Re Elders Trustee and Executor Company Limited v EG Reeves Pty Limited; Edward George Reeves (Second Respondent) and Daphne Joan Reeves (Third Respondent) [1987] FCA 332 (29 September 1987)

FEDERAL COURT OF AUSTRALIA

Re: ELDERS TRUSTEE AND EXECUTOR COMPANY LIMITED
And: E.G. REEVES PTY. LIMITED; EDWARD GEORGE REEVES (Second Respondent) and DAPHNE JOAN REEVES (Third Respondent) No. G419 of 1986
Trade Practices - Company Law - Equity - Trustees

COURT

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
Gummow J.(1)

CATCHWORDS

Trade Practices - misleading or deceptive conduct - false or misleading statements as to price - statements made in course of negotiations - not with the applicant but with third party - reliance - causation.

Trade Practices - misleading or deceptive conduct - failure to disclose material circumstances to purchaser - fiduciary duty relied on as source of obligation to disclose - silence as misleading or deceptive conduct.

Company Law - prescribed interests - obligations of trustee and manager in relation to undertaking or enterprise pursuant to which prescribed interests offered to public - promoters of such undertakings or enterprises - obligations of such promoters.

Equity - fiduciary duties allegedly arising in the course of commercial negotiations - criteria for determining existence and incidents of such duties.

Equity - rectification - need for outward expression of accord between the parties as well as common intention.

Trustees - nature of liability for debts incurred in conduct of the trust - exclusion of personal liability of trustee.

Trade Practices Act 1974 ss.52, 53A, 82 and 87 Companies (Queensland) Code 1981 Part IV Division 6

Corporate Affairs Commission v Drysdale [1978] HCA 52; (1978) 141 CLR 236 referred to.

Browne v Dunn (1894) 6 R 67 (HL) referred to.

Reid v Kerr (1974) 9 SASR 367 referred to.

Tsekos v Finance Corporation of Australia Limited (1982) 2 NSWLR 347 referred to.

Tiplady v Gold Coast Carlton Pty. Limited (1984) 3 FCR 426 referred to.

United Dominions Corporation Ltd. v Brian Pty. Ltd. [1985] HCA 49; (1985) 157 CLR 1 followed.

Rhone-Poulenc Agrochimie S.A. v U.I.M. Chemical Services Pty. Ltd. (1986) 68 ALR 77 followed.

Collins Marrickville Pty. Ltd. v Henjo Investments Pty. Ltd. (1987) ATPR 40-782 followed.

Nobile v The National Australia Bank Ltd. (1987) ATPR 40-787 followed.

United States Surgical Corporation v Hospital Products International Pty. Ltd. (1982) 2 NSWLR 766 referred to.

Hospital Products Ltd. v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41 followed.

Yorke v Lucas [1985] HCA 65; (1984) 158 CLR 661 referred to.

Octavo Investments Pty. Ltd. v Knight [1979] HCA 61; (1979) 144 CLR 360.

English v Dedham Vale Properties Ltd. (1978) 1 ALL ER 399 referred to.

Old Dominion Copper Mining and Smelting Co. v Bigelow (1909) 89 NE 193 referred to.

Lipkin Gorman v Karpnale Ltd. (1986) 136 New LJ referred to.

Ninety Five Pty. Ltd.(in liquidation) v The Banque Nationale de Paris (Supreme Court of Western Australia, Smith J. 12 June 1987) referred to.

Ardlethan Options Ltd. v Easdown [1915] HCA 53; (1915) 20 CLR 285 referred to.

Bradford House Pty. Ltd. v Leroy Fashion Group Ltd. (1983) ATPR 40-387.

Para Wirra Gold and Bismuth Mining Syndicate N.L. v Mather [1934] HCA 46; (1934) 51 CLR 582 referred to.

Tracy v Mandalay Pty. Ltd. [1953] HCA 9; (1953) 88 CLR 215 referred to.

Parkes Management Ltd. v Perpetual Trustee Co. Ltd. (1977) ACLC 29,545 referred to.

Archibald Howie Pty. Ltd. v The Commissioner of Stamp Duties (NSW) [1948] HCA 28; (1948) 77 CLR 143 referred to.

Ashby v Blackwell and the Million Bank Co. [1765] EngR 51; (1765) Amb 503; 27 ER 326 referred to.

Bligh v Brent (1836) 2Y & C Ex 268; [1836] EngR 1056; 160 ER 397 referred to.

In re Agriculturist Cattle Insurance Co.(Baird's Case) (1870) LR 5 Ch App 725 referred to.

In re European Assurance Society (Grain's Case) (1875) 1 Ch D 307 referred to.

In re Stanley (1906) 1 Ch 131 referred to.

Foss v Harbottle [1843] EngR 478; (1843) 2 Hare 461; 67 ER 189 considered.

Morrison v O'Brien [1953] HCA 49; (1953) 90 CLR 501 referred to.

Smith v Anderson (1880) 15 Ch D 247 referred to.

Charles v Federal Commissioner of Taxation [1954] HCA 16; (1954) 90 CLR 598 referred to.

Re International Vending Machines Pty. Ltd. and the Companies Act. (1962) NSWR 1408 referred to.

Petty v Penntech Papers Inc. (1975) 347 A 2d 140 referred to.

Guthrie v Harkness [1905] USSC 153; (1905) 199 US 148 referred to.

Nationwide Corp. v Northwestern National Life Insurance Co. (1958) 87 NW 2d 671 referred to.

Hichens v Congreve (1828) 4 Russ 562; 38 ER 917 considered.

Regal (Hastings) Ltd. v Gulliver (1967) 2 AC 134(n) referred to.

The Wheal Ellen Gold Mining Co. N.L. v Read [1908] HCA 58; (1908) 7 CLR 34

Emma Silver Mining Co. v Grant (1879)11 Ch D 918 referred to.

Yale-Gas Stove Co. v Wilcox (1894) 29 A 303 referred to.

Dickerman v Northern Trust Company [1900] USSC 24; (1900) 176 US 181 referred to.

Redgrave v Hurd (1881) 20 Ch D 1 referred to.

Lydney and Wigpool Iron Ore Co. v Bird (1886) 33 Ch D 85 considered.

Whaley Bridge Calico Printing Co. v Green (1879) 5 QBD 109 considered.

Eaves v Hickson [1861] EngR 831; (1861) 30 Beav 136; 54 ER 840 referred to.

Midgley v Midgley (1893) 3 Ch 282 referred to.

Redgrave v Hurd (1881) 20 Ch D 1 referred to.

Barnes v Addy (1874) LR 9 Ch App 244

The English and Scottish Mercantile Investment Company Ltd. v Brunton (1892) 2 QB 700 referred to.

W. Wehbe v Caltex Oil, (Australia) Pty. Ltd. (Unreported Full

Eaves v Hickson [1861] EngR 831; (1861) 30 Beav 136; 54 ER 840 referred to.

Consul Development Pty. Ltd. v D.P.C. Estates Pty. Ltd. [1975] HCA 8; (1975) 132 CLR 373 referred to.

Belmont Finance Corporation Ltd. v Williams Furniture Ltd. (1979) Ch 250 referred to.

Hornsby Building Information Centre Pty. Ltd. v Sydney Building

Information Centre Ltd. [1978] HCA 11; (1978) 140 CLR 216 referred to.

R v The Judges of the Federal Court of Australia; Ex parte Pilkington A.C.I. (Operations) Pty. Ltd. [1978] HCA 60; (1978) 142 CLR 113 referred to.

Parkdale Custom Built Furniture Pty. Ltd. v Puxu Pty. Ltd. [1982] HCA 44; (1982) 149 CLR 191 referred to.

McWilliam's Wines Pty. Ltd. v McDonald's System of Australia Pty. Ltd. [1980] FCA 159; (1980) 49 FLR 455 referred to.

Taco Company of Australia Inc. v Taco Bell Pty. Ltd. [1982] FCA 136; (1982) 42 ALR 177 referred to.

Pappas v Soulac Pty. Ltd. (1983) 50 ALR 231 followed.

Global Sportsman Pty. Ltd. v Mirror Newspapers Pty. Ltd. [1984] FCA 180; (1984) 2 FCR 82 followed.

Milner v Delita Pty. Ltd. (1985) 61 ALR 557 followed.

Jones v Acfold Investments Pty. Ltd. (1985) 59 ALR 613 followed.

Turner v Jenolan Investments Pty. Ltd. (1985) ATPR 40-571 followed.

Bateman v Slatyer (1987) 71 ALR 553 followed.

Johnson v Eastern Micro Electronics Pty. Ltd. (1986) 70 ALR 339 followed.

Industrial Equity Ltd. v North Broken Hill Holdings Ltd. (1986) 64 ALR 292 referred to.

Bill Acceptance Corporation Ltd. v GWA Ltd. [1983] FCA 269; (1983) 50 ALR 242 followed.

Clark Equipment Australia Ltd. v Covcat Pty. Ltd. (1987) 71 ALR 367 referred to.

Bank Keyser Ullmann S.A. v Skandia (U.K.) Insurance Co.Ltd. (1987) 2 WLR 1300 referred to.

Elna Australia Pty. Ltd. v International Computers (Australia) Pty. Ltd. (1987) ATPR 40-795 referred to.

Gorris v Scott (1874) LR 9 Ex 125 referred to.

Repatriation Commission v Law [1981] HCA 57; (1981) 147 CLR 635 referred to.

The Repatriation Commission v O'Brien [1985] HCA 10; (1985) 59 ALJR 363 referred to.

In re Johnson (1880) 15 Ch D 548 referred to.

Vacuum Oil Co. Pty. Ltd. v Wiltshire [1945] HCA 37; (1945) 72 CLR 319 referred to.

Helvetic Investment Corporation Pty. Ltd. v Knight (1984) 9 ACLR 773 referred to.

Bishopsgate Insurance Australia Ltd. v Commonwealth Engineering (NSW) Pty. Limited (1981) 1 NSWLR 429 referred to.

Pukallus v Cameron (1982) 56 ALJR 907 referred to.

Keith Henry and Co. Pty. Ltd. v Stuart Walker and Co. Pty. Ltd. [1958] HCA 33; (1958) 100 CLR 342 referred to.

HEARING

SYDNEY
29:9:1987

Counsel and Solicitors for : M.J. Finnane QC with G. Inatey the Applicant and R.N. Talbot instructed by
Madgwicks, solicitors.

Counsel and Solicitors for : W.H. Nicholas QC with B.R. McClintock the Respondents instructed by Messers. Cutler

Hughes and Harris.

DECISION

INTRODUCTION

In 1977 the first respondent became the owner of a property known as

"Bookookorara", identified in these proceedings as "Booka". The first respondent is a family company of the second and third respondents, Mr. and Mrs Reeves. Mrs. Reeves played little direct part in the events of the case. I will proceed on the footing that unless the applicant ("Elders") can succeed against the other respondents it cannot succeed against her.

2. Before 1977, Booka was in the ownership of Mr. Reeves' family, having been purchased by his father between 40 and 50 years previously. From 1978 there was a registered mortgage upon the title in favour of The National Bank of Australia Ltd. Mr. Reeves was born in 1928. His father died in 1976. Booka is situated in northern New South Wales approximately 37 km. from Tenterfield in New South Wales and 32 km. from Stanthorpe in Queensland. At all material times Mr. and Mrs.

Reeves resided in the town of Stanthorpe and not on Booka. Booka has a frontage to the Mount Lindsay Highway of more than 1 km. It has an area of approximately 1039 hectares.

3. On 22 August 1984 a conveyancing transaction was completed whereby the National Bank mortgage was discharged and the first respondent transferred Booka to Elders. The sale price for the land and improvements was $1,000,000 and Elders granted to the first respondent a "mortgage back". This was a second mortgage over Booka to secure an indebtedness of $490,000.

4. Elders granted a first mortgage over Booka to a group of some twenty-five persons and this security was described in the present proceedings as "the contributory mortgage". In the events that have since occurred, Booka was sold by the mortgagees under the contributory mortgage, in exercise of their power of sale. The sale price was $500,000. The transfer by the mortgagees under the power of sale was registered on 17 March 1986. Booka has thus passed into the hands of third parties who play no role in the present proceedings.

5. In the second mortgage to which I have referred, Elders covenanted with the first respondent to pay the principal sum of $490,000 on 22 August 1985 and, in the meantime, to pay interest at the rate of 20% per annum by equal half yearly instalments, the first instalment to be paid on the date of the mortgage, namely 22 August 1984. A sum of $49,000 was allowed in the adjustments on settlement for the first instalment. Also allowed for in the adjustments was $86,000 on account of plant and equipment sold along with Booka, but under a separate contract. The second mortgage contained a covenant that it was collateral with and secured repayment of the same sum as mentioned in a bill of sale and stock mortgage of the same date and between the same parties, and also a memorandum of mortgage of the same date between QFP Properties Pty. Ltd. as mortgagor and the first respondent as mortgagee. I refer later in these reasons to the circumstances of the creation of these collateral securities.

6. By its cross-claim in the present proceedings, the first respondent seeks to recover from Elders the principal sum outstanding together with interest. The cross-claim pleads that Elders failed to pay the plaintiff on 22 August 1985 the principal sum of $490,000 secured by the second mortgage and has failed to pay certain interest thereon with the result that there was outstanding at the time the cross-claim was filed on 23 February 1987, the sum of $537,242.O4. The correctness of these calculations is not disputed by Elders, nor, subject to what follows, is the existence of the obligation of Elders to pay these moneys.

7. Elders commenced these proceedings on 30 September 1986. By its Statement of Claim (which underwent several amendments), Elders seeks relief which would have the effect, inter alia, of removing its obligations to the first respondent under the covenants in the second mortgage upon which the first respondent relies as the source of its cross-claim. I turn now to the background to the case sought to be made good by Elders.

8. On 6 November 1984, a prospectus was issued to the public in respect of 11,231,581 units at $1 each in what was styled the "GGI Rural Income and Growth Trust" ("the GGI Unit Trust"). The prospectus was necessary because the units in question were prescribed interests within the meaning of Division 6 of Part IV of the Companies (Queensland) Code ("the Code") and the other State and Territory Codes. The prospectus had been through a number of drafts in the preceding year. The prospectus was lodged with and registered by the Commissioner of Corporate Affairs of the State of Queensland as delegate of the National Companies and Securities Commission. The prospectus stated that it was proposed to issue, circulate and distribute it in all States and the Australian Capital Territory. The manager was Golden Grove Industries Limited (described in these proceedings as

"GGI") and Elders was trustee to the unit holders. In the prospectus Booka was described as owned, together with plant and equipment thereon, by Elders as trustee of the GGI Unit Trust.

9. Elders had its central management based in Adelaide. It conducted its affairs independently of other companies in the Elders group.

10. Shortly put, the history of the GGI Unit Trust is that the original trust deed constituting what was then described as the "GGI Pig Trust" was dated 30 July 1982 and was made between GGI (then styled Golden Grove Industries Pty Limited) as manager and QFP Properties Pty. Limited as trustee. In July 1984, that is to say before the settlement of the 22nd August 1984 of the purchase of Booka and the creation of the second mortgage back to the first respondent, there were some important changes. Elders was appointed trustee, the name of the trust was changed to "GGI Rural Income and Growth Trust" and the then existing unit holders approved substantial changes to the trust deed to enable it to be an approved deed within the meaning of s.166 of the Code. The amending deed incorporating these amendments into the trust deed was executed by GGI as manager and Elders as trustee and dated 6 August 1984. This is the deed that was the trust deed for the purposes of the prospectus. I will have occasion later in these reasons to refer to particular provisions of the trust deed.

11. The GGI Unit Trust did not prosper. Section 175 of the Code contains provision for the winding up of the undertaking, scheme, enterprise or arrangement to which an approved deed relates. On 25 June 1985, on the application of Elders, the Supreme Court of Queensland confirmed the following resolution passed at a meeting of unit holders held on 15 May 1985:

> This meeting of unit holders being duly apprised of the placing of the former management company under the Trust Deed Golden Grove Industries Limited into liquidation on 26 March 1985 and of its ceasing to carry on business desires that the undertaking scheme enterprise or arrangement to which the Trust Deed bearing date 6th August, 1984 establishing the G.G.I. Rural Income and Growth Trust relates be wound up in accordance with the provisions of the said trust deed ...

12. The Supreme Court ordered that Elders, as trustee of the GGI Unit Trust, be authorized to carry out the winding up of the said GGI Unit Trust. It also authorized Elders to exercise all the powers set out in the trust deed which were necessary and incidental to the realization of the GGI Unit Trust.

13. The proceedings in this Court were commenced on 30 September 1986. Elders seeks relief which would have the effect both of requiring the first respondent to take no further steps to recover any moneys owing to it under covenants in the second mortgage and collateral securities I have mentioned and of declaring void such obligations to the first respondent under those securities. I will return shortly to indicate the footing on which these claims are based.

14. In addition, the second mortgage taken by the first respondent over Booka contains nothing which would indicate that Elders mortgaged Booka in any representative capacity or that Elders gave the covenants in favour of the first respondent in any fashion which limited the liability of Elders thereunder to the first respondent. Elders did not, for example, limit its liability, upon the

covenants to repay, to the value of assets held by Elders as trustee of the GGI Unit Trust. In this setting, Elders seeks rectification of the second mortgage and collateral securities by the insertion of words to indicate that the liability thereunder of Elders to the first respondent is "as trustee of the GGI Rural Income and Growth Trust and to the extent only of the assets of the GGI Rural Income and Growth Trust." 44p

Elders also seeks the taking of accounts and the
making of enquiries to ascertain the amount of loss or damage sustained by it or sustained by the unit holders for whom it was trustee. Apart from the equitable remedy of rectification, Elders places reliance for the authority of the Court to provide this range of remedies upon ss. 82 and 87 of the Trade Practices Act 1974 ("the TP Act").

15. The central element in the Elders' case is that the first respondent contravened ss.52 and 53A (1)(b) of the TP Act, that the other respondents were involved in those contraventions (within the meaning of s.75B of the TP Act and the principles expounded in Yorke v Lucas [1985] HCA 65; (1984) 158 CLR 661), and that the loss or damage suffered by Elders by the conduct done in contravention of these provisions is recoverable by Elders from the respondents under s.82.

16. The contraventions of s.52 are said to arise both from misleading or deceptive representations and from failure to make certain disclosures to Elders when, in the circumstances, there were obligations to do so. The allegedly misleading or deceptive representations relied on for contravention of s.52 include false or misleading statements as to the price payable for Booka and value of Booka. I refer later in this judgment to the distinction which may exist in this setting between "value" and "price". These false or misleading statements are alleged also to contravene s.53A (1)(b) of the TP Act; however in his address senior counsel for Elders indicated that reliance was placed upon s.53A for more abundant caution and that Elders would be unlikely to succeed under s.53A if it did not succeed under s.52. Elders relied upon s.53A as it stood before the amendment (by Act No. 17 of 1986) which substituted the word "representation" for "statement" viz.

53A(1) A corporation shall not, in trade or
commerce, in connection with the sale or grant,
... of an interest in land...

(b) make a false or misleading statement
concerning the nature of the interest in the
land, the price payable for the land, the
location of the land, the characteristics of
the land, the use to which the land is
capable of being put or may lawfully be put
or the existence or availability of
facilities associated with the land.

...

17. The obligations of disclosure were said to arise from fiduciary duties owed to Elders and the unit holders for whom Elders was trustee. Those fiduciary duties arose, it is alleged, either because the respondents (particularly Mr. Reeves) were (with GGI) promoters of the business venture described as the GGI Unit Trust or, because they owed fiduciary duties to Elders and the unit holders by reason of the particular circumstances of the case, whether or not this involved classification of Mr. Reeves or the other respondents as promoters in any technical sense. These

fiduciary duties thus were relied on, not as providing any direct footing for relief, so much as to support the submission that failure to discharge an obligation of disclosure may give rise to misleading or deceptive conduct to which s.52 of the TP Act applies.

18. The hearing proceeded on the basis that I would deal with what I might describe as the rectification issue and with the question of whether there had been contravention of s.52 and s.53A so as to give rise to liability for loss or damage under s.82 of the TP Act. It was agreed that if I found in favour of Elders on the TP Act issues it would be necessary to take further evidence and hear further submissions as to the quantification of any loss or damage that was recoverable under s.82 from the respondents and the terms of any other relief under s.87 of the TP Act. The hearing, in respect of the issues under the TP Act, was described as one concerning liability rather than quantum.

19. Elders' senior counsel referred at various stages of the case to its position as trustee charged with the protection and vindication of the interests of the unit holders. Alleged duties upon the respondents that were said to have arisen were described as owed to Elders in its representative capacity. However, the Application and Statement of Claim did not expressly assert that Elders sued in a representative capacity (cf Federal Court Rules, Order 4, Rule 4). Moreover, Elders has direct and personal interests in the claim for rectification and, if that fails, in defending the cross-claim; these are interests perhaps not necessarily co-extensive with those of the unit holders. But no point was taken on these issues by the respondents, and I say no more concerning them, particularly in the light of the conclusion I have reached on the rectification claim.

SALIENT FACTS
20. I turn now to consider the salient facts.

(A) Up to execution of the option agreement - 9 June 1983

21. Elders relies upon various incidents in this period as indicative of misleading or deceptive conduct or false or misleading statements within the respective meanings of s.52 and s.53A(1)(b) of the TP Act, as I above described. At all material times a Mr. Patrick Joseph O'Dea was a director of GGI. This company was styled Golden Grove Industries Pty. Limited until 6 February 1984, when, consequent upon conversion to a public company, it changed its name to Golden Grove Industries Limited. Mr. O'Dea was the dominant force in the affairs of GGI. He was not called to give evidence in these proceedings. In the prospectus he was described in terms marking him as an experienced man of business.

22. On 30 July 1982, GGI as manager settled the sum of $2,000 on QFP Properties Pty. Limited as trustee to establish what was then described as the "GGI Pig Trust". Mr. O'Dea controlled QFP Properties Pty. Limited. By 1 August 1984 a total of 1,277,000 units at $1 each had been issued to 169 unit holders. A piggery was constructed near Young in New South Wales and commercial operations commenced some time after August 1983. In February/March 1983 Mr. O'Dea considered proposals for expansion of the operations of the trust. A particular proposal involved the "vertical integration" of the piggery at Young with a breeding unit, a feed mill, processing works and a holding of rural property. Funds were to be solicited for these purposes from the public. Approaches were made to two professional trustee companies with a view to engaging one of these companies to act as trustee for the proposed public fund raising. One of these companies was Elders.

23. The attention of Elders was solicited initially by Mr. O'Dea in discussions with a Mr. Hewett on 12 April 1983. Mr. Hewett was an employee of Elders. He was not called to give evidence. These

discussions were followed by a letter of 13 April 1983 written to Mr. Hewett by Mr. Bryan Murray Hughes, an employee of GGI. Mr. Hughes did give evidence in Elders' case.

24. On 18 April 1983 a proposal was sent by GGI to Elders which outlined the expansion scheme and invited Elders to act "as Public Trustees" in relation to the proposed venture. On 13 May 1983, Mr. David Oakshott, the then General Manager of Elders, wrote a letter to Mr. O'Dea in which he "confirmed" that Elders "shall be pleased to act as Trustee" in the proposed public trust. This did not, in the view of Elders, impose an obligation upon it to continue if, as the project developed, it became apparent that Elders should not do so. The letter of 13 May also set out details of Elders' scale of fees. Mr. Oakshott was not called to give evidence. Mr. O'Dea then replied on behalf of GGI on 24 May 1983, stating "we are delighted that Elders are going to join us in this development" and indicating to Elders that a draft prospectus was being "developed" by GGI's solicitors Messrs. MacGillivray & Company of Brisbane. Mr. Hunt of this firm of solicitors appeared frequently in the events that followed. He did not give evidence.

25. The first priority of GGI in its expansion proposals was the location of a suitable rural property on which to conduct "the second phase" of the proposal. It was this which brought Mr. O'Dea into contact with Mr. Reeves. It is appropriate at this stage to turn to the situation at "Booka".

26. In February 1982, Mr. Davis, an officer of the New South Wales Soil Conservation Service, on the invitation of Mr. Reeves, visited Booka. Following discussions between him and Mr. Reeves, Mr. Davis wrote to his superior on 31 July 1982 a report recommending acceptance of an application by Mr. Reeves for an advance for soil conservation or erosion mitigation works, pursuant to s.22B of the Soil Conservation Act 1938 (NSW). Mr. Davis' letter of 31 July 1982 is a useful contemporary indication of the state of Booka. It gives some independent support to Mr. Reeves' belief, frequently expressed in his evidence in this case, that his property was "the best" in the district and that he carefully husbanded it. In his oral evidence, Mr. Davis (who was called by Elders) said Mr. Reeves was the first soya bean farmer to approach the Service since he (Mr. Davis) had arrived in the area in October 1980.

27. The letter of recommendation by Mr. Davis contains the following:-

"The property "Bookookarara" has now grown soybeans for seven seasons. In fact, it was the first country sown down to this increasingly important cash crop in this north-east corner of the Glen Innes Soil Conservation District.

The soybean "belt" is a fairly narrow strip starting from about the area of "Bookookarara" and running north along both sides of the Mount Lindsay Highway as far as Woodenbong. This strip experiences higher rainfall than the surrounding districts. "Bookookarara" for instance, has a 50" annual rainfall. ...

The combination of summer cropping, high rainfall and continued double cropping have pre-disposed the property to all forms of

soil erosion. The landowner is now aware of the situation and explains "that in some areas it is no longer possible to plough."

He is a good manager, with most natural flowlines having been preserved...

The future of continued soybean production can only be increasingly important due to the economic need of a suitable cash crop. It is therefore most important that the Service actively becomes involved in the District. This leading landholder provides the opportunity to firstly show just what can happen under continued production and more importantly, how it can be treated and prevented by the use of correct Soil Conservation techniques.

This will be the first soil conservation work performed by the Service in this District (other than Mining Rehabilitation) and, as such, will serve as an example of erosion control measures needed for soybean production in this District."

28. The application was successful and the work involved was performed later in 1982. The estimated cost of the proposed works was $30,316. On 31 July 1982 Mr. Reeves, on behalf of E.G. Reeves Pty. Ltd., applied for an advance from the Commission in order to pay for these works to be performed. The advance was to be repayable over fifteen years at a discounted rate of interest. Mr. Reeves was required to complete an application form and a statement as to his financial status. Mr. Reeves completed these forms under the supervision of Mr. Davis. Mr. Davis advised Mr. Reeves that he should use a "conservative figure" when disclosing the value of Booka and that the plant and equipment on Booka should be stated at a depreciated value. Mr. Reeves directed his accountant, a Mr. Rota, to make enquiries as to the Valuer General's valuation of Booka. Mr. Rota was given a figure of $300,000 which represented the value of the typical 1200 ha property in the area as at 1981. Mr. Rota was also advised that land values in the area had since risen by 50%. Mr. Rota adapted this figure to the dimensions of Booka and reached a figure of $254,000. He then added to this 50% of that figure and reached a total of $381,000. This figure was disclosed in the application and statement of financial status as the value of Booka. The advance was approved on 26 August 1983. Early in 1983 Mr. Davis arranged for a "technical day" to be held on the property with the assistance of the local soil conservation service, and this took place.

29. Mr. Reeves was a man of some experience in business matters. In 1958 he and his father established a road transport business which was built up by 1982 to a business employing approximately 50 persons. In 1982 this business was sold. By the means of a company "Western Freight Lines Pty. Limited", Mr. Reeves held the agency in his district for the North Western Vegetable Oil Company and, as such, sold soya bean seed to growers and marketed crops when harvested. There is in evidence material indicating that in February 1984 Mr. Reeves was interested in a company "Stanthorpe Freight Lines Pty. Limited" which described itself as a "specialist in freight and general transportation". It appears that at that time this company also acted as agents for

Cargill Oil Seeds. In respect of the year ended 30 June 1983 the first respondent lodged an income tax return as trustee for the "Ted Reeves Family Trust" in which the business or income producing activity was described as graziers, transport operators and motor dealers. From this return it also appears that the business of motor dealers was carried on by the first respondent under the name "Western Motors and Machinery".

30. By February 1982 Mr. Reeves was considering selling Booka. He listed the property with two agents, Dalgety Winchcombe Properties (under the attention of Mr. Walker) and Messrs. Keith Jensen & Company. Between February 1982 and November of that year there appear to have been no enquiries made concerning the property. The listed price was $825,000 for the front portion and $300,000 for the rear portion. In November 1982 Mr. Walker's partner, Mr. Cobon (who gave evidence in these proceedings), went out to Booka and took some photographs of the property with a view to further promotion. Mr. Reeves increased the purchase price of the front property by $50,000 (ie to $875,000) following that inspection on the basis of what he described as "the buoyant state" of the market. Nothing further developed from either agent and in February 1983 Mr. Reeves approached Mr. J.C. Mann for advice on how best to sell the property. Mr. Mann carried on business as Cec Mann & Company in Stanthorpe, Queensland. Mr. Mann gave evidence. Mr. Mann told Mr. Reeves that a brochure should be produced and sent to all stock and station agents in Queensland, New South Wales and Victoria and also to the head offices of all the major agencies in all capital cities in Australia.

31. On 14 March 1983 Mr. Mann went out to Booka accompanied by a photographer. He interviewed Mr. Reeves and inspected the property. A brochure was prepared. A copy of it was in evidence as Exhibit Q. It is a four page document with six colour photographs of the property and a map indicating its location. Booka is described in it as:-

A PICTURESQUE PROPERTY
with an annual rainfall of fifty-one (51)
inches - practically drought free.
Suitable for stud development or
sub-division.
Booka is said to be divided into two properties:
(a) Front property 457ha (1143ac) of
farming and pasture areas -
fully developed.

(b) Rear property 582ha (1397ac) of
improved pasture cattle country.

The brochure states that the owner will sell the land either separately or in total and that the price for the front property is "$750,000 (including crop)." The price for the rear property is stated to be $250,000. The description of the price continues -
stock & plant at valuation
vendors (sic) terms.
A detailed description is given of the front property. Elders relies upon this as an instance of the misleading or deceptive representations made and accordingly I set out the description in full:-
Comprising 457ha (1143ac). Fully developed
with only necessary shade areas remaining.
Approx.345ha (870ac) planted to Soya Beans
with an estimated yield of approximately 500
tonnes. A minimum return of $150,000.00 is

expected. The remainder is established with
excellent improved pastures.
32. Mr. Reeves had wished to include in the brochure a "guarantee" of a return of $180,000 on the soya bean crop. However, Mr. Mann had told him that that was "silly" and it was Mr. Mann "who broke it down" to the more conservative statement that the brochure contained.

33. The brochure also stated that Booka had been owned by the same family for many years and that all improvements and fencing were in as new condition and were of superior construction. The brochure also stated:-

Although virtually drought free, it has
unlimited potential for irrigation from deep
and permanent creeks. The assured rainfall
and the capacity to produce heavy yields of
Soya Beans and winter cereals make it a very
desirable property. Also its proven ability
to produce cattle and fat lambs, coupled
with its proximity to Southern Queensland
markets makes it even more desirable.
34. On the back page, in very small print, appeared the following:-
The information contained in this brochure
has been collated by reliable sources and
whilst we have no reason to doubt its
accuracy we do not guarantee it.
Prospective purchasers should make and rely
on their enquiries. The agent and producers
of this brochure cannot be accountable for
any inaccuracy or variation which may
occur.
35. Soya beans had been under cultivation at Booka since 1976. Initially there had been only two other farms in the locality where that crop had been cultivated. By 1983 the number had increased to 29. The crop was an attractive one, the domestic demand in those years exceeding supply. It also appeared that there were "export opportunities" for this crop. The evidence also indicated that the attractiveness of soya bean crops contributed to something of a land boom in the area and that this was to abate in 1985.

36. The capacity of Booka to produce soya beans was the source of much debate before me, in order to show that the statements concerning soya bean capacity in the brochure under the description of the front property (which I have set out) attracted s.52 and s.53A(1)(b) of the TP Act. I return later to this subject. Following the issue of the brochure there were two inspections at Booka but no offer was made.

37. Mr. O'Dea was introduced to Mr. Reeves by a Mr. Dore of Ray White Realty. Mr. Dore gave Mr. O'Dea a copy of the brochure. Ray White Realty was already known to Mr. O'Dea. An inspection of Booka was arranged. This took place early in May 1983. Mr. O'Dea, accompanied by Mr. Hughes, flew to Stanthorpe. He was met there by Mr. Mann and by Mr. Reeves. Mr. O'Dea, Mr. Hughes and Mr. Reeves travelled to the property in one car, Mr. Dore, Mr. Mann and the pilot of the aircraft travelling in another vehicle. The trip out took some twenty minutes.

38. The visit to Booka lasted some 3 to 4 hours. Both Mr. Hughes and Mr. Reeves agreed in the evidence that the subject of price had been brought up in the conversation on this visit. Mr. O'Dea

had with him a copy of the brochure and reference was made to the purchase price totalling $1,000,000 shown on the back page of the brochure. Mr. Reeves emphasised the attractiveness of the property, referring to the high rainfall of the area, the terrain, the level of the improvement of the property, the natural water courses and the adaptability of the property to various uses including cultivation of soya beans. Mr. Reeves told Mr. O'Dea that Booka was the best soya bean property in the district. In the course of the discussion as to the price, Mr. Reeves told Mr. O'Dea that he was "very firm" on the $1,000,000 price. Mr. O'Dea said that he was curious as to how this price was calculated.

39. There then followed, according to Mr. Reeves, a conversation between him and Mr. O'Dea in which he responded to that curiosity of Mr. O'Dea. The evidence of Mr. Hughes was given before that of Mr. Reeves and he was not asked any questions specifically directed to this topic. Indeed, Elders' case was that it had no advance notice of this aspect of the matter until volunteered by Mr. Reeves in his evidence in chief. Mr. O'Dea was not called. It follows that the only account of Mr. Reeves' response to Mr. O'Dea's question is that of Mr. Reeves in chief and in lengthy cross-examination. The matter is an important one because Elders relies upon what it submits was the effect of what was said by Mr. Reeves to Mr. O'Dea as an instance both of overtly misleading or deceptive conduct and of the making of false or misleading statements, as I have earlier described.

40. Mr. Reeves gave evidence to the effect that he was not "doing the homework" for Mr. O'Dea, although he believed that Mr. O'Dea was ignorant of the value of farms and farming methods. He also said that his own belief was that the value of Booka was "far in excess" of the asking price of $1,000,000.

41. The crucial passage in Mr. Reeves' evidence in chief which is relied upon by Elders, appears at page 681 of the Transcript. It is as follows:

Was there any discussion on this occasion about price? -
Yes.
Can you tell his Honour what was said about that?
- O'Dea said to me your price is a million dollars and he said this to me in the lounge of the homestead and I said yes it is. Are you firm on that price, that is what he asked me, I said very firm.
Yes? - He said he was curious to know how I arrived at the price.
Yes? - And I - -
Did you respond to that? - I responded,
Yes.
Well, then, this is an important part of the matter, as you appreciate, and I want you to take your time and tell his Honour what your response was? - I told him that I had had experience in assisting my father as a valuer over many years, and that the general way to come to the value of a property was, number one to get the unimproved value of that land and then, once you have that, you

then take into consideration the sale price of the properties in the near vicinity and then you add to that the structural improvements that you have and then you calculate the cost of improving that country to the state that it is in; and -
You said all those things to O'Dea, did you? - Yes, in that detail.
Yes; Go on? - And O'Dea did not question me on some of those aspects? He did not question me on unimproved value for a start; but he did question me on the cost of improving.
Well, you have told us that you gave him this indication about arriving at your figure? - Yes.
That is what he was asking you about? - Yes.

42. There was also a discussion at this stage concerning the GGI Pig Trust and the preparation and registration of a prospectus. Mr. Reeves engaged his solicitor, Mr. Sullivan of Messrs. Neil Sullivan and Bathersby to act for him in the matter. Mr. Sullivan did not give evidence. His son, who practised with him, did so, but he had played no part in the matter at this stage.

43. On or about 31 May 1983, a meeting took place between Mr. O'Dea, Mr. Hughes and Mr. O'Dea's solicitor, Mr. Hunt. In the course of that meeting, Mr. Hunt gave advice to the effect that, if a long delay was anticipated during the preparation and registration of the prospectus, O'Dea should attempt to secure an option over the property rather than be tied into the Reeves property which was probably over-valued.

44. Following these discussions, Mr. Hunt telephoned Mr. Sullivan. He told him he was acting for a "trust company to be formed", that a delay of between 9 and 12 months was expected in the issue of a prospectus, and that his client suggested an option over Booka for 12 months at a nominal consideration of $100 and "subject to conditions". Mr. Hunt told Mr. Sullivan Elders "will be trustee". Mr. O'Dea had received Mr. Oakshott's letter, as I have mentioned, on 13 May.

45. Whether before or after their above discussion with Mr. Hunt is not clear, but Mr. O'Dea and Mr. Hughes did look at and investigate other properties in the area of south-east Queensland. None compared favourably with Booka.

46. On or about Friday, 3 June 1983, there was another visit to Booka. Those attending were Mr. O'Dea, Mr. Hughes and Mr. Reeves. After the inspection of the property the parties went to Mr. Reeves' house in Stanthorpe where Mr. Sullivan and Mr. Hunt also attended. Mr. O'Dea indicated a willingness to purchase the property but only under an option arrangement. He referred to expected delay in preparation and registration of the prospectus. Elders points to this as indicating that even at this stage it was apparent to Mr. Reeves and Mr. Sullivan, or should have been apparent to Mr. Reeves and Mr. Sullivan, that it was only with moneys to be raised from the public by the prospectus that the purchase could finally be completed. Elders also points to the circumstance that even at these early meetings and conversations it was clear or should have been clear to Mr. Reeves and Mr. Sullivan, that the raising of the money from the public through the prospectus would involve the appointment of a professional trustee company and that, indeed, Mr. Hunt had already told Mr. Sullivan that Elders was to play that role. I accept that Mr. Sullivan appreciated these matters. Mr. Reeves was not quite in the same position. He was anxious, as soon as August 1983,

for an early settlement. Both to him and to Mr. O'Dea an issue to the public pursuant to the prospectus did not mean that there could not be an earlier settlement of Booka, with temporary finance from some source other than publicly raised funds. Mr. O'Dea was to make considerable efforts to obtain such temporary finance, as I later indicate.

47. At the meeting on 3 June 1983, Mr. O'Dea again attempted to negotiate with Mr. Reeves concerning the price but Mr. Reeves again indicated that he was firm as to the $1,000,000. I find that it was at this meeting that Mr. Reeves said to Mr. O'Dea that the price of the property was $1,000,000, that he had not had the property valued and that his assessment of $1,000,000 was based on an assessment by him of the relative values of properties north and south of Booka. I also find that while Mr. Reeves had beliefs as to the values of the properties relative to the $1,000,000 that he placed on Booka, his "assessment" was not a considered process of reasoning as one would expect of a professional valuer. Elders complains of what Mr. Reeves said as an instance of conduct contravening ss.52 and 53A of the TP Act.

48. Mr. Reeves did indicate a willingness to negotiate so far as concerned improvements to the property to suit Mr. O'Dea's purposes. Mr. O'Dea did not then express any concern over the lack of an independent valuation of the property. He had already been told by Mr. Hunt it was probably over-valued. Mr. Hughes prepared a resume of discussions dated 6 June. A copy was in evidence. The resume suggests an undertaking on the part of Mr. Reeves to invest $250,000 in the trust. Mr. Reeves denied in his evidence that he made any such commitment and stated that he had been advised against doing so by Mr. Sullivan. I accept what Mr. Reeves says as to this.

49. On 9 June 1983, an option agreement was executed by the first respondent and Mr. O'Dea. The agreement was a formal document. The option was to be current for twelve months and was granted for a nominal consideration of $100. Annexed to the option agreement was a draft contract for sale. The parties shown in the draft contract for sale were the first Respondent and Mr. O'Dea, "or his Nominees." The option contained the following special provisions:

2. For the consideration aforesaid the Owner (the first Respondent) hereby agrees undertakes as follows:-

(a) That it will for its own benefit harvest the soya beans growing on the said property

(b) that during the period October/December, 1983 it shall plant at its own cost approximately 800 acres or more to soya beans on the said property. Until the completion of the proposed Contract the Owner will tend the crop and if the Contract is not completed by the time of commencement of harvest, harvest the next crop of soya beans and market same. In that event and subject to the completion of the proposed Contract the cost of tending (including the cost of any spraying of the crop which may be necessary) and harvesting and marketing

the crop shall be borne by the intending purchaser. Should the Contract not be completed by the time of commencement of harvest the proceeds of the sale of the crop less the costs of tending harvesting and marketing of same shall be paid by the Owner into the Trust Account of the Solicitors for the Owner and therein retain. Should the Contract be completed the amount so paid into the said Trust Account shall be the property of and payable to the Intending Purchaser but should the option not be exercised in accordance with the terms thereof the amount so paid into the said Trust Account shall be the property of and payable to the Owner.

(c) That it will at its own expense take all necessary steps to enable the connection of the supply of electricity to the property in accordance with the requirements of the Intending Purchaser which are to be notified to the Owner, not later than 31st August, 1983.

(d) That it will construct an all weather gravel surface road to minimum required engineering standards (including any necessary crossing or culverts) from the Mount Lindsay Highway fronting the main entrance to the property to the house area of sufficient standard to sustain vehicles of up to 35 tonne weight.

(e) That it will not depasture on the said property any greater number of livestock and (sic) shall be deemed reasonable having regard to the condition of the property and good husbandry thereof.

(B) Between entry into the option and settlement - 22 August 1984

50. It is necessary to outline in some detail what follows in the period between 9 June 1983 and the settlement on 22 August 1984, because Elders relied in particular upon events in this period in support of submissions as to the existence of fiduciary duties owed by the respondents to Elders and the unit holders and, consequently, as to a duty of disclosure to which s.52 of the TP Act applied.

These events showed, it was submitted, that the relationship between the parties was more than that of optionor and optionee, or vendor and purchaser.

51. After the option was executed, Mr. O'Dea obtained a key to the house on Booka and, as Mr. Reeves put it, "he started to arrive on weekends and treat the homestead as his holiday situation." These visits increased in regularity after August 1983. Mr. Reeves began to undertake the work required under the option agreement including the building of the road and the connection of the electricity.

52. Some time after signing the option Mr. O'Dea telephoned Mr. Reeves and told him he needed to have the property valued. Mr. Reeves expressed surprise but agreed to telephone the valuer indicated to him by Mr. O'Dea, a Mr. Hynes, and arranged a convenient date for Mr. Hynes to visit Booka. 8 July 1983 was the appointed day and Mr. Reeves accompanied Mr. Hynes and a Mr. Lyons on the inspection. This lasted from 10.00am to 4.00pm. Mr. O'Dea had been introduced to Mr. Hynes by Ray White Realty, as a suitable valuer. The valuation made by Mr. Hynes is undated but refers to an inspection date of 8 July 1983. The valuation is of land and improvements and describes the property in enthusiastic terms as "well established with excellent improvements" and states that it is "in show condition and is a credit to the management and foresight of the present owners." The valuation contains various components and the total thereof is a figure of $1,185,000.78. Mr. Hynes was known to Mr. Reeves as a bookmaker and he had met him on a social occasion a year before. Mr. Reeves did not know Mr. Hynes was a real estate valuer. Mr. Hynes was not called to give evidence.

53. After Mr. Hynes' visit, Mr. Reeves telephoned Mr. O'Dea and attempted to draw from him the contents of the valuation. Mr. O'Dea limited his response to telling Mr. Reeves that the valuation "checked out all right". Mr. Reeves was persistent in his attempts to obtain a copy of the valuation and was provided with a copy in September 1983. He examined the valuation closely, later describing it in his evidence as a "fair enough valuation" although he thought the fencing and the stock yards had been undervalued.

54. At the time of Mr. Hynes' visit Mr. Reeves was experiencing problems with the harvesting of the 1983 soya bean crop. Normally harvesting would occur during the months of May and June. However, due to constant wet weather, only one third of the crop had been harvested by 8 July. Fourteen inches of rain fell between commencement of harvesting in May and final completion in August. Mr. Reeves engaged contractors to harvest the crop; however the machinery then available was unsuited to harvesting in wet weather, it being of single wheel drive and particularly heavy. Accordingly, although Mr. Reeves had what he described as "a wonderful crop", he could not get it in with the machinery then available to him. The result was that the 1983 crop failed to meet the expected yield and, in Mr. Reeves' words, was a disaster.

55. On 18 July 1983, Mr. O'Dea wrote to Mr. Oakshott of Elders, seeking to interest Elders as an investor in his schemes. He referred to an earlier conversation with Mr. Oakshott and enclosed a "Proposal". In it reference was made to the option over Booka and to the first (and thus then the only) Hynes valuation, stating "GGI has commissioned an independent valuer to make a valuation and report on the property".

56. In August 1983 there was a discussion between Mr. Reeves and Mr. O'Dea concerning settlement of the conveyance. The conversation took place in Mr. Reeves' house in Stanthorpe. Mr. O'Dea indicated that he would now be purchasing the property on his own behalf and that this would "certainly alter" the date for settlement. Mr. O'Dea said he anticipated this would occur in November. In September 1983 Mr. O'Dea approached Mr. Reeves with an idea of forming and

developing "a rural holiday village" on the property. Mr. O'Dea engaged an architect who visited the property and suggested more dams be installed. Mr. O'Dea also indicated an interest in further irrigation works and Mr. Reeves arranged for the property to be inspected by the Water Resources Commission. Mr. Reeves was not in favour of irrigating the property. However, at Mr. O'Dea's insistence, Mr. Reeves made enquiries.

57. Mr. Reeves raised the subject of settlement again in October 1983. He was assured by Mr. O'Dea that there were no problems with finance and that settlement would occur in November. At this time or shortly prior to it Mr. O'Dea approached Mr. Reeves concerning the accommodation of certain stud pigs which had arrived from Canada. Mr. O'Dea sought Mr. Reeves' permission to convert the shearing shed on Booka into a piggery. Mr. Reeves gave permission on the basis that a settlement would take place in November. In early November Mr. Reeves asked Mr. O'Dea "what was the definite date for settlement?" Mr. O'Dea told Mr. Reeves that there were some "hiccups" with finance and that settlement would be in late November or early December. In early December Mr. Reeves again pressed Mr. O'Dea for a definite date. Mr. O'Dea replied that he had not concluded negotiations and as Christmas was imminent there would be no further opportunity to negotiate until after the Christmas period. Mr. Reeves was told that settlement would occur in late January. Mr. Reeves expressed no overt annoyance although he was "not very pleased about it".

58. On 9 December 1983 Mr. Reeves was sent a copy of a draft prospectus. This was under cover of a letter from Mr. Hughes which also contained an invitation to join the board of GGI "after settlement". Mr. Reeves denied any recollection of receiving any copy of the draft prospectus. However, he said in evidence (which I accept) that in any event he wasn't particularly interested in Mr. O'Dea's schemes, as long as Mr. O'Dea purchased the property. In late December 1983, Mr. Reeves planted another crop of soya beans, the disposition of the proceeds of which would be governed by the provisions of clause 2(b) of the option agreement. In January 1984, Mr. Reeves phoned Mr. O'Dea concerning dates for settlement. Mr. O'Dea replied he was still having difficulties arranging finance and that settlement would occur in February 1984. In that month Mr. Reeves was told that settlement would take place on 28 March 1984. During January 1984, Mr. Hughes and possibly Mr. O'Dea arranged for Sir William Gunn to inspect Booka. After the inspection lunch was provided at Mr. Reeves' house in Stanthorpe.

59. On 6 February 1984 GGI converted to public company status under the Code. A further meeting was arranged for the discussion of settlement of the purchase for 26 February 1984, at Mr. Reeves' house in Stanthorpe. On 28 February, Mr. O'Dea wrote to Mr. Reeves purporting to set out the matters "agreed upon" at that meeting, including that "upon settlement" Mr. Reeves would become a director of GGI. In his evidence, Mr. Reeves strongly disputed the accuracy of other material there recorded, in particular statements that he had agreed to invest $150,000 in GGI and that "it was agreed that upon settlement you (i.e. Mr. Reeves) would advance $100,000 for a period of 120 days." Mr. Reeves said (and I accept) that various suggestions had been put to him, but that he had asked Mr. O'Dea to put them in writing and that there had been no agreement reached at the meeting of 26 February.

60. In late January or early February 1984 a severe hailstorm struck the soya bean crop growing at Booka. Mr. Reeves immediately spoke by telephone to Mr. O'Dea. On the same day Messrs. Hughes and O'Dea arrived by plane at Stanthorpe and, with Mr. Reeves, inspected the crop at Booka.

61. At this time, Mr. O'Dea was still attempting to have the prospectus settled and the delay had necessitated the obtaining of a fresh valuation. Mr. Hynes was again retained by Mr. O'Dea to value Booka. For this purpose a further inspection took place on 6 March 1984. The duration of the

inspection was much shorter on this occasion, and the "updated value" of the property was stated to be $1,356,524. The increase was said to be on the basis of an improvement in the economy, improvement to the fixtures on the property and a rise in land values generally and in the Tenterfield area in particular. The valuation does not bear a date of issue. Mr. Reeves received a copy of this valuation through Mr. O'Dea.

62. It might also be noted that the prospectus contains a further valuer's report by Mr. Hynes. This is dated 7 June 1984 and was issued to the directors of GGI. It discloses that on 30 May 1984 Mr. Hynes had valued three properties situated on the other side of the Mount Lindsay Highway to Booka and that in respect of each of these properties an option to purchase was held. The respondents did not own any of these properties. The first property had an area of approximately 885 hectares, the second 588 hectares, the third 774 hectares. The first and second properties were in New South Wales and the third, which adjoined the first, was across the border in Queensland. The purchase prices under the option arrangements as disclosed in the prospectus were, in respect of the first property $1,312,800, in respect of the second $700,000 and in respect of the third $670,000. In the declaration made in his valuer's report of 7 June 1984, Mr. Hynes declared that he was a registered valuer and had been involved in rural valuations since 1967. However, in fact he was not registered as such in New South Wales. He also declared in the prospectus that he did not have any direct or indirect relationship with Elders, GGI or their officers and directors.

63. During March 1984, Mr. O'Dea asked Mr. Reeves to enquire about the installation of a seed drying plant at Booka. Mr. Reeves told Mr. O'Dea that he believed that there were difficulties involved in such a project. Mr. O'Dea was concerned at the high price of planting seed and Mr. Reeves made the enquiry requested of him and in due course a drying plant was purchased by GGI. At this time Mr. Reeves was completing the work he had undertaken under the option agreement. The road work was completed at a cost of between $6,000 and $7,000. The work on the installation of the electricity was undertaken at a cost of $9,300. As I have indicated, the soya bean crop had been planted and this was at a cost of $63,000 excluding Mr. Reeves' labour. Mr. Reeves worked long hours on this task, over a period of several weeks at the end of 1983.

64. A further meeting was held in Brisbane on 20 March 1984. In attendance were Mr. O'Dea, Mr. Reeves, Mr. Sullivan and Mr. Hunt. Further discussion occurred concerning the investment by Mr. Reeves in the trust. The discussion was mainly between Mr. Sullivan, Mr. O'Dea and Mr. Hunt. Mr. Reeves said in evidence that the content of discussion was "way beyond" him. However, settlement was again postponed until 6 April 1984. The reason again being failure to finalize the provision of finance to enable the purchase of Booka to go ahead. Discussions also took place concerning the payment of "a salary" to Mr. Reeves of $37,000. Mr. Reeves accepted the amount proposed. No mention was made as to when it was payable.

65. On 9 March 1984, Mr. O'Dea wrote to Elders seeking a loan in favour of QFP Properties Pty. Limited for the sum of $1.45 million. Mr. O'Dea also wrote on 22 March 1984 to the Sydney manager of a related company of Elders, Elders Corporate Finance, seeking finance from that company. He said that an immediate objective was to purchase Booka and that if finance were forthcoming settlement could then be arranged for 20 April 1984.

66. On 16 March 1984 Mr. O'Dea went to the offices of Elders in order to speak with Mr. Lamshed, a legal officer employed by Elders. On this occasion Mr. O'Dea also met Mr. Wood. Mr. Wood was the only officer of Elders who gave evidence at the trial. Mr. O'Dea had an impromptu discussion with Mr. Wood for a couple of hours. Mr. Wood gave evidence that details were not discussed and that he did not send for any files held by Elders in respect of Mr. O'Dea's projects. He said that the matter at that stage was essentially in the hands of Mr. Lamshed. Mr. O'Dea discussed with Mr.

Wood possible sources of finance to provide funds to enable the purchase of Booka to take place in preparation for the funds to flow into the public trust. This, in Mr. Wood's view, was the specific thrust of the meeting. Mr. O'Dea gave Mr. Wood copies of the two Hynes valuations of Booka. In response to Mr. Wood's query as to whether they were at arm's length and by a valuer qualified to value that type of property, Mr. O'Dea said Mr. Hynes had been selected at random from the list of the New South Wales Institute of Valuers.

67. Mr. Wood said in evidence that he did not know about the details of the matter as it was in Mr. Lamshed's hands; he felt that involvement by him at that stage would have been premature, stating that often a couple of years elapse for "that type of business" to come to fruition.

68. At the meeting Mr. O'Dea handed to Mr. Wood a number of documents. They included in addition to the Hynes valuations, a paper prepared by Mr. Reeves which concerned the stocking of Booka with cattle and dealing inter alia, with "financial returns and estimated costs". Mr. Wood did not study the bundle of documents but said "they revolved around justification of figures in the draft prospectus". These were photocopied and sent by Mr. Wood to a finance company, Beneficial Finance Corporation Limited, under cover of a letter from Elders dated 16 March 1984. The letter was addressed to Mr. Richard Thomas of Beneficial Finance. It included the following:

> G.G.I. require approximately $1.4M (including prepaid interest for six to twelve months) to complete the purchase of the Stanthorpe property and provide working capital for preparation of prospectus and advertising material for the public trust.
>
> The existing private trust has been operating for some time and it is proposed to integrate it into a new public trust with Elders acting as Trustee for investors. The Trust Deed appears to satisfy Corporate Affairs and it is proposed to raise $7M. from public subscriptions.
>
> Amongst the enclosed papers is a list of existing investors in the private trust which may be of interest to you. There are also some details of an option over a site for an additional processing works which will require a further option fee to be paid in the near future. Also included is a letter from NatWest signifying the terms under which they would advance the funds. I spoke to the Brisbane Manager of NatWest today and he informed me that "because of a bad experience with a piggery, their Directors are not keen to take on this type of loan". He also said that they had no objection to lending to the princpals (sic) of Q.F.P. and had previous good experience with them.
>
> Perhaps you could telephone me on Monday when you have had the opportunity of reviewing this

collection of paper. We can then decide on
future strategy in regard to Mr. O'Dea.

69. The approach to this possible source of funding was not successful. After March 1984, Mr. O'Dea telephoned Mr. Wood regularly to inform him of his progress. Mr. Wood's attitude was that the trust deed and the prospectus had not been finalised, and that the latter was the responsibility of GGI as manager. There was, he said in evidence, "no need for me to get perturbed."

70. Following his meeting with Mr. Wood, Mr. O'Dea wrote to Mr. Reeves setting out his difficulties in obtaining finance. However, Mr. O'Dea said that he had had "a very positive indication from Beneficial Finance" and that he remained "confident of an April settlement but until I receive an offer in writing it will remain uncertain."

71. It will be recalled that the option agreement had been executed on 9 June 1983 and was open for twelve months. In May 1984 a meeting was held at Mr. Hunt's office. In attendance were Mr. Reeves, Mr. O'Dea and Mr. Hunt. The question of investment by Mr. Reeves in the trust was again raised. Mr. Reeves agreed to invest $110,000 provided that security and terms were sufficient. In particular, Mr. Reeves wanted a personal guarantee from Mr. O'Dea and his companies. Mr. Reeves asked Mr. O'Dea what the purpose of the loan was. Mr. O'Dea replied that the money was needed to satisfy a "Corporate Affairs requirement for a minimum asset backing" and also for investment in the trust.

72. On 9 April 1984, Mr. O'Dea wrote to Mr. Reeves, referred to prior discussions, and requested Mr. Reeves to order concrete to finish a piggery and to form the base for silos that had been ordered for Booka; Mr. Reeves was also asked to obtain an order book "for day to day items" for Booka. Authorized signatories were to include Mr. Reeves, and the letter stated "purchases in excess of $50 will need approval."

73. In May, shortly before the start of harvesting, an early frost further damaged the soya bean crop. On 11 May Mr. Mann visited Booka and then reported on the state of the soya bean crop to Mr. O'Dea.

74. Mr. Reeves had suggested to Mr. O'Dea that he explore the obtaining of finance with a Father O'Dwyer who conducted a business under the name "Burwood Business Services". In the course of May Mr. O'Dea wrote to Father O'Dwyer submitting a paper "upon the recommendation of Mr. Reeves". A meeting was then held in Sydney attended by Mr. O'Dea and Mr. Reeves with Father O'Dwyer, but nothing came of it. Father O'Dwyer had previously been known to Mr. Reeves as a parish priest. In the paper submitted by Mr. O'Dea it was made plain that finance was needed to purchase Booka and that moneys borrowed would be repaid from funds proposed to be raised from the public.

75. By now the term of the option was running out and also Mr. Reeves was very anxious for settlement. Towards the end of May another meeting was arranged with Mr. O'Dea. The meeting was at Mr. Reeves' house in Stanthorpe. Mr. Sullivan also attended. Mr. Reeves was agitated at the continual postponement of settlement. He told Mr. O'Dea he would not be continuing with the sale, that he had made plans to go overseas, that the option was to expire shortly and that he was selling the property too cheaply. Mr. O'Dea was apologetic and said he had made improvements to the property which were evidence of his good faith. After discussions aside with Mr. Sullivan, Mr. Reeves agreed to extend the option on conditions which included a more substantial deposit and interest to be payable on the purchase price if the conveyance were not settled by the end of the extension period. Mr. O'Dea said that the purchaser would be himself or one of his companies.

76. Mr. Sullivan then prepared an extension of the option and the agreement effecting this was executed on 9 June 1984. It provided that in consideration of the sum of $25,000 the first respondent agreed to extend the option period until 4.00pm on 16 June 1984, that is to say by one week. The sum of $25,000 was to be part of the purchase price if the option was exercised, otherwise it was to be forfeited. The agreement also provided that completion of the purchase would be no later than 16 July 1984 and that time would be of the essence. In due course, $25,000 was, on eventual settlement in August, allowed for as a "deposit" paid on 12 June 1984.

77. As I have mentioned, at the meeting of 20 March 1984 in Brisbane there was some discussion concerning a "remuneration package" between Mr. O'Dea and Mr. Reeves. Early in June 1984, Mr. Reeves approached Mr. O'Dea and said that it was about time Mr. O'Dea "hit the can on this wage". Mr. O'Dea replied that he was short of funds and asked Mr. Reeves if he could wait until settlement of the purchase of Booka. Mr. Reeves said that he could use the money on his forthcoming overseas holiday and Mr. O'Dea agreed to arrange for an American Express card to be available to Mr. Reeves whilst he was overseas. In the further course of this meeting Mr. Reeves continued to express scepticism. He asked Mr. O'Dea to sign a document prepared by him and typed up on the spot by Mrs. Reeves which embodied the understanding Mr. Reeves had reached with Mr. O'Dea. The document is undated and signed by Mr. Reeves and Mr. O'Dea. Before signing the document Mr. O'Dea altered it with respect to the provision as to settlement date saying that he thought it was "better to leave it more open." The document was in the following terms:

REGARDING THE AGREEMENT BETWEEN MR. PAT O'DEA AND GOLDEN GROVE INDUSTRIES AND E.G. REEVES WHICH REFERS TO THE ANNUAL SALARY AND TRAVELLING EXPENSES OF $37,000.00.

Pat O'Dea has agreed to arrange for an American Express Credit Card to be issued on the account of Golden Grove Industries which E.G. Reeves can personally use immediately on issue.
If an account is received by Golden Grove Industries from American Express prior to the "Settlement" date of "Booka" (i-e- 1-3- J-u-l-y-) this amount will be paid by Christopher Reeves (Mr. and Mrs. Reeves' son) on presentation to him and out of the bank account of E.G. Reeves Pty. Ltd.
The amount paid prior to "Settlement" will be reimbursed to the account of E.G. Reeves Pty. Ltd. on "Settlement".
It is agreed that the amounts paid for charges on this credit card by Golden Grove Industries will be deducted from the annual salary of $37,000. and classified as "Travelling & Entertainment Expenses".
At the expiry of one (1) year from the date of settlement the difference between $37,000.00 and the "Travelling & Entertainment Expenses" will be paid to E.G. Reeves Pty. Ltd. as a salary.
E.G. Reeves agrees that the amount charged

to the Credit Card account will not exceed the amount of $10,000.00 at any one time.

78. Mr. Reeves signed the necessary documents to apply for the issue of the card by American Express and he collected the card when he was in Athens. The card was valid from 7 July to the end of August 1984. Expenses were incurred using the card and these were paid by cheque drawn on GGI's account as manager of the GGI Pig Trust, payable to the first respondent and endorsed by Mr. Reeves on behalf of the first respondent to American Express. Payments to American Express by this method totalled $16,375.70. These were the only payments received by Mr. Reeves under the above arrangements. He later claimed a balance outstanding of $5,173.75, as at 17 April 1985 in respect of the period commencing 16 August 1984.

79. On 8 June 1984 Mr. O'Dea wrote to Mr. Reeves informing him that settlement of Booka would be effected on 22 June 1984. The purchaser was stated to be QFP Properties Limited and the solicitor acting for the purchaser was to be Messrs. Greg Delaney and Associates. It was this firm which acted for the mortgagees on the contributory mortgage to which I earlier referred.

80. On 15 June 1984 the option was exercised. The notice of exercise of the option was directed to the first respondent, signed by Mr. O'Dea and stated that he nominated "QFP Properties Pty. Limited or its Nominee" to be the purchaser under the contract. The notice of exercise of the option also stated that the sum of $25,000 was tendered therewith in payment of the deposit provided in the contract annexed to the option agreement.

81. After the exercise of the option, a conversation occurred at Stanthorpe concerning settlement. Mr. Reeves asked Mr. O'Dea who the purchaser was to be and Mr. O'Dea answered that it was "either myself or QFP Properties Limited." The form of the consideration was discussed. Mr. O'Dea told Mr. Reeves he would pay approximately $500,000 on settlement with the remainder of the purchase price to be secured by a second mortgage over Booka, a second mortgage over the piggery at Young and a bill of sale over the equipment at Booka. Mr. Reeves was not satisfied and required mortgage insurance of $250,000 and a stock mortgage over the pigs.

82. On 19 June 1984 Mr. Reeves had a discussion with Mr. O'Dea concerning the way in which Mr. O'Dea wanted the cheques for the investment of $110,000 to be made out. As I have related, this investment had been discussed in a meeting in May. Mr. O'Dea wanted two cheques. The first was to be for $50,000 in favour of GGI in consideration for the issue of non participating redeemable shares in GGI to be repurchased within twelve months of the date of issue. The second cheque for $60,000 was to be drawn in favour of Mr. O'Dea personally as a loan to him.

83. The departure of Mr. and Mrs. Reeves for their overseas trip was now imminent. They were to visit Greece. They had a daughter living in Athens. They were to be joined on their trip by the solicitor Mr. Sullivan. Mr. Reeves told Mr. O'Dea at the meeting on 19 June that he had appointed as attorneys in his absence his son Christopher and Mr. Stephen Sullivan. Mr. and Mrs. Reeves, and Mr. Sullivan departed Australia on 25 June 1984. Mr. Stephen Sullivan was in practice with his father. He had been given the file on 16-17 June and had the conduct of the matter in his father's absence.

84. An executed contract for sale of Booka bears the date 25 June 1984. The parties are identified as the first respondent as vendor and Mr. O'Dea "or his nominee" as purchaser. Mr. Reeves gave evidence that he signed the contract on 19 June but did not recall whether the document was then dated. Special Condition "N" to the Contract contained an acknowledgment by the first respondent and by the purchaser that the former had planted, at its cost, approximately 800 acres or more of

soya beans on Booka and that the crop had been harvested in part. It went on to provide for the first respondent to account to the purchaser for the nett proceeds of sale less expenses of tending, spraying, harvesting and marketing the crops. On the settlement in August, $16,140.73 was allowed for as "Nett Soy.bean proceeds."

85. On 22 June Mr. Reeves signed two cheques for a total of $110,000 on the account of the first respondent. Both were payable to "Golden Grove Industries or bearer"; one was for $50,000. and the other for $60,000. He left them with his son, one of his attorneys. Mr. Reeves gave evidence that at that time he did not know the identity of the purchaser but that he understood that Mr. O'Dea was to purchase the property. He said he was in a "state of confusion," although he did not contemplate that the purchaser would be an entity unassociated with Mr. O'Dea.

86. At the trial much attention was directed to the issue of whether before settlement on 22 August 1984 (on or before which date Elders alleges Mr. Reeves and the first respondent were bound to make, but failed to make, disclosure to Elders of various matters concerning Booka, of which Elders complained) Mr. Reeves had become a director of GGI. The books of GGI were not in evidence and in particular the Register of Directors was not before me. One cannot tell at what stage in a formal sense Mr. Reeves became a director of GGI. Certainly on 15 October 1984 Mr. Reeves attended, as a director, a director's meeting of GGI. This was some two weeks after his return from his foreign trip. Also, on 16 October 1984 Mr. Reeves signed a formal concurrence to his name appearing in the prospectus as a director of GGI. Further, the negotiations between Mr. Reeves and Mr. O'Dea had been on the footing that Mr. Reeves would become a director after settlement or upon settlement of the sale of Booka. Before he had left Australia on 25 June, Mr. Reeves had told Mr. O'Dea that on his return he would be prepared to accept the invitation to join the board of GGI.

87. Consistent with this is a letter from Mr. Hunt to Mr. O'Dea dated 11 September 1984 in which, after dealing with a number of "loose ends" concerning directors' minutes and other formal matters affecting GGI, Mr. Hunt added as a postscript that he enclosed "the forms of consent to act as director for signature by Messrs. Hughes, Dunn, Sullivan and Reeves". The tenor of the letter is that there had been some lack of attention by Mr. O'Dea to formalities concerning the internal management of GGI and, no doubt, with the issue of the prospectus imminent, Mr. Hunt was anxious to put matters in good order. On 14 September, Mr. Hughes replied to Mr. Hunt's letter to Mr. O'Dea. He stated that "the two consent to act forms from Messrs. Reeves and Sullivan will be passed to you when they have been signed by the two gentlemen."

88. The evidence included a form 56 under the Code. This is expressed to be a consent to act as a director of GGI, signed by Mr. Reeves. There was considerable dispute at the hearing as to the date when the document was signed. It bears the date 19 June 1984. Mr. Reeves denied that he had signed the document prior to leaving Australia on 25 June 1984 and denied he had agreed to become a director with effect prior to settlement of Booka. In the minutes of the meeting of directors of GGI on 21 June 1984 a reference is made to the appointment in the following terms:-

> The Chairman (Mr. O'Dea) advised the meeting that Messrs. E.G. Reeves and N.S. Sullivan had accepted invitations to act as Directors of GGI Industries Ltd. with effect 19 June 1984. The meeting welcomed their appointments as Directors of the Company.

However, Mr. Hunt's letter of 11 September 1984, to which I have already referred suggests some caution is appropriate in relying upon the accuracy of GGI minutes for this period. On 1 August 1984 Mr. Bryan Hughes wrote to Mr. Hunt stating that companies forms 56 had been completed

"for Messrs. Reeves and Sullivan" and were "held in this office". In the context of the letter, I read this as referring to typed up but unsigned documents.

89. On 7 August 1984 Mr. Hughes wrote again to Mr. Hunt. The letter purports to enclose signed copies of form 56 for Messrs. Reeves and Sullivan, "for your action please". By this time Mr. Reeves and Mr. Sullivan had been absent from Australia for some six weeks. I have carefully considered Mr. Hughes' evidence on this topic and have come to the conclusion that his recollection here was in error and that in fact no form 56 signed by Mr. Reeves was sent to Mr. Hunt under cover of that letter. The true picture emerges more accurately, in my view, from Mr. Hunt's letter of 11 September, which bears the hall-marks of careful attention to detail and from Mr. Hughes' own reply of 14 September, 1984, which I have earlier described.

90. Sometime in October, Mr. O'Dea phoned Mr. Reeves and asked him if he could arrange for himself and Mr. Sullivan to meet a plane at Stanthorpe to sign some urgent papers. Mr. O'Dea indicated that the documents were related to the preparation of the prospectus. The plane arrived and the documents were signed by Mr. Reeves on the wing of the aircraft. On the balance of probability I find it was at this date that Mr. Reeves signed the consent to act as director.

91. The degree of attention devoted in the evidence to the issue of the date of the signing by Mr. Reeves of the form of consent to act was disproportionate to its overall importance. To consent to act as a director is one matter and to become a director de jure is another. Elders sought to show that before settlement Mr. Reeves had become a director of GGI. It then sought to rely upon this circumstance in aid of its case that the respondents had failed to make material disclosures before settlement and that there thus had been misleading or deceptive conduct which caused loss or damage to Elders and the unit holders.

92. The definition of "director" for the purposes of the Code, which is contained in sub-s.5(1) thereof, includes a person, to put it shortly, acting de facto as a director (Corporate Affairs Commission v Drysdale [1978] HCA 52; (1978) 141 CLR 236) and the case that Mr. Reeves was acting informally as a director could have been assisted if he had signed a form of consent before he left Australia. However, my conclusion is that the whole thrust of the pre-settlement negotiations between the parties was that Mr. Reeves would not formally become a director until settlement. Whether he became a director de facto before settlement is another question, depending as it does upon the activities of Mr. Reeves in all the circumstances of the case. However, the finding that in the relevant period Mr. Reeves was a de facto director of GGI is hardly assisted by Mr. Reeves absence from the country from 25 June 1984 to 1 October 1984. Nor is there any evidence to suggest that during this period Mr. Reeves was in contact with Mr. O'Dea or other officers of GGI.

93. In the end, counsel for Elders accepted that the activities upon which he relied to establish the proposition that Mr. Reeves become a de facto director were in essence the same activities as relied upon to show that Mr. Reeves or the first respondent (or both) had become a promoter or otherwise a fiduciary in the circumstances of the case. I shall deal later with this aspect of the matter.

94. I return to 25 June 1984, the day Mr. Reeves and his party left Australia. The documents dated with that date include two agreements entered into between the first respondent and Mr. O'Dea, with respect to plant and equipment at Booka and payment of interest. Mr. O'Dea agreed to purchase the plant and equipment as particularized in the schedule for $86,000 to be paid on completion of the contract for the purchase of Booka. The other agreement (identified in evidence as the Deed of Extension) was signed by Mr. Reeves on behalf of the first respondent, ("the vendor"), and by Mr. O'Dea. "The purchaser" was identified therein as Mr. O'Dea "(or His (sic) nominee)". The recitals and operative portions of the agreement were in the following terms:-

WHEREAS the parties hereto are the parties to an Agreement for sale of land more particularly described in the said Agreement bearing date the Twenty-fifth day of June 1984 and the parties to an Agreement for sale of certain plant and machinery more particularly described in the said Agreement bearing date therewith

AND WHEREAS pursuant to the terms of the said Agreements completion was to take place not later that the Thirteenth (sic) day of July 1984 when the Purchaser was to pay to the Vendor the sum of $1,086,000.00 less the amount of $25,100.00 which had been paid by way of deposit under the said Agreements

AND WHEREAS the Purchaser has requested an extension of that time within which to effect completion which the Vendor has agreed to allow upon the Purchaser entering into these presents

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

1. In consideration of the Vendor allowing an extension of time within which the said Agreements may be completed until the Thirty-first day of August, 1984, which the Vendor hereby agrees to allow the Purchaser agrees to pay to the Vendor on the sum of $1,060,900.00 interest at the rate of 17.16 per centum per annum as from the Ninth day of June 1984 until the date of completion and such amount of interest shall be paid on completion together with the sum payable on completion.

95. On 2 July 1984 Mr. Wood, on behalf of Elders, wrote to Mr. O'Dea confirming Elders' consent to act as trustee of the GGI Rural and Income Trust. The minutes of meeting of Directors of GGI held on 10 July 1984 state that in addition to agreeing to act as trustee Elders had agreed "as trustee of the trust to purchase the property at Tenterfield from E.G. Reeves Pty. Limited on behalf of the trust."

96. In July, whilst in Greece, Mr. Reeves received an urgent message from his son Christopher asking that he telephone him. Mr. Reeves did so, they discussed the proposed loan from Mr. Reeves to Mr. O'Dea of $110,000. Mr. Reeves told his son he wanted the whole of the loan to be a "straight out loan to O'Dea." A couple of days later there was a further telephone conversation between father and son. Mr. Reeves was told that the loan would be made in favour of Elgin Insurance Group Pty. Ltd.. Mr. Reeves had never heard of this company. He was told by his son that it was "O'Dea's trust company". This understanding is confirmed by Mr. Stephen Sullivan's letter to Mr. Hunt of 25 July, to which shortly I will come.

97. On 17 or 18 July, Mr. Stephen Sullivan telephoned Mr. Peter Dunn an accountant of GGI. He sought information regarding the Young property for the preparation of the mortgage documents. At this stage the projected completion date was 31 July 1984. Mr. Sullivan also asked Mr. Dunn who would be the registered proprietor and mortgagee (sic) of Booka. Mr. Sullivan's note of the answer is in these terms:-

The registered proprietor and therefore the
mortgagee (sic) of the Bookookarara property
would probably be Elders Trustee and
Executor Company Limited.

Mr. Dunn also indicated that he assumed Elders would also be purchaser of the plant at Booka but that "the whole thing hinged" on a meeting of unit holders scheduled for 25 July.

98. Mr. Stephen Sullivan gave careful and accurate evidence of the events surrounding the settlement. Mr. Sullivan said that his conversation with Mr. Dunn on 17 or 18 July was the first occasion in which it had been indicated to him that Elders was to be involved in the purchase of the property. He had made the enquiry of Mr. Dunn because with the projected settlement date only 13 to 14 days away he was anxious as he did not yet have with certainty the name of the purchaser.

99. On 18 July 1984 Mr. Sullivan wrote to Mr. Hunt setting out details concerning the conveyance and requesting information as to the role of Elders as purchaser. On 23 July Mr. Hunt wrote to Mr. Astley of Messrs. Finlaysons in Adelaide. That firm acted for Elders. Mr. Hunt enclosed what he "hoped" would be the final draft of the trust deed, noting that Elders would purchase Booka as trustee subject to the proposed resolutions being passed on 25 July 1984.

100. On 24 July, Mr. Hunt telephoned Mr. Sullivan and told him that he (Mr. Hunt) had been told Elders would be the purchaser. Mr. Sullivan then had a telephone conversation with Mr. Reeves (who was still in Europe) in the course of which he told him Elders would be the purchaser. There were expressions of mutual reassurance in dealing with a company of the standing of Elders. At no stage in the transaction was Mr. Stephen Sullivan made aware of the involvement of Messrs. Finlaysons of Adelaide as solicitors for Elders. He dealt only with Mr. Hunt. Mr. Hunt requested Mr. Sullivan, in this conversation, of 24 July, to provide a contract showing Elders as the purchaser of Booka, in substitution for the contract dated 25 June 1984 in favour of Mr. O'Dea "or his nominee". No request was made to vary or supersede the Deed of Extension.

101. On 24 July Mr. Hunt wrote to Mr. Sullivan replying to three letters, one of 11 July and two of 18 July. This letter of 24 July states that:-

QFP Properties Pty Limited would retire as
trustee and Elders would be appointed as trustee
at a meeting of unit holders to be held on 25
July.

The letter confirms that Elders would be purchasing the property as trustee. The trust deed of 30 February 1982 was to be replaced with a new trust deed, at that date not yet executed. The letter also indicates that arrangements for the loan of $110,000 from Mr. Reeves to Mr. O'Dea had not been completed. On 24 July 1984, Mr. Hunt wrote to Messrs. Finlaysons enclosing a form of transfer to be completed by Elders on the understanding that it was to be the purchaser of Booka.

102. On 24 July, presumably after Mr. Reeves had spoken from Greece to his son, Mr. Sullivan wrote to Mr. Hunt enclosing a draft loan agreement and guarantee for the advance from Mr. Reeves to Elgin Insurance Group Pty. Ltd.. By now it had become apparent to Mr. Sullivan that the target

settlement date of 31 July had been abandoned. On 25 July, QFP Properties Pty. Limited retired as trustee in consequence of the special resolution passed by an extraordinary meeting of unit holders. Elders was duly appointed by GGI to act as trustee of the trust and the meeting of unit holders approved that appointment. On the same day, 25 July, Mr. Sullivan wrote to Mr. Hunt enclosing drafts of a loan agreement between the first respondent and Elgin Insurance Group Pty. Ltd., and of a guarantee by Mr. and Mrs. O'Dea, GGI and Queensland Financial Planning Pty. Ltd. In the letter Mr. Sullivan said he understood Elgin Insurance Group Pty. Ltd. to be the trustee of one of Mr. and Mrs. O'Dea's trusts.

103. On 30 July Messrs. Jennings and Kneipp, Mr. Sullivan's agents in New South Wales, sent to Mr. Hunt the following security documents:-

1. A second mortgage over Booka nominating Elders as mortgagor and the first respondent as mortgagee (it is upon the covenants as to payment in this document that the cross claim is brought in the present proceedings)

2. A third mortgage in respect of the property at Young nominating QFP Properties Pty. Ltd. as mortgagor and Mr. Reeves as mortgagee.

3. Bill of Sale from Elders to Mr. Reeves.

4. A stock mortgage from Elders to Mr. Reeves.

104. On 6 August 1984 the deed of appointment nominating Elders as incoming trustee and the new deed of trust were executed. On the same day Mr. Hunt wrote to Mr. Astley of Messrs Finlaysons stating that his firm had now received mortgages in respect both of the loan of $813,000 (being first security over Booka) and of the balance of the purchase (being $490,000) which would remain owing to Mr. Reeves. The letter states that owing to the difficulty of having the Young property transferred, Mr. Reeves' third mortgage would be registered on the existing Certificate of Title. There would then be a transfer to Elders subject to the three mortgages. On 6 August a meeting of the directors of GGI resolved that GGI act as guarantor for the lease by QFP Properties Pty. Limited of a grain dryer and moisture meter, three silos and a hopper at an approximate value of $50,000.

105. On 14 August 1984 Mr. Hunt wrote to Mr. Sullivan enclosing various securities executed by Elders, including the second mortgage over Booka.

106. The execution of these instruments by Elders, in escrow, had been in Adelaide on or about 13 August 1984 under the supervision of Mr. Wood. He had relied on his legal staff (Mr. Lamshed) and Elders' solicitors to get the transaction ready for settlement. Not until 1985 did Mr. Wood see any settlement sheet showing how moneys had been disbursed on 22 August 1984. Elders arranged for the security documents I have described to be sent to Mr. Hunt in Brisbane.

107. Before executing the documents Mr. Wood perused a note written by Mr. Lamshed containing details of the proposed application of funds on settlement. It was headed "Pat O'Dea 25/7/84". It included the words "New contract between ET and Vendor on way likewise mortgages." There was no reference to such matters as the loan of $110,000 to Elgin Insurance Group Pty. Ltd., the operation of the Deed of Extension, and the provisions as to the interest rate on the two mortgages

to be given by Elders. A note on the document indicates attendances by Mr. Lamshed upon Mr. Astley of Messrs. Finlaysons on 25 July and again (with Mr. Wood) on 26 July.

108. On 17 August Mr. Sullivan wrote to Mr. Hunt reiterating that Mr. Hunt's firm was acting on behalf of Elders as mortgagor. The letter goes on to provide for an amendment to the mortgage with the effect of deferring payment of $20,000 to the mortgagee for three months. The letter also required that priority be conceded to the incoming finance over the Young property and that finance secured over the Young property be limited to $400,000 rather than the $450,000 proposed. More importantly, the letter points out that clause 36(9) of the new Trust Deed limited the borrowings of the trust to 60% of the gross asset value of the trust fund. Mr. Stephen Sullivan requested the supply of certificates that the borrowings on the first mortgage over Booka of $813,000 and on the Reeves mortgage of $490,000, did not exceed that ceiling.

109. These certificates were provided both by Elders and GGI to Mr. Sullivan and to the contributory mortgagees. They are dated 20 August 1984. At this stage no valuation of Booka, on the evidence, had been undertaken by a valuer other than Mr. Hynes. There is no evidence one way or another as to whether a valuation of the Young property had been provided at this stage.

110. Later, on 11 September 1984 Messrs. Duesburys, auditors of GGI and the GGI Unit Trust wrote as follows to Elders:

> We are under instructions from the Manager (ie GGI) to confirm with you that the Trust has complied with Clause 36(9) of the Trust Deed dated 6th August 1984.
>
> Based on independent valuations of the properties owned by the Trust and as a result of investigations into the other assets and liabilities of the Trust as at 31st August 1984, we are now able to confirm that the total liabilities of the Trust did not amount to more than 60% of the Gross Asset Value of the Fund as defined by Clause 15(1) of the Deed as at that date.

On 27 August 1984 Messrs. L.J. Hooker had signed a valuation of the Young property at $850,000 (land and improvements). This was seven days after the issue of the certificates.

111. The certificate furnished by Elders to Mr. Sullivan had stated that Elders thereby certified:

> 1. That the Trustee has not defaulted in or breached its covenants duties or obligations pursuant to the Trust Deed; and
>
> 2. That upon completion by the Trustee of its purchase of "Bookookarara", Tenterfield, New South Wales, the total liabilities of the trust will not exceed sixty percentum (60%) of the Gross Asset Value (as referred to in

clause 15(1) of the Trust Deed) of the Trust
Fund.

112. The certificate by GGI was a certification that it had not defaulted in or breached its covenants duties or obligation pursuant to the Trust Deed and that upon completion of the purchase of Bookookarara the total liabilities of the trust would not exceed 60% of the Gross Asset Value of the Trust Fund as referred to in clause 15(1) of the Trust Deed.

(C) From Settlement to issue of the Prospectus - 6 November 1984

113. Settlement took place on 22 August 1984. The loan to Elgin Insurance Group Pty. Ltd. was also completed on that date.

114. The settlement took place at Stanthorpe, at the premises of Mr. Sullivan's firm. Those attending were Mr. Sullivan, Mr. Hunt, Mr. Greg Delaney (solicitor for the first mortgagees on the contributory mortgage), Mr. Christopher Reeves, Mr. and Mrs. O'Dea, and two officers from the National Bank of Australia. That bank, as part of the settlement, discharged its mortgage over Booka and made available the documents of title. One step on settlement was the handing to Mr. Hunt by Mr. Sullivan of a contract for sale showing Elders as purchaser. Elders had no other person at the settlement to attend to its interests. Mr. Sullivan regarded Mr. Hunt as acting for Elders, and, in my view, had proper grounds for doing so. He did not know of the involvement of Messrs. Finlaysons in Adelaide. The contract had been prepared by Mr. Sullivan following Mr. Hunt's telephoned request to him on 24 July. Conveyancing practice in Queensland differs from that in New South Wales and, moreover, what was done here was a variation of Queensland practice. In Queensland the vendor draws the contract, and submits unsigned duplicates to the purchaser; if the contract is acceptable both copies are executed by the purchaser and returned with the deposit to the vendor; the vendor then executes them, returns the original to the purchaser and retains the duplicate. At the conclusion of the settlement, Mr. Delaney, by arrangement with Mr. Sullivan, took with him all title documents and instruments requiring registration.

115. The disposition of moneys on settlement appears from a statement provided by Messrs. Neil Sullivan and Bathersby on 30 July 1985 in response to an enquiry from Elders of 17 June 1985. The nett amount on settlement of $638,984.55 was paid as to $615,732.66 to the first respondent, by payment into its bank account with the National Australia Bank and the balance of $23,251.89 was paid to Messrs. Neil Sullivan and Bathersby. The sum of $638,984.55 was made up as follows:

Sale Price - Land and improvements $1,000,000.00
Sale Price - Plant and equipment 86,000.00

$1,086,000.00
LESS Deposit paid to E.G. Reeves Pty Ltd on
12/06/84 25,000.00
$1,061,000.00
LESS Amount to be secured by Mortgage 490,000.00
$ 571,000.00
PLUS Interest in advance on Mortgage debt
for six (6) months 49,000.00
$ 620,000.00
PLUS Adjustment of Local authority Rates $243.30
Adjustment of P.P.B. Charges 0.00 243.30
$ 620,243.30

PLUS Interest as per Deed of Extension
(73 days @ $498.768) 36,410.09
$ 656,653.39
LESS Nett Soy-bean proceeds 16,140.73
$ 640,512.66
PLUS Principal and interest owing to
State Bank of New South Wales re:
Caveat in favour of Soil Conservation
Service (Principal $10,977.96 -30/6) $ 11,045.79
$ 651,558.45
LESS Stamp Duty on Release Mortgage ex
National Bank $30.00
Registration Fee on Release
Mortgage ex National Bank 30.00
Registration fee on Withdrawal of
Caveat $30.00 90.00
$ 651,468.45
PLUS Costs and outlays re: Production
by A.G.C. (Mortgage over Young) $ 125.00
Costs and outlays re:Production
by first mortgagee over
"Bookookoorara" 125.00
Costs and outlays re: Security
(Neil Sullivan and Bathersby) 6,098.10 6,348.10
$ 657,816.55
PLUS Outstanding Account re Options to
Purchase Neil Sullivan & Bathersby 1,108.00
$ 658,924.55
PLUS Adjustment of Crown Rental on R.P.
1926/7 in favour of vendor
(01/01/84 to 30/06/84 - $40.00 p.a.) 60.00
$ 658,984.55
LESS amount of interest unpaid 20,000.00
$ 638,984.55

116. On 13 September a director's meeting of GGI was held. At this meeting Mr. Reeves' non attendance is noted as an apology. It was resolved that Elgin be allotted $90,000 in shares of GGI in respect of a "temporary advance" made on 23 August. It was also resolved that as this money could not be repaid immediately, Elgin should receive $85,000 worth of units in the GGI Unit Trust.

117. By 13 September 1984, a second basic layout and design of the prospectus had been completed by the printers and an extraordinary general meeting of shareholders of GGI was then held. It was resolved that the nominal capital of the company be increased from $10,000 to $1,000,000 divided into one million ordinary $1 shares. New articles of association were adopted and it was resolved that 90,000 shares be issued to Elgin Insurance Group Pty. Limited "notwithstanding that that allotment will give that company a controlling interest in GGI."

118. As I have said, on 22 August 1984, the day of the settlement, the first respondent's cheque account with the National Australia Bank at Stanthorpe was credited with $615,732.66. On the same day the two cheques, totalling $110,000 and drawn "Golden Grove Industries or bearer", on the account of the first respondent by Mr. Reeves before his departure, were exchanged for a National Australia Bank bank cheque for $110,000 payable to Elgin Insurance Group Pty. Ltd. Two

officers of the bank attended on the settlement and the bank cheque was handed to Mr. O'Dea. On the same day Mrs. O'Dea paid it in to an account of Elgin Insurance Group Pty. Ltd. with the Bank of Queensland. That account was in credit beforehand of $437.52. Again on the same day a cheque for $90,000 was drawn on Elgin Insurance Group Pty. Ltd.'s account in favour of "Golden Grove Industries Ltd". GGI then drew upon an account with Westpac Banking Corporation a cheque for $55,174.33 in favour of Y.S.F. Pty. Ltd. of Young, a trade creditor which had supplied the Young operations of GGI. Without the injection of funds from Elgin, GGI would not have been able to pay this sum using the cheque account in question. A further sum of $10,000 was credited to GGI later in the month and by a similar route.

119. On or about 14 August 1984, Elgin Insurance Group Pty. Ltd. executed an agreement (undated) acknowledging receipt of $110,000 lent by the first respondent for a term of twelve months with interest at 25% per annum, to accrue from 16 August 1984. This was the document prepared by Mr. Reeves' solicitors and sent to Mr. Hunt on 24 July. The guarantee by Mr. and Mrs. O'Dea, GGI and Queensland Financial Planning Pty. Ltd. was also given on 14 August.

120. On 1 October Mr.Reeves returned to Stanthorpe. On 4 October Messrs. Neil Sullivan and Bathersby wrote to Mr. Hunt enclosing a duplicate Bill of Sale for re-execution. This was returned on 15 October. On the same day Mr.Reeves attended his first meeting as a director of GGI. Mr. Neil Sullivan gave his apologies.

121. I have already set out in the Introduction portion of this judgment the principal events following the issue of the prospectus dated 6 November 1984 which led to the institution of these proceedings.

(D) The Trust Deed of 6 August 1984

122. I turn now to the principal provisions of the Trust Deed dated 6 August 1984. It is expressed to be between GGI as Manager, Elders as the Trustee and "the several persons who have executed or hereafter execute this deed or an application for or a transfer of units". The "commencement date" is defined as the date of the first statement issued pursuant to s.170 of the Code relating to the units the subject of the trust or a date twelve months from the date of execution of the Deed if no such statement has been issued by that date. However, sub-cl.3(1) stated that the GGI Unit Trust was "hereby established" and GGI and Elders acted accordingly, as is indicated by the provision of the certificates to Mr. Sullivan before settlement and the auditors report of 11 September 1984. The "Code" is defined as meaning the Companies (Queensland) Code and where applicable is defined as being deemed to include the Codes in force at the date of the Deed in the other States and in the Australian Capital Territory.

123. Section 170 of the Code forbids a company to issue to the public or offer to the public any prescribed interest unless a statement in writing in relation to that interest has been registered by the Commission, and deems that statement in writing to be a prospectus issued by the company. The prospectus, as I have indicated, was dated 6 November 1984.

124. Clause 36 of the Deed confers on the trustee, in paragraph (9):-

> Power to borrow with or without security up to a limit whereby the total liabilities of the Trust will not at the time of borrowing exceed 60% of the Gross Asset Value of the fund (being the value referred to in clause

15(1)) and, if thought fit to give security for any such borrowing over any of the investments comprised in the Fund PROVIDED THAT the Trustee shall not be required to accept any personal liability for such borrowing.

Elders emphasised the existence of this proviso in its submissions upon the rectification issue. Further, the certificates sought by Mr. Sullivan and supplied before settlement of the purchase of Booka were designed to show compliance with this paragraph. Sub.cl. 6(1),(2),(3),(4) and (5) provide as follows:-

6(1) Upon lodging with the Trustee the sum of $2,000.00 under clause 2 and upon making any addition to the fund under the same clause or in either case as soon thereafter as the Manager finds it practicable so to do, the Manager shall inform the Trustee in writing of its proposals as to the investment of the said sum or the cash constituting any such addition as the case may be.

(2) If the Manager at any time and from time to time thinks it desirable in the interest of the Registered Holders to sell or otherwise dispose of, develop or reconstruct, exchange, vary, modify or otherwise change any investment forming part of the Fund it shall inform the Trustee in writing of its proposals in that behalf.

(3) Such proposals shall be rejected by the Trustee if they provide for investment or reinvestment otherwise than in an Authorized Investment or for the taking in exchange of property which is not an Authorised Investment.

(4) If such proposals constitute or provide for investment or reinvestment in or the taking in exchange of real property investments or personal property investments or if they involve the sale development reconstruction exchange variation modification or other change of real property investments or personal property investments they shall not be accepted by the Trustee unless they are recommended in writing by a qualified valuer and are accompanied by a relevant certified valuation.

(5) A real property investment or a personal property investment shall not be acquired by

the Trustee at a price higher than or sold by the Trustee at a price lower than the value thereof assessed in the report or recommendation of a qualified valuer given not more than three months (or if such investment is to be acquired from or sold to:-

(i) the Manager;
(ii) a company which by virtue of the provisions of section 7(5) of the Code is deemed to be related to the Manager;
(iii) another unit trust scheme managed by the Manager or by a company which by virtue of the Code is deemed to be related to the Manager;
(iv) a director of the Manager; or
(v) a company controlled by a director of the Manager;
given not more than two months) before the date of the Manager's proposal unless the qualified valuer recommends the sale or acquisition of such investment at such price and the Trustee is of the opinion that it is in the interests of the Registered Holders that such investment should be acquired or sold as the case may be at such price in which case the Trustee may acquire or sell accordingly PROVIDED THAT this clause shall not apply to livestock, stock feed or stores purchased or sold by the Trustee in the course of normal trading operations conducted on behalf of the Trust.

The significance of this clause in connection with the purchase of Booka is a matter to which I later return in these reasons.

125. There is also in Clause 1 a definition of "qualified valuer" as, to put it shortly, meaning a qualified person independent of both the Manager and Trustee.

126. Clause 3 has the effect of vesting the assets comprising the Trust Fund in Elders as trustee for the registered holders. In Clause 4 Elders covenants with GGI to the intent that the covenants shall benefit not only GGI but the registered holders jointly and severally, that, inter alia, it will exercise "all due diligence and vigilance in carrying out its functions and duties and in watching the rights and interests of the Registered Holders." This and other covenants in Clause 4 are no doubt inserted to comply with the requirements of the Code (s.168)for treatment thereunder as an "approved deed". Clause 41 provides for the fees of Elders and GGI and it was emphasised by counsel for Elders that these provisions operated in such a way that the remuneration of GGI as Manager could be expected to exceed considerably that of Elders.

127. The Deed also confers considerable powers upon GGI as Manager. In particular, Clause 38 provides that the Manager shall manage and supervise all real property investments and personal property investments comprised in the Fund.

THE CREDIT OF MR.REEVES

128. Mr. Reeves was cross-examined by senior counsel for Elders at some length. The pleadings indicate that Elders put its case as high as one that Mr. Reeves well knew the price he put on Booka was excessive, and that, to put it colloquially, he was cheating the purchaser, that is to say, Elders. Senior counsel for the respondents urged that the cross-examination of Mr. Reeves followed such a course as to make it unfair to embark upon an enquiry in this judgment as to the credit of Mr. Reeves. It was submitted that senior counsel for Elders had not observed the precepts propounded in Browne v Dunn. Reference was made to the remarks of Wells J. in Reid v Kerr (1974) 9 SASR 367 at 373-4; see also "Cross on Evidence" 3d Aust. ed, 2'9.61-9.66.

129. There may well be some force in this criticism by Mr. Reeves' counsel, but it is not one which I rely upon in dealing with the value to be placed upon the evidence of Mr. Reeves. I approach Mr.Reeves' evidence on the footing that senior counsel for Elders was correct in saying that the conduct of the cross-examination was not open to the type of criticism levelled at it and that Mr.Reeves' credit was properly put in issue.

130. My view is that having, as I have said, listened to a very lengthy cross-examination of Mr.Reeves over a number of days, his credit should be accepted and that he should not be held as setting out to cheat GGI or Elders or as being recklessly indifferent to the truth of what he may have represented or asserted to Mr. O'Dea or any other material party. My conclusion is that Mr. Reeves bore himself well through what was quite visibly an ordeal for him.

131. It is quite true that Mr. Reeves lacks fluency of expression particularly where he is endeavouring to grapple with concepts rather than relate events. It is also true that Mr. Reeves is a man of some business experience. But the fact that he has this experience and that he is in some respects inarticulate does not mean that such inarticulation is an expression of guile.

132. I reject the attack made upon the credit of Mr. Reeves.

THE CASE PUT BY ELDERS

133. I turn now to consider more closely the propositions which Elders seeks to make good as the basis of its claim that it has suffered loss or damage by conduct of the respondents in contravention of ss.52 and 53A(1)(b) of the TP Act. To some extent the formulation of these propositions developed as the case proceeded and this process attracted the complaint by senior counsel for the respondents that Elders was continually shifting its ground. In what follows I have endeavoured to deal with the issues as they were debated in final addresses.

134. As I have earlier indicated, Elders relies both upon failure by the respondents to make proper disclosure and upon statements and representations allegedly made by Mr.Reeves. I deal first with the alleged failure to make proper disclosure.

FAILURE TO DISCLOSE

(A) General

135. Elders complained principally of the following failures in disclosure on the part of the respondents:-

1. That they permitted and allowed Elders to purchase Booka as an investment for the GGI Unit Trust at a price which they knew to be in excess of the true value, the true value being no more than $703,552.50 and probably as little as $550,000.

2. That the respondents failed to inform Elders before settlement that the value of the property was not $1,000,000.

3. That the respondents failed to inform Elders that Mr. Hynes' valuation reports contained values in excess of the true value of Booka.

4. That the respondents failed to inform Elders of damage to the soya bean crop caused by hail, despite the significance this had for the operation of Special Condition "N" to the contract for purchase of Booka.

5. That at the settlement in August 1984 the first respondent was credited with the sum of $36,410.09 being allegedly for interest under the Deed of Extension additional to the purchase price of $1,000,000, without informing Elders thereof.

6. That the respondents concealed from Elders or failed to inform Elders before the settlement in August that the above credit of $36,410.09 would be made favour of the first respondent at settlement, that the first respondent had agreed to advance $110,000 under guarantee of GGI and Mr. O'Dea, and that Mr. Reeves had negotiated the "remuneration package" involving the issue of the American Express Card.

7. That the respondents permitted to be executed collateral securities in favour of the first respondent over other assets of the undertaking scheme or enterprise known as the GGI unit trust.

136. In his evidence Mr. Wood said that it was not until March 1985 that he was told (at a meeting with Messrs. Dunn, Hughes and Hunt) that Mr. Reeves had been paid over $16,000 in respect of the "remuneration package" involving use of the American Express Card. Nor until March 1985 (when told by Mr. O'Dea) did Mr. Wood know Mr. O'Dea personally had guaranteed the advance to GGI by the first respondent of $110,000, or that the damage to the soya bean crop had reduced the proceeds thereof provided for on settlement, or that moneys had been allowed for on settlement

under the Deed of Extension. I accept Mr. Wood's evidence that if he had known of these matters before settlement, each would have been the subject of concern to him.

137. The same would have been so, had it been the fact, that the purchase price of $1,000,000 was at an over-value. The question of value involves special consideration, to which I later return. But I now proceed on the footing that the other matters, factual rather than evaluative in character, would, if known, have been ,as Mr. Wood said, of "concern" to him.

138. At general law, where there is no allegation of fraudulent misrepresentation or fraudulent concealment or of innocent misrepresentation by a vendor of real property, and what is relied upon is mere non-disclosure on the part of the vendor, then, in the absence of a fiduciary relationship or of a warranty of disclosure, that mere non-disclosure cannot form a basis of rescission: Tsekos v Finance Corporation of Australia Limited (1982) 2 NSWLR 347 at 355; Tiplady v Gold Coast Carlton Pty. Limited (1984) 3 FCR 426 at 457-458; United Dominions Corporation Ltd. v Brian Pty. Ltd. [1985] HCA 49; (1985) 157 CLR 1 at 5-6. Nor would non-disclosure ordinarily constitute misleading or deceptive conduct which contravened s.52 of the TP Act: Bradford House Pty. Ltd. v Leroy Fashion Group Ltd. (1983) ATPR 40-387, at 44,550 - 44,551; Rhone-Poulenc Agrochimie S.A. v U.I.M. Chemical Services Pty. Ltd. (1986) 68 ALR 77 at 84-85, 98, 102-103; Collins Marrickville Pty. Ltd. v Henjo Investments Pty. Ltd. (1987) ATPR 40-782 at 48, 536-7; Nobile v The National Australia Bank Ltd. (1987) ATPR 40-787 at 48,588-589.

139. However, Elders submits that in this case the respondents were in a position vis-a-vis Elders quite different from what would have been the case if the relationship had simply been between the first respondent as optionor-vendor and Elders as optionee-purchaser under an arrangement for a mortgage back to secure part of the purchase price. Reliance is placed first upon the fiduciary duties of promoters, and secondly, and alternatively, upon fiduciary duties that arose in the circumstances of this particular case; cf English v Dedham Vale Properties Ltd. (1978) 1 ALL ER 399. Failure to make the disclosures as alleged, is then relied upon by Elders as misleading or deceptive conduct contravening s.52 of the TP Act: Rhone Poulenc Agrochimie S.A. v U.I.M. Chemical Services Pty. Ltd. (supra). Sub-s.4(2) of the TP Act draws the refraining from doing an act within the statutory concept of engaging in conduct, and Elders relies upon this provision.

140. I turn first to the submissions as to the duties of promoters.

(B) The Respondents as Promoters and Fiduciaries

141. Elders alleges by its Amended Statement of Claim that GGI was a promoter of the "undertaking scheme or enterprise" which, in a reorganized form became known as the GGI Rural Income and Growth Trust. The expression "undertaking scheme or enterprise", which I abbreviate to "the undertaking", was apparently derived from s.168(1) of the Code. Elders also alleges that the respondents either participated in the promotion of the undertaking or, allowed, permitted, encouraged and facilitated GGI in that promotion. The respondents are alleged to have so acted with knowledge that (a) Elders would hold the undertaking and assets thereof as trustee for "the holders of the rights or interests therein," and (b) the respondents would profit from the promotion and operation of the undertaking. It is then alleged that the respondents owed fiduciary duties to Elders "as holder or intended holder" of the undertaking and the assets thereof and interests therein.

142. The essence of the allegations is that GGI was a promoter of the undertaking and that the respondents (in particular, Mr. Reeves) became promoters also, or were so closely involved in GGI's promotion of the undertaking as to themselves owe to Elders, as holder of the undertaking,

the fiduciary duties of promoters. These fiduciary duties of the respondents are alleged to have arisen before the settlement of the purchase by Elders of Booka on 22 August 1984.

143. The business enterprise described by the pleader as the "GGI Rural Income and Growth Trust" was devised, established, and, in due course, conducted pursuant to an "approved deed" (viz that of 6 August 1984) and by the issue of "prescribed interests" to the public, within the meaning of Part IV, Division 6 of the Code. I have already set out some provisions of the Trust Deed. Elders was as trustee, for the purposes of the deed, charged thereunder to exercise all due diligence and vigilance in carrying out its functions and duties and in watching the rights and interests of the holders of the prescribed interests (Cl.4(1)(b), Code s.168 (1)(c)(i)). GGI as Manager was bound by the Trust Deed to use its best endeavours to ensure that the undertaking was carried on and conducted in a proper and efficient manner (Cl. 45(2), Code s.168(1)(a)).

(C) Promoters - The Law

144. The courts have treated certain relationships as within "accepted" or "ordinarily recognized" categories of fiduciary relationship: Hospital Products Ltd. v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41 at 68,96,141. And Ardlethan Options Ltd. v Easdown [1915] HCA 53; (1915) 20 CLR 285 at 292-3; Para Wirra Gold and Bismuth Mining Syndicate N.L. v Mather [1934] HCA 46; (1934) 51 CLR 582 at 591, 596, and Tracy v Mandalay Pty. Ltd. [1953] HCA 9; (1953) 88 CLR 215 at 241-242, show that promoters of corporations are one such category; see also Sir Frederick Jordan "Select Legal Papers" (1983) pp. 112-113. The present case raises the question of whether an entrepreneur of a business enterprise such as that I have described above is a promoter within that category and, if so, to whom the promoter owes the fiduciary duties that arise in such circumstances.

145. The management company may be seen, in such a situation as, in effect, the entrepreneur of the enterprise: Parkes Management Ltd. v Perpetual Trustee Co. Ltd. (1977) ACLC 29,545 at 29,551. The Code contemplates the existence of promoters of the management company, that is to say, in the present case, of GGI. (Section 170, Schedule 6, paras 22, 23, 25). But the Code does not, in terms, contemplate promoters of the undertaking managed by that company. The promoters of the management company will owe fiduciary duties to that body, whose interests, again as the present case illustrates, after collapse of the undertaking, may not coincide with those of the trustee and investors whose interests it had been appointed to safeguard. The Code contains, for its purposes, a definition of "promoter" (s.5(1)), but it is a limited one and not of direct assistance in this case; plainly it assumes reference will be made to the meaning of the expression as developed in equity. In any event, the claim here is not made under the Code, but by reference to the jurisdiction in equity over promoters.

146. In my view, history and principle indicate that persons who "get up and start" (Tracy v Mandalay Pty. Ltd. supra p.241-242) an undertaking of the character in question here are to be classed as promoters and as such treated as within an accepted category of fiduciary relationship. In order to reach this result, it is necessary to look to the deep and persistent involvement of equity in the evolution of modern commercial institutions and enterprises.

147. The trust played an extensive role in the evolution of the limited liability corporation as an instrument of business endeavour. In the modern law a share is regarded as an item of personalty distinct in character from the property owned by the corporation concerned: Archibald Howie Pty. Ltd. v The Commissioner of Stamp Duties (NSW) [1948] HCA 28; (1948) 77 CLR 143 at 156-157. This was not always so. In the eighteenth century the accepted view was that the corporation was trustee of its assets for its members (Cooke "Corporation Trust and Company" (1950), 69-70). This

meant that where a member complained that the corporation had carelessly registered a forged transfer of his shares in favour of an innocent third party, his remedy was in Chancery and against the corporation for breach of trust: Ashby v Blackwell and The Million Bank Co. [1765] EngR 51; (1765) Amb 503, 27 ER 326. Another consequence was that where the corporation held realty, the members were treated as owning beneficial interests in realty, the character of shares as personalty not being established until Bligh v Brent [1836] EngR 1056; (1836) 2 Y & C Ex. 268; 160 ER 397. Further, a practice persisted whereby corporations which did have the power to hold and deal with their assets nevertheless vested them in custodial trustees (Du Bois "The English Business Company after the Bubble Act 1720-1800" (1971) 115-116).

148. Corporate identity and character might be conferred by Crown charter, or by statute, and in addition there were certain corporations by prescription (Cooke op. cit., 85). But as James LJ later observed (in Baird's Case (1870) LR 5 Ch App 725 at 734):

> ...there were large societies on which the sun of royal or legislature favour did not shine, and as to whom the whole desire of the associates, and the whole aim of the ablest legal assistants they could obtain, was to make them as nearly a corporation as possible, with continuous existence, with transmissible and transferable stock, but without any individual right in any associate to bind the other associates, or to deal with the assets of the association.

The result was the unincorporated joint stock company. This assumed various forms (Du Bois, op. cit. Ch III) but common to all the lawyers identified by James LJ was a desire to avoid a partnership between the members (Baird's Case (supra), Grain's Case (1875) 1Ch.D 307 at 320). Hence the use of a deed of settlement containing covenants between the members and trustees selected by them. The effect of these covenants was both to oblige the trustees to apply the funds settled on them for the purposes specified and to bar transfers by members unless fresh covenants were obtained from the transferees (Cook op. cit. 86). These enterprises were described as companies but, of course, lacked incorporation and separate legal identity, the term "company" having no strict meaning (In re Stanley (1906) 1 Ch 131 at 134) and being used to describe business associations, incorporated and unincorporated.

149. In the establishment of enterprises of these various descriptions, incorporated and unincorporated, and the raising of funds from the public, promoters or "projectors" played an active and well recognized role; courts of equity entertained complaints by investors against them (Du Bois op. cit. 347-351, 379). The term "projector" as a synonym for promoter was still in use at the time of Foss v Harbottle [1843] EngR 478; (1843) 2 Hare 461; 67 ER 189 at 202. The use of the term "promoter" in respect of private Acts of the Westminster Parliament (Halsbury, 1st ed, Vol 21, paras 1357-1383; 4th ed, Vol 34, para 1338) is a reminder both of the vigorous efforts that once were made to obtain the benefits of statutory incorporation, and that control of these promoters rested with the Parliament itself rather than the courts.

150. Before the nineteenth century the terms "trustee" and "fiduciary relationship" were not used with the precision later acquired, and the expression "trust" was used more generally as identifying the subject matter of the exclusive jurisdiction of Chancery (Waters, "Banks, Fiduciary Obligations and Unconscionable Transactions" (1986) 65 Canadian Bar Rev. 37 at 43-45). Further, the nineteenth century saw the foundation in English law of the modern statutory system of

incorporation and with that the decline in the use of the trust as the vehicle for business enterprise. In particular, the Joint Stock Companies Act 1844 (7 & 8 Vic c.110) required the incorporation of all associations with twenty five or more members which carried on business and whose shares were transferable (Gower, "Principles of Company Law" 4th ed, 39-47; Ogus "The Trust as Governance Structure" (1986) 36 Univ. of Toronto L.J. 186 at 191-193). Limited liability in the sense understood today did not arrive until 1862 (Gower op. cit. 43-49). These laws were adopted in the Australian colonies; see, for example, as to Queensland, Morrison v O'Brien [1953] HCA 49; (1953) 90 CLR 501.

151. That left deeds of settlement which did not provide for the carrying on of business but rather for the investment in the businesses of others of funds received from members. These were known as management trusts and were the forerunners of the modern unit trust. They were not required to incorporate because they themselves did not "carry on business" in the sense required by the Companies Acts: Smith v Anderson (1880) 15 Ch D 247; Charles v Federal Commissioner of Taxation [1954] HCA 16; (1954) 90 CLR 598 at 600; Ford "Unit Trusts" (1960) 23 MLR 129.

152. But such exceptions apart, the trust as a mechanism for the conduct of business enterprise went into decline. In addition to the statutory forces at work directing efforts into incorporated entities, what Ogus (op. cit.) describes as the "intense fiduciary principles" developed in the nineteenth century for trustees of family settlements were unreasonably stringent for the entrepreneur. In particular, directors were given more flexibility in exercise of their powers than trustees. It has not always been readily appreciated how misleading it is to describe directors as trustees: Re International Vending Machines Pty. Ltd. and the Companies Act (1962) NSWR 1408 at 1419-1420, Sealy "The Director as Trustee" (1967) Camb. L.J. 83. Indeed, in the United States the description of directors as trustees (and shareholders as equitable owners of the assets of the company) is still, on occasion, used to provide a basis in principle for denial to directors of any right to remuneration, in the absence of special provision (Petty v Penntech Papers Inc., (1975) 347 A 2d 140 at 143), and for the entitlement of shareholders to reliable information concerning the financial position and management of their company (Guthrie v Harkness [1905] USSC 153; (1905) 199 US 148 at 155, Nationwide Corp. v Northwestern National Life Insurance Co. (1958) 87 NW 2d 671 at 678-9).

153. In Australia, circumstances have changed. There has been, at least in this country, a shift back to widespread use of trusts as the vehicle for business enterprise, including those which, as this case illustrates, involve raising money from the public. The reasons for these developments and the legal significance of them are discussed in the literature, most recently by Professor Ford and Mr. Hardingham in their essay "Trading Trusts: Rights and Liabilities of Beneficiaries" contained in "Equity and Commercial Relationships Finn ed. (1987) 48. As the learned authors observe, and as the present case shows, there is a distinction between private and public trading trusts; they say (at 48):

> In Australian jurisdictions the distinction is needed because any opportunity to be a beneficiary in any trust (whether trading or investment) may, in general, not be offered to the public unless Part IV Div.6 of the Companies Code is complied with. That legislation sets up certain requirements as to the contents of the trust instrument and otherwise regulates public offerings in the interests of potential investors. Part IV Div. 6 comprehends other investment opportunities

many of which are not organized as trusts but constitute mere contracts unrelated to any particular property and lacking the fiduciary elements present in a trust. The attempt of the legislature to regulate by the single set of provisions both trust-type opportunities and contractual opportunities has put a premium on the (National Companies and Securities Commission's) wide statutory discretion to exempt particular types of schemes from provisions in Part IV Div. 6 which are inappropriate to a particular type of scheme.

They continue (at 52-53)

Public trading trusts represent a resurgence of something like, but not identical with, the unincorporated joint stock company which was repressed in England by the Companies Act 1862 (sed. quaere 1844) in a provision forbidding the formation of large unincorporated partnerships. The public trading trust shares with those old companies the characteristics of a joint stock devoted to the conduct of a business, the ability of investors to transfer their interests and reliance upon trustees for the holding of assets in a convenient manner.

154. In modern parlance the expression "company promoter" generally is used with reference to corporations, thus reflecting the nineteeenth century developments I have outlined. But it has not always been so confined and, as I have mentioned, the term "company" identifies the genus of which the trading or financial corporation is the species. Thus, in Hichens v Congreve (1828) 4 Russ 562; 38 ER 917, Lord Lyndhurst L.C. brought to account promoters of an unincorporated joint stock company and their breach of duty was treated as actionable in a suit brought on behalf of the members. In the circumstances of the case before me, the appropriate moving party is Elders, its status flowing not only from the terms of the Trust Deed and the Code already referred to, but also from the confirmatory "winding-up" order of the Queensland Supreme Court made on 25 June 1985, pursuant to s.175 of the Code.

155. In Foss v Harbottle [1843] EngR 478; (1843) 2 Hare 461, 67 ER 189 at 201,(which concerned the affairs of an incorporated company) Wigram V-C described Hichens v Congreve as a case "where property was sold to (trustees for) an unincorporated company by persons in a fiduciary character, the conveyance reciting that L.25,000 had been paid for the purchase, the fact being that L.10,000 only had been paid, L.15,000 going into the hands of persons to whom the purchase was entrusted"; the Vice Chancellor also referred to "the fiduciary character of the projector". The term "promoter" has also been used in respect of those who get up and start trading partnerships: United Dominions Corporation v Brian Pty. Ltd. [1985] HCA 49; (1985) 157 CLR 1 at 5-6.

156. It may be a consequence of treating the matter in this way that those interest holders who ultimately benefit by recovery in a given case are not, as a class, co-extensive with the initial interest holders or interest holders at some particular earlier time. They are a fluctuating class. But so are shareholders, and as Regal (Hastings) Ltd. v Gulliver (1967) 2 AC 134(n) illustrates, a change in shareholding does not excuse company directors brought to account for breach of fiduciary duty; see Gower, "Company Law", 4th ed, 593.

157. A more difficult question then arises, what is a promoter? In the late nineteenth century various definitions were offered by the English courts and some of them are set out in Tracy v Mandalay Pty. Ltd. [1953] HCA 9; (1953) 88 CLR 215 at 241. These definitions and others are also discussed by Gross "Who is a Company Promoter?" (1970) 86 LQR 493 at 499-507; see also The Wheal Ellen Gold Mining Co N.L. v Read [1908] HCA 58; (1908) 7 CLR 34 at 42-43. A legislative attempt at definition was made in s.3 of the Joint Stock Companies Act 1844, viz "Every person acting by whatever name in the forming and establishing of a company at any period prior to the company obtaining a certificate of ... registration". But promotional activities need not cease with incorporation, and later statutory efforts have been of no greater assistance. Bacon V-C found it impossible to define the term (Emma Silver Mining Co. v Grant (1879) 11 Ch D 918). The English authorities received close attention in the United States and two influential decisions (Yale-Gas Stove Co v Wilcox (1894) 29 A 303, and Dickerman v Northern Trust Company [1900] USSC 24; (1900) 176 US 181 at 203-204) which contained judgments referring at length to the English case law, have passed into the mainstream of United States law: see 18 Am. Jur.2d, "Corporations", 2'119.

158. In Old Dominion Copper Mining and Smelting Co. v Bigelow (1909) 89 NE 193 at 201, Rugg J. said:

> In a comprehensive sense "promoter" includes those who undertake to form a corporation and to procure for it the rights, instrumentalities and capital by which it is to carry out the purposes set forth in its charter, and to establish it as fully able to do its business.
> Their work may begin long before the organisation of the corporation, in seeking the opening for a venture and projecting a plan for its development, and may continue after the incorporation by attracting the investment of capital in its securities and providing it with the commercial breath of life...

The occasions for enforcement of the duties of promoters usually arise after the business enterprise has been established, the breach of duty being a continuing one in the sense that the defendant promoter persists in refusal to restore profit wrongly made or loss wrongly inflicted: cf Redgrave v Hurd (1881) 20 Ch.D 1 at 12-13, United Dominions Corp. Ltd. v Brian Pty. Ltd. [1985] HCA 49; (1985) 157 CLR 1 at 8, 13-14.

159. In the nineteenth century the non-existence of the corporation at the time of the initial misconduct of the promoter caused some difficulty in characterizing him at that stage as an agent or fiduciary in respect of a non-existent principal. This is illustrated by the following remarks of Lindley LJ. (as he then was) in Lydney and Wigpool Iron Ore Co. v Bird (1886) 33 Ch.D 85 at 93-94:

> It is not correct to say that James Bird was the agent of the company when it did not exist, nor is it much less objectionable to talk of his being in a fiduciary relation to the company before the company had any

existence. Moreover, to say that James Bird was a promoter of the company and therefore liable to account to it, is calculated to mislead; for the word "promoter" is ambiguous, and it is necessary to ascertain in each case what the so-called promoter really did before his legal liabilities can be accurately ascertained. In every case it is better to look at the facts and ascertain and describe them as they are. In the present case James Bird procured the company to be formed and to be managed in such a way as to transfer from the moneys of the company to himself the sum of L.10,800 without informing the company of that fact. The company were told that they had to pay L.100,000 for the property, but they did not know that of that sum L.10,800 was to go into the pocket of the man who had got the company up and who had in fact increased the purchase-money in order to get that L.10,800. Under these circumstances he cannot retain the sum so got. Although not an agent of the company nor a trustee for it before its formation, the old familiar principles of the law of agency and of trusteeship have been extended, and very properly extended, to meet such cases; and using the word "promoter" to describe a person acting as James Bird did, it is perfectly well settled that a promoter of a company is accountable to it for all moneys secretly obtained by him from it just as if the relationship of principal and agent or of trustee and cestui que trust had really existed between them and the company when the money was so obtained.

160. As I have indicated, there are in my view no particular obstacles to equity obliging an errant promoter to account later for misconduct before incorporation of the corporate plaintiff he has promoted. The significance of the above case for present purposes lies in its emphasis that whilst promoters have been admitted to the class of accepted or ordinarily recognized fiduciaries, the identification of an individual promoter in a given situation depends upon the application of fairly broad principles of equity to the facts of the case. The point had already been made before Lindley LJ. spoke, by Bowen J. (as he then was) in Whaley Bridge Calico Printing Co. v Green (1879) 5 QBD 109 at 111:

The relief afforded by equity to companies against promoters, who have sought improperly to make concealed profits out of the promotion, is only an instance of the more general principle upon which equity prevents the abuse of undue influence and of

fiduciary relations. The term promoter is a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence. In every case the relief granted must depend on the establishment of such relations between the promoter and the birth, formation and floating of the company, as render it contrary to good faith that the promoter should derive a secret profit from the promotion. A man who carries about an advertising board in one sense promotes a company, but in order to see whether relief is obtainable by the company what is to be looked to is not a word or name, but the acts and the relations of the parties.

161. The end result is that although undoubtedly once identified as a promoter the defendant is ipso facto stamped as a fiduciary, the process required in order to identify him as such in most cases probably will differ very little from that involved in deciding whether, independently of any acknowledged category of fiduciary, the defendant was in the circumstances of the case a fiduciary and, if so, what were the incidents of his fiduciary duty. The incidents of the duty asserted here are concerned principally with the obligation of disclosure which I summarized under the sub-heading "(A)General" in this part of the reasons; cf. United States Surgical Corporation v Hospital Products International Pty. Ltd. (1982) 2 NSWLR 766 at 812.

162. The point is illustrated in the present litigation by Elders having put its case on each footing I have described, and having relied upon the same particulars for each part of its case. On either approach the question is whether, to paraphrase Lord Bowen, the facts showed the establishment of such relations between the alleged promoter and the birth, formation and floating of the business enterprise in question as to render it contrary to good faith that the alleged promoter should retain from the promotion a secret profit, or, one might add, that he should refuse restitution for loss inflicted by him by preferring his interest to his duty (United States Surgical Corp. v Hospital Products International Pty. Ltd. (1982) 2 NSWLR 766 at 816).

163. As I have said, Elders' case is that the respondents, especially Mr. Reeves, are liable both as promoters and what I might call fiduciaries ad hoc. I now refer to the particulars which are common to both claims.

(D) Conclusions as to Non-Disclosure

164. In his address, senior counsel for Elders pointed principally to the following matters as indicative of the fiduciary relationship asserted by Elders:-

(i) The "nominal consideration" paid for the option in June 1983.

(ii) Provisions of the option, including those as to the term (12 months), the disposition of the proceeds of the crop, the connection of

electricity and the construction by the first respondent of road-works on the property.

(iii) The activities of Mr. Reeves in the first half of 1984, in connection with the improvements by Mr. O'Dea to Booka, as illustrated by the letter from Mr. O'Dea to Mr. Reeves of 9 April 1984, the substance of which I have earlier set out.

(iv) The protracted and allegedly illogical settlement negotiations in 1984, particularly having regard to the circumstances that the option ran out on 9 June 1984 and that Mr. Reeves was prepared to extend it so that the contractual arrangements ultimately concluded between the parties were not directly, as a matter of legal form, the product of any exercise of the original option.

(v) Arrangements made for the "remuneration package" whereby Mr. Reeves would receive a "salary" of $37,000 in respect of his "labour and expenses".

(vi) The invitation extended by letter from Mr. Hughes on behalf of GGI of 9 December 1983 to Mr. Reeves that he become a member of the Board of GGI after settlement, an understanding which certainly produced the result that by the time of the issue of the prospectus in November 1984 Mr. Reeves was a director of GGI.

(vii) The receipt by Mr. Reeves of the draft prospectus sent under cover of this letter of 9 December 1983, that is to say during the currency of the original option period, and his awareness before he left Australia that Elders was likely to be trustee for a public fund raising.

(viii) Mr. O'Dea's regular use of the house on Booka during the currency of the option period, the provision by Mr. Reeves of promotional material including a paper relating to the stocking of Booka with cattle (handed by Mr. O'Dea to Mr. Wood of Elders) and assisting at the visit of Sir

Gunn to the property, in addition to the matters mentioned in the letter of 9 April 1984 (para (iii) supra).

(ix) What was described as collaboration by Mr. Reeves in relation to the two valuations by Mr. Hynes.

(x) The assistance by Mr. Reeves to Mr. O'Dea in seeking finance for the project, in particular his coming to Sydney in May 1984 with him to meet with Father O'Dwyer of Burwood Business Services, after furnishing Mr. O'Dea with an introduction to that potential source of finance.

(xi) The evidence of Mr. Reeves at page 681 of the Transcript (which I have set out) as indicating co-operation between him and Mr. O'Dea for a method of supporting the price for the property for use when the trust was floated to the public.

(xii) The entry into the Deed of Extension dated 25 June 1984 and the allowance at settlement of $36,410.09 for interest payable thereunder to the vendor.

(xiii) The loan arrangements between the first respondent and Elgin Insurance Group Pty. Ltd., the payment of $110,000 by two cheques drawn by Mr. Reeves on the first respondent's account before his departure, and the application thereof to pay a substantial trade creditor of GGI viz Y.S.F. Pty. Ltd.

165. I have dealt with the circumstances of the provision of the two valuations by Mr. Hynes. In my view not only was Mr. Reeves not a moving party in respect of these matters but he could not be described as collaborating or acting as a confederate of Mr. O'Dea in the procuring of the valuations or subsequently in putting these to any particular use. I deal later with the legal character and effect of the passage at page 681 of the transcript in the light of ss.52 and 53A(1)(b) of the TP Act. However, I state now that I do not regard it as indicating co-operation between Mr. Reeves and Mr. O'Dea, as suggested in para. (xi) supra.

166. Senior counsel for the respondents in his address submitted that whilst the transaction was not a standard one, the other matters relied on by Elders do not take the relationship in question beyond that of optionor and optionee, or vendor and purchaser, and into the area of fiduciary relationship. There was, he submitted, nothing inherently strange in the provisions of the option, which reflected bargaining between the parties, with legal advice as to special terms, and, in any event, work done on the property during the option period was consistent with the realization by Mr. Reeves that, if

the transactions did not go ahead, his family property would still have been further improved. Nor was there anything inherently strange in the improvements effected to Booka by Mr. O'Dea. The attitude of Mr. Reeves to extension of the option was an expression of his belief that it was better to try to keep the "bird in the hand" than to set about seeking a new purchaser. However, that did not mean that Mr. Reeves failed to advance his own interests vis a vis those of Mr. O'Dea when the opportunity offered. The "remuneration package" and the Deed of Extension are examples. Mr. O'Dea sought finance for the completion of the purchase of Booka in advance of going to the public. From Mr. Reeves' viewpoint the earlier this finance was obtained the earlier settlement could take place. Mr. O'Dea, in his quest for funds sought and obtained an introduction by Mr. Reeves to Beneficial Finance. Likewise, he used the assistance of Mr. Reeves in this and related concerns mentioned in para. (viii) supra of Elders' submissions.

167. Senior counsel for the respondents continued his submissions by contending that these matters, with or without (a) the receipt of the draft prospectus,(b) the "invitation" to join the board of GGI on or after the settlement, (c) the eventual acceptance of Mr. O'Dea's proposals that on settlement $110,000 be invested by Mr. Reeves with Elgin Insurance Group Pty. Ltd, and (d) the information given Mr. Sullivan by Mr. Hunt (well before the option was executed) that, at least in principle, Elders had agreed to be trustee for the public fund raising, do not lead to the conclusions claimed by Elders. They do not show, he submitted, that before 22 August 1984, Mr. Reeves had de facto become a director of GGI, that he or his company had become a promoter of the business enterprise conducted or to be conducted by GGI as manager of the GGI Unit Trust, or that, in the circumstances of the case, the respondents were in fiduciary relations with GGI or Elders such as to impose the duties of disclosure asserted by Elders in these proceedings.

168. I accept these submissions as to the absence of de facto directorship, and of fiduciary duty and also of promotion in the sense of the authorities I have discussed earlier in these reasons. There was, in my view, no obligation of disclosure as asserted by Elders which can be founded in any of these equitable relationships.

169. Further, the case put by Elders is to be examined not only by examination of the particulars relied on by Elders but also in the general setting revealed by the facts as being that in which the relevant actors performed. That setting must be reviewed on its merits to ascertain whether it manifests the characteristics of a fiduciary relationship with the incidents claimed by the plaintiff: Hospital Products Ltd. v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41 at 100, United Dominions Corporation Ltd. v Brian Pty. Ltd. [1985] HCA 49; (1985) 157 CLR 1 at 10-11. It is appropriate first to look to the relations between the parties before entry into the option on 9 June 1983.

170. In the resume of discussions dated 6 June 1983 and prepared by Mr. Hughes, that is to say relating to a time before the entry into the option agreement, the following is shown as having been discussed on 3 June 1983 between Mr. Sullivan and Mr. Reeves in the presence of Mr. O'Dea and Mr. Hughes, viz:-

"Neil (Sullivan) asked Ted (Reeves) about his attitude to being bound into a contract with settlement possibly 12 months away. Ted replied that the discussions of the week previous had emphasised the shorter time, of about 6 months. He explained that there had been an increase in the level of interest in the property over the past ten days; but

those interests were not as firm as GGI's. He was happy with the "bird in the hand" and the "bird" was GGI.

Ted said he was looking forward to the development under GGI. Pat (O'Dea) replied that he would be looking to Ted for his expertise in the management of the property. Pat mentioned that he would consider offering Ted a position on the Board, thus maintaining his involvement.

Neil asked for an indication as to what stage in the financial status of the trust the settlement would occur. Pat gave his views on priorities within the trust, namely the processing plant, the mill/piggery and the "Booka" property. He said that when the minimum subscription (possibly $2 million) was reached, settlement would occur.

The question of the crops was discussed. Ted said that he would be happy to take in the current crop and replant in November. If settlement had not occurred before the next cropping (in May) then Ted would take that crop in, too, and place the net proceeds in the Trust, with these net proceeds being considered in conjunction with the purchase price.

Ted reiterated the contractual agreements made during the earlier discussions; bridge/road, power, crop...

171. Mr. Sullivan's file contained a note of a conversation with Mr. Hunt on 1 June 1983 in the course of which arrangements were made for a conference on the following Friday, 3 June 1983, at Stanthorpe; it is this conference which is the subject of the above resume of discussions by Mr. Hughes made on the following Monday 6 June 1983. Both Mr. Hughes' resume and Mr. Sullivan's notes of the conference on 3 June indicate that there was some discussion of Elders being the trustee of the unit trust. Mr. Hughes' resume states that Mr. Reeves "agreed to leave $250,000.00 in the trust on settlement." Mr. Sullivan's note is "($250,000.00 to be invested in the Trust])" The significance of the exclamation mark is borne out by Mr. Reeves' evidence, which I accept, that whilst there was discussion of the investment of the $250,000 he was advised against making any commitment and he did not then do so.

172. This evidence as to what transpired before the entry into the option is significant in that it indicates that from the outset the transaction proposed was not simply that of vendor and purchaser in what one might call a standard sale of land. In the form in which the transaction was originally conceived it had a number of special features, but that does not mean it generated fiduciary duties as alleged by Elders. Mr. Reeves, for his part, was ready in the months ahead to persevere with his

attitude that it was worth having "the bird in the hand" and his attitude persisted even as the prompt settlement of the matter became increasingly unlikely. As time went on he made various concessions to Mr. O'Dea and Mr. O'Dea made various concessions to him in pursuance of what no doubt each perceived to be a coincidence of interest in bringing the transaction to completion.

173. Mr. Reeves was as I have said, a man of some experience in business. He was conscious of the need for legal advice before making or implementing business decisions of any complexity. As I have already found, as early as 31 May 1983 Mr. Sullivan had been instructed by Mr. Reeves and on his behalf was in contact with Mr. Hunt, the solicitor for GGI. That pattern continued and Mr. Sullivan was present on various of the important meetings in which Mr. Reeves dealt with Mr. O'Dea. Likewise, Mr. O'Dea was accompanied by Mr. Hunt to various of these meetings. The evidence also discloses that Mr. O'Dea was well aware of the wisdom, if not necessity, of acting with legal advice in the bringing to fruition of his schemes to float the "pig trust".

174. Likewise, Elders had the services of both "in house" and "external" legal advisers. When Mr. O'Dea visited Elders in March 1984 the primary purpose was to discuss various matters with Mr. Lamshed, as, in Mr. Wood's words, "it was still Mr. Lamshed's matter."

175. The proper conclusion is that the parties were acting in a commercial transaction, at arm's length and each with the assistance of independent professional advice. Whilst these considerations are not of themselves decisive indicia of the absence of fiduciary obligations of disclosure (as relied on here) they are of significance: Keith Henry and Co. Pty. Ltd. v Stuart Walker and Co. Pty. Ltd. [1958] HCA 33; (1958) 100 CLR 342 at 350-351; Hospital Products Ltd. v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41 at 70, 119, 146.

176. In my view, the evidence, seen as a whole, shows that Mr. Reeves (and his company) did not undertake to act, and could not fairly be seen to have undertaken to act on behalf of, or in the interests of GGI, Elders or the prospective unit holders, either at all or in preference to his own interests. In the result there was no obligation of disclosure as asserted by Elders in these proceedings: Hospital Products Ltd. v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41 at 96-97; Turner v Jenolan Investments Pty. Ltd. (1985) ATPR 40-571 at 46,645-6. This is so, whether the case against the respondents is regarded as one of de facto directorship of GGI, or of promoter's or other fiduciary obligation.

177. It may be that Mr. O'Dea and GGI were, before the settlement of Booka in August 1984, promoters in the sense I have described with duties of disclosure to Elders and, in that sense, to the prospective unit holders. I shall assume this was so and I shall assume also that those duties deliberately were not observed by GGI and Mr. O'Dea. But I emphasise that they were not parties to these proceedings, that Mr. O'Dea was not called, and that limited evidence was led by Elders as to dealings between its executives and Mr. O'Dea.

178. On this footing, I turn to consider whether the respondents, although not directly fiduciaries, nevertheless became accountable for breaches of duty by GGI and Mr. O'Dea in not making the disclosures Elders submits should have been made.

179. The respondents would be accountable on this basis if they had knowingly induced or immediately procured breaches of duty by Mr. O'Dea and GGI in the sense revealed by such authorities as Eaves v Hickson [1861] EngR 831; (1861) 30 Beav. 136; 54 ER 840, and Midgley v Midgley (1893) 3 Ch. 282 at 301, 304. On the facts as I have found them Mr. Reeves and his company did not act as instigators or persons immediately procuring any of the conduct in question on the part of GGI or Mr. O'Dea.

180. Alternatively, liability might arise from the application of what has come to be regarded as the principles laid down by Lord Selborne LC in Barnes v Addy (1874) LR 9 Ch. App. 244 at 251-252. The many and complex authorities in this field (including those in Australia) are analysed and discussed by Mr. Charles Hurpum in his two part article "The Stranger as Constructive Trustee" (1986) 102 LQR 114, 267, and also in his shorter article "Liability for Intermeddling with Trusts" (1987) 50 MLR 217. The question here concerns the "second limb" of Barnes v Addy, namely whether there was participation with knowledge in a dishonest and fraudulent design on the part of Mr. O'Dea and GGI.

181. Whilst, as I have said, I am prepared to approach the case on the basis that there were duties of disclosure by GGI and Mr. O'Dea and that they were deliberately not observed, I find, on the materials before me and in the circumstances of this case, no participation on the part of the respondents in any such dishonest and fraudulent design. The awareness by Mr. Reeves of Mr. O'Dea's plans and schemes was not detailed or continuous. For example, it took Mr. Reeves some effort to obtain a copy of the first valuation by Mr. Hynes, and it was not until 17 or 18 July 1984, that is to say after Mr. Reeves' departure from Australia, that Mr. Stephen Sullivan was told that the purchaser was to be Elders. Further, Mr. Stephen Sullivan on appreciating the significance of Clause 36(9) of the Trust Deed as it stood after 6 August 1984, went to some pains to obtain appropriate certificates from Elders and GGI that the proposed borrowings by Elders on Booka did not exceed the 60% ceiling provided for in that sub-clause.

182. I find that Mr. Reeves and his company did not have the necessary "knowledge" of the designs of Mr. O'Dea and GGI. This is so whether by knowledge one is identifying (a) actual knowledge, (b) wilful shutting of the eyes to the obvious, or (c) knowledge of circumstances which would indicate the facts to an honest and reasonable man, even if the moral obtuseness of a defendant prevented him from recognising the impropriety involved. Categories (a) and (b) represent what the common law would regard as knowledge in such a case: The English and Scottish Mercantile Investment Company Ltd. v Brunton (1892) 2 QB 700 at 707-8, per Lord Esher MR; W. Wehbe v Caltex Oil (Australia) Pty. Ltd. (Full Court of the Federal Court, 12 May 1987, p.19 ff). Category (c) is drawn from what was said by Gibbs J. and Stephen J. (with whom Barwick CJ. agreed) in Consul Development Pty. Ltd. v DPC Estates Pty. Ltd. [1975] HCA 8; (1975) 132 CLR 373 at 398, 412; see also Ninety Five Pty. Ltd.(in liquidation) v The Banque Nationale de Paris (S.C. of W.A. Smith J. 12 June 1987 at pp.88 and 89). It travels some distance beyond common law concepts, but not, as the case itself decides for Australia, fully into the field of constructive notice as developed in relation to purchasers under old system conveyancing. I should add, if it be germane in Australia, that I would not regard the present case as one of wilful and reckless failure to make such inquiries as an honest and reasonable man would make: Belmont Finance Corporation Ltd. v Williams Furniture Ltd. (1979) Ch.250 at 267. This apparently is to be understood as a species of actual not constructive notice: Lipkin Gorman v Karpnale Ltd. (1986) 136 New L J 659.

183. In any event, even if one acceded to Elders' submissions as to the existence of responsibilities of disclosure to Elders by the respondents, there would remain a certain air of unreality surrounding the proposed method of proper discharge of their responsibilities. First, as I later conclude, Mr. Reeves did not believe that the price for Booka was at an undervalue; he believed it was worth more than $1,000,000. Secondly, he also believed his labours at Booka in the option period had entitled him to the "remuneration package" he had with difficulty negotiated with Mr. O'Dea and the investment of the $110,000 was from monies Mr. Reeves regarded as becoming available for the purpose on that settlement of Booka. Thirdly, at the times of the vicissitudes suffered by the soya bean crop, in February and May 1984, Mr. O'Dea was promptly informed. Fourthly, the state of Elders' involvement in the purchase of Booka was to the knowledge of Mr. Reeves and his solicitor then (and certainly until July 1984) insufficiently advanced and defined to make it appropriate to

deal directly with Elders (even assuming they knew how directly to do so) concurrently with Mr. O'Dea. Fifthly, before he left Australia, and indeed before the settlement of Booka, Mr. Reeves did not suspect the bona fides of GGI and Mr. O'Dea in dealings with Elders; he was prepared to join the board of GGI on his return. Sixthly, the Deed of Extension was a formal document and provided for adjustments on completion; the same was true of adjustments for proceeds of the soya-bean crop. If Elders were to be the purchaser it would properly be expected to have the solicitors acting for it on the settlement satisfy themselves of the adjustments made on settlement. The same is true of the collateral securities. Seventhly, as I have mentioned, Mr. Reeves' solicitor was at pains as the settlement of Booka approached, to obtain confirmation that the requirements of the Trust Deed with respect to the purchase and mortgage back had been complied with by Elders and GGI. Eighthly, by the time in July 1984 when it became quite clear that Elders indeed be the purchaser of Booka, Mr. Reeves was in Europe and the only contact Mr. Stephen Sullivan had with Elders was through Mr. Hunt, who was also the solicitor for GGI and Mr. O'Dea.

184. That leaves the question of whether there nevertheless was, on the assumption that the necessary duty of disclosure to Elders existed, a failure to discharge it, because the value of Booka was in truth less than $1,000,000 and Mr. Reeves had a strict liability to disclose that which he neither knew or believed. I have considerable difficulty in accepting the existence of a duty framed in this way in the circumstances of the present case. In the absence of Mr. Reeves vouching any special skill or expertise as a valuer I do not see how in the circumstances of this case such a duty could exist.

185. This brings me to the passage at p.681 of the transcript of which much was sought to be made by Elders. I deal later with the alleged misrepresentations said to be made therein. What has to be said now is that in my view Mr. Reeves did not there put himself forward as a valuer or as skilled in that respect. He was responding to a question put by Mr. O'Dea as to how he had arrived at the price of $1,000,000. When it came to valuing the property Mr. O'Dea relied on Mr. Hynes. Mr. Hughes' resume of the further meeting of 3 June 1983 shows Mr. Reeves explaining to Mr. O'Dea that Booka had not been valued. Mr. Hughes said in evidence that he and Mr. O'Dea had relied on their own judgment in deciding that the option should be taken over Booka with a purchase price of $1,000,000. They were conscious that Mr. Reeves had said he had not valued the property. They realized an independent valuation would be necessary to raise finance and in late June or early July took steps that led to Mr. Hynes.

186. My conclusion, on this branch of the case, is that Elders fails in its reliance upon alleged failures to discharge duties of disclosure as attracted by s.52 of the TP Act.

EXPRESS REPRESENTATIONS

187. This brings me to the case propounded under s.53A(1)(b) of the TP Act and the balance of that propounded under s.52. I will deal first with what appear to be the applicable principles of law and then with the instances relied on to make out Elders' case.

(A) The Law

188. In submissions, much was sought to be made of decisions of the High Court in which s.52 was construed in the setting of applications for injunctive relief under s.80 of the TP Act against a competitor of the applicant, the complaint being that the apprehended or continued contravention of s.52 misled or deceived or was likely to mislead or deceive members of the class of consumers acquiring or likely to acquire the products or services of the applicant. The decisions in question are Hornsby Building Information Centre Pty. Ltd. v Sydney Building Information Centre Ltd. [1978] HCA 11; (1978) 140 CLR 216, R v The Judges of the Federal Court of Australia; Ex parte

Pilkington ACI (Operations) Pty. Ltd. [1978] HCA 60; (1978) 142 CLR 113 and Parkdale Custom Built Furniture Pty. Ltd. v Puxu Pty. Ltd. [1982] HCA 44; (1982) 149 CLR 191. In the last mentioned decision some approval was given to the Full Federal Court decision in McWilliam's Wines Pty. Ltd. v McDonald's System of Australia Pty. Ltd. [1980] FCA 159; (1980) 49 FLR 455; see [1982] HCA 44; 149 CLR 191 at 198, 203-4, 213, 225. In these cases a competitor sought primarily to enjoin the activities it complained of; no consumer came to the Court as an applicant seeking recovery of loss or damage allegedly sustained by that consumer by reason of the conduct of the respondent in question. Issues as to deceptive or misleading conduct were much more at large than they would have been in such a situation. The references made in these cases to the class of persons or consumers to which the respondent addressed its promotional activities are readily understood in the setting I have described.

189. In the present case, the complaint is made in an action to recover actual loss or damage, not an application for injunctive relief brought by one trader concerning conduct of another trader in respect of third parties. Further, the complaint arises from particular negotiations and other conduct of identified individuals with reference to particular transactions. In such proceedings, primary attention will of necessity be focused upon the conduct of those individuals and the establishment of a sufficient causal link between the respondent's conduct and the applicant's loss or damage: Taco Company of Australia Inc. v Taco Bell Pty. Ltd. [1982] FCA 136; (1982) 42 ALR 177 at 202. It is, of course, fundamental that s.52 is not designed for the benefit of persons who fail, in the circumstances of the case, to take reasonable care of their own interests and also that it would be wrong to select particular words or acts which, although misleading in isolation, do not have that character when viewed in context: Parkdale Custom Built Furniture Pty. Ltd. v Puxu Pty. Ltd. [1982] HCA 44; (1982) 149 CLR 191 at 199.

190. In the consideration of the submissions by the parties in the present case particular assistance is afforded by the following decisions: Pappas v Soulac Pty. Ltd. (1983) 50 ALR 231; Bill Acceptance Corporation Ltd. v GWA Ltd. [1983] FCA 269; (1983) 50 ALR 242; Global Sportsman Pty. Ltd. v Mirror Newspapers Pty. Ltd. [1984] FCA 180; (1984) 2 FCR 82; Milner v Delita Pty. Ltd. (1985) 61 ALR 557; Jones v Acfold Investments Pty. Ltd. (1985) 59 ALR 613; Turner v Jenolan Investments Pty. Ltd. (1985) ATPR 40-571; Johnson v Eastern Micro Electronics Pty. Ltd. (1986) 70 ALR 339; Nobile v The National Australia Bank Ltd. (1987) ATPR 40-787; Bateman v Slatyer (1987) 71 ALR 553. From them these propositions may be drawn:

(i) Where statements have been made either before or in the course of complex negotiations for a significant transaction for sale and purchase of property those statements are not to be assessed in isolation but in the overall context of the negotiations (Pappas v Soulac Pty. Ltd.(supra) at 234).

(ii) It is for the applicant to show reliance upon the conduct complained of as supplying a sufficient causal connection between the conduct and the loss or damage for which recovery is sought under s.82 (Pappas v Soulac Pty. Ltd. (supra) at 238-239, Jones v Acfold Investments Pty. Ltd. (supra) at 623-624); conduct in contravention of Part V

of the TP Act need not be the only cause of the "loss or damage" that may be recovered under s.82 (Milner v Delita Pty. Ltd. (supra) at 572).

(iii)If a representation is of such a nature as to be likely to induce a representee to act upon it, the inference may be drawn, if the representee does act, that the representee has acted in reliance on the representations, but the inference is one of fact and may be rebutted by other, inconsistent, evidence (Jones v Acfold Investments (supra), Nobile v The National Australia Bank (supra) at 48,586).

(iv) Where what is relied on for contravention of s.52 of the TP Act is a statement of opinion it will not be misleading or deceptive or be likely to mislead or deceive merely because it misinforms or is likely to do so; the situation may differ if the evidence shows that the opinion was not held or that it lacked any, or any adequate, foundation (Global Sportsman Pty. Ltd. v Mirror Newspapers Pty. Ltd. (supra) at 88; Turner v Jenolan Investments Pty. Ltd. (supra) at 46,635), particularly if the opinion was expressed as an expert (Bateman v Slatyer (supra) at 559). See also Industrial Equity Ltd. v North Broken Hill Holdings Ltd. (1986) 64 ALR 292 at 300-301.

(v) A forecast or prediction as to the future does not, in general, offend s.52 unless the maker did not believe it could be fulfilled or was recklessly indifferent to the accuracy thereof (Bill Acceptance Corp. Ltd. v GWA Ltd., (supra) at 246-247; Johnson v Eastern Micro Electronics Pty. Ltd. (supra) at 350). In the present case, the time scale was such that reliance was not placed upon s.51A of the TP Act; if it had been, the result would not, in my view, have differed.

(B) The Facts - Reliance and Causation

191. I should add some observations as to the operation of Peru. (ii) (supra) upon the facts in this case, it being of particular importance. The applicant which claims for loss or damage is, of course, Elders. The direct dealings Mr. Reeves had before he left Australia in June 1984 were with Mr. O'Dea and other representatives of GGI, not Elders. Of its officers Elders called Mr. Wood alone.

Mr. Wood had relied upon others to attend to the detailed work in the matter. Mr. O'Dea was not called. Giving full force to the evidence of Mr. Wood and the documentary material (including the papers left with Mr. Wood by Mr. O'Dea on 16 March 1984 and transmitted by Mr. Wood to Beneficial Finance Corporation Limited) there was still but a limited picture of the extent, quality or contents of the dealings in the period up to settlement in August 1984 (and indeed thereafter, in so far as it is relevant) between the officers of Elders on the one hand and Mr. O'Dea and GGI on the other. Yet it is in these dealings that one would have to find the conduit, whether porous or insulated, for the passage to Elders of the representations relied on as deceptive or misleading conduct for s.52 of the TP Act or false or misleading statements for s.53A(1)(b) of the TP Act.

192. Even if (a) the representations relied on were made by Mr. Reeves on behalf of the first respondent, (b) they were false, misleading or deceptive within the statutory requirements and (c) they were transmitted to Elders in the manner I have indicated, Elders would still have to show that it relied on them so as to supply the necessary causal connection for the purposes of the TP Act. In my view, this necessary causal connection has not been shown in the evidence in this case.

193. Alternatively, it was suggested for Elders that it was enough to show that the representations in question were made to Mr. O'Dea and to GGI and that they were relied on by Mr. O'Dea and GGI and were a cause of the entry into and exercise of the option over Booka; were it not for the engagement of GGI in the transaction, Elders would not have become involved as purchaser and as mortgagor under the second mortgage. Therefore, it was suggested, a cause of the loss or damage suffered by Elders was the impact upon Mr. O'Dea and GGI of the representations by Mr. Reeves and the first respondent.

194. I see considerable difficulty in the path of this submission. As I have indicated, the conduct relied on by the applicant need not be the only cause of the loss or damage of which complaint is made. However, in my view, that does not necessarily mean that a party is to be fixed with liability under s.82 for loss or damage suffered by his conduct where the chain of causation has been broken or dislocated, or where the real, essential, substantial, direct, appreciable or effective cause lies elsewhere, particularly in a cause or causes arising from the acts or omissions of the applicant himself: Tiplady v Gold Coast Carlton Pty. Ltd. (1984) 3 FCR 426 at 464-465; Clark Equipment Australia Ltd. v Covcat Pty. Ltd. (1987) 71 ALR 367 at 372; Elna Australia Pty. Ltd. v International Computers(Australia) Pty. Ltd. (1987) ATPR 40-795; cf Bank Keyser Ullmann S.A. v Skandia (U.K.) Insurance Co. Ltd. (1987) 2 WLR 1300 at 1342-1344.

195. I take, for example, those representations allegedly concerned with price and value of Booka. Mr. O'Dea obtained from Mr. Hynes two valuations of Booka, as Mr. Hughes indicated in his evidence, to assist with raising finance for the project. Both valuations were handed to Mr. Wood by Mr. O'Dea when they met on 16 March 1984. Clause 6(5) of the Trust Deed of 6 August 1984 (which I have already set out) obliged Elders to act, or certainly contemplated that Elders would act, upon the report or recommendation of a qualified valuer. Further, the exercise of the power to borrow conferred on Elders by clause 36(9) of the Trust Deed was limited by the necessity to observe the permissible ratio of total liabilities to gross asset value of the trust fund. Also, Clause 6(5) imposed a limitation upon the age of valuer's reports or recommendations upon which reliance may be placed, subject to Elders forming an opinion that purchase at the price in question was in the interests of the unit holders. Clause 6(5) thus directed the attention, or obliged Elders to direct its attention before settlement to the question of the adequacy of the price put on Booka.

196. On the evidence, the only valuations of Booka held by Elders at settlement on 22 August 1984 were those of Mr. Hynes handed to Mr. Wood in March 1984. The date of the Manager's (GGI's) proposal (if any) referred to in Clause 6(5) does not appear, but, bearing in mind the opening words

of Clause 6(1), it could not very well have been before the Trust Deed itself was executed on 6 August. The prospectus, when it was issued later in the year, contained another valuation by Mr. Hynes dated 7 June 1984. This concerned other properties and was addressed to GGI not Elders. The only valuation of Booka referred to in the prospectus is the second Hynes valuation of March 1984. The reference is:

> This property was purchased by the Trust in August 1984 at a price $1 million. It was professionally valued in March 1984 at $1.356 million.

Elders felt sufficient confidence in its knowledge as to valuation to issue a certificate, dated 20 August 1984, (the text of which I have earlier set out) for supply to Mr. Stephen Sullivan, the solicitor for Mr. Reeves and the first respondent, which expressed compliance by Elders with the requirements of clause 36(9). The auditors of GGI wrote to Elders on the subject of compliance with Cl.36(9) "as at 31 August 1984", but this was not until 11 September 1984. I have set out the text of this letter earlier in these reasons.

197. In these circumstances it is little short of bizarre to suggest that any representations as to price or value made, as alleged, by Mr. Reeves to Mr. O'Dea, and at the time and in the circumstances they are alleged to have been made, constituted the real, essential, substantial, direct appreciable or effective cause, or the uninterrupted cause, of loss or damage allegedly incurred by Elders.

198. I would add to what is said in Elna Australia Pty. Ltd. v International Computers (Aust) Pty. Ltd. (supra) on the question of causation as it affects the operation of s.82 of the TP Act, the following citations:-

> (a) As to what was said ((1987) ATPR at 48, 676-677) on the role of considerations of policy in this area: Stone "Legal Systems and Lawyers' Reasonings" (1964) 264-267;Prosser and Keeton on Torts 5th ed., 264, 272-273; J.C. Smith "Liability in Negligence" (1984)94.

> (b) As to the reference ((1987) ATPR at 48,677) to Gorris v Scott (1874) LR 9 Ex. 125: the apparent adoption of the reasoning in that case as illustration 4 to the Comment on Clauses (c) and (d) of the Second Restatement of Torts, 2'286; and the treatment of the expression "incapacity or death has arisen out of or is attributable to his war service" in s.101 of the Repatriation Act 1920, by the High Court in Repatriation Commission v Law [1981] HCA 57; (1981) 147 CLR 635 at 647-649, and The Repatriation Commission v O'Brien [1985] HCA 10; (1985) 59 ALJR 363 at 366-368.

199. Further, I have not been persuaded that even if the conduct complained of by Elders on this branch of the case contravened ss.52 or 53A(1)(b) of the TP Act, it was relied upon by GGI or Mr.

O'Dea in the necessary sense in reaching their decisions to enter into the option on 9 June 1983 and to continue with the involvement with Booka in the months that followed, culminating in the Deed of Extension the execution of the document in early June dealing with Mr. Reeves' "remuneration package", the notice of exercise of the option on 15 June 1984, and the making of the arrangements for the mortgage back and collateral securities and the receipt from the first respondent of the $110,000 which went into the account of Elgin Insurance Group Pty. Ltd..

200. All of what I shall for brevity identify as the representations principally relied on were made to Mr. O'Dea and to GGI before the entry into the option agreement of 9 June 1983, that is to say before the first of a series of steps which involved further negotiation, with adjustments of existing legal rights and the creation of further legal rights, between the first respondent and Mr. Reeves on the one hand and GGI and Mr. O'Dea on the other.

201. The position of GGI and Mr. O'Dea after the making of these alleged misrepresentations and before embarking upon the option agreement, appears from the following passage in the cross examination of Mr. Hughes:

And the true situation is, is it not, that after a number of visits to the place Mr. O'Dea and yourself had come to the view that this was just what you wanted for the purposes of the trust, was it not? - Yes.
And regardless of what people such as Mr. Hunt had to say this place was the one you wanted and you were going to get it; correct? - Correct.
And so you were happy to pay or enter into a commitment to pay the asking price of a million dollars; that is so is it not? - That is correct.

...

Because one thing that was very plain to you all as a result of your inspections that this was a very fine property; correct?---Correct.

And very efficiently managed; correct?---Correct.

And so much so that you took the view that it was not necessary to have your view confirmed from independent advice; that is so, is it not?---That is so.

And it sums up the position properly, does it not that you and Mr O'Dea relied on your own judgment in deciding that this property was the place to get; correct?---Correct.

And that a million dollars was the proper price to pay for it; correct?---Correct.

And there is no doubt about it that you had ample opportunity to take independent advice about these matters had you so wished; correct?---We sought independent valuation.

But that did not come till afterwards, did it?---It did not.

I am dealing with the situation prior to 9 June you understand, right?---Correct.

Now, thus your judgment was that a million dollars was a fair price to pay, was it not?---It was the view of the Golden Grove Industries, yes.

And indeed to be perfectly fair to you it was the view of Golden Grove Industries which is Mr O'Dea at the time, is it not?---Yes.

Assisted by you?---Correct.
That you were getting a very good property for a very good price; that was the view, was it not?
That was the view.

(C) The Facts - False, Misleading or Deceptive?

202. I turn to the consideration of the alleged contraventions of ss.52 and 53A(1)(b) by these mis-statements or misrepresentations.

203. Particular reliance was placed (in chronological order) upon (a) the statements in the brochure, Exhibit Q, as to the quantity and value of the soya bean crop, (b) representations allegedly made by Mr. Reeves at the first meeting early in May 1983, that Mr. Reeves had planted soya beans for ten years and that Booka was the best soya bean property in the district, (c) the representations said to be made at the same meeting early in May 1983 and reproduced at page 681 of the Transcript, (d) the alleged statement by Mr. Reeves also at the first meeting, that he looked for a yield in soya beans of between 0.7 and 1 tonne per acre, based on past experience, (e) the statement made by Mr. Reeves at the meeting on 3 June 1983, that he had not had the properties valued and that his assessment of $1,000,000 was based on an assessment by him of the relative values of properties north and south of Booka and (f) a "gentleman's agreement" at the 3 June meeting that Mr. Reeves re-plant a minimum of 800 acres under soya beans.

204. These matters were said both to contravene s.52 of the TP Act and also to be false or misleading statements concerning the price payable for Booka or the characteristics of Booka thus attracting s.53A(1)(b) of the TP Act.

205. In my view, these statements and materials do not amount to engaging in conduct by Mr. Reeves or the first respondent which contravened s.52 or s.53A(1)(b), as the case might be, of the TP Act.

206. As to (b), I reject Elders' case that at the first meeting early in May 1983, Mr. Reeves said to Mr. Hughes that he (Mr. Reeves) had planted soya beans at Booka for ten years, that is to say since

1973. There is some disparity in the evidence of Mr. Hughes and Mr. Reeves concerning a particular passage in the conversations that took place on the first meeting. Mr. Hughes' evidence is as follows:

What did he say about it? - Mr. Reeves said that
he had planted soya bean on that property for the
past years. My immediate recollection is that he
said ten years but - well, ten years.
Did he say over what acreage, or hectareage I
suppose they call it these days, or was that left
as a general proposition? - No, I cannot
remember.

The evidence of Mr. Hughes was in chief. In his evidence in cross examination Mr. Reeves gave evidence as follows:-

You went all over the property? - Yes.
And you had some discussions about the soyabeans
did you not? - Oh yes.
And you told him, did you not, Mr. O'Dea - Mr.
O'Dea and Mr. Hughes - while you were out on the
property that you first planted soya beans there
about ten years before? - No, I did not say that.
Of course, that - ? - I said years before. I had
been planting them for years.
Oh, years before? - Yes.
Not ten years? - No, I was not so specific as
ten.
Just years? - Yes.
Of course, ten years, that is obviously
completely wrong. You were not planting them for
ten years? - No, I was not planting them for ten
years.
You started in 1976, I think? - That is correct
yes.
So you said you had been planting them, you say,
for years? - Yes.

207. I accept the evidence of Mr. Reeves as to what was said as to the period of plantation of soya beans. It follows that there has been no misstatement or misdescription of the character alleged by Elders.

208. I have found, earlier in these reasons under the heading "Salient Facts", that Mr. Reeves said that Booka was the best soya bean property in the district. However, this remark has also to be understood in the context in which it was uttered and as an expression of opinion by an obviously proud owner. In any event, it was not, in my view, an opinion held without any adequate foundation.

209. I turn now to the allegation I have numbered (f) viz a statement that appears in the resume by Mr. Hughes dated 6 June 1963 of the meeting with Mr. Reeves on 3 June. The passage is as follows:-

> Ted agreed to replant a minimum of 800 acres under soya beans. This was to be a "gentleman's agreement".

More than 800 acres were planted and any "gentleman's agreement" was honoured. Indeed, it became a contractual obligation (Clause 2(b) of the option). Therefore there is no need to consider this submission further.

210. I turn next to the representations identified as item (e) viz that Mr. Reeves responded to a question by Mr. O'Dea on 3 June 1983 by explaining that he had not had the property valued and that his assessment of $1,000,000 was based on an assessment by him of the relative values of properties north and south of Booka.

211. Plainly, Mr. Reeves was not vouching any opinion as a professional valuer. His views as to the relative values of the properties concerned were genuinely held by him and any lack of intellectual rigour in the mental processes by which he reached his view is not such, in my judgment and in the setting of the negotiations and discussions between the parties, as to render it misleading or deceptive or false in the sense required by the statutory provisions in question. I refer, in particular, to what was said by Fisher J. in Pappas v Soulac Pty. Ltd. (1983) 50 ALR 231 at 234.

212. I turn then to the passage in Mr. Reeves' evidence in chief at p.681 of the Transcript (item (c)). I have set out this passage earlier in these reasons. The effect of Mr. Reeves' evidence was alleged by Elders to be:-

> The second respondent in his own behalf and on behalf of the first respondent stated he had experience in valuation and that he had determined the price of $1,000,000.00 taking the unimproved value of the land, taking into consideration the sale price of properties in the near vicinity and then adding to that the structural improvements and then calculating the cost of improving the country to the state it was in.

As I have indicated, a considerable degree of cross examination was devoted to this passage. Again, the significance of what is there said has to be understood very much in the setting in which the words were uttered. Mr. Reeves placed a value on Booka which, in his words in evidence was "far in excess of the asking price" and his attitudes were coloured by deeply held beliefs as to the superior qualities of Booka and the efforts he had put into it over many years building it up. However, he realized that he was not going to get a price commensurate with the value of Booka to him. The unsuccessful listing of Booka since February 1982 was a plain indication of that. He did not fix his price of $1,000,000 by the "formula" he explained to Mr. O'Dea. Mr. Reeves believed that if that formula were followed it would yield a figure reflecting the value he had in his mind, that is to say one in excess of the asking price. Mr. Reeves was not, in my judgment, setting out in the conversation in question to prejudice Mr. O'Dea or to make any misleading statement as to the price being asked for Booka or otherwise.

213. Nevertheless, were the remarks to Mr. O'Dea, when looked at in context, false or misleading statements concerning the price payable for Booka in the necessary sense for the operation of the legislation? In my view they were not. The words used should not be subjected to close verbal analysis on the written page. They were spoken, not written, and heard in the context of a general

discussion in the course of a quite lengthy visit. It was made plain that there had been no independent valuation and Mr. Reeves was very firm as to the purchase price.

214. What the passage at p.681 of the Transcript indicates is that in response to Mr. O'Dea's expressed curiosity as to how he arrived at this price, Mr. Reeves explained "the general way to come to the value of a property". The account of the conversation in the evidence is made difficult to follow as Mr. Reeves and his counsel got into cross purposes, counsel apparently did not appreciate that, to Mr. Reeves, the phrase "your figure" included in questions put by him to Mr. Reeves, meant his own estimate of the worth of Booka not the lesser figure of the asking price.

215. In any event, Mr. O'Dea shortly after this conversation had the benefit of Mr. Hunt's expression of view that a price of $1,000,000 the property was probably overvalued. After entering into the option he went on to obtain the valuations provided by Mr. Hynes.

216. I turn now to consider the complaints made in respect of the brochure, item (a) of the alleged contraventions.

217. It will be recalled that the brochure, Exhibit Q, stipulated a price for the front property of "$750,000. (including crop)". The brochure was prepared following Mr. Reeves' consultation with Mr. Mann in March 1983. Mr. O'Dea had a copy when he first visited Booka in May 1983. The rhythm of the seasons necessitated the planting of soya bean crops in the period October/December and harvesting in May, depending upon the state of the weather. The last completed harvest before the preparation of the brochure was that harvested in 1982. In respect of that crop 870 acres had been planted with a yield of 454 tonnes and revenue of over $100,000.

218. The brochure contained the following material as part of the description of the front property:-

Approx. 345 ha (870ac) planted to Soya Beans with
an estimated yield of approximately 500 tonnes.
A minimum return of $150,000.00 is expected.
Elders directed its attack to false misleading or deceptive statements made in these sentences. At the end of 1982, Mr. Reeves had planted 870 acres. This was the crop that was unharvested when the brochure was prepared. The estimated yield of 500 tonnes was a fair estimate. Mr. Reeves had estimated a yield of 700 tonnes but was persuaded by Mr. Mann to reduce it to 500 tonnes in the brochure. The yield of 454 tonnes on the previous crop was, in Mr. Reeves' belief, which I accept, partly the product of the use of badly germinated seed and rectification of that fault was fairly and reasonably expected to lead to a higher yield. Accordingly, the statement in the brochure "approximately 345 ha (870ac) planted to soya beans with an estimated yield of approximately 500 tonnes" was in my judgment one that involved no mis-statement or misrepresentation in the sense necessary for a contravention of the legislation in question.

219. I interrupt the treatment of the complaints concerning the brochure to turn to item (d) of the alleged contraventions.

220. At the first meeting with Mr. O'Dea at Booka there was discussion concerning the brochure, between Mr. O'Dea and Mr. Reeves. Mr. Reeves told Mr. O'Dea approximately 870 acres had been planted to soya beans. He also said that he looked for a yield of between 0.7 and 1 tonne per acre, based on past experience. This was on the optimistic side and Elders complains of this incident in the discussion as another instance of misleading or deceptive conduct. In my judgment, it was an honestly and fairly held view and, in all the circumstances of the case, not misleading or deceptive in the necessary sense.

221. There remains the sentence in the brochure "a minimum return of $150,000.00 is expected." To produce this figure for the brochure Mr. Reeves went to the estimated yield and multiplied it by the tonnage price, that is to say the price being offered at the time by North Western Vegetable Oil Company, a business conducting its operations at Narrabri in New South Wales. The business included the selling of soya bean seeds to growers in the area and the marketing of crops. As I have said, Mr. Reeves was the agent in the area for this concern. He had been such since approximately 1980. In my view, the reference to the minimum return is a reference to the minimum return for the crop presently in the ground at the time of the issue of the brochure. As such there was in it, in my judgment, no misrepresentation as alleged by Elders. It represented an estimation honestly believed in and fairly arrived at by Mr. Reeves. In so far as it involved an expression of opinion, the opinion was based on an adequate foundation.

222. It was urged by senior counsel for Elders that the sentence in question was directed not to the situation concerning the crop in the ground at the time of the issue of the brochure but rather was a forecast, looking into the future to further crops and that in that respect it was conduct contravening ss.52 and 53A(1)(b) of the TP Act. Certainly, the evidence disclosed in this, as one would expect in any rural occupation, both vicissitudes of nature which produced fluctuations in productivity and variable market forces which produced fluctuations in price. However, as I have indicated, a forecast or prediction as to future events does not in general offend s.52 unless the maker did not believe what was said would be fulfilled or was recklessly indifferent to the accuracy of what was said. In 1983 the evidence clearly shows the market for soya beans was "booming". This was a boom which was to subside by mid-1985, sharply and unexpectedly. The crop planted in 1982 had grown impressively, but as I have earlier explained, heavy rain caused the poor harvest completed in August 1983. Further, the crop which was planted at the end of 1983 suffered the onslaughts of hail and frost before it was harvested in 1984, as I indicated earlier in these reasons. On the other hand, the crop harvested at Booka in 1982, had been of such a character as reasonably to give rise in May 1983 to some optimism for the future and in May the rains which were to cause such damage to the crop then in the ground had not yet set in.

223. In my view, it cannot be said, on the assumption that the sentence in question is one which contains a forecast or prediction, that Mr. Reeves was recklessly indifferent to the accuracy of it, still less that he did not believe it was likely to come to pass.

224. The conclusion therefore is that Elders has not made out its case in respect of any of the items said to constitute misleading or deceptive conduct or the making of false statements concerning Booka.

(D) - Valuation

225. Much has already been said in these reasons as to the contrast sought to be drawn between value and price as regards the $1,000,000 put by Mr. Reeves upon Booka.

226. The central allegation is found in paragraphs 11 and 12 of the Amended Statement of Claim. These paragraphs read as follows:-

11. During the course of the negotiations
referred to in paragraphs 6 and 8 hereof,
(being the negotiations before entry into
the option on 9 June 1983) the second
respondent in his own behalf and on behalf
of the first respondent represented and

stated that the property was assessed by him, based on the prices of surrounding properties, as having a value of $1,000,000.00.

12. The value of the property at the time, as was well known to the second respondent, was not $1,000,000.00.

Particulars

The property was at the time worth no more than $703,552.50 and probably as little as $550,000.00.

227. I have already expressed my conclusions that Mr. Reeves did not purport to proffer a valuation of Booka at $1,000,000 and that in truth his belief was that it was worth more than that sum. It was not known to him that the value of the property was no more than $703,552.50 and probably as little as $550,000. The reference to $550,000 may be to the sale price of $500,000 on the eventual sale of Booka by the mortgagees under the contributory mortgage in exercise of their power of sale.

228. The reference to $703,552.50 is to the value placed upon Booka by Mr. Curry who inspected Booka in September 1985 at the request of a Mr. Bacon, an officer of Elders. Mr. Curry gave evidence. His valuation was made after the collapse of the soya bean boom. The failure of the soya bean market brought to an end what had been a land boom in the area.

229. The extent of that land boom is evidenced in materials produced by the Department of the Valuer General, listing the capital value of a typical property of 1,200 hectares in the Tenterfield area as increasing in value from $300,000 in 1981 to $850,000 in 1985; in 1986 the value of the typical property is shown as not having increased. Mr. Curry said that in his opinion these figures were not applicable and he had not taken them into consideration in his assessment of his value of Booka. He also valued Booka in 1985 without a soya bean crop upon it. Indeed, the thrust of his valuation exercise was that Booka should be valued as a grazing proposition not as a soya bean property. The conclusion reached by Mr. Curry has to be viewed in the light of all these circumstances. He did not regard Booka as suited for cultivation of soya beans in the long term and expressed concern with erosion, whilst noting the rectification work that had been done by Mr. Reeves; I have earlier referred to the work done in conjunction with the New South Wales Soil Conservation Service in 1982.

230. Before the eventual sale of Booka by the contributory mortgagees, efforts had been made to sell the property. In particular on 24 April 1985, Elders AML Estates, a division of Elders IXL Limited, by its manager at Warwick in Queensland, wrote to Mr. Wood at Elders in Adelaide suggesting an auction of Booka on Friday 14 June 1985 and a recommended reserve price of $850,000 "based on the recent sale of "Spring Plains" a fully improved property of 366.7 ha which sold for $360,000.00". The letter went on to indicate that the property was well known to the writer, that the sale in question was the only sale of comparable land in the area in the last twelve months, and that "Spring Plains" was similar in land type and pasture to the front portion of Booka. The writer also said that he noted Mr. Wood's comments and appreciated the importance of achieving maximum price but felt that in assessing sale values Elders must be guided by the present market.

231. This estimation of the value of Booka in April 1985 is equidistant between the $1,000,000 price placed on Booka during the boom period of 1983/1984, and the value placed upon it by Mr. Curry in September 1985.

232. These matters serve to demonstrate, from materials emanating from within the Elders camp, the difficulty in reaching any conclusion that the price placed on Booka by Mr. Reeves of $1,000,000 was one which was an overvalue and one recklessly stated as an overvalue. It has also to be remembered that the second Hynes valuation, procured by Mr. O'Dea and apparently accepted by Elders when it issued its certificate to Mr. Reeves' solicitor, before settlement, was $1,356,554.

233. On 27 May 1985 Mr. Wood wrote to Mr. Reeves concerning the auction to be held on Friday 14 June.

234. Mr. Wood said, inter alia,:-

> On advice received from Elders Pastoral, the property is unlikely to gross more than $850,000 in the present climate. In fact, I believe the most likely contender has indicated that he is prepared to pay up to $800,000.
>
> Bearing in mind your interest in the property, it may be useful for you to seek independent advice from your local sources to arrive at an appropriate Reserve price. A sale at a gross figure of $850,000 would be insufficient to pay out the first mortgage, after commissions and selling expenses are deducted.
>
> In my view, we should set a higher Reserve price and negotiate with the highest bidder on the day, rather than sell the property without Reserve. However, if the Reserve is too high, we run the risk of achieving no sale at all.

235. In the event the reserve was fixed by Elders, after consultation with Mr. Reeves, at $1,100,000. There was only one bid, of the order of $400,000. The property eventually was sold later in the year in the manner I have earlier described.

236. Mr. Mann gave evidence that at the time in 1983 he regarded the selling price of $1,000,000 as being a fair price and that he felt "the value was there". Mr. Mann had long experience in the area. Mr. Cobon, who was called by Elders, is a stock and station agent who has carried on business in the Stanthorpe area since 1964. He gave evidence that he had thought the price placed on the property by Mr. Reeves when it was on the books with his firm was too high. Nevertheless Mr. Cobon had been prepared to leave it on his books at that price taking the view that it was a good price if Mr. Reeves could get it. Mr. Cobon's views were predicated on the basis that Booka was to be valued primarily as a grazing property. In cross examination he agreed that soya bean farming increased the value of properties at the time in question, and whilst he had no knowledge of the yields of soya beans produced by Booka, he agreed that this would have been a "vital piece of information" in valuing the property. Mr. Cobon had not embarked on any formal process of valuation and his evidence has to be read in that light.

237. A most experienced valuer, Mr. Hudson, was called by Elders in the course of its case in reply. However, Mr. Hudson's evidence was directed to exposing what he regarded as errors in methodology in the process apparently involved in the statements by Mr. Reeves (at p.681 of the Transcript) as to the assessment by Mr. Reeves of value of Booka. In these circumstances, Mr. Hudson did not propound a figure for valuation of Booka. However, in cross examination, Mr. Hudson was asked by senior counsel for the respondents the accepted extent of variation in valuations between expert valuers, given the same evidence. Mr. Hudson responded as follows:

... such as a rural property something relatively
easy, shall we say, you would find that there
would be some argument between valuers if you
have got more than ten per cent.

Evidence also was given by Mr. Twyford, an expert in soya bean cultivation. He gave evidence as to the absence of desirable soil at Booka for the long range cultivation of soya beans. He was not a valuer. None of the other persons who approached the question of valuation had his expertise in dealing with the significance to be attached to the character or quality of the property as one for the cultivation of soya bean in the long term. Mr. Curry had views on the subject which I have already mentioned.

238. This is not a case in which on the pleadings an ultimate issue is one of ascertaining as a matter of objective fact what actually was the "true value" of Booka at the time of the entry by Mr. O'Dea into the option or the completion of the purchase by Elders. Nor is it a case where on the pleadings an ultimate issue is whether $1,000,000 was in excess of the "true value" (assuming that "true value" can be ascertained specifically) at either of these dates. The case is directed more narrowly as indicated by paragraphs 11 and 12 of Elders' pleading. These I have earlier set out.

239. I have indicated my conclusions that Mr. Reeves did not, within the meaning of paragraphs 11 and 12 of the Amended Statement of Claim, "well know" that the value of Booka was less than $1,000,000. In fixing the price of $1,000,000 he was not acting with any belief that this was an excessive price, nor was he recklessly indifferent to truth and accuracy in not having a view that his price was in excess of the true value of Booka.

240. Even if the ultimate issues were not as I have just expressed them but did involve some enquiry as to "true value" on objective considerations, I would not hold that Elders had shown that $1,000,000 was at either of the dates I have mentioned in excess of the true value of Booka.

241. Elders also attacked the Hynes valuations and the assurance by Mr. O'Dea to Mr. Wood in March 1984 that they were valuations at arm's length. If there were any misleading or deceptive conduct involved in this incident, it was not conduct for which the respondents are accountable. Mr. Hynes had been engaged by Mr. O'Dea and was not vouched for to Elders by Mr. Reeves, who was not directly privy to Mr. O'Dea's dealings with Elders.

RECTIFICATION

242. I have already outlined the substance of Elders' claim seeking the equitable remedy of rectification in the section of these reasons headed "Introduction". Elders seeks rectification of the second mortgage and collateral securities by the insertion of words to indicate that the liability of Elders thereunder to the first respondent is "as trustee of the GGI Rural Income and Growth Trust and to the extent only of the assets of the GGI Rural Income and Growth Trust." An effect of this amendment would be to limit the effect of any judgment recovered against Elders on the cross claim for principal and interest owing on the second mortgage.

243. Elders placed reliance upon the terms of the Trust Deed of 6 August 1984, in particular the statement in clause 36(9) thereof that the trustee shall not be required to accept any personal liability for the borrowings authorised by that provision. The full text of clause 36(9)is set out earlier in this judgment under the heading "The Trust Deed of 6 August 1984".

244. It is fundamental that the common law does not recognize a trustee as having assumed an additional or qualified legal personality. This means that the liability of the trustee for debts he incurs includes those incurred in the course of performance of the trust. His liability to creditors is not limited or quantified by reference to the extent of the trust assets: In re Johnson (1880) 15 Ch D 548 at 552. The debts are his debts: Vacuum Oil Co. Pty. Ltd. v Wiltshire [1945] HCA 37; (1945) 72 CLR 319 at 324,325, Octavo Investments Pty. Ltd. v Knight (1979) 149 CLR 360 at 367. However, the law does permit a trustee to contract with third parties on the basis that his personal liability is limited, for example, to the extent of his right to resort to and apply trust funds for the discharge of liabilities incurred by him in the authorised conduct of the trust. Nevertheless, third parties may, in a given case, not be prepared to deal with a trustee on such a basis and, in any event, clear words are necessary to achieve a result whereby what is a prima facie the unlimited personal liability of a trustee is so qualified: Helvetic Investment Corp. Pty. Ltd. v Knight (1984) 9 ACLR 773.

245. This is the result which Elders seeks to achieve by the order for rectification it propounds in this case. The submission is that the "mortgage-back" of Booka, dated 22 August 1984, upon which the cross claim is brought by the first respondent against Elders to recover principal and interest, did not accurately reflect the common intention of Elders and the first respondent that the liability thereunder of Elders be limited in the way proposed by the suggested order for rectification. The first step then is to show that there was such common intention. There is no debate as to the necessity of Elders satisfying that requirement.

246. However, there is debate as to the existence or extent of any principle that not only must the document mistakenly record the continuing common intention of the parties but also that that intention be evidenced by "some outward expression of accord" before the parties executed the document in question: Bishopsgate Insurance Australia Limited v Commonwealth Engineering (NSW) Pty. Limited (1981) 1 NSWLR 429, Pukallus v Cameron (1982) 56 ALJR 907 at 909.

247. In view of the conclusion I have reached on the submission that there was an intention common to both parties at the time of entry into the mortgage back to include therein the provision sought by Elders, it is not necessary in these proceedings to express any concluded view upon the debate as to the necessity to show that any accord between the parties had found some outward expression. However, if it were necessary to do so, I would, with respect, follow what was said upon the subject by Yeldham J. in Bishopsgate Insurance Australia Limited v Commonwealth Engineering (NSW) Pty. Ltd. (1981) NSW LR 429 at 430-431.

248. Yeldham J. there observed that whilst there may be no requirement that the respective intentions of the parties have been communicated inter se, nevertheless the firm accord or common intention which must be established as a basis for rectification must be one that has been manifested in the words or conduct of the parties, and not merely one which remained undisclosed in the course of negotiations.

249. In the present case Mr. Stephen Sullivan, who, it will be recalled, had the conduct of the transaction for the first respondent and Mr. Reeves from the latter part of June 1984, until completion on 22 August 1984, gave evidence that he never had any discussion as to limitation of Elders' liability with any other party during that time. Further, Mr. Reeves gave evidence to the

effect that he did not at any time before the settlement hold the intention that liability thereunder to his company should be limited in any way. I accept what both witnesses say on these points. Further, Mr. Reeves did not know with any certainty that Elders was indeed to be the other party to the transaction until a telephone conversation with Mr. Stephen Sullivan whilst Mr. Reeves was in Europe. The telephone conversation was in late July 1984.

250. In this setting I conclude (a) there was no outward expression inter se of accord as to limitation of Elders' liability (assuming this to be a legal requirement) (b) there was no evidence manifesting in the words or conduct of Mr. Reeves (and thus of the first respondent) any firm accord or common intention that the liability of Elders be limited in the way suggested and (c) indeed, there was no such intention on the part of Mr. Reeves or the first respondent.

251. I reach these conclusions even without regard to the requirements that the Elders advance "convincing proof" that the written instruments do not embody the final intention of the parties and that the omitted ingredient be capable of such proof in clear and precise terms: Pukallus v Cameron (supra) at 909. Regard to what is there said by the High Court of course immeasurably strengthens the position of the first respondent in resisting the claim to rectification.

252. Elders sought to escape these conclusions by urging that Mr. Reeves must have known that Elders was purchasing Booka not in its own right but as a trustee and that, as it was put by Elders' senior counsel, he knew Elders would be no more than a cipher. I have already indicated that I accept Mr. Reeves' evidence that he never had any intention at the relevant time that the liability of Elders be limited in the way now urged by Elders. In any event, even if it be the case that Mr. Reeves did well appreciate that Elders was purchasing Booka as trustee and therefore giving the mortgage back and collateral securities in that capacity, it would by no means necessarily follow that, had he had the legal situation explained to him, he would have agreed to limit the liability thereunder of Elders to the assets of the GGI Unit Trust, or, in particular, that he would have agreed to relinquish what ordinarily are the rights of a third party contracting with a trustee. As between itself, GGI, and the unit holders no doubt clause 36(9) of the Trust Deed did not oblige Elders to accept personal liability for authorised borrowings; but that did not prevent Elders from accepting such liability or bar a third party from contracting with Elders without limitation on the liability of Elders.

253. Elders also sought to rely on evidence of conversations between Mr. Reeves and Mr. Wood well after the settlement date. As I understand it, these conversations were relied upon both as throwing light upon the state of Mr. Reeves' mind before settlement and as being admissions against interest.

254. It was not until some time in March 1985 that Mr. Wood became aware of the particular security documents that had been executed by Elders in connection with the acquisition of Booka on 22 August 1984. On 26 March 1985 GGI had gone into liquidation and the winding up of the GGI Unit Trust was confirmed by the Supreme Court of Queensland on 25 June 1985. In Melbourne on about 12 August 1985 Mr. Reeves had a lengthy meeting with a Mr. Brannigan, an officer of a company holding security from Elders. Mr. Reeves also had a conversation with Mr. Wood. There is some dispute as to what was said.

255. According to Mr. Wood, Mr. Reeves said to him that he had been told by Mr. Brannigan that if his company were not successful in recovering under its mortgage, they would sue Elders and that he, Mr. Reeves, could not understand how this could be done because Elders was merely trustee and could not personally be responsible for these debts.

256. According to Mr. Reeves, the substance of what he said to Mr. Wood was that he had been told by Mr. Brannigan that if his company was not successful in obtaining all of its money under the mortgage and there was a shortfall, his company would sue Elders and if Elders saw fit to join the unit holders that would be their business. According to Mr. Reeves, Mr. Wood responded to this narrative by saying "Poor unit holders".

257. It will immediately be apparent that the direct thrust of the conversation concerns liabilities in respect of the security held by Mr. Brannigan's company, not any security held by the first respondent and, even on its face, the conversation put forward by Mr. Wood falls short of supplying with anything like the necessary degree of precision, clarity, and substance,the support required in order for Elders to advance its case on rectification. I should also add that in so far as there is a conflict between the recollection of Mr. Wood and Mr. Reeves I prefer the account of Mr. Reeves.

258. Further, Mr. Wood, in respect of the same occasion, went on in his evidence to relate a further statement made by him to Mr. Reeves, sequential upon that just dealt with. Mr. Wood said that he said to Mr. Reeves that whilst it was a matter on which he (Mr. Reeves) would have to seek his own advice, he should remember that "Elders Trustee" was "in this as trustee" and that he (Mr. Wood) could see no reason why Elders should be personally liable. Mr. Wood also said that Mr. Reeves' response to this was to say "Yes, yes, yes, I concede that". Mr. Wood also said that Mr. Reeves had stated that he did not understand how the trustee could be personally responsible for the debt. Mr. Reeves denied that these words were exchanged between Mr. Woods and himself.

259. On the account of these remarks given by Mr. Wood, several observations may be made. First, Mr. Wood prefaced these remarks by indicating that Mr. Reeves would have to seek his own advice. Secondly, Mr. Wood did not say that, as a matter of law, Elders was not liable but that he could see no reason why it should be personally liable. Again, I do not regard what Mr. Wood said, even if it be accepted as an accurate recollection of what took place, as of sufficient specificity, clarity and substance to advance to any significant degree the case sought to be made by Elders on this issue. The words recollected by Mr. Wood were put in terms to Mr. Reeves in cross-examination and he said that they were not exchanged. I accept the accuracy of Mr. Reeves' recollection. It may well be that some other, even looser and more speculative and general form of words was exchanged and this may have formed the basis for Mr. Wood's recollection. However, my conclusion remains, that Elders has not made out its case on the claim for rectification.

260. In addition to claiming rectification as an equitable remedy in the accrued jurisdiction of the Court, Elders relied on sub-para.87(2)(b) of the TP Act as a footing for relief to the same effect. However, the footing on which an order of this character could be made is quite different in character from the equity which founds a right to rectification of a written instrument; for the present case, it would be necessary to show contravention of Part V of the TP Act. Thus the availability of a remedy in the nature of rectification under sub-para.87(2)(b) refers one back to a consideration of the primary part of Elders' submissions concerned, as it is, with alleged contraventions of ss. 52 and 53A(1)(b) of the TP Act. As no case is made out for such contravention there is no ground laid for the making of the rectification order under s.87.

CONCLUSIONS

261. It follows that Elders fails in its case and the first respondent succeeds on the cross claim. Elders should pay the costs of the respondents on the main claim and of the first respondent on its cross claim.

262. I will hear the parties as to the quantification of the sum payable on the cross claim.

263. The exhibits may be returned.

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