

IN THE HIGH COURT OF AUSTRALIA

OLIVER BENNETT

Appellant

v

URBAN AUTO GROUP PTY LTD

Respondent

SUBMISSIONS FOR THE APPELLANT

Appearing for the Appellant

R. Finnane,
Senior Counsel

O. Tisbury-Brown
Junior Counsel

I. INTRODUCTION AND BACKGROUND

1. Urban Auto Group Pty Ltd (“the Respondent”) is a specialist restorer of luxury motor vehicles. Mr Bennett (“the Appellant”) bought a restored 1967 Ford Mustang (“the Vehicle”) from it for \$165,000 under a written agreement (“the Contract”). Shortly after delivery he discovered serious mechanical defects and sought orders for rescission and damages.
2. The Respondent procured the sale on the strength of three specific statements about the quality of its own restoration work:
 - a. That the Vehicle had undergone a “full professional restoration to concours standard”;
 - b. That the engine had been “completely rebuilt using original-specification components”; and
 - c. That the Vehicle was “suitable for regular road use without any further major work required”
3. Each was false. An independent mechanic found that several engine components were not original-specification parts, that parts of the restoration used non-standard methods, and that the engine required substantial further work before the Vehicle could safely be driven on public roads. Rectification will cost approximately \$45,000. Internally, the Respondent called the restoration “cosmetic-heavy” and its engine work “passable but not perfect”.

II. ISSUES PRESENTED

4. The Appellant was granted special leave. Four issues arise for the determination by this Court:
 - a. Issue 1 (Ground 1): whether the pre-contractual statements were representations of fact or mere puffery, and so actionable as misrepresentations or, in the alternative, innocent misrepresentations;
 - b. Issue 2 (Grounds 3 and 5): whether making them was conduct that was misleading or deceptive, or likely to mislead or deceive, contrary to s 18 of the Australian Consumer Law (“ACL”);
 - c. Issue 3 (Ground 2): whether clause 9 precluded the Appellant from establishing reliance;
 - d. Issue 4 (Ground 4): whether the Contract contained a statutory implied condition that the Vehicle be reasonably fit for the purpose the Appellant made known.

5. Issue 1 (Ground 1): Misrepresentation

1. The trial judge found the statements “were capable of constituting representations of fact”, then declined to give that finding effect because they were “not intended to be taken literally” and formed part of general promotional language common in the sale of restored vehicles.
2. A misrepresentation is a false statement of a material fact made to induce the other party to contract, and which has that effect. It has five elements: an express or implied representation; which is factual, in that it is capable of being true or false when made; which is false; which was intended to induce entry into the contract and did so; and which is material.¹ Proof of those elements grounds rescission whatever the representor’s state of mind.
3. Three express oral statements were made, and the trial judge found so. Each was false. Inducement is answered at Issue 3; It suffices here that a representation calculated to induce entry into a contract raises a fair inference that it did, need not be the sole inducement, and is not displaced by a failure to investigate.² Ground 1 turns on the second element.
4. A representation is factual if it is capable of being true or false when made. Puffery falls outside that description because such statements are understood by all as not intended to be statements of fact.³ The exclusion is confined to two classes: statements so vague as to be incapable of any reasonably precise meaning, and statements of exaggerated commendatory opinion rather than of any factual matter.⁴ The question is objective, and turns on the circumstances of the transaction, the parties’ knowledge and positions, and the words used.⁵ His Honour did not ask it of each statement; he answered it for all three from the imprecision of one.

¹ The elements are drawn from *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 481, 483 (Bowen LJ); *Gould v Vaggelas* (1985) 157 CLR 215, 236 (Wilson J); and, as to implied representations, *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563.

² *Gould v Vaggelas* (1985) 157 CLR 215, 236 (Wilson J); *Redgrave v Hurd* (1881) 20 Ch D 1, 13–14 (Jessel MR).

³ *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256, 261 (Lindley LJ), 268 (Bowen LJ). A puff is an extravagant statement not intended to be taken seriously, and is neither a term nor a representation.

⁴ *Mitchell v Valherie* (2005) 93 SASR 76, [71]–[72] (White J): “Statements that are so vague as to be incapable of being given any reasonably precise meaning or because they are exaggerated commendatory opinion rather than a statement of any factual matter do not give rise to an actionable misrepresentation.” The test stated in the same passage is objective: “would a reasonable person in the position of the representee have been led into error by the statement?”

⁵ *Bisset v Wilkinson* [1927] AC 177; *Mitchell v Valherie* (2005) 93 SASR 76, [7]–[8] (Sulan J): the meaning of a representation, and whether it is a misrepresentation, are determined objectively having regard to the context in which the statement was made, including the respective experience and knowledge of the maker and of the person said to have relied upon it.

5. “Completely rebuilt using original-specification components” is capable of being true or false in the plainest way, because a component either matches the original specification or it does not. The Respondent said it of its own completed work, to a buyer with no means of checking. Where the facts are not equally known to both sides, a statement by the party who knows them best “involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion”.⁶ The authorities distinguish general opinion, in the nature of introductory comment, from detailed information capable of being correct or incorrect.⁷
6. “Without any further major work required” is in its primary sense an assertion about the present condition of the goods. So far as it looks forward, it carries an implied representation of present fact: that the Respondent held the belief and had reasonable grounds for it.⁸ That is the Appellant’s primary case. If the statement is instead one with respect to a future matter, s 4 of the ACL applies, and the Appellant relies on it in the alternative.
7. The latitude allowed to sales talk is confined to statements too vague to convey a definite meaning, and “concoirs standard” carries technical content in the restoration industry.⁹ The Appellant accepts that some degree of puffing is expected in commerce.¹⁰ But the line must be drawn “between exaggerated sales talk and misleading and deceptive conduct, between a commercial gilding of the lily and misrepresentation”.¹¹ The more specific a statement, the less room to treat it as puff.
8. The trial judge erred in treating “concoirs standard” as inherently imprecise and incapable of conveying meaningful content. In *Gilltrap v Autopromos Pty Ltd*, Spender J observed that “Concoirs D’Elegance” is a phrase sufficiently common and descriptive in the automotive context, referred to its dictionary meaning as a “parade of vehicles with prizes for the most elegant-looking”, and found that the phrase was “quite widespread and understood in Australia”.¹² *Gilltrap* does not establish a fixed technical specification for a “concoirs” restoration; It demonstrates the narrower but important proposition that the expression has an established automotive meaning rather than being empty promotional language. What Urban’s statement conveyed must then be determined objectively in its particular context: it was made by a specialist restorer describing its own completed work, alongside the specific assertions that the engine had been completely rebuilt using original-specification components and that no further major work was required.
9. In any event, a finding about the imprecision of one phrase cannot carry the other two. Each was a discrete assertion, and the three were conveyed together in a single conversation; Where the mental impression created by several representations is in question, it is wrong “to attempt to analyse the separate effect of each representation”.¹³
10. Rescission on the basis of misrepresentation requires only a false statement of fact that induced the Contract, and is available whether the misrepresentation was innocent, negligent or fraudulent. Want of reasonable care goes only to damages, which are unavailable for an innocent misrepresentation. Fraud is not alleged, nor is negligent misrepresentation, or misstatement. The Appellant relies on innocent misrepresentation and confines the general law claim to rescission.

B. Issue 2 (Grounds 3 & 5) — Misleading or deceptive conduct

11. Ground 3 alleges error in failing to find the representations misleading despite the Vehicle not conforming to what was described. The relevant findings were that the Appellant had not sufficiently established that Urban engaged in misleading or deceptive conduct, as his Honour regarded the statement as being “too vague to be actionable”. The primary judge further accepted that the vehicle required further work, but found that this was not inconsistent with the nature of classic-car restorations.
12. The evidence at trial included:
 - a. internal Urban communications describing the restoration as “cosmetic-heavy”; and

⁶*Smith v Land and House Property Corporation* (1884) 28 Ch D 7, 15 (Bowen LJ).

⁷ *CH Real Estate Pty Ltd v Jainran Pty Ltd* [2010] NSWCA 37, [128] (Basten JA), citing *Sanders v Glev Franchise Pty Ltd* [2002] FCA 1332, [270]–[272] (Kenny J). See also *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, 88 (Bowen CJ, Lockhart and Fitzgerald JJ): the expression of an opinion is not for that reason alone incapable of being misleading.

⁸*Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483 (Bowen LJ).

⁹*Cf Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64, [167]–[170] (Campbell JA): technical words are presumed, rebuttably, to bear their technical meaning.

¹⁰ *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164, 177–8 (Davies and Einfeld JJ, Gummow J agreeing).

¹¹ *CH Real Estate Pty Ltd v Jainran Pty Ltd* [2010] NSWCA 37, [293] (Young JA).

¹² *Gilltrap, T.J. v Autopromos Pty Ltd* [1995] FCA 151 (Spender J)

¹³ *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, [52] (French CJ, Crennan, Bell and Keane JJ), where the proposition was common ground between the parties. The representations there were conveyed by a single advertisement; the Appellant relies on the reasoning by analogy.

- b. internal communications stating that the “engine work is passable but not perfect”.
13. Ground 5 alleges that the judge failed to give sufficient weight to that evidence.
- I. Statutory Misleading and Deceptive Conduct (s 18, ACL)**
14. Section 18(1) of the Australian Consumer Law ('ACL') provides that “[a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”¹⁴
15. The test under s 18 is one of characterisation, objectively assessed: “whether the impugned conduct viewed as a whole has a tendency to lead a person into error”, judged, where the conduct is directed at an identified individual, by the context of the dealings between the parties.¹⁵
16. The intended audience was Bennett, an identified individual. The characterisation remains objective, but is undertaken in the circumstances of the particular dealings, including characteristics and knowledge of Bennett known to Urban.¹⁶ Although the relevant passage in *Butcher* was introduced by reference to causation, French CJ explained in *Campbell* that the ensuing discussion concerned the characterisation of conduct directed to identified individuals. Urban knew Bennett proposed to use the Vehicle for weekend driving and display. Urban was the specialist restorer and possessed direct knowledge of its own work. There was no finding that Bennett possessed specialist restoration or mechanical knowledge. The specification of components, the restoration methods, and engine defects were latent or technical matters.
17. In *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* ('*Self Care*'), a Majority of this Court held that the statutory inquiry under s 18(1) proceeds in four steps: “[F]irst, identifying with precision the “conduct” said to contravene s 18; second, considering whether the identified conduct was conduct “in trade or commerce”; third, considering what meaning that conduct conveyed; and fourth, determining whether that conduct in light of that meaning was “misleading or deceptive or ... likely to mislead or deceive”.”¹⁷
18. Although a representation will commonly constitute the conduct relied upon, s 18 is directed to 'conduct' and does not require the identification of a representation as a separate technical element.¹⁸
19. The conduct in question was Urban’s three unqualified oral statements that (1) the Vehicle had undergone a “full professional restoration to concours standard”, (2) its engine had been “completely rebuilt using original-specification components”; and (3) it was “suitable for regular road use without any further major work required”. The associated failure to disclose the Vehicle’s actual condition forms part of the context and effect of those positive assertions; it is not advanced as a free-standing case based on silence. The conduct occurred in trade or commerce; Urban made the statements in negotiating the commercial sale of a vehicle which it had restored and offered for sale in its specialist business.
20. The first statement was composite. “Full professional restoration” asserts completed historical work by Urban. “To concours standard” was evaluative. In this specialist, own-work context it nevertheless reinforced the message of a completed, authentic and professionally executed restoration and, at least, conveyed that Urban honestly held the evaluation on a rational basis.
21. The second statement was the clearest existing fact. “Completely rebuilt” and “using original-specification components” admitted objective verification against Urban’s work and the components installed. Urban was the restorer, seller and source; it was not transparently repeating another’s information. The mechanic’s component finding directly contradicted that unqualified message.¹⁹

¹⁴ *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law') s 18(1).

¹⁵ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, [24] (French CJ); *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, quoted *ibid* [26].

¹⁶ *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* [2023] HCA 8, [82]–[83] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ); *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, [24]–[26] (French CJ), explaining the characterisation analysis in *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592, [36]–[40] (Gleeson CJ, Hayne and Heydon JJ).

¹⁷ *Self Care IP Holdings Pty Ltd v Allergan Australia Pty Ltd* [2023] HCA 8 at [80] (Kiefel CJ, Gageler, Gordon, Edelman, Gleeson JJ).

¹⁸ *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 368 [15] (French CJ and Kiefel J); *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, [89]–[93] (Hayne J, separately).

¹⁹ *Butcher* [64]–[65]; *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, [68]–[73] (French CJ, Crennan and Kiefel JJ) ('*Google*').

22. The third statement predominantly asserted present condition and present suitability for the regular road use Bennett had disclosed. “Without any further major work required” was contradicted by the need for substantial work before safe public-road operation. If, contrary to that primary characterisation, it was a future matter, s 4 applies only as the confined alternative.²⁰
23. The three meanings must then be assessed cumulatively. In one showroom conversation they conveyed that Urban had completed a professionally executed restoration, had rebuilt the engine with original-specification components, and was supplying a Vehicle presently ready for Bennett’s disclosed regular road use without substantial further work. That whole-message inquiry does not erase the precise meanings. Rather, it prevents the communication from being atomised.²¹
24. The judge instead relied on the sales manager’s subjective description of “general promotional language” and allowed the imprecision of “concours standard” to obscure the two concrete statements. Intention to mislead, dishonesty, negligence and actual deception are not elements. State of mind may be probative of objective meaning or likely effect, but it is evidence, not the legal test.⁸

C. Issue 3 (Ground 2) The entire agreement and non-reliance clause (cl 9)

25. The trial judge held that cl 9 “was effective to prevent Bennett from establishing reliance on the pre-contractual statements” and that the Appellant “had agreed that he did not rely” on them. That is the language of legal preclusion, and it led his Honour never to ask the question that statute and the general law both make one of fact.
26. Terms which exclude or limit liability for contravention of s 18 are ineffective to do so.²² Neither an entire agreement clause nor a provision expressly denying reliance on pre-contractual representations will necessarily prevent misleading pre-contractual information from constituting a contravention, because whether conduct is misleading “is a question of fact to be decided by reference to all of the relevant circumstances, of which the terms of the contract are but one”.²³ A declaration of non-reliance “may, according to the circumstances, be evidence of non-reliance and of the want of a causal link”, but its maker may still be found to have been actuated by the misrepresentation into contracting, as “[t]he question is not one of law, but of fact.”²⁴ The primary judge answered it as one of law. That alone is an appealable error.
27. An intention to mislead, dishonesty, knowledge of falsity and negligence are not elements of a contravention of s 18. Conduct may contravene the section notwithstanding that the representor honestly and reasonably believed what was conveyed to be true.²⁵
28. It does not follow that the representor’s state of mind is evidentially irrelevant. Evidence of intention, knowledge, belief, internal communications or a deliberate marketing strategy may support an inference about the objective meaning and likely effect of the conduct, including the dominant impression which the representor intended the communication to create.²⁶
29. Answered as a question of fact, cl 9 is a pre-printed acknowledgment standing against the ordinary inference of inducement. Where a material representation calculated to induce entry into a contract is made and the representee contracts, “there arises a fair inference of fact that he was induced to do so by the representation”, and the representation “need not be the sole inducement”.²⁷

²⁰ *ACL*, s 4

²¹ *TPG* [49], [52]–[58]

²² *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 (Lockhart J).

²³ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, [130] (Gummow, Hayne, Heydon and Kiefel JJ), citing *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 625 [109]; “neither the inclusion of an entire agreement clause in an agreement nor the inclusion of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent the provision of misleading information before a contract was made constituting a contravention”.

²⁴ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 [28], [30] (French CJ).

²⁵ *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, [9] (French CJ, Crennan and Kiefel JJ); *Bed Bath 'N' Table Pty Ltd v Global Retail Brands Australia Pty Ltd* [2025] HCA 50, [54] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ).

²⁶ *Bed Bath 'N' Table Pty Ltd v Global Retail Brands Australia Pty Ltd* [2025] HCA 50, [52]–[57] (Gageler CJ, Gordon, Edelman, Jagot and Beech-Jones JJ); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, [55]–[57] (French CJ, Crennan, Bell and Keane JJ).

²⁷ *Gould v Vaggelas* (1985) 157 CLR 215, 236 (Wilson J).

30. Construed properly, cl 9 means what a reasonable businessperson would understand its words to convey, read against the surrounding circumstances known to the parties and the commercial purpose of the Contract.²⁸ The pre-contractual statements form part of those circumstances.²⁹ A reasonable businessperson, knowing the Vehicle was sold by its restorer as a completed professional restoration, would read cl 9 as a formal acknowledgment, not as a covenant that the statements which procured the sale were never made or never mattered.
31. A person is not liable in negligence for information if he has effectually disclaimed responsibility for it.³⁰ Clause 9 is not such a disclaimer. It says nothing about the Respondent's responsibility for the accuracy of what was said on the showroom floor. It is the buyer's acknowledgment as to his own state of mind at signing, given after the representations had done their work. It is therefore no answer to any claim: not to the statutory claim, which it cannot exclude; not to the claim in misrepresentation, which does not depend on fault; and not to the allegation of want of care, because a clause by which the buyer disclaims reliance is not one by which the seller disclaims responsibility.
32. The Appellant's inspection was brief and visual, and could not have revealed the specification of components inside an engine. It has been settled since *Redgrave v Hurd* that it is not enough "to say that the purchaser had the opportunity of investigating the real state of the case, but did not avail himself of that opportunity".³¹ The same answer was given under the statute in *Henjo*.³²

D. Issue 4 – The implied term

33. The trial judge rejected the pleaded term under BP Refinery's business-efficacy test. This test governs terms implied in fact from the parties' presumed intention.³³ Appellant submits that this term arises by statute and is governed by the statutory requirements.³⁴ As a result, testing it against business efficacy was an error of law.
34. Section 19(1) of the Sale of Goods Act 1923 (NSW) implies a condition that goods be "reasonably fit for... purpose" where the buyer states the purpose, therefore demonstrating a reliance on the seller's skill or judgment, and the seller supplies goods of that description.³⁵ All of these elements are satisfied: the Appellant disclosed weekend driving and classic-car display; the Respondent supplied restored vehicles; and reliance follows from Respondent's specialist expertise, assurances about latent qualities, and the Appellant's brief visual inspection. Breach is established by the mechanic's findings.
35. Cl 7 and cl 11 do not prevent implication. Their meaning depends on the language, known circumstances and commercial purpose of the contract.³⁶ Clause 7's reference to "present condition" after an "opportunity to inspect" is ambiguous and admits the surrounding circumstances.[44] It addresses defects apparent on inspection, not latent engine components; otherwise it would defeat the transaction's main object.³⁷
36. Clause 11 cannot exclude the condition. Although s 57 permits exclusion of liabilities implied by law, s 64(1) voids any term excluding ss 18-20, or liability for their breach, in a consumer sale.³⁸ This was such a sale: the Respondent sold restored vehicles in business, a motor car is commonly bought privately, and the Appellant bought it for weekend driving and display, not business. Clause 11 is therefore void to the extent it excludes s 19(1).

²⁸*Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656–7 (French CJ, Hayne, Crennan and Kiefel JJ); *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, [46]–[51] (French CJ, Nettle and Gordon JJ).

²⁹*Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 352 (Mason J). See also *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, [50].

³⁰*L Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]* (1981) 150 CLR 225, 231 (Gibbs CJ); cf *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

³¹*Redgrave v Hurd* (1881) 20 Ch D 1, 13–14 (Jessel MR).

³²*Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 557–558 (Lockhart J).

³³*BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282–3 (Lord Simon of Glaisdale, delivering the advice of the majority of the Judicial Committee).

³⁴*Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 (McHugh and Gummow JJ). See also *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 186 (French CJ, Bell and Keane JJ), reiterating *Codelfa* (1982) 149 CLR 337, 345 (Mason J) that implication is not "an orthodox exercise in the interpretation of the language of a contract" though it remains "an exercise in interpretation".

³⁵*Sale of Goods Act 1923* (NSW) s 19(1). The defects lay within the seller's sphere of responsibility.

³⁶*Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656–7; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, [46]–[51].

³⁷*Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656–7, citing *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530, 559; *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423, 429. A commercial contract is construed so as to avoid commercial nonsense and not so as to render the transaction futile.

³⁸*Sale of Goods Act 1923* (NSW) ss 57, 62, 64(1), 64(2).

37. Nor does inconsistency with express terms assist the Respondent: that requirement is subject to s 64(1). Authorities allowing express warranties and exclusions to displace a fitness condition did not concern consumer sales.³⁹ In any event, cl 11 operates only “[t]o the extent permitted by law”. It defines its own limits and is drafted to operate within the law, not to displace it. An exclusion clause is construed “according to its natural and ordinary meaning, read in the light of the contract as a whole”, and, if ambiguous, *contra proferentem*.⁴⁰ A contract for the sale of a professionally restored vehicle is not naturally read as excluding the very quality sold.
38. Further, if the Appellant acquired the Vehicle as a consumer, the guarantees in ss 54 and 55 of the ACL applied of their own force, and s 64 voids any term purporting to exclude, restrict or modify them.[49] The price exceeds the s 3(1)(a) threshold, and the Appellant does not rely on that limb. He relies on s 3(1)(b): the Vehicle is goods of a kind ordinarily acquired for personal, domestic or household use. That inquiry is directed to the kind of goods, not the price of the specimen, so such goods remain within the paragraph however expensive; a motor car is such a kind. That the Appellant is a small business owner is immaterial, as he acquired the Vehicle for weekend driving and display, not for re-supply or business use. By s 3(10) he is taken to have acquired it as a consumer unless the Respondent proves otherwise, and no evidence was directed to that question.

ORDERS SOUGHT

The Appellant seeks the following orders:

- a. Appeal allowed.
- b. The Respondent to pay the Appellant’s costs.

R J Finnane,

Senior Counsel for the Appellant

O Tisbury-Brown,

Junior Counsel for the Appellant

³⁹ *Cf Gemmell Power Farming Co Ltd v Nies* (1935) 35 SR (NSW) 469; *Australian Guarantee Corp Ltd v Ross* [1983] 2 VR 319, 321–2 (Young CJ). Neither was a consumer sale within the meaning of s 62.

⁴⁰ *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500, 510 (Mason, Wilson, Brennan, Deane and Dawson JJ).