

IN THE HIGH COURT OF AUSTRALIA

On Appeal from the Supreme Court of New South Wales

BETWEEN:

OLIVER BENNETT

Appellant

-and-

URBAN AUTO GROUP PTY LTD

Respondent

REPRESENTED BY [JAIDA TIMBS] AND [ELLA RUANE]

WRITTEN SUBMISSION FOR THE RESPONDENT

ISSUES FOR DETERMINATION

1. Whether the trial judge was correct in holding that the pre-contractual statements were not actionable representations of fact.
2. Whether the trial judge was correct in holding that Clause 9 validly precluded reliance on the pre-contractual statements.
3. Whether the trial judge was correct in holding that the Respondent did not engage in misleading or deceptive conduct.
4. Whether the trial judge was correct in holding that no term should be implied into the Contract.
5. Whether the trial judge was correct in finding that the Respondent lacked knowledge concerning the condition of the vehicle.

SUBMISSIONS

I Whether the trial judge was correct in holding that the pre-contractual statements were not actionable representations of fact

6. The statements relied upon by the appellant, namely that the Vehicle had undergone a “full professional restoration to concours standard,” had a “completely rebuilt” engine and was “suitable for regular road use,” were promotional statements rather than representations of objective fact. Whether a statement constitutes an actionable representation must be determined in its context, having regard to the principles articulated in *Campbell v Backoffice Investments Pty Ltd*.¹
7. The statements were made in the context of the sale of a restored classic vehicle and employed language that a reasonable purchaser would understand as promotional rather than as a precise guarantee of the Vehicle’s condition. As recognised in *Australian Competition and Consumer Commission v We Buy Houses Pty Ltd*,² whether a representation constitutes puffery turns upon the particular facts, considering the ordinary incidents and character of commercial behaviour. In particular, the expression “concours standard” is evaluative language directed to the quality and presentation of a restoration, rather than a representation that the Vehicle satisfied a particular objectively ascertainable standard.
8. A degree of promotional language or “puffery” is ordinarily to be expected in commercial dealings, as attested in *Schindler Lifts Australia Pty Limited v Debelak*.³ Such statements do not constitute actionable representations merely because they convey a favourable impression of the subject matter. Properly construed in context, the statements were not intended to be understood as precise representations of fact.

Accordingly, the trial judge was correct to conclude that the statements were not intended to be taken literally and therefore should not be considered actionable representations.

¹ (2009) 238 CLR 304, 319 [25]–[28].

² (2017) FCA 915, [64]–[68].

³ (1989) FCA 311, [40].

II Whether the trial judge was correct in holding that Clause 9 validly precluded reliance on the pre-contractual statements

9. Clause 9 of the Contract expressly provides that the appellant did not rely on any prior representations not set out in the agreement. Such clauses are effective in defining the basis upon which the parties' contract as established in *Campbell v Backoffice Investments Pty Ltd*.⁴
10. Further, the contractual acknowledgment of non-reliance bears upon whether the Appellant should be believed when asserting that the pre-contractual statements induced the purchase. In *IOOF Australia Trustees (NSW) Ltd v Tantipech*, it was recognised by the Full Federal Court that a contractual acknowledgment of non-reliance may bear upon whether the applicant should be believed when asserting that pre-contractual representations induced the transaction.⁵
11. The significance of Clause 9 is conceptually distinct from whether the pre-contractual statements were misleading or deceptive. Even if the Appellant establishes that the statements were misleading or deceptive, the statutory remedies sought require the Appellant to establish the requisite causal connection between that conduct and the loss suffered.
12. Section 236(1)(a) of the *Australian Consumer Law* provides for damages where a person suffers loss or damage "because of" conduct contravening, relevantly, s 18.⁶ Similarly, s 237(1)(a) permits the Court to make orders where a person has suffered or is likely to suffer, loss or damage "because of" such conduct.⁷
13. Where the Appellant did not rely upon the pre-contractual statements, he cannot establish that any loss or damage was suffered "because of" those statements.⁸ The absence of reliance therefore defeats the Appellant's claim for the remedies sought, even if the statements are otherwise found to have been misleading or deceptive.
14. This conclusion is reinforced by Clause 7, which provides that the Vehicle was purchased in its present condition following inspection. The contractual terms therefore demonstrate that the Appellant's purchase was not founded upon reliance on the pre-contractual statements.

Accordingly, Clause 9 validly precluded reliance upon the pre-contractual statements and the Appellant cannot establish the causal element necessary to obtain the remedies sought under the *Australian Consumer Law*.

III Whether the trial judge was correct in holding that the Respondent did not engage in misleading or deceptive conduct.

15. Section 18 of the *Australian Consumer Law* prohibits conduct that is "misleading or deceptive." However, not all statements give rise to liability as the conduct must convey a representation that is sufficiently precise and capable of misleading.
16. In *Campbell v Backoffice Investments Pty Ltd*,⁹ the High Court emphasised that context is critical in determining whether conduct is misleading. Similarly, *Google Inc v*

⁴ (2009) 238 CLR 304, 319 [31].

⁵ (1998) 156 ALR 470, [480].

⁶ *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') ss 18, 236(1)(a).

⁷ *Ibid* s 237(1)(a).

⁸ See *ibid*.

⁹ (2009) 238 CLR 304, 319 [25]–[28].

ACCC¹⁰ confirms that liability depends on whether the respondent can properly be said to have conveyed the misleading representation.

17. The statements relied upon by the Appellant were, in their context, too vague and uncertain to lead a reasonable purchaser into error. Expressions such as “full professional restoration to concours standard” and “suitable for regular road use” do not convey a sufficiently precise representation as to the Vehicle’s particular mechanical condition or future performance.
18. The relevant distinction is between a statement that conveys a definite representation which may lead a person into error and a statement whose uncertainty prevents it from conveying any sufficiently precise representation at all. Here, the statements fall into the latter category.

As such, the statements made were insufficiently precise to lead the Appellant into error. The trial judge was therefore correct to conclude that the Respondent had not engaged in misleading or deceptive conduct.

IV Whether the trial judge was correct in holding that no term should be implied into the Contract

At trial, the Appellant confined its case concerning the Implied Term to implication in fact and did not rely upon the *Sale of Goods Act 1923* (NSW).¹¹ The Appellant should not be permitted to advance a new statutory basis for the Implied Term on appeal, as established in *Bird v DP*.¹²

19. The appellants alternative argument is that the Contract contained an Implied Term that the Vehicle would be regularly fit for regular road use. The implication of terms is governed by the five-limbed test in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.¹³ To uphold the decision of the trial judge, it is only necessary for one of those limbs to be absent.
20. The respondent submits that the trial judge was correct in finding that the Implied Term was not necessary for business efficacy. Further, the trial judge could have found that the Implied Term was inconsistent with the express terms of the Contract. The Respondent therefore focuses on those two limbs.
21. The Implied Term was not necessary to give the Contract business efficacy. The Contract is capable of functioning effectively without a term requiring the Vehicle to be reasonably fit for regular road use. There are sensible commercial reasons why a purchaser may acquire a restored classic vehicle even where it is not capable of being driven regularly.
 - (a) The absence of regular road use therefore does not deprive the Contract of its commercial purpose or operation.
22. The Implied Term is also inconsistent with the express terms of the Contract, as it would impose an additional warranty concerning the Vehicle's roadworthiness despite the parties having expressly addressed the Vehicle's condition and excluded additional

¹⁰ (2013) 249 CLR 435, 446 [15].

¹¹ *Sale of Goods Act 1923* (NSW).

¹² (2024) 283 CLR 45, 70 [39].

¹³ (1977) 180 CLR 266, 267 [2].

warranties. In *Byrne v Australian Airlines Ltd*,¹⁴ the High Court confirmed that a term cannot be implied where it is inconsistent with the express terms of the contract.

Therefore, no such term can be implied into the Contract.

V Whether the trial judge was correct in finding that the Respondent lacked knowledge concerning the condition of the vehicle

23. The appellant relies upon evidence that the respondent's employees were aware of deficiencies in the Vehicle, including that the restoration was "cosmetic-heavy" and the engine work was "passable but not perfect." However, knowledge or intention is not an element of misleading or deceptive conduct under section 18 of the *Australian Consumer Law*.¹⁵
24. The employees' knowledge that the Vehicle was not mechanically perfect did not establish that the respondent's representations were objectively misleading. The Vehicle was a restored classic vehicle, in respect of which a reasonable purchaser would understand that restoration involves the repair, replacement and refurbishment of existing components and may involve further work. Accordingly, the respondent's internal knowledge of imperfections did not determine whether the representations conveyed a misleading impression to the appellant.
25. The trial judge therefore did not err by declining to place greater weight upon the employees' knowledge. Even if greater weight had been placed upon that evidence, it could not have altered the outcome because the respondent's subjective knowledge was not determinative of liability under section 18.¹⁶

The appellant has not established any material error in the trial judge's application of the objective test. Ground 5 should therefore be dismissed.

ORDERS

26. The appeal should be dismissed with costs.
27. The orders of the Supreme Court of New South Wales should be affirmed.

¹⁴ (1995) 185 CLR 410, [42].

¹⁵ *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') s 18.

¹⁶ See *ibid*.