IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S CI 2013 01707

WTE CO-GENERATION PTY LTD (ACN 142 284 820) — First Plaintiff
VISY ENERGY PTY LTD (ACN 115 133 321) — Second Plaintiff

v

RCR ENERGY PTY LTD (ACN 080 753 680) — First Defendant
RCR TOMLINSON PTY LTD (ACN 008 898 486) — Second Defendant

And Between

RCR ENERGY PTY LTD (ACN 080 753 680) — Plaintiff by Counterclaim

v

WTE CO-GENERATION PTY LTD (ACN 142 284 820) — First Defendant by Counterclaim
VISY PAPER PTY LTD (ACN 005 803 234) — Second Defendant by Counterclaim

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JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	17 OCTOBER 2016
DATE OF JUDGMENT:	10 NOVEMBER 2016
CASE MAY BE CITED AS:	WTE CO-GENERATION v RCR (No 3)
MEDIUM NEUTRAL CITATION:	[2016] VSC 674

PRACTICE AND PROCEDURE — Summary judgment sought by defendants under ss 62 and 63 of the *Civil Procedure Act 2010* (Vic) — Not established that the claim has no real prospect of success — Application for summary judgment dismissed.

CONTRACT — Whether terms of a construction and engineering contract, relating to performance of an engineering plant once completed, capable of giving rise to misleading or deceptive conduct if breach of s 52 of the *Trade Practices Act 1974* (Cth) or s 18 of the Australian Consumer Law — Not established that the claim has no real prospect of success — Observations on the risk inherent in construction and engineering projects and the role of a contract in allocation of risk — Need to construe any actionable representations in the context of the contract read as a whole.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr C M Scerri QC with Mr M Whitten SC	Arnold Bloch Leibler
For the Defendant	Mr B Walker SC with Ms K L Stynes	Corrs Chambers Westgarth

HIS HONOUR:

1 By summons dated 6 September 2016, the Defendants seek an order that parts of the Plaintiffs' claim pleaded in its Further Amended Statement of Claim (the 'FASOC') be dismissed, and summary judgment given under ss 62 and 63 of the *Civil Procedure Act 2010* (Vic) (the 'CPA') on the ground that the claim has no real prospect of success.

2 The Plaintiffs ('WTE' and 'Visy Energy') allege that the Defendants (RCR Energy and RCR Tomlinson, together called 'RCR') engaged in misleading or deceptive conduct in contravention of s 52 of the *Trade Practices Act 1974* (Cth) (the 'TPA') or s 18 of the Australian Consumer Law[1] (the 'ACL'). The impugned conduct (referred to as the 'TPA/ACL Claim') is the making of contractual promises in a contract between the First Defendant, RCR Energy, and the Second Defendant by Counterclaim ('Visy Paper') ('Visy Energy' and 'Visy Paper' together called 'Visy').

3 The TPA/ACL Claim is set out in paragraphs [10]–[17A], [20] and [36]–[38] of the FASOC.

Background

4 The following background facts are accepted for the purposes of this application.

5 The proceeding relates to a dispute arising from the construction of a cogeneration plant in the Melbourne suburb of Coolaroo (the 'Plant'). The purpose of the Plant was to combust non-recyclable waste materials from paper mills — which were operated by Visy — to produce both steam and electricity for use at the paper mills at Coolaroo and to significantly reduce landfill. A suitable contractor was sought to deliver the Plant on a design and construct basis from design through to installation and commissioning.

6 On 15 October 2008, RCR Energy, as contractor, entered into the Coolaroo Cogeneration Plant Boiler Contract (the 'Contract') with Visy Paper. Pursuant to the Contract, RCR Energy was required to design, construct and commission the

1 *Competition and Consumer Act 2010* (Cth) Sch 2.

cogeneration Plant in Coolaroo to burn fuel supplied by Visy Paper and achieve certain performance standards.

7 On 6 September 2010, Visy Paper, RCR Energy and WTE, the First Plaintiff, entered into a deed of novation (the 'Deed of Novation') to assign the rights and obligations of Visy Paper under the Contract to WTE.

8 Thus Visy Paper was the original principal in the Contract. The Contract was later novated to WTE. Visy Energy is not, nor was it ever, a party to the Contract.

9 Solid fuel was first supplied to the Plant in the 3rd quarter of 2011.[2] Visy Paper (and subsequently WTE, following novation) was responsible for the supply of fuel to the Plant. The Plant failed to achieve a 3 week period of continuous operation which was required to attain practical completion.

10 Towards the end of 2011:

(a) the parties exchanged show cause notices and responses; and

(b) WTE purported to take over the works on the basis that RCR had failed to show cause.

11 In March 2013:

(a) WTE issued a further show cause notice in relation to RCR's materials and standard of work; and

(b) RCR issued a notice of dispute.

12 On 5 April 2013, WTE issued to RCR a letter purporting to terminate the Contract under cl 39.4(b).

13 On 11 April 2013, RCR responded to WTE's termination letter. RCR said it accepted WTE's repudiation of the Contract (constituted by its purported termination of the Contract) and rescinded the Contract.

14 On 8 April 2013, WTE and Visy Energy commenced these proceedings.

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2 The precise date is, however, a matter of dispute.

Pleading of the TPA/ACL Claim

15 The Plaintiffs' claim against the Defendants can be separated into two parts.

(a) The first part is WTE's claim for rectifications costs of $18,102,940 and liquidated damages of $995,674. WTE's claim is made pursuant to terms of the Contract;

(b) The second part of the Plaintiffs' claim — and the subject of the present application — comprises WTE and Visy Energy's TPA/ACL Claim. The TPA/ACL Claim is based on the terms and conditions of the Contract, which are alleged to constitute actionable misrepresentations.

16 The TPA/ACL Claim essentially alleges in the FASOC in paragraphs [10] and [10A] that the Defendants made representations regarding:

(a) the plant's future performance characteristics;

(b) RCR Energy's qualifications and experience; and

(c) the suitability of RCR Energy's proposal for the works under the Contract (to ensure the works would achieve the performance guarantees);

17 Paragraphs [10] and [10A] are pleaded as follows:

> **Representations**
>
> 10 In the Contract, RCR [RCR Energy] and Tomlinson [RCR Tomlinson] [together RCR] represented to Visy Paper and Visy Energy that the Plant would have certain performance characteristics, namely that it would:
>
> (a) have a 100% MCR of, and be capable of producing, 39,600kg of steam per hour; and
>
> (b) be capable of achieving its 100% MCR (that is, of producing 39,600kg of steam per hour) using fuel comprising 9,350kg/hr of PMR and material recovery facility residue (Operating Condition 1); and
>
> (c) be capable of achieving its 100% MCR (that is, of producing 39,600kg of steam per hour) using fuel comprising 9,350kg/hr of PMR and demolition wood residue (Operating Condition 2); and

(d) be capable of achieving its 100% MCR (that is, of producing 39,600kg of steam per hour) using fuel comprising 14,303kg/hr of PMR (Operating Condition 3); and

(e) be complete and capable of:

(i) achieving 100% MCR (that is, of producing up to 39,600kg of steam per hour); and

(ii) satisfying Operating Condition 1; and

(iii) satisfying Operating Condition 2; and

(iv) satisfying Operating Condition 3,

by the date for practical completion,

(the **Representations**)

Particulars

The Plaintiffs rely upon the whole of the Contract and, in particular, upon:

(a) the Technical Schedule which forms Annexure Part H of the Contract;

(b) the Proposal which forms Annexure Part I of the Contract; and

(c) the Performance Guarantees which forms Annexure Part K of the Contract.

Further particulars may be provided prior to trial.

10A Further, in the Contract, RCR and Tomlinson represented to Visy Paper and Visy Energy that RCR:

(a) was suitably qualified and experienced, and would exercise due skill, care and diligence in the carrying out and completion of the works (General Condition 2.2(a)(i)); and

(b) had prepared the Proposal (as defined) so that the works under the Contract, performed in accordance with the Proposal, would enable the works to meet and continue to meet the Performance Guarantees on and from achievement of practical completion (General Condition 2.2(a)(iii)).

(the **Further Representations**).

18 It is to be noted that the sole source of the Representations and Further Representations is said to be the Contract. The prefatory words in paragraphs [10] and [10A] provide that the alleged representations were made 'in the Contract'.

19 At paragraph [12], the plaintiffs allege that Visy Paper 'was acting for and on behalf of Visy Energy in relation to the conduct of Visy Paper that is alleged'. No particulars of this agency have to date been provided.

20 The alleged falsity of the Representations and the Further Representations is pleaded in paragraphs [17] and [17A] respectively as follows:

> 17 Further to paragraph 10 above, the Representations were false in that the Plant:
>
> (a) was not, and is not capable of producing, 39,600 kg of steam per hour and satisfying each of Operating Condition 1, Operating Condition 2 and Operating Condition 3; and
>
> (b) was not complete by the date for practical completion, and is not complete.
>
> 17A Further to paragraph 10A above, the Further Representations were false in that RCR:
>
> (a) was not suitably qualified and experienced; and
>
> (b) had not yet prepared the Proposal (as defined) so that the works under the Contract, performed in accordance with the Proposal, would enable the works to meet and continue to meet the Performance Guarantees on and from achievement of practical completion.

21 At paragraph [20], the Plaintiffs allege that in reliance on the alleged misrepresentations:

(a) Visy Paper entered into the Contract dated 15 October 2008;

(b) WTE entered into the Deed of Novation dated 6 September 2010 and Deed of Sub-sublease and a Chattel Lease dated 30 June 2010; and

(c) Visy Energy entered into the Chattel Lease and the Take and Pay Agreement dated 30 June 2010 – which was an agreement between Visy Energy, Visy Industries Australia and Westpac.

22 At paragraph [36], the alleged representations are said to be misleading or deceptive in breach of s 52 of the TPA (and/or s 18 of the ACL). The Plaintiffs contend that the representations in paragraph [10] (but not [10A]) are representations as to future

matters and rely (solely) on the deeming provision s 51A of the TPA (and/or s 4 of the ACL).

23 At paragraph [37], WTE (which is a party to the Contract) alleges it has suffered loss and damage by reason of the alleged conduct comprising the cost of completing construction of and rectification work to the Plant less any additional cost it may have incurred under an alternative contract.

24 At paragraph [38], Visy Energy (which is not a party to the Contract) alleges that it has also suffered loss and damage by entry into a take and pay agreement (the 'Take and Pay Agreement'). In summary, Visy Energy says that in reliance on contractual warranties given by RCR Energy to Visy Paper (in the 2008 Contract between RCR Energy and Visy Paper):

(a) it entered into the Take and Pay Agreement with Visy Industries Australia and Westpac (on 30 June 2010); and

(b) it has suffered loss of income of approximately $24.7 million pursuant to the Take and Pay Agreement.

25 A may be seen, the representations said to constitute misleading or deceptive conduct in breach of the TPA/ACL are alleged to be contained entirely within the terms of the Contract.

Defendants' contentions

26 By way of summary, the Defendants originally advanced the following contentions in their written submissions:

(a) First, RCR did not make representations in the form pleaded by the Plaintiffs. No relevant representations were made in addition to, or different from, the contractual promises;

(b) Second, entering into a contract — containing contractual promises — constitutes assent to, and intention to be bound by, the terms agreed and nothing more;

(c) Third, if the contractual promises are unfulfilled or false, then the promisee's remedy lies within the relevant contract which establishes the agreed liability regime;

(d) Fourth, a contractual warranty cannot amount to a misrepresentation which is actionable under the TPA/ACL; and

(e) Fifth, if this was the law, it would have the effect of constraining or avoiding the contractual limitations on liability contained in the Contract itself (for example, in this case, by the contractual limitation contained in Special Condition 21 of the Contract).

27 The Defendants' position was said in their written submissions to respect the sanctity of contract and would avoid what was alleged to be the 'perverse' outcome where every promise contained in a contract also constitutes a representation under the TPA/ACL. If this was the case, then 'carefully drawn agreements by sophisticated (and often expensively-advised) parties would be rendered ineffectual'.

28 On the basis that the TPA/ACL Claim was alleged to have no real prospect of success and, in order to:

(a) avoid the parties needlessly incurring costs associated with the TPA/ACL Claim (in circumstances where a contractual remedy is clearly appropriate and available); and

(b) provide certainty to contracting parties together with their advisors and insurers,

it was submitted that the TPA/ACL Claim should be dismissed.

29 During the course of oral argument the Defendants appeared to refine the position adopted in their written submissions. In essence it was contended at the hearing of the summons that:

(a) the case should be characterised as one where the conduct claimed to be misleading or deceptive in contravention of the statutory provisions comprise contractual promises which were made but not fulfilled or performed; and

(b) the authorities do not support the position that this can amount to conduct which is misleading or deceptive in contravention of the statutory provisions. As was said by Senior Counsel for the Defendants: '… there is no authority which deals with the stark case of supposed misleading or deceptive conduct by [a] supposed representation conveyed by a contractual promise falsified by the promise not being fulfilled'.

30 While the Defendants accepted that there can be cases where statements made in a contract are capable of constituting misleading or deceptive conduct within the meaning of the relevant legislative provisions, it was contended that this could not apply to the situation where, as here, the falsification of the representation relied upon to establish the impugned conduct is the breach of the very contractual term relied upon to constitute the conduct. In this circumstance, it was submitted, there can be no misleading conduct in breach of the statutory provisions. There is a breach of contract for which there is a remedy provided in law.

Plaintiffs' submissions

31 The Plaintiffs contend that the application should be refused for the following reasons:

(a) the law on the area is sufficiently settled to demonstrate that the Defendants' contentions are unsupported by, or are inconsistent with higher, binding authority;

(b) on the current state of the law, properly considered, the Plaintiffs' TPA/ACL Claim has real prospects of success;

(c) alternatively, if the asserted 'absence of uniform authority' argument be accepted, such that the law is unsettled, it should not be decided by summary judgment;

(d) even if s 63 of the CPA is satisfied (which the Plaintiffs deny), the discretion in s 64 ought to be exercised to refuse summary judgment.

32 The Plaintiffs maintained that the represented performance of the Plant and the Defendants' professed expertise and capacity to complete the project (such that the represented performance would be achieved) were 'the critical integers for the entry into these agreements'.

33 Further, the Plaintiffs allege, as pleaded at paragraph [14] of the FASOC, that at no time did the Defendants withdraw or qualify any of the representations said to comprise the contravening conduct under the TPA/ACL Claim.

The authorities

34 In the High Court decision of *Campbell v Backoffice Investments Pty Ltd*,[3] French CJ observed the following in relation to contractual statements claimed to constitute misleading or deceptive conduct:[4]

> The term "conduct which is misleading or deceptive or likely to mislead or deceive" is apt to cover a large variety of possible circumstances in which the conduct of one has a tendency to lead another into error. There is no reason in principle why the fact that a false statement is contained in a contractual document thereby takes the use of that statement in the document out of the scope of "misleading or deceptive conduct". Whether the proffering of a contractual document containing a false statement amounts to a misrepresentation or to misleading or deceptive conduct, is a matter of fact to be determined by reference to all the circumstances. The circumstance that such a representation is the subject of a contractual warranty does not, as a matter of law, exclude the making of it from the purview of the statutory prohibition. This is consistent with the observation by Lockhart and Gummow JJ in *Accounting Systems 2000 (Developments) Pty Ltd v CCH*

3 (2009) 238 CLR 304.
4 Ibid 322 [35]–[36].

> *Australia Ltd*: "the making of a statement as to a presently existing state of affairs, if false, may be the engaging in misleading or deceptive conduct, where the statement is embodied as a provision of a contract".
>
> The question whether the giving of a warranty about the accuracy of a statement of present fact or a forecast of performance is misleading or deceptive raises slightly different considerations. The giving of a warranty embodying a false statement of present fact may be characterised as misleading or deceptive conduct simply because it involves the making of that false statement. A warranty as to a forecast of performance may fall within the category of, or involve the making of, a statement as to a future matter. Such a statement can be characterised as misleading or deceptive or likely to mislead or deceive according to whether there were reasonable grounds for making it or whether any other implied representations which it conveyed were true.

35 His Honour added:[5]

> … it is not an answer to a plea of misleading or deceptive conduct based on misrepresentation to assert that the misrepresentation is contained in a contractual document.

36 Although the Defendants sought to distance the present case from these observations, in part on the basis that the relevant observations of the Chief Justice were *obiter dicta*, in my opinion they are of sufficient weight to dispose of this application for summary judgment. They are supported by both earlier authority and academic writing,[6] and have been cited with approval in subsequent cases.[7]

37 In an early decision on this issue, *Futuretronics International Pty Ltd v Gadzhis* ('*Futuretronics*'), Ormiston J of this Court said:[8]

> ... It is hard to believe that normally any promisee with ordinary contractual rights would then describe himself as having been deceived or misled. It is only when it becomes apparent that the promise cannot be enforced, because, for example, it is either unenforceable or the promisee's rights are valueless or diminished, that one may return to the original promise to inquire whether that promise was of so little substance that it can be concluded that the

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5 Ibid 324–325 [42].

6 See: Derek Neve 'Concurrent Liability for Breach of Contract and Breach of section 52' (2005) 33 *Australian Business Law Review* 249, 269: '*Unisys Australia Ltd v RACV Insurance Pty Ltd* [2004] VSCA 81 … is one of the first substantial, litigated contract disputes in which the plaintiff has mounted parallel s 52 and contract claims (in the sense used in this article). It strongly suggests that "the natural scepticism of Australian practitioners" may be a thing of the past. And if not already a thing of the past, it probably soon will be. The case is likely to encourage all future plaintiffs in breach of contract cases to mount parallel s 52 claims as well'.

7 *Lane Cove Council v Michael Davies & Associates* [2012] NSWSC 727 [44] (Sackar J); *Manning Motel Pty Ltd v DH MB Pty Ltd* [2013] NSWSC 1582 [16] (Lindsay J).

8 [1992] 2 VR 217, 239, 240–241.

> promisee was indeed misled or deceived in the first place, at the time of his acceptance of the promise. Thus it may then be seen that the promisor originally had no intention to perform his promise or that he originally had no capacity or ability to perform it. ...
>
> … It would seem on the authorities that, at the least, a contractual promise would amount to an implied representation that the promisor then had an intention to carry out that promise. If it can be shown that he had no such intention, he would be guilty of misleading or deceptive conduct. Likewise it would seem that such a representation connotes a present ability to fulfil that promise which, if shown to be untrue at the time of making, would likewise characterise the implied representation as misleading or deceptive.
>
> ... I am not persuaded that one should treat every contractual promise as giving rise to an implied representation of the kind referred to in ... s 51A ... However, I am persuaded that if there be an unconditional promise which forms part of the contractual obligations, then it is proper to treat the giving of that promise, at least in the ordinary case, as the making of a representation as to a future matter, being either the doing of an act or the "refusing" (*sic*) to do an act, being in each case the subject of the promise. Perhaps conditional promises may also be treated as the making of a representation as to future conduct, but in each case the qualified terms of the promise would usually lead to the conclusion that the maker had reasonable grounds therefor, unless it could be shown that under no circumstances would the promisor have fulfilled his promise. ...

38 In *Effem Foods v Lake Cumbeline*,[9] the High Court[10] considered the question of whether or not contractual provisions may constitute misleading conduct towards persons not party to the contract. In that case, misleading and fraudulent representations were alleged to have been included in provisions in a contract for the supply of fish, which representations were made to third party investors in the seafood catching and processing business (TIA). The majority explained:[11]

> … for a party in the position of the appellant to enter into a genuine and binding commercial agreement such as W17299, even coupled with an awareness that the contract would be shown to people considering making an investment in TIA, does not involve making representations to potential investors, either in or about the contract. It might be easier to reach a different conclusion if one had decided that the contract was a sham. However, once it is concluded that the contract was genuine and binding (as was accepted in the Full Court), then a conclusion that the appellant was making some kind of a representation to third parties as to its own attitude towards performance of the contract, or as to the other party's capacity to perform it, would require the existence of very unusual commercial circumstances.

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9 161 ALR 599, 606 [34].

10 Gleeson CJ, Gaudron, Kirby and Hayne JJ (Callinan J agreeing).

11 *Effem Foods v Lake Cumberline* 161 ALR 599, 606 [34].

39 On the other hand, a degree of caution was expressed by Mason P in *Concrete Constructions Group v Litevale Pty Ltd*,[12] where it was held that mere failure to keep a promise is not in itself misleading or deceptive conduct. As his Honour observed:[13]

> I readily accept that it will be comparatively easy to establish that a contracting party is implicitly representing a present intention to perform it according to its tenor. If the other party can establish causation and loss then damages should ensue, although there is usually little point in addressing such a claim because the law of contract will compensate the innocent party for the consequences of non-performance without even having to prove misleading intent from the inception.
>
> But when one turns to an alleged implicit representation as to capacity to perform things are not so simple, nor should they be. There are policy reasons for restraint. The law arms the parties to a contract with rights to damages and other forms of relief if breach occurs or is threatened. A complex set of common law, equitable and statutory rights are superimposed on the terms of the bargain chosen by the parties. That bargain may have the simplicity as a contract to sell a loaf of bread or the complexity of a building agreement such as the one in question in this case.
>
> Why should the parties be found or presumed to have intended more by what they expressly represented and understood? Of course, s 52 goes beyond intentionally misleading or deceptive conduct, but it does not follow that the innocent party understood or relied upon anything more than the express representations and the usually adequate consequences stemming from breach of them stemming from the law touching the mutually chosen regime, that is, contract.

40 A similar approach was also expressed by Allsop J (as he then was) when his Honour said in *McGrath v Australian Naturalcare Products Pty Ltd*:[14]

> I do not see this representation as arising out of the precise formulation of an express or implied term of the Manufacturing Agreement. Rather, I see it as arising out of all the circumstances of the case and the legitimate expectations of honest commercial people in all the circumstances and upon the entry by Pan into the Manufacturing Agreement on 3 April 2002.
>
> I do not think that the comments of the majority of the High Court in *Effem Foods Pty Ltd (t/as Uncle Ben's of Australia) v Lake Cumberline Pty Ltd* (1999) 161 ALR 599 at [34] or of Tamberlin J at first instance assist. The representation there asserted, arising from the entry into the contract, was quite different. Nothing said in *Futuretronics International Pty Ltd v Gadzhis* [1992] VicRp 63; [1992] 2 VR 217, 233-241; *Wright v TNT Management Australia Pty Ltd (t/as Comet Overnight Transport)* (1989) 15 NSWLR 679; *Wheeler Grace & Pierucci Pty Ltd v Wright* [1989] FCA 127; (1989) 16 IPR 189; or *Adelaide Petroleum NL v Poseidon Ltd* [1988] ATPR 49,695 (40-901) requires any different conclusion.

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12 [2002] NSWSC 670; (2002) 170 FLR 290.
13 Ibid 348 [167]–[169].
14 [2008] FCAFC 2; (2008) 165 FCR 230, 265 [137]–[138].

> Without setting any artificial constraints on the operation of ss 51A and 52 and the balance of Div 1 of Pt V, it is appropriate to say that the divining of representations from the making of contractual promises and the entry into contracts is a task to be approached with caution and with an eye to all the facts and not by reference to implying representations mechanistically from equivalent promises: see *Concrete Constructions Group v Litevale Pty Ltd* [2002] NSWSC 670; (2002) 170 FLR 290 at [156]-[168] (Mason P). That said, I agree with the primary judge that in all the circumstances here, the entry into the Manufacturing Agreement represented to ANP the matters in the QAR.

41 It is further to be observed that a reference to 'engaging in conduct' for the purposes of the TPA/ACL is defined to include 'the making of, or the giving effect to a provision of, a contract or arrangement'.[15] Having noted this provision, it needs to be emphasised that the conduct alleged in the present case is not expressly pleaded as the making of relevant provisions. However, it is difficult to see how the conduct alleged could be anything other than the 'making' of provisions in the Contract which are said to give rise to contravening conduct.

42 In *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* ('*Accounting Systems 2000*'), the majority (Lockhart and Gummow JJ) held:[16]

> [I]n a case such as the present, standing to seek remedies under Pt VI [of the *Trade Practices Act 1974* (Cth)], such as those provided for in ss 82 and 87, is not limited to parties in contractual relations with the party which contravened s 52: see, with particular reference to s 82, *Janssen Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 109 ALR 638. It is no objection to relief under these provisions that the misleading conduct is found in the making of a contractual provision, and the complainant does not have contractual privity with the defendant. …

43 This passage received recent endorsement from Edelman J in *Australian Competition and Consumer Commission v Valve Corporation (No 3)*, his Honour adding:[17]

> Since "engaging in conduct" includes the "the making of, or the giving effect to a provision of, a contract or arrangement", representations contained within a contract are capable of being misleading or deceptive conduct … Indeed, a contractual provision can constitute misleading conduct even towards persons who are not party to the contract. …

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15 *Competition and Consumer Act 2010* (Cth) sch 2 s 2(2)(a).

16 (1993) 114 ALR 355; (1993) 42 FCR 470, 506.

17 [2016] FCA 196 [222].

Conclusion

44 Whether particular conduct is misleading or deceptive is a question of fact to be determined in the context of the evidence to be adduced at trial, including the relevant surrounding facts and circumstances.[18] In *Butcher v Lachlan Elder Realty Pty Ltd* McHugh J remarked:[19]

> The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention has occurred the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself.

45 In the present application, the Plaintiffs are limited to the four walls of their pleaded case. This case relies upon, and is confined to, the text of the contractual provisions pleaded as giving rise to the representations relied upon. The Plaintiffs also rely upon the same facts said to occasion the breach of those terms as also giving rise to the alleged falsity of the representations pleaded.

46 Future matters are pleaded by the Plaintiffs in the FASOC. By paragraph [15] of the FASOC the Plaintiffs allege that the Representations (but not the Further Representations[20]) were representations as to future matters within the meaning of s 51A of the TPA and s 4 of the ACL.

47 Further, by paragraph [16] of the FASOC, the Plaintiffs plead that they rely s 51A of the TPA and s 4 of the ACL. In the light of paragraph [15] of the FASOC, the work paragraph [16] is intended to perform in the structure of the pleading appears to relate back to, and apply, paragraph [10A(b)] of the FASOC relating to certain aspects of the Further Representations.

48 Either way, future matters are pleaded with the result that s 4 of the ACL and its TPA equivalent apply, with the consequence that if the Defendants do not adduce evidence to the contrary, the representation is taken to have been made without

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18 *Lane Cove Council v Michael Davies & Associates* [2012] NSWSC 727 [40]; *Taco Company of Australia Inc v Taco Bell Pty Ltd* [1982] FCA 136; (1982) 42 ALR 177, 199-200 (Deane and Fitzgerald JJ).

19 (2004) 218 CLR 592, 625 [109].

20 Even though paragraph [10A(b)] of the FASOC relating to the Further Representations would, in part at least, appear to relate to future matters.

reasonable grounds and is taken to be misleading. Whether or not the Defendants take this course will be a matter for the trial.

49 In this context, *Futuretronics* was referred to with approval by Lockhart and Gummow JJ in *Accounting Systems 2000*.[21] Their Honours in that case relevantly held in relation to a statutory claim founded on s 51A of the TPA:[22]

> Where the conduct relied upon involves not a statement as to a presently existing state of affairs, but a representation with respect to a future matter, which is contained purely in a contractual promise, then a case for contravention of s 52 will involve consideration of the extra steps spelled out in s 51A of the [TPA]. ...

50 Although some of the authorities express a degree of reservation about the circumstances where a contractual provision may constitute conduct in contravention of the TPA/ACL, there is a substantial body of authority which supports the position.

51 Alternatively, even if the law can be said to be unsettled in relation to the precise circumstance where a contractual provision may constitute conduct in contravention of the TPA/ACL, this does not assist the applicants.

52 The application raises some unique elements. There is no direct authority on the specific situation where the alleged misleading or deceptive conduct constituted by a representation conveyed in a contractual promise which in turn is claimed to be falsified by the promise not being fulfilled. It is also a case where the contractual promises relied upon relate to performance standards which comprise terms of a construction and engineering contract.

53 Here we have a situation where statutory rights are sought to be superimposed on the rights created by terms of the agreement negotiated by the parties. Proof of the breach of the contract will need to be established by the Plaintiffs if they are to succeed in the contractual cause of action. The fact that the same body of facts may also be deployed to establish contravention of legislative provisions, at first glance,

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21 (1993) 42 FCR 470, 506.

22 Ibid

does not preclude the statutes from being engaged. In principle, and subject to further analysis and argument, there would appear to be no impediment in law to proceeding in this way, as the authorities presently stand. However, this will be a matter for the trial.

54 As to the argument that importing the statutory regime of misleading or deceptive conduct as an overlay on contractual terms negotiated between parties would have the effect of constraining or avoiding the contractual limitations on liability contained in the Contract itself, this is again best dealt with at trial.

55 Determining precisely what the Representations and the Further Representations contained in the Contract could reasonably be understood to mean and convey may well involve a process of construing the Contract as a whole against the relevant background.

56 In this case, a number of factors potentially raise themselves for consideration when examining both the contractual terms relied upon as actionable misrepresentations in the context of the this particular contract, as well as the meaning and effect of the representations. Such factors may include, but are not limited to, the following:

(a) the contract in this case is a design, construct and commissioning engineering contract for the construction of a complex facility comprised in the Plant;

(b) the representations relied upon which are contained in the terms of the Contract relate essentially to the performance of the Plant once constructed and commissioned;

(c) the propensity for the undertaking of construction and engineering contracts to be attended with risk of non-performance or performance short of what was contracted for. Construction is a risky business.[23] In his 1994 review into the construction industry's procurement and contractual arrangement practices in the United Kingdom, Sir Michael Latham remarked that '[n]o

[23] See Andrew Burr, *Delay and Disruption in Construction Contracts* (Routledge, 5th ed, 2016) 13 [2-001].

construction project is free of risk. Risk can be managed, minimised, shared, transferred or accepted. It cannot be ignored'.[24] A similar view was expressed by this Court in *APN DF2 Project 2 v Grocon Constructors (Victoria) & Ors (No 2)*:[25]

> It is widely accepted that each construction project is a unique endeavour. As such, each is a risky venture, and therefore is vulnerable to disputation. This is so because every construction project, whether large or small, is something of an experiment. As has been said:
>
> > ... [t]he construction of every capital asset involves unique design, procurement and construction challenges. Different location and site conditions, construction methods, equipment and materials, and the assembly and management of a team of people to design, procure and construct each asset invariably mean the construction process is one of creating a prototype.

Additionally 'every construction project involves people as a principal resource'.[26] This is an infinitely variable commodity. The following passage from the most recent edition of *Delay and Disruption in Construction Contracts* illustrates this reality:[27]

> There is usually a large number of parties involved in a building, or civil engineering project, with differing responsibilities: architects, quantity surveyors, civil structural engineers, mechanical and electrical engineers, project managers, main contractors, subcontractors and suppliers. The different responsibilities invariably lead to different priorities.

The means by which risk in a construction or engineering project is allocated is the contract itself, as further recognised by the learned author of the text referred to above:[28]

> How risks are distributed will depend not only upon the method of procurement, but also the form of the agreement under which the works are procured and the duration of the contract under which the risk is assumed. For example, a risk of an adverse economic shift in the demand for property, or materials, may be manageable over three months, but over a few years that risk may be of an entirely different character.

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24 Sir Michael Latham, *Constructing the Team: Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the Construction Industry* (Her Majesty's Stationary Office, 1994) 14.

25 [2014] VSC 597 [89] (citations omitted).

26 Ibid.

27 Andrew Burr, *Delay and Disruption in Construction Contracts* (Routledge, 5th ed, 2016) 23 [2-039].

28 Ibid 24 [2-042].

(d) the fact that the risk attaching to the performance of this Contract was, in part, arguably reflected in other of its terms, for example the contractual limitation contained in Special Condition 21, the performance guarantee provided by the Second Defendant, Tomlinson, and in terms which defined the duration of the Contract and the responsibilities allocated in its performance.

57 As already mentioned, the alleged Representations and Further Representations as to performance may need to be scrutinised at trial to determine their meaning and effect in the contractual context. It may be, for example, that the representations conveyed an intention to perform to the performance standards, but qualified by the usual risks of non-performance for projects of this type undertaken in the context of the Contract.

58 That being said, in determination of the present application, I am unable to find that the Plaintiffs' TPA/ACL Claim has 'no real prospect of success' as required under ss 62 and 63 CPA for the Applicants to succeed.[29] The tests under these sections of the CPA are not satisfied.

59 The application will be dismissed with costs.

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[29] *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27.