FEDERAL COURT OF AUSTRALIA

Reinhardt v Mill Estate Holdings Pty Ltd
[2014] FCA 1056

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| Citation: | Reinhardt v Mill Estate Holdings Pty Ltd [2014] FCA 1056 |
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| Appeal from: | Mill Estate Holdings Pty Ltd v Reinhardt [2014] FCCA 906 |
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| Parties: | **BRYAN REINHARDT and REINHARDT PTY LTD ACN 096 681 060 AS TRUSTEE FOR THE REINHARDT FAMILY TRUST v MILL ESTATE HOLDINGS PTY LTD ACN 119 975 505** |
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| File number: | QUD 266 of 2014 |
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| Judge: | **RARES J** |
|  |  |
| Date of judgment: | 19 August 2014 |
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| Catchwords: | **CONTRACTS – MISLEADING OR DECEPTIVE CONDUCT** – whether misleading or deceptive representations made to induce sale of business – alleged representation that principal of vendor would remain in employ of purchaser for term of two years – whether any reliance – failure of trial judge to take into account context of transaction including express terms of contracts – where business sale contract contemplated potential for principal of vendor to not commence or remain in purchaser’s employment and provided for restraints of trade on principal – where no reference to two year term of employment discussed after business sale contract entered into – where employment contract entered into after completion of sale contract permitted termination or resignation of vendor’s principal with one week’s notice – meaning of commercial documents determined by what reasonable person in position of parties would have understood them to mean – need for representation to be assessed with respect to particular individual rather than a class having regard to all of the circumstances  |
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| Cases cited: | *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 applied*Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 applied*Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 applied*Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 applied*Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 applied*Gates v The City Mutual Life Assurance Society Limited* (1986) 160 CLR 1 applied*Catalano v Managing Australia Destinations Pty Ltd* [2014] FCAFC 55 referred to*Baltic Shipping Company v Dillon* (1993) 176 CLR 344 applied  |
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| Date of hearing: | 19 August 2014 |
|  |  |
| Place: | Brisbane |
|  |  |
| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 53 |
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| Counsel for the Appellants: | Mr A Reilly |
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| Solicitor for the Appellants: | Harding Richards Lawyers |
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| Counsel for the Respondent: | Mr M Jones |
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| Solicitor for the Respondent: | Toogoods Lawyers |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| QUEENSLAND DISTRICT REGISTRY |  |
| GENERAL DIVISION | QUD 266 of 2014 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | BRYAN REINHARDTFirst AppellantREINHARDT PTY LTD ACN 096 681 060 AS TRUSTEE FOR THE REINHARDT FAMILY TRUSTSecond Appellant |
| AND: | MILL ESTATE HOLDINGS PTY LTD ACN 119 975 505Respondent |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 19 AUGUST 2014 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Orders 1 and 3 made by the Federal Circuit Court of Australia on 21 May 2014 be set aside, and in lieu thereof it be ordered that:

1. the respondents pay the applicant $2065;

2. there be no order as to costs.

1. There be no order as to costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| GENERAL DIVISION | QUD 266 of 2014 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | BRYAN REINHARDTFirst AppellantREINHARDT PTY LTD ACN 096 681 060 AS TRUSTEE FOR THE REINHARDT FAMILY TRUSTSecond Appellant |
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| JUDGE: | RARES J |
| DATE: | 19 AUGUST 2014 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

**(REVISED FROM THE TRANSCRIPT)**

1. This is an appeal from a decision of the Federal Circuit Court. The trial judge found that the appellants, Reinhardt Pty Ltd, as trustee of the Reinhardt Family **Trust**, and its principal Bryan **Reinhardt**, in the sale of a real estate business to another real estate business acted in breach of contract and made representations that were misleading or deceptive in inducing the sale. The purchaser of the business was **Mill Estate** Holdings Pty Ltd, whose principal was Martin **Millard**. Both Mr Millard and Mr Reinhardt were experienced real estate agents whose businesses were trading in areas in close proximity in suburbs of Brisbane.

## Background

1. The parties entered into an agreement dated 17 November 2006 in the standard form contract for business sale (second edition) incorporating the standard conditions of business sale, adopted by the Real Estate Institute of Queensland Limited with special conditions drafted by the solicitors who acted for each of the parties on the transaction. The base purchase price of $40,000 was payable by Mill Estate, on the date of completion, that was to occur on 4 December 2006 (special condition 3.1), but actually occurred on the next day.
2. Contrary to the trial judge’s finding that the consideration for the business was only $40,000, the sale agreement on its face made clear that the consideration was $40,000 together with the adjustment to the purchase price provided in special conditions 4 and 5. Those provisions obliged the purchaser, Mill Estate, to pay to the trustee any sum necessary, in addition to the $40,000 that it had to pay under cl 4.1, so that the trustee would receive a total of $420,000 from Mill Estate and a third party, **Your Property Solutions** Pty Ltd under a separate contract for the sale of the trustee’s rent roll business (**the rent roll contract**). The rent roll contract had an adjustment mechanism that reduced what Your Property Solutions had to pay in certain circumstances. In addition, special conditions 5.1 and 5.2 provided that even if the rent roll contract did not complete, Mill Estate remained liable to pay the adjusted purchase price 60 days after 22 December 2006.
3. In the event, the sale to Your Property Solutions completed but Mill Estate had to pay an adjustment of $44,725 to the trustee. Thus, the actual contractual purchase price paid by Mill Estate was $84,725. Mill Estate paid that money to the trustee in accordance with the sale agreement.
4. There is no substantive challenge to the findings of the trial judge that, having seen and heard the witnesses, he accepted that the trustee and Mr Reinhardt had made two representations to Mr Millard prior to the entry of the Mill Estate agreement that, in the event, were found to be false. Those representations were that, *first*, Mr Reinhardt would work for a minimum of two years, and possibly longer, as an employee of Mill Estate, if it purchased the trustee’s business (**the two year employment representation**), and, *secondly*, the trustee had commercially favourable chattel leases for its photocopiers leased from Toshiba (**the Toshiba representation**).
5. Importantly, the trial judge found that the two year employment representation was made in circumstances where, as his Honour found:

“plainly any long term arrangement would always be subject to a proviso that the parties’ work relationship was amicable.”

1. As I will explain in more detail shortly, on 21 March 2007, Mill Estate entered into a written employment contract in a standard form Real Estate Industry Individual Workplace Agreement or **IWA** with Mr Reinhardt that provided that it was terminable at will by either party on one week’s notice.
2. Mill Estate also alleged that Mr Reinhardt had represented to Mr Millard that the trustee’s contacts list of about 7,000 names would pass on completion to Mill Estate from the trustee’s business. His Honour did not accept Mr Millard’s evidence that that representation had not been honoured. Although his Honour found that the Toshiba representation was misleading, he also found that that did not give rise to any loss or damage.
3. His Honour dealt at considerable length with the circumstances in which he said the representations were made, paying cursory attention to the terms of the two written agreements that the parties executed. His reasons did not explain the lack of reconciliation between the terms of those agreements and the two representations that he found were conveyed, being the two year employment and the Toshiba representations. That is the more remarkable given that the parties had solicitors acting for them at the time each of the contracts was made. That position gives rise to considerable difficulty in dealing with his Honour’s findings of fact. His Honour generally preferred the evidence of Mr Millard to that of Mr Reinhardt and there is no reason, where the evidence of the two conflicts, to depart from those findings.
4. As I have mentioned, the trial judge found that, during the negotiations leading up to the entry into the sale agreement, Mr Reinhardt represented to Mr Millard that he would commit to at least two years’ employment with Mill Estate, if it agreed to purchase the trustee’s business and that that was done in the circumstances of the proviso that any such long-term arrangement would always be subject to the parties’ work relationship continuing to be amicable. However, when the sale agreement was prepared by the parties’ solicitors, it did not contain any promise reflecting any representation that Mr Reinhardt would be, or remain, an employee of Mill Estate for any time period at all. *First*, special condition 1.3, set out below, was an entire agreement clause that could affect a finding as to whether any such representation could have continued to affect the parties:

“1.3 **This Contract supersedes all prior representations, arrangements, understandings** and agreements (whether written and/or verbal) **between the parties relating to the subject matter of this contract and contains entire agreement and understanding** between the parties relating to the subject matter of this Contract” (emphasis added)

1. Moreover, *secondly*,special condition 1.5, as originally drafted, referred to a draft employment contract that was intended to be annexed to the sale agreement. But the parties made handwritten amendments that deleted the reference to that draft employment contract so that it read instead as follows:

“1.5 The completion of this Contract is subject to and conditional upon the signing of ~~the~~ an employment agreement between the principal of the Seller, Mr Bryan Reinhardt (**Reinhardt**) as employee and the Buyer as employer for the employment of Reinhardt in the business sold pursuant to this Contract, ~~which employment commences on and from the date this Contract completes a copy of which is annexed as annexure “A” to these Special Conditions~~ (**the Employment Contract**). If the Employment Contract is not signed by Reinhardt on or before the completion of this Contract, then, at the election of the Buyer prior to the Date of Completion the Buyer may terminate this Contract and this Contract shall be at an end and neither party shall have a claim against the other party in relation to any matter arising out of this Contract. Upon such termination, all monies will be returned to the Buyer.”

1. The trial judge did not refer to this or any other relevant term of the sale agreement. In my opinion, that is a significant omission in his Honour’s reasoning process. That is because special condition 1.5 acknowledged that, when Mr Millard caused Mill Estate to enter into the sale agreement, there was no concluded agreement as to the terms on which Mr Reinhardt would be employed. Moreover, that condition provided that if the parties could not agree as to those terms by the date of completion, Mill Estate had the right to terminate the sale agreement with the consequence that both contracting parties would then be restored to their pre-contractual positions.
2. In the event, the parties did not agree as to the terms on which Mr Reinhardt would be employed until, as admitted on the pleadings, early February 2007. And, even then, no final terms of an employment contract were agreed until 21 March 2007, as I will explain.
3. In addition, special condition 9 provided for a restraint of trade in respect of Mr Reinhardt. It applied from the date of completion if Mr Reinhardt were not an employee or consultant of Mill Estate. The restraint prohibited him from working, or being interested, in any competing business for periods of two years, one year or six months from the date of completion, in areas ranging from five kilometres from the Mill Estate’s business premises to down to 500 metres. Mr Reinhardt signed and handed over at completion on 5 December 2006 a complementary personal covenant, as the director and shareholder of the vendor trustee, agreeing to be bound in the same terms. Thus, if Mr Reinhardt never became or ceased to be an employee of Mill Estate, he would be prohibited from competing so long as the restraint was in place and enforceable.
4. Mr Millard gave some affidavit evidence that, at the time of completion, Mr Reinhardt was out of town and:

“… because of the inconvenience created by Mr Reinhardt being away at completion and because of my confidence based on his statements to me that he would work for Mill Estate for a minimum of two years, I did not insist on a written employment contract being signed prior to completion of the business sale contract. I trusted Mr Reinhardt, and by settlement we were already in the process of moving his furniture to the new office, so there was absolutely no doubt in my mind, after my conversations with him, that Mr Reinhardt was coming across to Mill Estate as a salesperson.”

1. The trial judge made no express finding about that evidence. As admitted on the pleadings at trial, in early February 2007, Mill Estate’s solicitor, Andrew **Taylor**, who had acted for it on the contact, discussed the form of an employment contract in a conference with Mr and Mrs Reinhardt and Mr Millard. Mr Taylor took minutes of the meeting. Counsel for Mr Reinhardt and the trustee attempted at the trial to tender Mr Taylor’s file note, however, for some reason an objection was taken and the tender was not pressed. The admitted purpose of the meeting was to discuss Mr Reinhardt’s employment with Mill Estate, following the settlement of the sale agreement. Thus, on the pleadings, it was common ground that the terms of Mr Reinhardt’s employment had not been resolved by that time. At the meeting, Mr Reinhardt and Mill Estate agreed that Mr Reinhardt would be employed as a real estate sales agent and would be paid commission payments totalling 68% of the net commission to Mill Estate on each sale made by Mr Reinhardt following a deduction for the franchisor’s marketing campaign fees.
2. Significantly, at no time after the entry into the sale agreement on 17 November 2006 or at any subsequent time, including the February 2007 meeting with Mr Taylor, was any reference made to any term of Mr Reinhardt’s employment for any time, let alone a minimum of two years. Mill Estate accepted that at no time after the agreement sale was signed on 17 November 2006 did Mr Millard raise any assertion that Mr Reinhardt was to be employed for a minimum of two years. He only did so after the relationship of the parties broke down in circumstances that I will describe later.
3. Mr Reinhardt and Mill Estate ultimately signed the IWA on 21 March 2007. The IWA provided that, unless otherwise stated, it constituted a complete agreement that operated in conjunction with any written or verbal offers of employment that acknowledged the IWA and could be enforced separately. Importantly, the IWA provided in cl 7(a):

“Although **you are designated a regular casual**, unless alternate written arrangements are agreed **you may be terminated or resign with one weeks notice**.” [sic] (emphasis added)

1. Mr Millard’s explanation in cross-examination of how the IWA came to contain that term was as follows:

“Now, if it was so important to you that Mr Reinhardt worked for two years … for your business or for the agency, the – why is there **no reference** to – to that in the individual workplace agreement? **---** **Because we were trying to get Mr Reinhardt to sign one and he wouldn’t sign one. That’s why we had the meeting with Mr Taylor to try and sort these issues out, and there was nothing signed after that, nothing agreed to.** We couldn’t move forward. All there was was a dramatic deterioration and dishonest behaviour over the next period of time.” (emphasis added)

## Consideration

1. In my opinion, that evidence demonstrated that at no time did Mr Millard act reasonably or, indeed, at all, in reliance on any representation or assertion that Mr Reinhardt intended to or would remain employed, come what may, for two years after the sale agreement was entered into or completed. Indeed, special condition 1.3 of the sale agreement was an entire agreement clause designed to record that the sale agreement represented the complete understanding of the parties relating to its subject matter. That agreement also contained the restraint of trade provision in special condition 9 with cascading periods and areas of enforceability. At no time did Mill Estate seek to enforce the restraint.
2. It is obvious that, once completion occurred, without any employment contract of Mr Reinhardt being signed, Mr Millard, on behalf of Mill Estate, took the risk that Mr Reinhardt, ultimately, might not agree to any acceptable employment contract with Mill Estate. After all, their discussions to that time had not even reached the point of an understanding or agreement about what Mr Reinhardt’s commission arrangements were to be for sales that he negotiated. They only reached that point at the meeting in February 2007 with Mr Taylor.
3. It follows that Mr Millard could not have relied on Mr Reinhardt remaining an employee of Mill Estate, in circumstances where the basic requirements of a contract of employment, such as agreement for remuneration of the employee, had not been finalised. I am of opinion that no person in the position of Mr Millard or Mill Estate, with the knowledge that they had when they proceeded with completion of the sale agreement on 5 December 2006, could have relied, reasonably, on any earlier representation by Mr Reinhardt or the trustee that Mr Reinhardt would be an employee of Mill Estate for two years or at all. Such a representation in is the teeth of, *first*, the express right of termination in special condition 1.5 at the time of completion if no such employment contract then existed, *secondly*, the deletion from that provision of reference to a draft employment contract, *thirdly*, the absence of any in principle agreement as to the terms of Mr Reinhardt’s employment, and *fourthly*, the existence of the restraint of trade in special condition 9 that provided directly for the situation that Mr Reinhardt not only was not an employee of Mill Estate, but also never became one.
4. It is not credible that Mr Millard could have placed any reliance entering or in completing the sale agreement on an earlier proposition that Mr Reinhardt would work for his business for a minimum period of two years when at those times they had not reached anything resembling a deal for the terms on which that employment would occur.
5. The objective circumstances, including the long period after Mill Estate *first*, entered into, *secondly*, waived, by completion of the sale agreement, the condition precedent to completion, in special condition 1.5, that there be an employment contract and, *thirdly*, the entry into the IWA on 21 March 2007, demonstrate that Mill Estate had not relied on any representation or contractual offer that Mr Reinhardt would remain employed by it for two years on terms that had not been agreed by either the times of making or completing the sale agreement.
6. *First*, no written contractual term reflected that such a fundamental matter of the employment terms had been agreed, despite ample opportunity for it to be documented. *Secondly*, there is no indication that the period of two years as a minimum term of employment was ever mentioned by Mill Estate or Mr Millard after entry into the sale agreement on 17 November 2006. In particular, there is no suggestion that the two year term was mentioned in the meeting with Mr Taylor in early February 2007 when the principal terms of Mr Reinhardt’s employment contract were discussed. *Thirdly*, a term of two years’ employment is radically different from the relationship designated as regular casual employment terminable by either party without cause on one week’s notice that was expressly provided in cl 7(a) of the IWA, that the parties entered into as reflecting the terms on which Mr Reinhardt actually agreed with Mill Estate. *Fourthly*, as the trial judge found, for the parties’ employment relationship to continue at all, they had to remain in an amicable relationship. *Fifthly*, the sale agreement itself contained a significant commercial restraint of trade that would also apply to Mr Reinhardt if he signed an employment agreement subsequent to completion but thereafter ceased to be employed.
7. The meaning of commercial documents must be determined objectively as conveying what a reasonable person in the position of the parties would have understood them to mean: *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. That requires the Court to consider, not only the text of the contract, but also the surrounding circumstances known to all of the parties to the transaction and the purpose and object of the transaction.
8. The collateral contract that the trial judge found appeared to have only one term, namely, that if Mr Reinhardt would remain an employee of Mill Estate for two years subject to the work relationship remaining amicable, then Mill Estate would complete the sale agreement. However, that term could not have continued to govern, or to apply to, the parties’ relationship at the time of entry into the sale agreement because that expressly recognised that no terms of an employment contract had yet been agreed and still needed to be negotiated in the future to the satisfaction of all of the parties. Moreover, the supposed collateral contract was flatly contradicted by the IWA that ran, not for two years, but an indeterminate period terminable on notice of not greater than one week given by either party without cause.
9. I am of opinion that the objective circumstances demonstrate that, not only were there no collateral or other contractual terms for Mr Reinhardt to remain an employee of Mill Estate for two years, but also Mill Estate did not rely on any representation to that effect when it entered into the sale agreement, supplemented as it was by the terms of special conditions 1.3, 1.5 and 9 or by signing the IWA.
10. The IWA constituted the only contractual or promissory statement by Mr Reinhardt in the parties’ relationship that had contractual or representational force in respect of the terms of his employment. To the extent that the trial judge found that Mr Reinhardt and the trustee had made a representation or promise that he would be employed for a minimum two year term, it ceased to have any effect by reason of the contrary terms of the sale agreement and certainly because it was inconsistent with and subsumed by the terms of the IWA. It would be very odd, indeed, if one party agreed to work for another for a minimum term of two years and entered an IWA that provided that his employer could terminate that employment without cause after one week as could he. Plainly, the two suggested contracts could not stand together.
11. In the circumstances, the parties objectively must be taken to have entered into the terms of the sale agreement and the IWA that they signed as recording formally, and so to place beyond dispute, the nature of their contractual arrangements.
12. Additionally, in analysing whether Mr Millard, as the principal of Mill Estate, was induced to cause his company to enter into the sale agreement, the trial judge applied an incorrect principle. He referred to Mr Millard as being a member of a class to whom representations had been directed and tested Mr Millard’s position by reference to ordinary and reasonable members of the class. That was contrary to both the facts in this case (where any representation had to be assessed as made to Mr Millard as an individual) and the law as identified in cases such as *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 85 [103] per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 604-605 [36]-[40] per Gleeson CJ, Hayne and Heydon JJ; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at 384 [91] per Heydon, Crennan and Bell JJ.
13. Importantly, as the two latter cases require, in order to determine whether conduct was misleading or deceptive for the purposes of s 52 of the *Trade Practices Act 1974* (Cth) and its analogues, the Court must engage in a close analysis of all the circumstances of the transaction. In my opinion, the primary judge failed to do that. His Honour did not consider, let alone analyse, the terms of any of the contracts or explain, having regard to all of the circumstances in evidence, how the written contractual terms, which were in conflict with the representational statements and collateral contract that he found, could have been made or, if made, continued to have force at the time that Mill Estate or Mr Millard acted with legal assistance from his solicitor, Mr Taylor, to enter into or complete the sale agreement. As the Court said in *Campomar* 202 CLR at 85 [102], in approving what Gibbs CJ had said in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199:

“**the legislation did not impose burdens which operated for the benefit of persons ‘who fail[ed] to take reasonable care of their own interests’.** In the same case, Mason J concluded that, whilst it was unlikely that an ordinary purchaser would notice the very slight differences in the appearance of the two items of furniture in question, nevertheless such a prospective purchaser reasonably could be expected to attempt to ascertain the brand name of the particular type of furniture on offer [*Puxu* 149 CLR at 210-211].” (emphasis added)

1. Here, both parties were represented by solicitors who drew the terms of the sale agreement providing for the purchase of a significant business asset. Had the suggestion that Mr Reinhardt would work for Mill Estate in a contractual employment relationship for a minimum period of two years been intended to be one that would have any force or effect contractually, or in terms of inducing entry into the sale agreement, one would not expect to see a provision with the alterations deleting reference to an annexed employment contract that were recorded in special condition 1.5.
2. Those deletions made clear that the parties had taken care, *first*, to identify that a contract of employment still needed to be negotiated and, *secondly*, to provide a particular protection for Mill Estate in the event that it was not negotiated, being its right to terminate the sale agreement and to the return of all monies paid under it. Had any other representation, inducement or collateral contractual provision been operative at that time, it would have found force in a term of the sale agreement or been superceded by its express terms to the contrary. Instead, the parties both accepted, by crossing out the reference to a draft contract of employment that was intended to be annexed to the sale agreement, that they had not reached any agreement as to the terms on which, if at all, Mr Reinhardt would be employed.
3. In my opinion, it could not sensibly be inferred at the time of entry into the sale agreement that Mr Reinhardt had committed to Mill Estate to become its employee for a minimum of two years, either contractually or by a representation on which a reasonable person in Mill Estate’s position could rely. In my opinion, there was no basis for the judge’s finding that Mr Millard did rely on any representation or collateral contract to that effect.
4. It is plain beyond argument that the parties had not agreed on the terms on which Mr Reinhardt was to be employed as at 17 November 2006, and that they had only started negotiations for such a contract in detail at the meeting with Mr Taylor in early February 2007. The ultimate agreement in the IWA reflecting the terms on which Mr Reinhardt was to be employed included cl 7(a). Moreover, to the extent that Mr Millard and Mill Estate asserted that they relied, which I do not accept, on a representation by Mr Reinhardt that he would remain an employee for a minimum period of two years, at the time that the sale agreement was entered into, the parties turned their minds to how Mill Estate would be protected in the event that Mr Reinhardt did not become, or ceased to be, an employee. They provided for the consequences in special condition 9 that operated as a restraint of trade.
5. I am satisfied that Mill Estate, through Mr Millard, failed to take reasonable care of their own interests if they continued to rely on the two year employment representation when or after Mill Estate entered into the sale agreement. Mill Estate could not use that failure to thrust responsibility onto the trustee or Mr Reinhardt either in contract by the collateral contract (that the trial judge erroneously found) or under the provisions of s 52 of the *Trade Practices Act* for allegedly misleading or deceiving them into entering or completing the sale agreement: see *Campomar* 202 CLR at 84-85 [101]-[102].
6. In my opinion, there was no basis for the trial judge’s findings that Mr Reinhardt or the trustee had made a collateral common contract or had engaged in misleading or deceptive conduct in relation to the two year employment representation.
7. Even if I were wrong in that conclusion, the trial judge’s finding that the two year employment term was subject to a proviso that the parties remained on amicable terms entailed that Mr Reinhardt would be free to leave the employment if that relationship broke down. Not only was that proviso ordinary common sense, since a relationship of employment between two successful real estate agents involved in a small business could only work if the parties remained on amicable terms, but it was a finding that the judge made, yet then failed to have any regard to in dealing with the facts as found.
8. His Honour found that, by June 2007, it was plain that irreconcilable difficulties had arisen between the parties. He found that that was the position two days before Mr Reinhardt informed Mr Millard that he was going to open his own business. Despite that finding that the relationship could not continue, the trial judge found that Mr Reinhardt’s communication of that information and his intention to act on it was repudiatory conduct entitling Mr Millard summarily to dismiss him on the next day.
9. His Honour then awarded damages for the breach of the collateral contract and misleading and deceptive conduct in relation to the two year employment term based on the net value of sales that Mill Estate would have lost because Mr Reinhardt ceased employment of $74,373 together with the costs of $5,628 incurred by Mill Estate in entering into the sale agreement, including stamp duty.
10. I am of opinion that, once his Honour found that the parties’ relationship had encountered irreconcilable difficulties, Mr Reinhardt was free to leave his employment and engage in a business that separated him from Mill Estate’s business. Indeed, the IWA entitled him to do so on one week’s notice. His conduct, in deciding to leave his employer in that situation, could not have been a repudiation of the terms of the collateral contract or inconsistent with the two year employment representation. Rather, Mr Reinhardt’s conduct was consistent with the terms of that representation and the collateral contract containing the proviso, as found by his Honour, even if, contrary to my findings, Mill Estate could have relied on that representation or the collateral contract could have survived entry into the sale agreement. In any event, no damages could be awarded having regard to the terms of the IWA entitling Mr Reinhardt to give one week’s notice.
11. Accordingly, having regard to the facts as found by his Honour, as to the terms of the two year employment representation, qualified as they were by the proviso, and the collateral contract for a two year employment term, there was no basis on which to award any damages for the alleged breach of contract or misleading or deceptive conduct. In any event, his Honour’s calculation of damages cannot be sustained.

## The damages for lost revenue award

1. His Honour’s calculation damages was based on an assessment of expectation damages for what Mill Estate would have earned had Mr Reinhardt performed in accordance with the two year employment representation or term of the contract of employment. In *Gates v The City Mutual Life Assurance Society Limited* (1986) 160 CLR 1 at 11-12, Mason, Wilson and Dawson JJ discussed the two established measures of damages applicable in contract and tort in the context of discussing what might be recoverable under s 82 of the *Trade Practices Act*. They said that:

“In contract, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed – he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss). In tort, on the other hand, damages are awarded with the object of placing the plaintiff in the position in which he would have been had the tort not been committed (similar to reliance loss).”

1. The trial judge had evidence from accountants called by both parties before him. Importantly, Mill Estate made no attempt to prove, *first*, what it, in fact, had earned over the remainder of the two year term of the contract that it asserted Mr Reinhardt should have served. It should have used those figures as a basis to compare its position with what it would have been in had Mr Reinhardt performed as promised after deducting the remuneration that he would have been paid a commission of 68% and 9% to his employer contribution superannuation, that was significantly greater than the about 40% commission payable to the ordinary sales persons it had employed.
2. In my opinion, Mill Estate failed to adduce precise, or reasonably precise, evidence of the loss when it was able to do so, because it did not identify what it in fact earned, so as to compare whatever benefit Mr Reinhardt would have made to its net revenue had he continued to work for it with what it actually earned. That evidence was available from Mill Estate’s records for the financial years ended 30 June 2007, 2008 and 2009 at the trial. In *Catalano v Managing Australia Destinations Pty Ltd* [2014] FCAFC 55 at [31], Siopis, Rares and Davies JJ said:

“It was for the Kurth/Hepner camp to prove the amount of loss or damage that they claimed Fine Food Solutzion suffered. In our opinion, the primary judge erred in awarding any damages on the cross-claim. That was because the Kurth/Hepner camp **failed to adduce precise or reasonably precise evidence of loss when they were able to do so**: *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257; [2003] HCA 10 at [37]-[38] per Hayne J with whom Gleeson CJ, McHugh and Kirby JJ agreed. In *Ted Brown Quarries Pty Ltd v General Quarries (Gilston Pty Ltd)* (1977) 16 ALR 23 at 37 Gibbs J, with whom Aickin J agreed, said that **where there was no evidence, or no evidence that the trial judge was bound to accept, as to the value of an asset, there would be no basis on which the judge was entitled to make a jury assessment as to the value**. He said:

The case was not one in which the matter had necessarily to be left to the opinion and judgment of the court, acting at large, as is the case, for example, in the assessment of damages for personal injuries. **It was possible, in the circumstances, to prove, with some degree of certainty and precision, the value of the property purchased, and it was not unreasonable to expect General Quarries to call acceptable evidence as to the value of the ‘resource’. General Quarries failed to discharge the burden of proof that rested upon it.**” (emphasis added)

1. Here, it was not unreasonable to expect Mill Estate to call acceptable evidence of its actual financial performance rather than have assumptions made about it by its expert with which he then compared with the hypothetical position had Mr Reinhardt worked during the subsequent 18 or so months.
2. However, having regard to the conclusion that I have come to, that no contractual term or representation was proved that entitled an award of damages, it is not necessary to deal in any further detail with that assessment.

## The transaction cost damages award

1. Finally, the trial judge awarded transaction costs to Mill Estate on the basis, so he said, that:

“It follows that, notwithstanding the fact that it [Mill Estate] received some value for its consideration, the Applicant did incur an expense that it otherwise would not have. In my view it is entitled to be compensated for this outlay.”

1. That finding was contrary to well-established principle. The only basis upon which transaction costs could be awarded as damages would be in a case where the consideration for the transaction had entirely failed due to circumstances in which, through no fault of the purchaser, it was necessary for it to be recompensed for loss: *Baltic Shipping Company v Dillon* (1993) 176 CLR 344. Here, the transaction did not fail. Rather, Mill Estate affirmed and sued on the transaction in which property and valuable consideration had passed to it and which it continued to retain. That is, it received a benefit from the transaction. There was no basis in accordance with settled principle for his Honour to award any amount for transaction costs.

## Conclusion

1. For these reasons, I am of opinion that the appeal succeeds and that the two challenged sums awarded by the trial judge for damages and transaction costs cannot be sustained.
2. The trial judge found that Mr Reinhardt had established his cross-claim in the sum of $42,660.06. His Honour netted off the damages of $124,726 (that included another sum that was not challenged on appeal) that he found in favour of Mill Estate against the $42,660.06, and awarded a net sum of $82,065.94 in favour of Mill Estate. Having regard to my findings, which dealt only with those parts of the trial judge’s award that were challenged, that leaves a balance now between the parties of $2,065 being due by Mr Reinhardt and the trustee to Mill Estate. The trial judge’s award of damages must be reduced to that amount.
3. Having regard to the outcome of the appeal, I am of opinion that there should be no order for costs of the trial or the appeal.

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| I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares. |

Associate:

Dated: 29 September 2014