

SOFTWARE INTEGRATORS PTY LTD v ROADRUNNER COURIERS PTY LTD

BC9704123

SUPREME COURT OF SOUTH AUSTRALIAMAGISTRATES APPEALS CIVIL

DOYLE CJ

SCGRG 746 of 1997; S6333

17, 21 and 22 July 1997; 27 August 1997

16 Pages

TRADE PRACTICES

Misleading and deceptive conduct in contravention of the Trade Practices Act 1974 (Cth) - whether silence may be misleading and deceptive conduct - whether reasonable expectation that relevant information will be disclosed.

Trade Practices Act, 1974 (Cth) s52 and s87, referred to.

Spedley Securities (in liq) v Bank of New Zealand (1991) ATPR 41-143; Lam v August Investments Australia Pty Ltd (1990) 97 FLR 458; Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (1988) 79 ALR 83; Kimberley NZI Finance Ltd v Torero Pty Ltd (1989) ATPR 46-054; Demagogue Pty Ltd v Ramesky (1993) 110 ALR 608; Warner v Elders Rural Finance Ltd (1992) 113 ALR 517, considered.

Doyle CJ

Introduction

This is an appeal against a decision of a Magistrate. The Magistrate appears to have proceeded on the basis that a contract for the provision of certain computer software, services and goods either had been validly rescinded or should be rescinded. Accordingly, he ordered repayment of \$16 000 paid under the

contract by the plaintiff. He awarded the plaintiff damages to compensate it for some expenses that it incurred.

The appeal turns upon issues of misleading and deceptive conduct. In particular, those circumstances in which silence, or the failure to provide information important to a contract, will constitute misleading and deceptive conduct for the purposes of s52 of the Trade Practices Act. The pleadings, as is common, raise a series of causes of action. I propose to deal only with misleading and deceptive conduct.

Background

The factual background is drawn largely from the Magistrate's findings, which were not challenged, except where indicated to the contrary.

The appellant, Software Integrators Pty Ltd ("Software") develops and sells computer software. In a document tendered at the trial Software described itself as having "significant experience in the transport, communications, banking, insurance, service and sports administration industries."

The respondent, Roadrunner Couriers Pty Ltd ("RR") is a medium size courier company, with a fleet of 45 vehicles, operating in the metropolitan area of Adelaide. In its business it uses computer software described as the 'Carry' system. In essence, the Carry system performs a number of essential functions for the operational and administrative requirements of the parcel, courier and taxi truck business.

One piece of software that Software were developing is known as the Transpac system. This has an adaptability to the courier transport business and is a competitive alternative to the Carry system.

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The Carry system was installed by RR in approximately 1990.

By 1994, Mr Ryan, the managing director of RR, was beginning to be dissatisfied with the Carry system. In particular, Ryan was unhappy with the customer support for the system and with deficiencies in what he described as the end of day procedure. Mr Ryan began to think seriously about installing an updated computerised transport management system to replace the existing Carry system.

At about this time there was contact with Software and discussions about whether the Transpac system, as supplied by Software, would be more suitable for RR's business. The discussions were with a Mr Brain, a director of Software. In May 1994 there was a written proposal (Exhibit D3) from Software to RR. If accepted, this would have resulted in the replacement of the Carry system with the Transpac system. Mr Ryan decided against implementing any changes in 1994.

There were further discussions in the early part of 1995 and a revised proposal was put by Software to

RR on 23 February 1995. The discussions became quite advanced and there was a meeting between Ryan and Brain. Once again the proposal was rejected.

In about the middle of 1995 negotiations again took place. They resulted in another proposal which Ryan ultimately decided to accept. The proposal was embodied in a one page quotation (Exhibit D1) which Ryan accepted by signing and faxing back to Software Integrators in Sydney. That was done on 26 July 1995. The quotation provided that Software was to supply the "Transpac Version 6.2" software, and related programs, documentation, set-up and testing, user training, general consulting and data setup. The contract price was \$42,400.

The Magistrate made no finding about when the contract came into existence. It seems to me that a contract was entered into when Ryan accepted the quotation.

On 29 August 1995 Ryan went to Sydney and had discussions with Brain. A deposit of \$16,000 was then paid. As a result of these discussions a document was produced (Exhibit P2) and faxed to RR in Adelaide on 30 August 1995. I will refer to it as the implementation schedule. In brief the implementation schedule set out the tasks (with a brief description) to be performed to implement the new system. It also assigned responsibility for these tasks, along with the required date for the completion of each task. The implementation schedule provided that Ryan was to be responsible for

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distributing help documentation to staff, for the setup rates, for the setup of driver details, for setup of customer details, for setting up customer account balances, for setting up permanent job booking details, for confirming the invoice statement layout and checking customer, driver, remote jobs and Routing details. The schedule stipulated that Brain was responsible for setting up and testing RR's standard rates, setting up codes such as driver class, pay periods etc, tailoring menus to RR's requirements, removing unwanted suburbs, setting up three character suburb codes, investigating whether existing suburb distances could be extracted and loaded into Transpac, setting up RR's invoice statement layout and follow up training.

A representative of Software came to Adelaide a few days later and assisted Mr Ryan and his employees with certain of the installation work.

The Magistrate found that there was an understanding between the parties that the system would be operational by 3 October 1995. He also found that by this time the system was not installed and ready for use.

Brain came to Adelaide on 3 October and met with Ryan. At this point there is a conflict in the evidence of Brain and Ryan. The evidence of Ryan was that he was substantially dissatisfied with what Transpac had to offer and that he had been misled by Software. Ryan said that he was still prepared to proceed if the problems could be fixed. Ryan said that it was arranged that Brain would get back to Ryan by 6

October. Brain did not contact Ryan and on 17 October Ryan sent Brain a faxed letter containing his reasons for not proceeding with the contract (Exhibit P1).

Brain's versions of what transpired is that on 3 October Mr Ryan, in effect, advised him that he had changed his mind because of certain economic and work place factors. Brain said that he returned to Sydney to consider the situation with his co-directors, however, on 17 October he received the fax (Exhibit P1) indicating that RR would not be proceeding with the contract.

The Magistrate appears to have preferred Ryan's evidence on this point. He appears to have accepted that on 3 October the Transpac system was a long way from being operational.

Legal proceedings were then commenced in which RR sought to rescind the contract, claimed damages and a refund of the deposit. RR relied upon certain alleged misrepresentations and misleading and deceptive conduct. Software counter-claimed for the balance of the contract monies which it sought, by way of damages, for, in short, RR's breach of the contract.

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Findings of the Magistrate

The Magistrate found that there was an understanding between the parties that, by 3 October 1995, the system would be operational. He further found that by 3 October the system was not installed and ready for use.

He found that Ryan, did not possess knowledge and experience of the type which was possessed by Brain. He found that Ryan relied upon Brain for expert guidance, in relation to his replacement of his present system by the Transpac system.

He found that Brain had represented to Ryan that the Transpac system was better than the Carry system.

He found that by 3 October 1995 Transpac could not provide a number of essential requirements for RR's business. These were functions that the Carry system performed. In particular there were problems with: the transfer of the data within the transit grid, the copying of the plaintiff's client files from one system to another, the flexible rate system, the unlimited billings option and aspects of duplication on the Transpac system of screen functions which the Carry system had.

The evidence as to the transit grid can be summarised as follows. A company called Transit markets distance grids for each capital city of Australia, in the form of floppy disks. For Adelaide, this grid comprises a database of suburbs cross-referenced to each other with a distance stated in kilometres from each suburb to every other. The so-called "raw grid" was purchased from Transit in the form of a floppy disk by RR in 1990. In examination in chief Ryan described the transit grid in the following way:

"A. Probably the clearest way of describing it initially is if you take the city open zone as being a suburb, which it is in a book format, you have every suburb ex Adelaide listed with a distance attached and then throughout the book obviously every other suburb cross references back to the other suburb, so there is a suburb that you might wish to travel."

.....

"A. From a practical users point of view every client that we engage we have the facility to apply a different rate to the distance that the system says a particular job is worth so we might do it on a let's say a job to Henley Beach is a \$10 delivery for client A. We have facility to charge client B the same ten or lets say the distance is

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10 km and the cost of the job is \$10, we have the facility to charge client B the same 10 km journey but at a discount or at a different base rate at a different kilometre rate. All sorts of different ways of coming up with a different price that almost always they are predominantly distance based so it's just how we then attach a dollar value to that distance. So, I mean, you could even say if you look at a taxi depends on which way the taxi driver goes that trip can take a longer distance and you'll get charged a different price because we can't - we have to quote the clients a fee up front, we have to allow for a certain amount of variables such as going to the furthest point of the suburb or the closest point and get an average sort of distance that is acceptable for charging purposes.

Q. Does the information which arises from that distance grid does that have any relevance to the rates of pay of your drivers.

A. Yes, everything to do with how far our drivers go or goes relates specifically to what sort of money they end up earning. So clearly if one system is say a trip from point A to point B is 10 km and another system says that same trip is 15 km, let's say the true distance is 15 km, our driver will get paid on the basis of the 10 rather than the 15 and it works the other way so the driver may, if the distance grid is inaccurate for any reason, and unfortunately for whatever reason they do seem to be filled with inaccuracies, then the driver will either win or lose on the client they may have. Then if we switch distance grids or even go back to the original book format that there are just so many differences for whatever reasons that it can be very counter productive both from the customer and driver's point of view as to whether they end up getting charged higher or lower rates."

Between 1990 and 1995, the operators of RR had manually entered numerous changes to the raw grid, to "...correct errors..." The floppy disk and the data originally held upon it, could be transferred from the old Carry system into the new Transpac system simply by transferring over the floppy disk. The Transpac system could then access the data which constituted the raw grid. The many changes to the raw grid made between 1990 and 1995 by RR staff could be transposed only if they were re-entered manually in the same way that they had originally been entered. The changes to the raw grid could not automatically

be transferred by a "...push of the button..."

With respect to the transfer of the data in the transit grid, the Magistrate found that by about the end of 1994, and certainly by the time that the

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agreement was entered into by the parties, Brain knew that the only way of transferring the information contained within the grid was to use the procedure adopted when Software assisted another company in Perth, Fasta Couriers. The evidence of Michael Skuba, the managing director of Fasta Couriers, revealed that Software had performed a similar operation for Fasta Couriers in late 1994 or early 1995. It was found that changes to the transit grid needed to be re-entered manually in the same way as they had originally been entered. Mr Skuba achieved this task by hiring two data processors for two weeks.

The Magistrate held that it is was incumbent upon Brain to tell Ryan that a straight transfer was not possible and that it would have to be done manually, which would be quite labour intensive. His Honour found that that this was never done, and that if it had been done it would have materially influenced Ryan's decision as to whether he was going to accept the proposal.

In relation to the flexible rate system and the unlimited billing options, he found that Ryan was ignorant of the problems and that if he had known he would have been apprehensive about committing himself to any contractual arrangement. As to the flexible rate system, the problem was that the Transpac system was inferior to the Carry system in this respect. According to RR's particulars in the Statement of Claim, Transpac was unable to provide the same level of ratings as Carry. For example, a very important rate that RR offered its clients was a discounted rate for a second delivery to the same suburb. As an example, a client located in the city has two envelopes for delivery to separate addresses in the city. The charge applied was \$3.85 for the first delivery and \$2.65 for the second. The Transpac system was not able to accommodate the \$2.65 charge. A further problem was that the Transpac system did not have an unlimited billings option. The Carry system allowed for the setup of multiple accounts with their own individual characteristics, such as, their own special rate table, their own special lists of frequent pick-up and delivery locations, and the ability to charge the transactions to another account. Carry also allowed for unlimited or 'on demand' billing. In effect Carry allowed the user to potentially run a 'live' billing for one client or a virtually unlimited number of clients as frequently as every day if desired.

Brain was also found to have failed to bring to the attention of Ryan that it is was not possible to transfer the client files.

The Magistrate considered that all of these factors were so important to RR that had Ryan been aware of the true state of affairs, Ryan would not have entered into the contract.

He found that there were representations and omissions which improperly influenced Ryan and caused him to enter into the contract.

The Complaint on Appeal

Software complains that the learned Magistrate erred both on matters of fact and law.

Software contends that, leaving aside the issue of the transit grid, the other items cannot justify setting aside the contract for two reasons. First, no representations or warranties were made about them at any time; neither before nor after entry into the contract. Moreover, on Ryan's own evidence, the other four factors referred to by the Magistrate were "irrelevant" (T24 & 147).

There is some force in Software's last submission. However, in my opinion the effect of Ryan's evidence is, not that these other factors were completely irrelevant, but that without the transfer of the data contained in the transit grid the other matters dwindled into insignificance. In other words, as the evidence of Ryan revealed, the transit grid was the "dominant component." Everything came back to the transit grid such was its importance. However, these other factors may be relevant in assessing whether the overall conduct of Software was misleading and deceptive, in its statutory sense.

To say this much is to recognise that the crucial aspect of the case, upon which everything turned, was the acts, omissions, statements or silence of Software, through its agent Brain, in relation to the transit grid. There can be no doubt that Ryan considered this to be an issue of fundamental importance. In the course of evidence Ryan said: "The distance grid forms the total foundation of our system." (T10). The evidence of Michael Skuba, the managing director of Fasta Couriers confirms the importance of the transit grid. He agreed in evidence in chief that the transit grid was "fundamental to the operation of the business."

Brain accepted that the modifications to the transit grid could not be transposed from one software system to the other, otherwise than by a manual process, which history and experience had proven to be quite labour intensive.

Ryan said that he unaware of this problem. Brain was adamant that at no stage did he make any positive representations to Ryan, particularly any representations to the effect that all of the data in the transit grid could be simply transposed.

Counsel for Software stressed that no positive misrepresentation was made in relation to the transit grid, as if to suggest that was a complete and exculpatory answer to the dispute. As will become apparent, in my opinion, this is not so.

Counsel for Software submitted that the Magistrate had completely misunderstood the evidence. He

pointed to the Magistrate's finding that the raw transfer grid could not be transposed from one system to the other except by a manual process. Counsel argued this was an erroneous finding. Ryan and his expert Mitchell had both agreed that the raw transfer grid could be transferred from one system to another. This was a simple matter of extracting and then re-inserting a floppy disk. The manual changes to the raw grid could also be transferred, although only by manual re-entry. The only thing which could not be done was the automatic transfer of the manual changes which had been made to the raw data by RR's operators over the years. These modifications required re-entry.

I agree that the finding in relation to the raw grid was incorrect. However, I am not convinced that as much turns on the point as suggested by counsel for Software. The significant point is that a considerable degree of work was required to transfer the data in the transit grid, as it stood at the time of contract, with all the modifications, amendments and corrections made by RR. Further, and more importantly this fact was never disclosed to RR. I consider that the Magistrate had understood this.

Software accepted the finding of the Magistrate that Ryan was labouring under a mistaken impression. Software argued that at worst it gave RR the impression that the data comprising both the raw grid and the manual changes thereto could be "automatically transferred", whereas in truth, only the data on the original floppy disk could be transferred in this way.

Counsel for Software vigorously argued that any misunderstanding on Ryan's part was the product of Ryan's failure to read Exhibit D3 (the written proposal of May 1994), Exhibit D1 (the quotation) and particularly item 11 of Exhibit P2 (the implementation schedule). Further, Software says that Brain specifically invited Ryan to contact Skuba, so Software submits, the RR should bear the consequences of Ryan's failure to contact Skuba. However, on the last point, the evidence suggests that Ryan did contact Skuba, but Skuba was in a management meeting at the time, thus, little information was obtained from Skuba. In particular, the problem with the transfer of data was not disclosed by Skuba.

My attention was drawn to exhibit D3, the written proposal of May 1994. Under the heading of "Project Plan" the proposal read:

"Roadrunner Couriers will be required to gather and prepare the data on customers, drivers, permanent jobs, services and rates. *This*

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information may be able to be extracted from the computer's existing database." (emphasis added)

It was argued that this was an explicit warning that there may be problems.

However, the main argument of counsel for Software was that it had clearly and unambiguously warned RR that there may be difficulties with the transfer of all of the data contained within the existing transit grid to the new software system. Software pointed to Item 11 of Exhibit P2, the implementation

schedule, which stated that it was the task and responsibility of Brain to "investigate whether existing system suburb distances can be extracted and loaded into Transpac." Furthermore, the point was made that this implementation schedule arose out of discussions between Ryan and Brain when in Sydney.

Software argued that any finding of misleading and deceptive conduct on the basis of silence or non-disclosure could not stand against a clear and expressed statement on the topic. Counsel for Software argued that this was not a case of positive misrepresentation or even silence, it was a case where there had been a clear and express warning which was plainly at variance with any suggestion of misrepresentation by omission. This conclusion was said to be even clearer when juxtaposed against the background of D3, the written proposal.

Applicable Legal Principles

At the outset it is necessary to point out some deficiencies in the decision of the Magistrate. The main deficiency is the imprecision as to the particular legal principle relied upon to reach his conclusion. At one point the Magistrate says:

"I consider that I can accept that there can either be direct representations or conveying of certain half-truths or, as plaintiff's counsel suggested, misrepresentation by silence."

At a later point the Magistrate says that "the lack of information therefore, made the statement misleading or negligent." Presumably the reference to misleading means misleading and deceptive conduct pursuant to 52. However, this is not clear and the Magistrate seems to base his decision on the footing that a duty of care was owed to RR as to the provision of certain information and that this duty was breached. Hence, the Magistrate appears to rest his conclusion in the field of negligent misstatement. It would also appear that it was lack of information, that is silence, as opposed to positive representations that were decisive in arriving at his final conclusion.

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Because of the unsatisfactory nature of the Magistrate's decision in terms of legal principle I propose to examine the issue afresh. Since misleading and deceptive conduct is wider than negligent misrepresentation¹, I propose to deal with that first. For reasons that will become apparent it will then be unnecessary to deal with negligent misrepresentation.

There can no longer be any doubt that silence can constitute misleading and deceptive conduct within the meaning of s52 of the Trade Practices Act 1974. However, silence or non-disclosure, without more, will not amount to misleading and deceptive conduct. Silence and non-disclosure, by themselves, are not misleading and deceptive conduct for at least two reasons.

For one thing, mere silence or non-disclosure cannot cause a person to be misled or deceived. For an

applicant to establish that a contravention of s52 has occurred, it is not sufficient to show that it was laboring under an erroneous belief. The applicant must prove its belief was caused by the defendant's conduct. That requisite causal nexus is necessarily absent in cases of mere silence or non-disclosure.

The second reason is closely allied to the first. In cases of silence the defendant's conduct must fall within the purview of "engaging in conduct" which is the essential threshold hurdle to be cleared for any s52 action. As that expression is defined to include refusing to do an act "otherwise than inadvertently" (s4(2)(a)) it has been interpreted as including an omission to disclose information only where that omission is deliberate, see: *Spedley Securities (in liq) v Bank of New Zealand* (1991) ATPR 41-143 at 35, 065 per Cole J.

It is also pertinent to bear in mind the comments of Gleeson CJ in *Lam v August Investments Australia Pty Ltd* (1990) 97 FLR 458 (at 475):

"When parties are dealing at arm's length in a commercial situation in which they have conflicting interests it will often be the case that one party will be aware of information which, if known to the other would or might cause the other party to take a different negotiating stance. This does not impose an obligation on the first party to bring to the attention of the other party, and failure to do so would not, without more, ordinarily be regarded as dishonesty or sharp practice."

Despite the foregoing comments, it is now beyond question that silence or non-disclosure can be misleading when combined with other factors such as the

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provision of incomplete information, or half-truths, or the failure to correct a representation which has become false. S52 plainly contemplates that misleading and deceptive conduct may be constituted by a factual matrix consisting of silence as well as the paradigm situations concerned with overt activity.

At common law, a failure to correct a representation which has become false may constitute an actionable misrepresentation. Such a failure could also be misleading and deceptive conduct.² A duty of disclosure may also exist where there is the provision of incomplete information or half-truths. An example of the latter situation is *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83. In that case Lockhart J stated the position as follows (at 95):

"At common law, silence can give rise to an actionable misrepresentation where there is a duty upon the representor to reveal if a matter exists, and where the other party is therefore entitled to infer that matter does not exist from the silence of the representor..."

However, the law has moved on from this statement. Contemporary authority approaches the question from the perspective of whether the circumstances are such that they give rise to a reasonable expectation that if a relevant fact exists, it will be disclosed. The notion of a reasonable expectation, which is

becoming common in modern jurisprudence,³ was employed in this context by French J in *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) ATPR 46-054 (at 53,195):

"...unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist."

This test has subsequently been endorsed by a decision of the Full Court of the Federal Court. In *Demagogue Pty Ltd v Ramensky* (1993) 110 ALR 608 the circumstances in which silence may amount to conduct in contravention of s52 were the subject of exhaustive analysis by Gummow J, with whose reasoning Black CJ and Cooper J agreed. His Honour identified the proper approach to be taken in determining the issue of liability, when silence on the part of the respondent's conduct is central to the applicant's case, in the following way (at 618):

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"But consistently with regard to the natural meaning of the terms of s52, the question is whether in the light of all the relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive. Conduct answering that description may not always involve misrepresentation."

In addition to expressing his agreement with Gummow J, the Chief Justice observed (at 609-610):

"Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of "mere silence" or a duty of disclosure can divert attention from the primary question. Although "mere silence" is a convenient way of describing some fact situations, there is in truth no such thing as "mere silence" because the significance of silence falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed."

The decision in *Demagogue* was followed in *Warner v Elders Rural Finance Ltd* (1992) 113 ALR 517 where Hill J made it clear that whilst analogies can be drawn to duties to speak at common law, silence for the purposes of s52 is dealt with as a question of statutory construction. In determining whether silence falls within the four corners of s52, the term 'misleading and deceptive conduct' may be enlivened by, but not constrained by, consideration of those circumstances where there is a duty of disclosure in the general law, see: *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) ATPR (Digest) 46-054 at 53, 195 per French J⁴. Thus, assistance may be gained from consideration of cases at common law and in equity dealing with related types of situations, but the reach of s52 is not confined by such cases because s52 is concerned with the interpretation and application of the words of a particular statute.⁵ Hence, s52 is, in some cases, wider than the common law. As Hill J explained (at 522-523):

"Of course, where a duty to speak is imposed by the general law, the circumstances will obviously be such that the person to whom the duty is owed will be entitled to infer from the silence that no danger or

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detriment exists. Failure to speak will thus easily be seen to constitute misleading and deceptive conduct. The converse is clearly not true. The fact that no duty to speak is imposed by the general law will not conclude the inquiry whether that failure to speak is to be characterised as conduct which is misleading or deceptive."⁶

Analysis of the authorities leads me to the conclusion that the appropriate inquiry in this case is whether the conduct of Software, considered as a whole, was misleading and deceptive. In answering this question Software's silence will be misleading and deceptive if, objectively assessed, a person in Ryan's position, would be entitled to expect or infer, (has a reasonable expectation), that Brain would disclose the fact that transfer of the data entered on the transit grid involved a substantial amount of manual work and substantial cost.

Application of the Principles

A reasonable expectation does not exist in the abstract. It exists because the factual matrix is such as to generate in the mind of the law's reasonable person an inference that, in the absence of some positive statement to the contrary, a particular state of affairs may be assumed as the true state of affairs. The critical issue is thus whether the factual context of Brain's silence gave rise to a reasonable inference or expectation that if the transfer of the data involved substantial cost, that would be disclosed by Brain to Ryan. In my opinion it did for the following reasons.

First, the subject matter of the contract was the purchase of a computer software program. As counsel for RR pointed out, computer software is intellectual property which a person without some instruction could not understand. Thus, it is a commodity significantly different from commodities which are the subject of daily trade and commerce. The Magistrate found that Ryan did not possess knowledge about the programme of the degree and extent possessed by Brain. Further, Ryan relied upon Brain for expert guidance, which Brain knew or at the least ought to have known, in relation to the replacement of the Carry system by the Transpac system. At the time of the contract Brain knew that the only way of transferring the data from the transit grid to the new system was to use the manual procedure employed when Software assisted Fasta Couriers.

So this was a situation where Brain was a specialist with superior information dealing with a client with no sophisticated knowledge of the

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subject matter, on an issue both parties knew was of importance to the effective operation of RR and the agreement in general. Further, Brain knew or ought to have known that Ryan was relying on his expertise and advice in this field. In these circumstances, the onus was on Brain to make it clear to

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Ryan that in acquiring the software there was a significant manual task to be performed.

In all the previous proposals through to the proposal that was finally accepted there were statements by Software that "it is assumed your existing transit suburb grid will be used for suburb to suburb distances." The evidence of Ryan revealed that this was of considerable significance to him. This statement undoubtedly contributed to an erroneous impression in Ryan's mind that all of the data in the transit grid could be transposed easily to the new software system.

The evidence was that Ryan interpreted this as being an assurance that the transit grid was capable of being transferred between the two systems. Ryan did acknowledge the difference between the word "assured" and "assumed". Software argued that Ryan had in effect substituted the word "assumed" for the word "assured", and that if there was any confusion arising from this, Software could not bear legal responsibility for confusion flowing from Ryan's misreading of previous proposals. In short, any confusion was Ryan's fault. It is probably correct to say that Ryan did misread the previous proposals, although the Magistrate found that broadly speaking the word "assumed" was consistent with Ryan's interpretation of it. It seems to me that it is arguable that a reasonable purchaser in Ryan's position could have interpreted the word "assumed" in the previous proposals as meaning that Software was able to transfer the data in the transit grid (including manual adjustments) across to the new software system. However, in my opinion it does not really matter. The crucial point is that once Brain, as the specialist armed with superior information, became aware that the assumption in the previous proposals was incorrect, it was incumbent on him to inform Ryan of the true state of affairs.

In these circumstances Ryan was entitled to conclude that any significant matter affecting the transfer of the data from the transit grid would, if it existed, be communicated and Brain's failure to so communicate was, in my opinion, misleading and deceptive because Ryan was entitled to infer from Brain's silence that no significant problem existed. It is also no answer to say that Ryan should have made his own inquiries and that, if he had done so, he would have found out the true position. (see Henjo (1988) 79 ALR 83 at 95 per Lockhart J). This turns the onus of disclosure on its head. It is true that Brain told Ryan to contact Mr Skuba, but this does not negate or discharge the onus imposed by the law on Software under the circumstances to disclose the true state of affairs. Brain, being the specialist, the onus was him to make it clear to Ryan that in acquiring the software from Software Integrators, there was a large manual task to be performed.

Having concluded that there was a reasonable expectation of disclosure the question is whether Item 11 of Exhibit P2, the implementation schedule, sufficiently discharged this requirement of disclosure. In my opinion it did not. I do not consider that this statement would convey to the reasonable purchaser in the

position of Ryan that there was a significant manual task to be done. The required disclosure needs to be clear and unambiguous. In my opinion Item 11 of P2 was not. The Magistrate found that the difficulty was "never mentioned" to Ryan. There was obviously no attempt to ensure that he was aware of it. Item 11 itself was, in truth, misleading. Brain knew that the data could not be transposed, other than manually. Software submitted that if Ryan was confused, that was his own fault. Once again this misplaces the onus of disclosure. Once it has been established that there existed in the factual circumstances a reasonable expectation of disclosure, that expectation can only be satisfied by a clear and unambiguous statement on the topic. To put it simply, what Brain ought to have told Ryan was that based on his experience a significant manual task would be required by Roadrunner to transfer any modifications it had made to the transit grid to the new system. Brain's failure to do this resulted in the conduct of Software being misleading and deceptive, that is, conduct which had the capacity to (and did) lead Ryan into error.⁷

In light of these conclusions it is not strictly necessary to deal with the other alleged deficiencies that the Magistrate identified in the conduct of Software, other than to say that the fact that these other problems with Transpac were not mentioned, reinforces the conclusion that Software's conduct was misleading and deceptive in the circumstances. This is all the more so when one considers that there were also representations by Brain to Ryan that the Transpac system was better than the Carry system. Ryan was entitled to assume from this that if the Transpac system was defective in any area of importance to the smooth operation of the business, this would be divulged to him clearly and unambiguously. Brain's failure to do this bolsters the conclusion that he kept disclosure of important information to a minimum. Thus, whilst considered alone these additional factors were probably not decisive, in combination they reinforce the conclusion that Brain did not provide Ryan with information on matters of importance to the contract.

The Appropriate Relief

S87 (2) empowers the court, in appropriate circumstances, to declare the whole of or any part of a contract void ab initio. It is clear that in deciding whether or not to exercise its discretion under s87(2) to set aside a

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contract, the court is not constrained (though it may have regard to) the limitations arising under the general law on the right to rescind for misrepresentation: *Henjo supra* at 103 per Lockhart J.⁸ The object of rescission is to put the parties back into the position that they occupied before the contract was made. Consequently, if rescission is to operate, it must be possible to restore the parties to substantially the same position they occupied before the contract. Orders for rescission under s87 are discretionary and, although it is not necessary that the status quo ante be precisely restored, practical justice should be done between the parties. Normal limitations on rescission include factors such as a substantial alteration to the subject matter of the contract, material changes in the positions of the parties, the conduct of the parties after they had knowledge of the misleading and deceptive conduct, length of time that has elapsed since the agreement, and the nature and extent of any delay in prosecution by the innocent part (see

Henjo supra at 100-104). This is not intended to constitute an exhaustive list. The ultimate inquiry is always whether rescission is appropriate in light of all the relevant circumstances. After considering the above factors and the circumstances in general I consider, as did the Magistrate, that rescission is appropriate in this case. I can find no basis upon which to disturb what seems an appropriate order in the circumstances.

Since the other orders of the Magistrate, namely, an award of \$1040.87 to Ryan for a wasted trip to Sydney were not contested before the Magistrate I see no reason to interfere with that order.

Footnotes

[1](#) See PH Clarke, "The Hegemony of Misleading and Deceptive Conduct in Contract, Tort or Restitution" (1989) 5 Aust Bar Rev 109

[2](#) With v O'Flanagan [1936] Ch 575

[3](#) See Finn & Smith, "The Citizen, the Government and 'Reasonable Expectations'" (1992) 66 ALJ 139

[4](#) See the extra judicial remarks of Justice French, "The Law of Torts and PtV of the Trade Practices Act" in Finn ed, The Law of Torts, 1989, p186-p187

[5](#) Rhone-Poulenc Agrochemie SA v UIM Chemical Services Ltd (1986) 68 ALR 77 at 84-85 per Bowen CJ. See also Robertson, "The Circumstances in Which Silence can Constitute Misleading and Deceptive Conduct" (1991) Qld Law Soc Jnl 21 at 22.

[6](#) See also the remarks of Samuels JA in Commonwealth Bank of Australia v Mehta (1991) 23 NSWLR 84 at 88 where he said: "Silence is not misleading only where there is a duty of disclosure at common law or in equity. It may simply be the element in all the circumstances of a case which renders the conduct in question misleading or deceptive."

[7](#) Weitman v Katies Ltd (1977) ATPR 40-041

[8](#) See also Skapiner & Carter, "Breach of Contract and Misleading and Deceptive Conduct in Australia" (1997) 113 LQR 294 at 295 where the authors in discussing orders pursuant to s87 remark: "Because the jurisdiction is both statutory and discretionary, it is not regulated by the law of contract. Nor is it regulated by doctrines which, although not themselves contractual, often operate in the contractual context. The principles regulating election between rights, principles of estoppel, the concept of restitutio integrum and so on, are simply not applicable unless a court, in the exercise of its discretion, chooses to apply them by analogy."

Order

The appeal should be dismissed.

Counsel for the appellant: Mr M Hoile

Solicitors for the appellant: Kelly & Co

Counsel for the respondent: Mr G Britton

Solicitors for the respondent: Townsends

END OF JUDGMENT