the Certificate of Classification was not issued by 30 September 2007. On 16 April 2007, Efstathis sent to Actron a folder of documents that included the Certificate of Classification dated 4 April 2007. Actron contends that if DEQ had not given the allegedly misleading Form 15 to DDS, the building would not have been approved, the Certificate of Classification would not have issued, and Actron would have exercised its right to terminate the contract. It follows, so Actron contends, that in circumstances in which the valuation evidence at trial proved that the rectification work did not increase the market value of the property, Actron is entitled to recover its rectification and associated costs as compensation for loss it suffered by DEQ's contravention of s 52 of the *Trade Practices Act* 1974 (Cth).

[13] Having rejected Actron's claim under the *Trade Practices Act* on the ground that there was no breach of the applicable design standards in respect of the design of the slab,[9] the trial judge did not go on to consider additional issues raised by the pleadings concerning contributory negligence, proportionate liability, and the quantum of damages.[10] The trial judge found that the Form 15 was relied upon in the issue of the development application decision notice,[11] but otherwise the trial judge did not make findings upon the issue of whether, in terms of s 82 of the *Trade Practices Act*, Actron suffered its claimed loss by DEQ's alleged contravention of s 52 of that Act. Nor did the trial judge address the claimed liability of Mr Henry as a person allegedly involved in DEQ's contravention. During the hearing of the appeal it became common ground between the parties that, if the Court held that

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9 Reasons [164].

10 Reasons [167], [168]. The trial judge expressed some views about quantum (Reasons [169]-[171]) after observing (Reasons [168]) that it was not necessary to consider that issue. Thus those views were necessarily tentative, including the trial judge's view about a point described in Reasons [172] as "academic".

11 Reasons [95].

DEQ had engaged in the alleged misleading conduct, it would be appropriate for the matter to be remitted to the trial judge for the purpose of making findings upon the unresolved issues and giving judgment accordingly. An exception to that proposal is that the Court was invited to decide whether or not Mr Henry was proved to have sufficient knowledge of DEQ's alleged contravention to render him a party involved in that contravention.

The main issues in the appeal

[14] There are two main issues in this appeal. The first is whether DEQ's communication of the Form 15 to DDS was misleading conduct in contravention of s 52 of the *Trade Practices Act*. The second issue is whether Mr Henry possessed the knowledge required to render him liable as a party to DEQ's alleged contravention.

Further evidence about the expected subsidence and its effect on the slab

[15] The DEQ drawings forming the "referenced documentation" in the Form 15 are identified as S01 to S12 P1. On drawing S01 P1 there are notes: "refer slab plan for design notes for slab on ground… the structural work shown on these drawings has been designed for the following live load unless noted otherwise…warehouse floor 15kPa"; under the heading "FLOOR SLABS", "the slabs have been designed as a floating slab. Hence movement in the subgrade will result in vertical & curvature movements in the slab along with some minor cracking. Expected movement to be in the range of +/-40 – 70 mm".[12] Drawing S01 P1 also includes a note, "a limited foundation investigation is available. Should any further information be required the contractor shall arrange the work at his cost." This plan is endorsed with a stamp by the certifier, A1 Express, that it was noted on 1 March 2007 and that "structural plans have been inspected for conformity of layout with the architectural plans only." Consistently with the reference to +/- 40 – 70 mm, Mr Henry gave evidence that if the conditions were wet at the time of measurement then the movement might be downwards 40 to 70 mm, but if the conditions were then dry the movement might be 40 to 70 mm upwards.[13]

[16] Drawing S02 P2 is entitled "Slab and Footing Plan". One of the notes under the heading "Floor Design Loads for Slab" refers to "6 tonne front axle load of solid rubber tyre fork lift trucks with single wheel axles". The drawing is endorsed with another note: "the slab has been designed as a floating slab. Thus the floor will undergo surface movement that occurs. The floor may also experience settlement due to consolidation at compressible marine clays on site. Differential settlement may occur." The trial judge considered that this note communicated that there was potential for the floor to undergo two types of movement: "surface movement from the clays shrinking and swelling of 40 to 70mm and settlement due to the consolidation of compressible marine clays."[14]

[17] Mr Henry gave evidence that the DEQ drawings did not include a schematic diagram for the floor designs loads for the slab where pallet racking was to be installed and said it was his experience that if a slab-on-ground was designed for racking it would be expected to see such a schematic diagram in the engineering

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12 One version of the drawings included "?" and another version instead included the symbol "+/-". There was no challenge to the trial judge's finding that the relevant drawings included the symbol "+/-": Reasons [45].

13 T5-6, referred to in Reasons [52].

14 Reasons [48].

drawings.[15] When Mr Henry had earlier prepared a fee proposal for DDS, a director of DDS, Mr McFadden, asked him to design an industrial building with a slab on ground. Mr McFadden told Mr Henry of Efstathis' requirements that the building have six metres of storage and the portal frame to accommodate a five tonne gantry frame.

[18] DEQ, by Mr Henry, carried out a site investigation and provided DDS with a report dated 21 July 2006 ("the first report"), which Mr McFadden had requested to be the "bare minimum" to obtain building approval. On 25 August 2006 DEQ gave DDS another report ("the second report") as a result of DDS giving to DEQ a geotechnical report for a site about 200 metres away (which had been given to DDS by the contractor engaged by it to do the piling on site for the perimeter of the building).

[19] The first report (which DDS gave to A1 Express) describes DEQ's purpose in carrying out a site investigation as being to determine for design purposes the soil profile, the shrink/swell potential of the subsoils, and the allowable bearing capacity of the subsoils and identification of suitable footing systems for the proposed development. Under the heading "Conclusions and Recommendations" and the subheading "Foundations", Mr Henry referred to the soil profile of fill over marine clays, typical of the low lying areas in that part of Brisbane, noted that the investigation did not include an investigation about the properties and depth of the marine clays, and concluded:

> "Marine clays when loaded can undergo consolidation which results in settlement of the surface. More advanced investigations in these areas have calculated typical surface settlement of over 100mm could be expected to sites that have not been pre-loaded.[16] … Typical differential settlements are of the order of 50% of the total deflection.
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> …We would anticipate that footings founded in the existing fill would settle to an extent that would affect structural adequacy of the building. Thus we would recommend that the building be supported on deep foundations founded in material below the compressible marine clays. A piling contractor experienced in the area should be used…
>
> The floor design of an industrial building is dependent on the proposed use of the building and it's [sic] sensitivity to floor movement and also construction budget. At this time of the writing of this report the proposed use of the building is unknown.
>
> Structural options for the floor design are as follows:–
>
> 1. Free Floating Slab-on-Ground Option.
>
> 2. Partial Floating Slab-on-Ground with relieving slabs to perimeter.
>
> 3. Suspended Slab supported on piles.
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> (Note, all of the above options rely on the building superstructure being supported on piles.)
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> …

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15 T5-9 to T5-10, Reasons [62].

16 This site was not intended to be, and was not, pre-loaded.

> The above methods (a) & (b) has [sic] the lowest construction cost, however the drawbacks associated with these methods of construction is that settlements and associated damage, floor cracking and floor curvatures would be high, resulting in higher maintenance costs for the buildings.
>
> Option 3 is clearly the most expensive option with regards to construction cost, however, the internal slabs would be stable with resultant deflections kept within code requirements.
>
> …
>
> Where settlements of the floor can be tolerated, options 1 & 2 may be the most economic in construction, however, the client and/or future owners and tenants must be made aware of the increased maintenance costs associated with this type of construction.
>
> If the warehouse slab settlements cannot be tolerated, or increased maintenance costs and potential damage associated with the slab settlements and movements are unacceptable, then Option 3 should be the preferred method of construction.
>
> …
>
> [Under the heading "Recommendations for Limiting Effects of Reactive Clays"]
>
> Floating pavements are the most economical pavement system for expansive clay sites. It should be noted however that the levelness of the pavement will not be maintained due to the surface movement. The end user of the building should be advised that movement of the pavement could occur."

[20] The trial judge referred to Mr Henry's explanation of the statement in his first report of a "calculated typical surface settlement of over 100mm" because that would be a "red flag" to "someone doing a due diligence review of these drawings".[17]

[21] In the second report (which was not given to A1 Express), DEQ, by Mr Henry, noted that the soil report provided allowed DEQ to quantify what settlement could occur "due to the compressible materials encountered on site". DEQ then advised that "settlement figures of between 150 and 200mm could be expected for a loading of 20 kPa", being the loading applicable for the designed building, and that a further 50 mm of "secondary creep could also occur". The report advised DDS that its client "should be made aware that the slab-on-ground as presently designed will experience similar magnitude movements" that "may severely restrict the possible usage of the building", and that re-levelling of the floor "can be expected to be required in heavily loaded zones of floor throughout the life of the building". The report concluded:

> "Your client should be made aware also that the use of a floating slab-on-ground is a minimum construction cost option and the construction saving made should be weighed against the possible economic costs with regard to future maintenance costs and lack of compatibility with building use of future purchasers."

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17 Reasons [54].

[22] The trial judge referred to Mr Henry's explanation of the reference to "re-levelling" in the second report as being to undertake maintenance to make the floor level by replacement or grout injection.[18] Mr Henry accepted in cross-examination that his client was aware that the costs of jacking the slab (if it were re-levelled by way of jacking up the slab rather than removing it) would be in the order of several hundred thousands of dollars.[19]

[23] Mr Healey, a structural and civil engineer engaged by Actron, gave evidence of his opinion that the absence of piling to the floor slab and allowing it to settle and move demonstrated a lack of compliance with the BCA.[20] Mr Healey considered that the designer must take into account a variety of possible uses for the slab over the life of the building and, although the owner's budgetary constraints would not be irrelevant, the engineer was required to make decisions based on the BCA as to the suitable floor system.[21]

[24] DEQ and Mr Henry engaged a structural and geotechnical engineer, Mr Wright. He gave evidence of his opinion that the decision to use a floating slab was made by others in light of warnings issued by DEQ regarding settlement and that DEQ's actions were those of a competent engineering practice.[22] Mr Wright considered that the construction engineer should give the client sensible options but that it was ultimately the client who decided which option to adopt, "because he is the one 'with the purse strings' and has to make a decision as to low cost construction with high maintenance or high cost construction with low maintenance".[23] Mr Wright considered that the designer was bound to act on the instructions of the owner in relation to the performance of the slab; if the owner considered that the settlement was acceptable the designer would have satisfied the obligations under cl 16 of AS3600.[24]

[25] The trial judge accepted Mr Henry's evidence that the anticipated design life of the building was 40 years.[25] Mr Henry gave evidence that he could expect the settlement to be reasonably substantial and there would be a need to either re-level the slab or replace it at least once.[26] He agreed that it can be important to have a flat surface with minimal differential settlements for a floor design that is going to involve the use of forklifts and it can be particularly important for a warehouse with a forklift carrying loads, or storage, within the confines of the warehouse.[27] He agreed that one of the DEQ drawings referred to a six tonne front axle load forklift, indicating that such a forklift could move around the slab without deformation.[28]

[26] When it was put to Mr Henry in cross-examination that it was important in his considerations of how to design a slab, to ensure that the slab lasts to enable the forklift to continue to operate, and it was important to his expectations as a competent person, he answered by referring to what was "within my client's

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18 Reasons [61].
19 T6-21.
20 Reasons [99].
21 Reasons [106].
22 Reasons [97].
23 Reasons [104], paraphrasing from the transcript at T6-105.
24 Reasons [106].
25 Reasons [63].
26 T5-91, Reasons [63].
27 T5-109.
28 T5-109.

expectations".[29] The trial judge construed this as making the point that Mr Henry's client was happy to have a warehouse with a floor that settled and he was designing to meet his client's expectations.[30] Mr Henry denied that as a competent person he was required to determine that sufficient foundation had been carried out to ensure that the load could be carried by the slab without undue differential or uniform settlement[31] and he gave evidence that it was sufficient to do such investigation as his client required.[32] He gave evidence that, whilst "undue" meant something to the effect of "excessive", he expected that more than 100 mm of settlement would occur, and that was an excessive amount for the slab with racking on it, he was not aware that the expected settlement would be "undue" for the purposes of cl 16.2.1 because what was "undue" depended upon what the client wanted.[33] Similarly, when Mr Henry was referred to the objective of Part B1 of the BCA as including to "safeguard people from loss of amenity caused by structural behaviour", Mr Henry responded that "[t]he amenity levels were set by the client".[34]

[27] Mr Henry acknowledged in evidence that a Certificate of Classification ultimately would be issued in reliance, at least in part, upon the Form 15.[35] Mr Henry said that the certifier did receive the drawings but he did not know whether or not the certifier would read the drawings.[36] It is apparent from Mr Henry's evidence that he did not know, and considered that it was not his business to know, whether or not DDS sent the second report to the certifier.[37]

[28] Mr Henry agreed that it was a distinct possibility that there would be racking to store goods in a building designed for use as a warehouse.[38] Mr Henry said that if it was his decision, for any movement greater than 100 mm, the slab would be suspended. When it was put to him that was so because he recognised that such a movement was too excessive to use as a warehouse, he answered that "[i]t can be difficult to work with, yes."[39]

The trial judge's reasoning upon the misleading conduct claim

[29] The trial judge rejected the appellant's claim under the *Trade Practices Act* on the ground that it could not succeed because there was no breach of the design standards under the BCA in respect of the design of the slab.[40]

[30] The trial judge observed that Mr Healey's approach would result in an engineer designing a building for all possible industry or warehouse purposes irrespective of the anticipated use or requirements of the owner. However, "if the owner's requirements were so ridiculous that the building as constructed would not comply with the BCA for the least intensive use appropriate for that type of building within the relevant BCA classification, the engineer could not rely on the owner's requirements to

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29 T5-109.
30 Reasons [63].
31 T6-22.
32 T6-22.
33 T6-22, 6-23.
34 T6-23, 6-24.
35 T6-26 L1-15.
36 T6-16 L35-36, T6-17 L12.
37 T6-17 L12-25; T6-17 L32.
38 T6-10 L40-45.
39 T6-11 L32-43.
40 Reasons [164].

absolve the engineer from exercising the professional skill and judgment in designing the building to comply with the BCA."[41] There must be scope for what is "undue" settlement under cl 16.2.1 of AS3600. The trial judge considered that Mr Healey's opinion, that the magnitude of the anticipated settlements precluded DEQ's options 1 and 2 in the first report from demonstrating compliance with BCA, was difficult to reconcile with evidence given at the trial that there were numerous other industrial buildings in the vicinity with a slab on ground construction. Ultimately, the trial judge was "persuaded by Mr Wright's evidence which supports Mr Henry that, in the circumstances in which Mr Henry designed the slab on ground, including the warnings in the first and second reports, the design was of a slab, 'without undue differential or uniform settlement' and therefore compliant with the BCA."[42]

[31] The nature of the design flaw alleged by the appellant was "otherwise expressed as whether a slab on ground should ever have been considered as a feasible option for this building."[43] Settlement of the slab was caused by consolidation of the underlying marine clays. The only failure of the structure concerned problems arising from settlement of the slab. Those problems were confined to the uneven levels of the floor slab and consequent chipping and cracking of the concrete. The slab was designed to move independently of the walls of the building, which were on piles. It does not follow from the fact that settlement of the slab was unsatisfactory for the appellant's use of the building that the design did not conform with the applicable standards.

[32] DEQ and Mr Henry were obliged to comply with the BCA and codes incorporated by it, relevantly including AS1170.1 and AS3600. There are many possible uses of an industrial building. Such a building may be purpose built for a use that requires performance outcomes that are not necessary for other uses. The use of the term "warehouse" to describe the building in DEQ's fee proposal to DDS, in the Form 16 (certifying that components including the "warehouse slab on ground had been built generally in accordance with the development approval, the referenced documentation [the DEQ drawings] and the Standard Building Regulation"), and the development application decision notice (approving the application for the proposed new "industry/warehouse"),[44] did not define the quality of the construction or range of uses for which the building was designed. The trial judge referred to the fact that the decision notice was for building work for "industry/warehouse" that had been assessed with a building classification Class 8. Table 3.1 in AS1170.1, which set out different imposed actions appropriate to the type of activity or occupancy for which the floor would be used, provided a reference value of 5.0 kPa for a Class 8 building (including factories, workshops and similar buildings (general industrial)) but it provided a reference value of 2.4kPa for each metre of storage height for the use of a Class 7b building for warehousing and storage areas with areas subject to the accumulation of goods.

Consideration

[33] Section 52 of the *Trade Practices Act* 1974 (Cth) provides, "[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or

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41 Reasons [123].
42 Reasons [124].
43 Reasons [118].
44 Development application Decision Notice 2 March 2007.

likely to mislead or deceive." The only element of that provision in issue in the appeal is the requirement that the alleged conduct be misleading. The conduct alleged to be misleading was DEQ's issue of the Form 15. (I will use the word "issue" to describe the conduct of DEQ, by Mr Henry, in giving to DDS the Form 15 signed by Mr Henry.) The certification in the Form 15 was conditional upon the certified structural elements being installed and carried out in accordance with the information contained in the certification, the relevant information being the nominated DEQ drawings. That condition was fulfilled, as was evidenced by the issue of the Form 16 signed by Mr Henry. Putting that condition aside, Mr Henry, who was described in the Form 15 as a competent person, certified that the items described in the form (the structural elements detailed on the nominated DEQ drawings include the floating slab) "will comply with the Standard Building Regulation". Consistently with the incorporation in the BCA of AS3600, that Australian Standard is nominated in the form as one of the Australian Standards forming the "Basis of Certification". Thus the issue of the Form 15 conveyed Mr Henry's certification that the floating slab will comply with AS3600.

[34] Actron did not argue that the Form 15 was instead in the nature of a prediction to which s 51A of the *Trade Practices Act* applied. DEQ and Mr Henry did not argue that the certification was an opinion which would not be misleading unless Mr Henry did not hold that opinion or there was no reasonable basis for a competent person in Mr Henry's position to hold that opinion. The parties' arguments treated the determinative question as being whether or not the anticipated settlement of the slab would be "undue" settlement within cl 16.2.1 of AS3600. DEQ and Mr Henry argued that this underlying question involved a professional judgment and Mr Henry was entitled to consider that the anticipated settlement was not undue. For the following reasons, I would hold that the issue of the Form 15 was misleading because the anticipated settlement would be "undue", the evidence demonstrates that this was in fact Mr Henry's own opinion, and there was no reasonable basis for a competent person in Mr Henry's position to reach the contrary opinion.

[35] The question whether conduct is misleading is an objective question to be determined by the Court with reference to all of the relevant surrounding facts and circumstances; where, as here, an alleged contravention of s 52 relates primarily to a document, the Court must determine the effect of the document in the context of the evidence as a whole including all of the alleged contravenor's conduct in relation to the document.[45]

[36] The regulatory scheme under which the Form 15 was issued supplies important context. DEQ, by Mr Henry, expected that DDS would give the Form 15, signed by Mr Henry as a competent person, to a building certifier with a view to obtaining the necessary building approval and subsequent Certificate of Classification. Furthermore, s 23 of the *Standard Building Regulation* provides that a building certifier may accept in good faith and, without further checking, rely on the certification of a competent person to the extent of the certification.[46]

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45 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 341-342 [102], quoting with approval from McHugh J's reasons in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 625 [109].

46 Provisions to the same effect are included in sections 49 and 50 of the subsequent *Regulation*.

[37] The BCA imposes a performance requirement that a "structure is to withstand the combination of loads and other actions to which it may be reasonably subjected",[47] and that a "structure, to the degree necessary, must … minimise local damage and loss of amenity through excessive deformation… by resisting the actions to which it may reasonably be subjected."[48] The reference to "actions" comprehends "ground movement caused by … swelling [or] shrinkage … of the subsoil".[49] The content of those requirements are informed by the relevant objectives of the applicable part of the BCA, which are to:

> "(a) safeguard people from injury caused by structural failure; and
>
> (b) safeguard people from loss of amenity caused by structural behaviour; and
>
> (c) protect *other property* from physical damage caused by structural failure;
>
> (d) safeguard people from injury that may be caused by failure of, or impact with, glazing."[50]

[38] The nature of the judgment required by cl 16.2.1 of AS3600 is further illuminated by cl 2.1.1 of that standard:

> "The aim of structural design is to provide a structure that is durable, serviceable and has adequate strength while serving its intended function and that satisfies other relevant requirements such as robustness, ease of construction and economy.
>
> A structure is durable if it withstands expected wear and deterioration throughout its intended life without the need for undue maintenance.
>
> A structure is serviceable and has adequate strength if the probability of loss of serviceability and the probability of structural failure are both acceptably low throughout its intended life."

[39] The regulatory scheme under which a Form 15 is issued is designed for the protection of the public. One section of the public intended to be protected comprises those people who may suffer loss of amenity caused by structural behaviour. A competent person who puts into circulation a Form 15 thereby potentially affects, not only the interests of a client of that competent person, but all persons who might be exposed to risks of personal or financial injury as a result of an approval of a non-conforming design of the specified structural elements of a building. It is the appropriately qualified person – in this case, a duly qualified engineer – designated as a "competent person" who is obliged to make any judgments necessary for a decision whether or not a Form 15 should be issued. In relation to the issue of a Form 15, the regulatory scheme is irreconcilable with Mr Henry's thesis that a client (presumably DDS's client) is entitled to decide whether anticipated settlement is "undue" in terms of cl 16.2.1 of AS3600.

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47 Clause BF 1.1.
48 Clause BP 1.1(a)(iii).
49 Clause BP 1.1(b)(xiii)(A).
50 Clause B01 in Part B1 "Structural Provisions".

[40] In the context of the regulatory scheme, Mr Henry's certification in the Form 15 conveyed at least that the anticipated loads could be resisted by the floating concrete slab without producing what in Mr Henry's opinion would be undue differential or uniform settlement. But Mr Henry's own evidence demonstrates that he did not form any such opinion. The effect of his evidence is that he thought there would be excessive settlement but that a client determined whether or not the expected settlement was "undue" settlement.

[41] Consistently with Mr Henry's notes on the plans, his reports, and his oral evidence (when the irrelevant consideration of his client's suggested expectations is disregarded), a competent person in Mr Henry's position could not reasonably have concluded that the expected settlement was not "undue". In deciding what settlement is "undue", it is relevant to bear in mind that the third paragraph of cl 2.1.1 of AS3600 requires that the probability of structural failure of a concrete slab be "acceptably low throughout its intended life". The timing and extent of anticipated settlement and its likely effect upon the structure must be considered. The evidence, including Mr Henry's evidence, establishes that at the time of design it was actually expected that there would be settlement causing structural failure early in the design life of the slab. In the first report, Mr Henry explained why he anticipated that there would be settlement "to an extent that would affect structural adequacy of the building" unless the building was supported on deep piles. It was only with respect to option 3 (a suspended slab supported on piles) that Mr Henry expressed the view that "resultant deflections [would be] kept within code requirements". Mr Henry described the initial calculated settlement of over 100 mm as a "red flag". He gave evidence that in the first 10 to 15 years of the anticipated design life of the building of 40 years, it would be necessary either to relevel the slab or replace it.[51]

[42] As was common ground in the parties' arguments, the design of the building and the Certificate of Classification allowed for the use of the building as a warehouse, amongst other uses. (Consistently with that view, the trial judge found that one of the design requirements of Efstathis conveyed to Mr Henry was that the building was to have six metres of storage.[52]) The note about the floor design loads for the slab on drawing S02 P2 (which includes reference to a forklift) is consistent with the slab being designed for the use of the building as a warehouse in the way in which Actron subsequently used it. Mr Henry's own evidence was that it was particularly important for a warehouse in which a forklift was to carry loads that there be a flat floor surface with minimal differential settlements. The only answer Mr Henry could give to the suggestion that it was important that the slab last to enable the forklift to continue to operate was to refer to his client's "expectations", a matter of irrelevance to Mr Henry's role in issuing a Form 15.

[43] In these circumstances, an anticipated requirement to embark upon the admittedly expensive and disruptive exercise of relevelling or replacing a concrete slab, perhaps as soon as after only one quarter of its intended design life and no later than after three-eighths of its design life, could not reasonably be regarded as a probability of structural failure which is "acceptably low throughout its intended life" for the purposes of the third paragraph of cl 2.1.1 of AS3600. There is no apparent basis for an opinion that settlement of that extent and with those

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51 T5-91 L35-46.

52 Reasons [39].

substantial structural effects so early in the building's design life is not "undue" settlement in the context of the application under the BCA of cl 16.2.1 of AS3600.

[44] It is hardly necessary to go further, but it should be noted that in the second report Mr Henry advised that expected settlement would be much greater than that with reference to which he expressed his opinions in the first report; such was his concern that in the second report he wrote that DDS's client should be told that the designed slab "will experience" movements that "may severely restrict the possible usage of the building".

[45] So far I have examined the character of the Form 15 without reference to the notes about settlement on the drawings or DEQ's first report. The significance of the first report and the notes on the drawings depends in part upon the question whether DEQ, by Mr Henry, reasonably could assume that the building certifier would examine them for the purpose of considering whether DEQ's design of the floating slab complied with AS3600. That the report and the notes on the plans were not examined by the certifier for that purpose is suggested by the A1 Express stamp on drawing S01 P1 that "structural plans have been inspected for conformity of layout with the architectural plans only." Putting aside the benefit of hindsight, under the regulatory scheme a building certifier may seek help in performing building certifying functions for building design from an individual who has the appropriate registration to be qualified as a competent person to give that help to the certifier, and the building certifier may rely upon a competent person's issue of a Form 15 without checking it. In those circumstances, an engineer in the position of Mr Henry should anticipate that the building certifier might not review the underlying basis of the Form 15; it was readily foreseeable that the certifier might not examine the first report at all and might examine the drawings only for purposes other than considering afresh the competent person's engineering judgments. Furthermore, the notes on drawing S01 P1 convey an expectation only of "minor cracking" resulting from expected settlement of +/- 40 – 70 mm. That may be contrasted both with the more serious consequences mentioned in the first report and with the references in the second report to severe restrictions on the possible use of the building and incompatibility with future purchasers' building uses.

[46] In the result, the issue of the Form 15 was seriously misleading as to the implicit compliance with AS3600. Its misleading character was not altered by the mere possibility that the building certifier might discover that the anticipated settlement would be undue by examining the first report and the notes on the plans.

[47] DEQ and Mr Henry argued that the notes on the drawings identifying anticipated settlement and consequences of it were incorporated in the Form 15 by reference to the contingency expressed in the form that the items would be installed and carried out in accordance with the information contained in the certificate, including any referenced documentation. The contingency in the Form 15 is "if installed and carried out in accordance with" identified information, which relevantly includes the drawings. The notes to the effect that the slab will settle in accordance with movement in the subgrade, and there may be differential settlement, with movement expected to be in the range of +/- 40 – 70 mm and minor cracking, do not concern the manner of installation or carrying out of the structural elements. They refer to anticipated consequences of movement in the subgrade after construction. A different note does concern the manner of construction – the note on drawing S01 P1 that "internal partitions will be subject to movement from the floating floor.

Articulate with control joints at 3000 … provide control joints at interfaces with structural elements." But the installation of such control joints would have no effect upon the relevant structural defect in this case, which was the inherent inability of the slab to resist the relevant forces without undue settlement.

[48] Mr Wright's evidence, to which the trial judge referred as support for the evidence of Mr Henry, was that in his opinion "you do give your client … sensible options … it is ultimately the client who decides – because he's the one with the purse strings … he's the one that ultimately has to make a decision as to whether you go low cost now with high maintenance, or whether you go high cost now with low maintenance … It's not an engineer decision, but if he's choosing an alternative that has, shall we say, risks associated with it … of lesser performance than the other options, he needs to be aware of what they are."[53] Reference to the transcript of the evidence immediately before that passage[54] confirms that it concerned the role of an engineer pursuant to an engagement by a client to design an engineering solution or to provide expert engineering advice to the client. That evidence did not purport to bear upon the obligation of an engineer as a "competent person" issuing a Form 15.

[49] The evidence that there were numerous industrial buildings in the vicinity with a slab on ground construction is also not persuasive upon this issue. There was no evidence whether the slab in any of those other buildings had subsided or subsided to an extent which adversely affected any occupier. The question whether DEQ's communication of the Form 15 to DDS was misleading is to be answered with reference to the particular facts and circumstances of this case.

[50] DEQ and Mr Henry argued that it was relevant if the design of the building itself indicated that it was not suitable for some of the potentially available uses within the anticipated classification. That may be accepted, but the building was designed in a way that made it suitable for use as a warehouse and that use fell within the classification subsequently assigned to the building. The evidence demonstrated DEQ's appreciation of the fact that the design was apt for the use of the building as a warehouse, including with a forklift carrying loads within the building. It was also submitted to be material that the installation of racks in the warehouse, as required by Actron for its particular use, could not occur without a further approval which was not the subject of any application when the Form 15 was communicated to A1 Express. It was not submitted, however, that the further approval would require a certifier to revisit the structural adequacy of the floating slab to support racks of the kind that ultimately were installed.

[51] There was also reference at the trial to table 3.1 in AS1170.1, which sets out reference values of imposed floor actions for a variety of different kinds of activities or occupancy of parts of buildings. The trial judge mentioned that for a Class 8 building, which includes what is described in table 3.1 at "factories, workshops and similar buildings (general industrial)", table 3.1 provides for a reference value of 5.0 kPa, whereas for a class 7b building table 3.1 at "warehousing and storage areas. Areas subject to accumulation of goods" provides for the reference value of imposed actions of 2.4 kPa for each metre of storage height. This appears to be something of a red herring, given that an "imposed action" is a "variable action resulting from the intended use or occupancy of the structure"[55] and the evidence is

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53 T6-105.

54 T6-104 L46 to T6-105 L6.

55 AS1170.1, cl 1.5.1.

to the effect that the anticipated deflection in the slab would arise instead from swelling or shrinking of the subsurface even without regard to any "imposed action". Even if an imposed action relating to Actron's particular use of the building as a warehouse had some impact upon the degree of settlement, it would not follow that the Form 15 was not misleading in circumstances in which DEQ, through Mr Henry, anticipated that the expected settlement would result in structural damage requiring the slab to be replaced or relevelled relatively early within its intended working life, and possible "lack of compatibility with building use of future purchasers".[56]

[52] For these reasons, DEQ engaged in conduct that was misleading for the purposes of s 52 of the *Trade Practices Act* by giving the Form 15 to DDS. There being no other issue concerning the elements of s 52, it follows that DEQ should be found to have contravened that section.

The liability of Mr Henry as a person involved in DEQ's contravention

[53] Pursuant to s 82(1) of the *Trade Practices Act*, Actron is entitled to recover the amount of loss or damage it suffered by the contravening conduct by action against DEQ or any "person involved in the contravention". Pursuant to s 75B(1) that expression refers to a person who:

(a) has aided, abetted, counselled or procured the contravention;

(b) has induced, whether by threats or promises or otherwise, the contravention;

(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) has conspired with others to effect the contravention.

[54] The potentially relevant paragraphs are (a) and (c).

[55] Mr Henry argued that he was not "involved in the contravention" because he did not know of the falsity of the representation in the Form 15. Actron argued that it was sufficient to attract the application of s 75B(1) that, as Actron contended was the case, Mr Henry knew of the essential facts making up the contravention.

[56] *Yorke v Lucas*[57] established, by analogy with similar provisions in the criminal law, that a person could be involved in a contravention in terms of s 75B(1) only if the person was "an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention",[58] but it is not necessary that the person know that the facts are capable of characterisation in the language of the statute.

[57] Mr Henry knew that DEQ, a corporation, gave the Form 15 to DDS in trade or commerce, expecting that DDS would give the form to a building certifier with a view to considering whether to approve the building works. The issue concerns knowledge of the essential facts with reference to which that conduct is properly

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56 The second report by DEQ to DDS.

57 (1985) 158 CLR 661 at 666-670. See *Medical Benefits Fund v Cassidy* (2003) 135 FCR 1 per Moore J (Mansfield J agreeing) esp at [15]; *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 at [138]; *Rafferty v Madgwicks* (2012) 203 FCR 1 at [252], [254].

58 *Yorke v Lucas* (1985) 158 CLR 661 at 670.

characterised as misleading conduct in contravention of s 52. Those essential facts are that (1) the Form 15 signed by Mr Henry conveyed that the anticipated loads would be resisted by the floating concrete slab without undue settlement and (2) the anticipated settlement would be undue, that was Mr Henry's opinion, and there was no reasonable basis for a competent person in Mr Henry's position to reach the contrary opinion. It follows from my reasons for the conclusions in (2) that the critical question is whether Mr Henry knew that the Form 15 he signed conveyed that the anticipated loads would be resisted by the floating concrete slab without undue settlement. If he knew that, he knew the facts from which there was an irresistible inference that the issue of the Form 15 was misleading.

[58] Mr Henry's evidence suggests the surprising conclusion that he believed that what settlement was undue was to be determined by a client, rather than by the competent person who signs a Form 15. That implies that he believed that the Form 15 would not convey to the building certifier that it was Mr Henry's own opinion that the anticipated settlement was undue. The trial judge, having rejected the claim against DEQ, did not make findings of fact about this issue. It is appropriate to make such findings in circumstances in which both parties invited the Court to decide the issue.

[59] The probabilities strongly favour a finding that Mr Henry knew that the Form 15 would convey to the building certifier that it was Mr Henry's own opinion that the anticipated settlement was undue. The content of the certificate and the fact that Mr Henry signed it in his capacity as a competent person must have made it clear to him that the building certifier would regard the certificate as incorporating Mr Henry's professional opinion, rather than the opinion of a lay client not mentioned in the form, that the slab complied with AS3600, including in relation to the engineering judgments required by it. At the very least, that inference is available and there is no finding of fact or credible evidence to the contrary. That inference should be drawn. Mr Henry possessed the knowledge required to render him liable as a person involved in DEQ's contravention.

Proposed Orders

[60] At the request of the parties**,** the Court indicated at the hearing of the appeal that it would not deal with costs in this judgment. In my opinion, the appropriate orders are:

1. Allow the appeal.
2. Set aside the order made in the trial division that the proceeding against the second and third defendants is dismissed.
3. Remit the matter to the trial division for further consideration.
4. Direct that the parties have leave to make written submissions about costs in accordance with the practice direction.

[61] **MORRISON JA:** I agree with the reasons of Fraser JA and the orders his Honour proposes.

[62] **ATKINSON J:** I agree that the appeal should be allowed for the reasons given by Fraser JA and with the orders his Honour has proposed.