

## Gosper v Re Licensing (NZ) Ltd - [1998] 3 NZLR 580

Court of Appeal Wellington  
30 March; 9 April 1998  
Richardson P, Henry and Tipping JJ

***Practice and procedure -- Limitation of proceedings -- Proceedings under the Fair Trading Act 1986 alleging misrepresentation in connection with the purchase of land -- When "the matter giving rise to the application occurred" - Fair Trading Act 1986, s 43(1) and (5).***

Gosper entered into a contract to purchase land and a building to be constructed on the land. The purchase was to be financed by a loan secured by a mortgage over the property. A valuation had been obtained dated 15 February 1993; the agreement for sale and purchase was dated 23 February 1993. Settlement took place on 11 November 1993. On 5 September 1996 Gosper commenced proceedings alleging, inter alia, misrepresentations in breach of ss 9 and 14 of the Fair Trading Act 1986, primarily by the vendor and the mortgagee. The alleged misrepresentations were all made during the negotiations in February 1993.

The respondents applied to the High Court to strike out these causes of action relying on s 43(5) of the Fair Trading Act which provides for a limitation period of three years "from the time when the matter giving rise to the application occurred." Master Thomson made the strike-out order, and an application by Gosper to review that decision was dismissed by Gallen ACJ. Gosper appealed against that decision.

There was no challenge in the Court of Appeal to its earlier findings in *Murray v Eliza Jane Holdings Ltd* (1993) 5 TCLR 272 that "the matter giving rise to the application" was confined to the conduct constituting a contravention of the Act, and did not include ensuing loss or damage; or that time started to run on the occasion of the matter giving rise to the application, not when that matter was reasonably discoverable. The focus of the appeal was rather the identification of the time at which the conduct complained of occurred in respect of the three heads of claim.

### **Held:**

1 The word "application" in s 43(5) of the Fair Trading Act did not have the same restrictive meaning as it did in s 43(1). Gosper's proceedings included applications for orders under s 43 and therefore the limitation period in subs (5) applied (see page 583 line 2).

2 The causes of action were time-barred under s 43(5). Where misleading conduct took the form of a misrepresentation, whether positive in form or arising from silence, the conduct had not "occurred" for the purposes of s 43(5) until it had become effective and available for the purposes of seeking relief

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under s 43. In relation to all three heads of claim in the present case that was, at the latest, the time of the contract (see page 584 line 39, page 585 line 40, page 586 line 18).

3 The continuing effect of misleading conduct which had earlier occurred and become actionable did not amount to a further actionable wrong simply because the original falsity had not been corrected. In this case the misleading conduct was in making the offers, and that conduct continued until the offers were accepted, when it was complete. In particular, there was no separate conduct, capable of basing an application under s 43, at the date of settling the transaction. The matter giving rise to the applications was not the act of settlement but, in broad terms, the earlier making of false representations (see page 584 line 21, page 585 line 40, page 586 line 22).

Appeal dismissed.

### **Other cases mentioned in judgment**

*Gillespie v Elliott* [1987] 2 Qd R 509.

*Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83; ATPR 40-850 (FCA).

*Jobbins v Capel Court Corporation Ltd* (1989) 91 ALR 314; ATPR 41-005 (FCA).

*Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1988) ATPR 40-853 (FCA), (1989) ATPR 46-048; 67 LGRA 238 (FCA).

## Appeal

This was an appeal from a judgment of Gallen ACJ upholding the decision of the Master to strike out causes of action based on the Fair Trading Act 1986.

*John Delany* and *Duncan Ferrier* for the appellants.

*Brooke Gibson* for the first respondent.

*Warwick Smith* for the second and third respondents.

*John Porter* for the fourth respondent.

*Cur adv vult*

## The judgment of the Court was delivered by

## HENRY J.

This appeal is concerned with the limitation period prescribed by s 43(5) of the Fair Trading Act 1986. The appellants have commenced proceedings in the High Court at Wellington. The pleadings include, amongst others, causes of action based on the Fair Trading Act. In the High Court Master Thomson made an order striking out those causes of action. An application by the appellants to review the Master's decision was dismissed by Gallen ACJ, and the present appeal results.

The hearing before this Court was conducted on the basis of the second amended statement of claim, which had been filed on 16 March 1998 after not only the Master had struck out (on 19 June 1997) the causes of action now in question, but also Gallen ACJ's judgment confirming the strike out, delivered on 12 September 1997. The proper course would have been to submit the proposed amended pleading in so far as it relates to the Fair Trading Act issues in draft form for the purposes of argument. It is however appropriate in the circumstances to consider the present issues on the basis of that pleading and, in accordance with established practice, taking into account any additional amendments which could properly be sought to cure particular alleged defects.

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The sole issue is whether the Fair Trading Act claims, which are based on s 9 and s 14, are barred by reason of lapse of time. Subsections (1)(a) and (5) of s 43 of the Act provide:

- 43. Other orders** -- (1) Where, in any proceedings under this Part of this Act, or on the application of any person, the Court finds that a person, whether or not that person is a party to the proceedings, has suffered, or is likely to suffer, loss or damage by conduct of any other person that constitutes or would constitute -
- (a) A contravention of any of the provisions of Parts I to IV of this Act;
- ... the Court may (whether or not it grants an injunction or makes any other order under this Part of this Act) make all or any of the orders referred to in subsection (2) of this section.
- ...
- (5) An application under subsection (1) of this section may be made at any time within 3 years from the time when

the matter giving rise to the application occurred.

All pleaded causes of action arise from a transaction entered into by the appellants under which they contracted to purchase land, and also a residential building which was to be constructed on it, in accordance with agreed plans and specifications. The transaction was to be financed by way of a loan secured under a mortgage over the property. A valuation of the property with the residence constructed (dated 15 February 1993) was obtained by the second respondent (**Fletcher** Homes) and made available to the appellants. Following negotiations, they then entered into an agreement for sale and purchase which is dated 23 February 1993. On 18 August 1993 a completion certificate was issued by the **valuer**, and settlement of the purchase was effected on 11 November 1993. The proceedings were issued on 5 September 1996.

There are two causes of action under the Fair Trading Act, one under s 9 and one under s 14. They are primarily directed against **Fletcher** Homes and the third respondent (the mortgagee). Although the pleading contains a considerable number of allegations supporting the claims of misleading or deceptive conduct, for present purposes the substance of them can be reduced to three heads, all of which could be said to come under the same broad umbrella, namely the value of the package presented to and accepted by the appellants. It is claimed: first, that the valuation of 15 February 1993 misrepresented the current market value of the completed property; second, that the offers of a rent-free period of possession and of free redundancy insurance were not in fact free but were separately built into the purchase price; third, that there was a failure to disclose the intention of the local authority to construct a public footbridge behind the property which would affect its privacy and value. The last mentioned matter was the subject of a separate submission by the respondents to the effect that it constituted a new cause of action or a new case, which cannot now be incorporated into the proceedings because it is statute-barred, even accepting the appellants' contention that the date of settlement is the point at which time started to run. The footbridge allegations were first made in March 1998. A similar submission was made by Mr Smith in respect of the second head of claim relating to the "free" aspects of the package, which was first expressed some time after May 1997 in response to a request for further particulars. This will require consideration if the appellants' primary argument is accepted.

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## Section 43(5)

The three-year limitation period starts to run "from the time when the matter giving rise to the application occurred." At the outset of presenting his case, Mr Delany raised a contention which had not been the subject of argument in the High Court, and was not contained in written submissions. He contended that there was a distinction to be drawn in s 43 between an "application" and "proceedings", and that subs (5) applied only to an application. He submitted that the appellants' claims were the subject of a proceedings under Part V of the Act (s 43(1)), not "applications by any persons", and therefore not caught by subs (5). The limitation period for these proceedings, he submitted, was governed by the Limitation Act 1950. The first question which arises is whether the Limitation Act, and s 4 in particular (actions founded on simple contract or tort) has any application to the statutory causes of action and remedies provided by the Fair Trading Act. That apart, the argument is not sustainable. The fallacy lies in the attempt to give the word "application" in subs (5) the same restricted meaning it clearly has in subs (1). Jurisdiction is given by s 37(c) to the High Court to hear and determine "Applications for orders under sections 42 and 43 of this Act." Section 43(2) lists the "other" orders which can be made. Jurisdiction to hear and determine applications for s 43 orders is also given to the District Court and to Disputes Tribunals (ss 38, 39). It is beyond question that the appellants here have made applications for orders under s 43. They have also applied for an injunction under s 41, which empowers the Court to grant an injunction "on the application of . . . any other person". The use of the disjunctive in s 43(1) when referring to "the application of any person" clearly is to cover a situation when a person not a party to existing proceedings, seeks to make an application for s 43 orders. The interpretation propounded would make nonsense of the limitation provision, and result in distinctions which could have no possible justification.

Turning to s 43(5), it is therefore necessary to determine when the particular matters giving rise to the application for s 43 orders occurred. The meaning and effect of the provision was considered by this Court in *Murray v Eliza Jane Holdings Ltd* (1993) 5 TCLR 272. The Court there held that the expression "the matter giving rise to the application" was confined to the conduct constituting a contravention of the Act, and did not include the ensuing loss or damage or the likelihood of loss or damage. The distinction between s 43(5) and its equivalent in the Australian legislature (s 82 of the Trade Practices Act 1974) which based the limitation period on accrual of cause of action was noted. The Court also

held that time started to run on the occasion of the matter giving rise to the application, not when that matter was reasonably discoverable. Neither of those propositions was challenged by Mr Delany, and accordingly neither is presently in issue. The Court in *Eliza Jane* also rejected an argument that general equitable principles should be introduced if there was concealment by fraud, including equitable fraud, thereby extending the limitation period until discovery of the fraud. In *Eliza Jane* it was claimed that the misleading or deceptive conduct was a failure to notify the purchasers of shares of a certain potential liability which would have affected the value of their investment. Mr Delany did not invite this Court to reconsider this aspect of the *Eliza Jane* decision, but submitted that somehow "the fraud extension may apply when all the facts are known". There is no express pleading of fraud applicable to the Fair Trading Act causes of action. Short of reversing the rationale of that earlier decision, this argument does not assist the appellants.

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We turn therefore to what is the real substance of the appellants' submissions, which requires an identification of the time at which the conduct complained of and giving rise to the orders sought occurred in respect of each of the three heads.

## The valuation

The valuation was made and provided to the appellants, and the **valuer's** completion certificates were provided to them, outside the limitation period. In so far as those matters constituted misleading conduct they occurred outside the available time. The other particulars supporting both the s 9 and the s 14 claims can be grouped. The first group alleges failure to disclose matters which would demonstrate or indicate that the valuation was in excess of current market value. The second group alleges failure to disclose matters demonstrating or indicating that the mortgage commitment undertaken was improvident. On analysis, it becomes clear that all complaints have as their basis a representation made prior to contract to the effect that the valuation represented current market value and, associated with that, the intended mortgage was not disadvantageous. That was the misleading conduct. The Court must for present purposes accept that the appellants are entitled to the claimed relief, all of which stems from the obligations undertaken by them in the contract to purchase.

We are unable to see, either in principle or in logic, how the continuing effect of this conduct which had earlier occurred and became actionable can somehow be converted into a further actionable wrong simply because its original falsity is not corrected. Mr Delany endeavoured to rely on the line of cases which establish that in some circumstances silence can constitute misrepresentation or misleading conduct. As a general proposition that is accepted, but it can have no application to the present circumstances. If Mr Delany is right, the Act makes it actionable not only to make a false representation or to deceive by some other conduct but also, as a separate and distinct offence and actionable wrong, to fail thereafter day by day to correct the falsity or the deception. That cannot be correct. The immediate effect, as Gallen ACJ observed, would be that time would never start to run because the obligation to correct would remain until correction was effected. There is no logical basis for holding, as was submitted, that time would start to run from settlement of the transaction - the effect of the falsity or deception remains operative, as must any obligation to disclose remain if that constitutes the basis of the actionable conduct. Any "crystallisation" of the appellants' position, as Mr Delany termed it, was at the time of contract, not settlement.

It would seem logical, as Gallen ACJ held, that where the misleading conduct is in the form of a misrepresentation, whether positive in form or arising from silence, that the conduct continues and has not "occurred" for the purposes of s 43(5) until it has become effective and available for the purposes of seeking relief under s 43. In the present case, at the latest, that would be the time of contract. This particular point did not arise in *Eliza Jane*, where the proceedings were issued more than three years after settlement of the agreement to purchase shares. What is of some significance is the Court's rejection in *Eliza Jane* that what in reality is a manifestation or particular of the alleged misleading conduct cannot give rise to a distinct head of claim for limitation purposes (p 279).

Although the Australian legislation is concerned with accrual of a cause of action and in that respect distinguishable from s 43(5), its application in case law is consistent with the approach we would adopt.

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In *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1988) ATPR 40-853 the applicants were induced to enter into a lease for a shop in a new shopping complex, by various misrepresentations by the respondents and a real estate agent working for them, and issued proceedings under the Trade Practices Act 1974. Their claim was held to be statute-barred. Pincus J referred to a decision of the Supreme Court of Queensland (*Gillespie v Elliott* [1987]

2 Qd R 509) where the Court held that losses arising from events within the limitation period cannot be founded upon an allegation of a new cause of action when a quantifiable loss had been sustained outside the limitation period. He concluded that the cause of action accrues by the time the applicant has entered into the relevant transaction. In *Keen Mar* the relevant transaction was a lease and the action was said to have accrued no later than the execution of the lease. On appeal Spender J expressly agreed with this finding although the appeal itself was decided on a different basis. Spender J stated that "the relevant date is the date of execution of the lease, not the date of entering into possession pursuant to the lease." (See *Keen Mar Corporation Pty Ltd v Labrador Park Shopping Centre Pty Ltd* (1989) ATPR 46-048 at p 53,156.)

The decision of the Full Court of the Federal Court in *Jobbins v Capel Court Corporation Ltd* (1989) 91 ALR 314 reaches a similar conclusion. It was argued that a claim was not statute-barred because although the plaintiff invested his money outside the limitation period, no losses were sustained until a later time. The Court rejected this, finding that the necessary damage was sustained at the date of entry into the agreement.

In *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 79 ALR 83, the plaintiff was induced to enter into the purchase of a restaurant under the impression that it seated 120 people when it was only licensed for 84. Lockhart J, who delivered the main decision of the Full Court of the Federal Court, stated that the real complaint arose from the silence of the vendors in not informing Collins Marrickville of the true position with respect to seating and the use to which the bar area could be put. Lockhart J held that there was a duty to disclose the true position since the vendor had sold the business knowing it was subject to serious limitations which vitally affected profitability, that the agent had misrepresented the legal position, and that the manner in which the business was being operated at the time of the sale supported this understanding. These circumstances, Lockhart J said, gave rise to a duty to reveal the true position before any contract was signed.

Section 43(5) does not call for a construction which would give a less restrictive effect to its operation.

## Free rent/free redundancy insurance

The allegation is that offers of possession of the property prior to settlement free of rent, and of free redundancy insurance, were misleading because the cost of both services was calculated for individual purchasers and then actually built into the total purchase price. The offers are obviously capable of being construed as misleading or deceptive conduct if the allegations are established. Again, we do not see how it can be said that a failure to disclose the true situation, at least after acceptance of the offers which would have been complete at the time of contract, can constitute actionable conduct under the Act. The same reasons which relate to the valuation and mortgage issue apply. The conduct is in making the offers, and it continues until they are accepted when it is complete, as is its occurrence.

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## The proposed footbridge

Because it does not contain any underlying representation of a positive nature, this head of claim falls for slightly different considerations. It is alleged that **Fletcher** Homes was aware of the intention of the local authority to construct a footbridge, which would be detrimental to the value of the property. Assuming that the failure to pass on that information to the appellants is actionable under either s 9 or s 14, in our view it was conduct which occurred (and was occurring) during the course of negotiations. As with the other heads of claim, entitlement to the relief now sought for failure to disclose came into existence when the parties entered into contract. Therefore, any such failure was no more than a failure to correct the false impression which had earlier been given and acted upon. If the conduct continues "to occur" after that time, then again there would appear to be no operative limitation provision - the obligation to disclose remains until disclosure. In our judgment that would negate the clear intention of the legislature, which provides a comparatively short period of time during which a person is at risk for breaching the provisions of the Act.

Accordingly we would hold that the conduct giving rise to this claim occurred no later than when the contract was entered into, at which point time started to run under s 43(5).

## Settlement of the transaction

As an alternative, Mr Delany submitted that the act of settlement was itself misleading conduct on the part of **Fletcher Homes**. The difficulty with this submission is that the conduct complained of is not the act of settling the transaction, but the failure to disclose prior to effecting settlement the very same matters which have earlier been identified and discussed. Accordingly no separate conduct, capable of basing an application under s 43, occurred. The matter giving rise to the applications in these proceedings was not the act of settlement but, in broad terms, the making of false representations.

## Conclusion

For the above reasons we agree with the conclusions reached by both Master Thomson and Gallen ACJ. These two causes of action are barred by the operation of s 43(5). It is unnecessary to consider the further question whether new causes of action have been introduced into the pleadings by way of amendment or the furnishing of particulars.

The appeal is therefore dismissed. The second and third respondents, who bore the bulk of the argument are entitled to costs in the sum of \$5000 jointly, together with reasonable travelling and accommodation expenses for counsel. Costs for the first and fourth respondents are fixed in the sum of \$2500 each. Disbursements for all respondents are to be settled by the Registrar if necessary. Appeal dismissed.

Solicitors for the appellants: *Hanning Connor* (Wellington).

Solicitors for the first respondent: *B A Gibson* (Wellington).

Solicitors for the second and third respondents: *Chapman Tripp Sheffield Young* (Auckland).

Solicitors for the fourth respondent: *Sievwrights* (Wellington).

*Reported by: Graeme Palmer, Barrister and Solicitor*