JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 92/2002

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A. (AG.)

BETWEEN	**THE FAIR TRADING COMMISSION**	**APPELLANT**
AND	**SBH HOLDINGS LTD**	**1ST RESPODNENT**
AND	**FOREST HILLS JOINT VENTURE LIMITED**	**2ND RESPONDENT**

Patrick Foster and Miss Katherine Francis instructed by the Director of State Proceedings for the Appellant

Thomas Ramsay instructed by Tenn Russell Chin-Sang Hamilton and Ramsay for the Respondents

20th, 21st, 22nd January & 30th March, 2004

FORTE, P:

I have had the opportunity of reading, in draft, the judgment of K. Harrison, J.A. (Ag.) and am in agreement with his decision and his reasons therefor.

One of the major purposes of the Fair Competition Act, is to protect consumers from circumstances such as have been revealed by the evidence in the instant case. The reasons put forward for their default by the respondents, cannot avail them, for the reasons advanced by Harrison, J. A. (acting).

In any event I hold the view that the respondents must have known that to depend on monies advanced by purchasers, to complete the facilities as advertised, was subject to serious risk because of the possibility of defaulting purchasers, and the consequential result of their (the respondents') inability to make good their representations. In addition, it is not disputed that they made representations that the development was being financed by the Jamaica National Building Society, a well-respected organization. Anyone to whom such a representation was made, would feel secure in making such an investment, and would be highly unlikely to believe that their investment, would be subject to the ability and willingness of other purchasers to meet their agreed payments.

In the circumstances of this case, I would hold, even if on a correct construction of section 37 (1) of the Act, liability is not strict, that the respondents at the time of the representations must have foreseen the likelihood, given the facts within their knowledge, of financial difficulties preventing them from accomplishing the fulfillment of their representations.

I would allow the appeal, and impose the penalty as prescribed in the judgment of Harrison, J.A. (acting).

HARRISON, J.A:

I have read the draft judgment of Karl Harrison, J.A. (Ag). I also agree with his reasoning and conclusion therein. However, I make the following comments.

The Fair Competition Act ("the Act") which came into force on March 9, 1993 had as its main purpose the supervision of conduct and practices of persons engaged in the provision of goods or services in any trade or business, and the detection and punishment of such persons for unfair conduct and practices in protection of the public in general. This is a comparatively new piece of legislation.

The Act is in pari materia with the Trade Practices Act 1974, (Australia) which was directed towards "trade practices" and in particular, preventing deception or misrepresentation by persons in the course of trade, causing injury to the public at large.

Section 37 of the Act, inter alia, reads:

> "(1) A person shall not, in pursuance of trade and for the purpose of promoting, directly or indirectly, the supply or use of goods or services or for the purpose of promoting, directly or indirectly, any business interest, by any means –
>
> (a) make a representation to the public that is false or misleading in a material respect; ..."
> (Emphasis added)

By comparison, the Trade Practices Act 1974, (Australia), in section 52, inter alia, reads:

> "(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive ...".
> (Emphasis added)

The High Court of Australia (per Stephen, J) in interpreting section 52 of the Act in the case of ***Hornsby Building Information Centre Pty Ltd. v Sydney Building Information Centre Ltd*** (1978) 140 CLR 216, at page 228, said:

> "Section 52 (1) creates no offence, it only prescribes a course of conduct deviation from which may result in an order of the Court, made under section 80 of the Act, forbidding further deviation in the future. The section should be understood as meaning precisely what it says and as involving no questions of intent upon the part of the corporation whose conduct is in question."

This case concerned the use of the name "***Hornsby Centre***" which was likely to deceive or mislead the public with the long established "***Sydney Centre***".

In ***Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*** (1981-82) 149 CLR 191, the appellant was complained against by ***Puxu Pty Ltd*** ("***Puxu***") of manufacturing and selling furniture designed to resemble ***Puxu's.*** The appellant's furniture was however properly labelled. Gibbs,

C.J., for the majority, in the High Court of Australia, in allowing the appeal, and following the ***Hornsby*** case, (supra), of section 52, at page 197, said:

> " There is nothing in the section that would confine it to conduct which was engaged in as a result of a failure to take reasonable care. A corporation which has acted honestly and reasonably may therefore nevertheless be rendered liable to be restrained by injunction, and to pay damages, if its conduct has in fact misled or deceived or is likely to mislead or deceive. The liability imposed by section 52, in conjunction with sections 80 and 82, is thus quite unrelated to fault and it need not involve any infringement of a right to a trade name, trade mark, copyright or design. It may have been thought that the unequal position of consumers as against the corporations which supply them with commodities justified a measure that from the point of view of the latter seems draconic, but although section 52 is intended for the protection of consumers, it is enforceable by a trade competitor who is not a consumer."
>
> (Emphasis added)

In ***Yorke v Lucas*** (1985) 158 CLR 661, it was held, again following the ***Hornsby*** case, that in interpreting section 52, a breach of that section may be committed although a corporation acts honestly and reasonably and without any intent to mislead or deceive.

The above cases provide some guidance as to the approach of the courts in construing a statute of that nature which is contravened, and which contravention incurs civil liability attracting a penalty.

The Fair Trading Commission, a body corporate established under the Act, has, as one of its functions contained in section 5:

"5.- (1) ...

(a) to carry out, on its own initiative or at the request of any person such investigations or inquiries in relation to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in business practices in contravention of this Act and the extent of such practices; ..."

One has to look at the entire structure and language used in the particular statute and its intent, in order to determine whether the civil liability attracting a penalty is strict or incorporates a mental element such as intention.

The criminal law generally requires that the mental element be read into a statute creating an offence, unless it is expressly excluded. In respect of the civil law, the courts have readily interpreted a statute as imposing strict liability on an individual who contravenes it, whenever the statute exists for the protection of members of the public. The author of the *Law of Torts* by John Fleming, 7th edition, in discussing this strict liability, (albeit that which is imposed on manufacturers of certain products), at page 463, said:

"The contemporary movement for better consumer protection has made the existing law of products liability a special target for reform, with the aid of giving victims of a defective product a right of recourse against the manufacturer without proof of fault".

...

> "Even in a free market economy seeking to maximize consumer options, this measure of compulsion is justified because the consumer is usually ill-equipped to exercise a meaningful choice and society is concerned that the high accident cost does not overburden the public purse."

In the emerging economic system in Jamaica described as the free market in commerce, the Fair Competition Act can well be seen as created to protect purchasers in the market, from the overwhelming effect of competitive and attractive advertising offers which may prove to be less than they appear to offer.

I also disagree with Mr Ramsay for the respondents that lack of intention to provide the amenities must be proven. I am persuaded to follow the Australian line of cases commencing with the ***Hornsby*** case, (supra) and hold that, liability under section 37 of the Fair Competition Act should be strictly construed.

However, even assuming that the mental element ought to be read into section 37, which I maintain it should not, the respondent would fail on the facts of the case.

Both Hopeton Delisser and Donna McLaren, purchasers in the development scheme Estate Homes of Forrest Hills, in their affidavits, stated that they were induced to buy, because of the representations both oral and that which was contained in the brochures, pamphlets and newspaper advertisements in 1996 and 1995, respectively. The

representations offered "Elegant Living at its Dignified Best" as also the "Ultimate in Affordable Living", which would be effected by the facilities, namely, a swimming pool, tennis court, a clubhouse and security fencing. McLaren entered into possession in August 1996, and Delisser entered into possession in March 1997. The first phase of construction, of 4 two-bedroom and 6 three-bedroom units, should have been completed in July 1996, six months after the scheduled completion date.

On the latter date, July 1996, the occupants then were entitled, at least, to the facilities offered, namely the swimming pool, tennis court and clubhouse. They had received none.

There is no evidence that at any time from 1995 to date, even the tennis court area was indicated or prepared or even marked out. Nor was there any evidence of any negotiations or failed contracts to build the said tennis court. Furthermore, there was no attempt to refurbish the dwelling house to be used as the clubhouse nor to restore the swimming pool referred to by the respondents. The conduct of the respondents and the absence of any relevant evidence, confirm that there was a total absence of any intention to provide the facilities which the attractive advertisements had promised.

The presence of evidence of an attempt to provide the said facilities, even if it was subsequently made impossible by "the downturn in the Jamaican economy", although not a defence to liability, could serve

as a mitigating factor in the respondents' favour, when a court is exercising its powers in respect of the imposition of any penalty under section 47 of the Act. The respondents committed a clear breach of section 37 of the Act, were quite insincere in their advertisements of the facilities offered to the purchasing public and are accordingly liable to pay a penalty to the Crown in the sum referred to by Karl Harrison, J.A. (Acting).

As this Court had intimated during the course of the hearing, it is hoped that some consideration will be given by the authorities, to the fact that although the penalty of $2,500,000.00 is payable to the Crown, the purchasers in the said development are still deprived of the promised facilities.

I would allow the appeal.

HARRISON J.A (Ag):

Introduction

This is an appeal from the judgment of James, J on the 19th day of July 2002 dismissing a Motion filed by the Fair Trading Commission ("the Appellant") seeking the following relief:

> "(a) A Declaration that the Respondents have contravened the obligations and/or prohibitions (or any part of the said obligations and/or prohibitions) imposed in part VII of the Fair Competition Act and/or in particular that the Respondents in pursuance of trade or business have been engaged in misleading advertising in contravention of section 37 of the Fair Competition Act.
>
> (b)An Order that the Respondents do pay to the Crown such pecuniary penalty not exceeding Five Million Dollars ($5,000,000.00) for the breach so declared, or
>
> (c) Such sum as this Honourable Court deems fit.
>
> (d) ..."

Notice and Grounds of Appeal were filed on August 5, 2002 and the single ground of appeal is as follows:

> "That the learned trial judge erred as a matter of law when he held that the Respondents have not contravened the obligations and/or prohibitions (or any part of the said obligations and/or prohibitions) imposed in Part VII of the Fair Competition Act and in particular that the Respondents in pursuance of trade or business have not engaged in misleading advertising in contravention of section 37 of the Fair Competition Act".

Once more, the Court was without the benefit of the learned trial judge's reasons for judgment. We were informed however, that the judge's notebook could not be located and as a result of this problem a note of the reasons that was prepared by the Attorneys could not be verified by the learned trial judge.

This Court has commented on previous occasions on the absence of reasons for judgment and quite recently Harrison J.A in ***Omar Young and Another v June Black*** SCCA 106/01 (un-reported) delivered on December 19, 2003, had this to say:

> "Once again, it is lamentable that the learned trial judge gave no reasons for his decision. This Court is therefore unable to ascertain the basis of his assessment and award. This Court has repeatedly stated that trial judges have a duty to do so. In its absence, this Court is itself obliged to examine the evidence to find therein what facts may have prompted his decision. The absence of reasons creates an added burden for an appellate court."

In view of the absence of reasons, the Court was faced with the task of having to peruse several affidavits and exhibits in order to discern what could have prompted the trial judge's decision.

The factual background

The facts reveal that SBH Holdings Ltd and Forest Hills Joint Venture Ltd. ("the Respondents") are real estate developers. They had advertised the construction and sale of townhouses in a scheme called the "Estate

Home of Forrest Hills" ("the Development") situate in the Parish of St. Andrew. The project was advertised as being financed by the Jamaica National Building Society.

Hopeton DeLisser and Donna McLaren are proprietors of respective units in the development and it was because of their complaint to the Appellant that the Notice of Motion was filed in the Supreme Court. DeLisser has sworn to an affidavit dated the 22nd day of November 1999 and has stated inter alia:

> "1. ...
>
> 2. That in or about March 1996 I was looking for a house to purchase, and on the advice of a friend went to view the development at Estate Homes of Forrest Hills hereinafter referred to as the Development.
>
> 3. That at the viewing of the Development I was shown a model house with fixtures and fittings of a high standard. I collected brochures and pamphlets from the representatives of the First and Second Respondents. Exhibited hereto are copies of two of the brochures marked comprehensively 'HD1' for identification.
>
> 4. That the said brochures listed the First and Second Respondents as developers of the premises and represented that the Respondents would ensure the provision of a swimming pool, tennis court, club house and security fencing at the Development.
>
> 5. That I verily believe that the said brochures were issued by either the First and Second Respondents jointly or severally.

6. That I verily believed that the representations made in the said brochures were true and the fixtures and fittings of a similar standard to the model unit would be provided in all the units, and in reliance on these representations I decided to purchase one of the townhouses.

7. That I went to the offices of the First Respondent to select the lot that I would purchase from viewing the plan of the site of the premises, and representations were made to me by officers of the First Respondent company about the features of the premises as stated in paragraphs 3 and 4 hereof. That I chose Lot 18 on the plan.

8. That in or about March of 1997, when I was scheduled to take up possession of Lot 18, I was informed by the representatives of the Respondents companies that it was not completed.

...

13. That notwithstanding the construction which was taking place I noticed that no work was being done on the tennis court, clubhouse, pool and common area...

14. That in early 1998, I along with other proprietors of the Development attended a meeting with Messrs. Owen Brodber and Roy Curtis directors of the Respondent companies. Later in October 1998, I attended another meeting where the said gentlemen were accompanied by their Attorney at Law Mrs. Jennifer Messado.

15. That at the said meetings the proprietors repeated their grievances about the poor state of their individual units and about the lack of provision of the advertised features of the Development to the two Directors of the Respondent Companies. That the Respondents stated that some of the residents were in arrears

and that the Development could only be completed with the payment of the arrears. Both meetings ended inconclusively.

16. That along with other proprietors I outlined my grievances to the Respondents by letter dated July 28, 1999 a copy of the said letter is exhibited hereto marked 'HD2'.

...

18. That despite several attempts made by me both personally as well as in my capacity as President of the association of proprietors, the Respondents have failed to provide the features and services advertised, specifically to fix the defects in individual units and to provide a swimming pool, tennis court, clubhouse and security fencing for the Development.

19. That I verily believe that I was misled in a material respect by the representations made to me in the brochures for the Development, from viewing the model units and by the oral representations of the officers of the Respondent companies on sundry occasions, that the Respondents would provide the features and services referred to in paragraph 18 hereof."

The Brochure exhibited describes the Development and states inter alia:

"The Estate Homes of Forest Hills will be a townhouse development of two (2) and three (3) bedroom units. A clubhouse, tennis court, swimming pool plus copious amount of common area will compliment the attractively designed units that will offer '*Elegant Living at its Dignified Best*'.

...

Each development will have its own perimeter security fence, guard house and intercom system to ensure proper security. The common areas will be professionally landscaped and the

> developers are providing a Maintenance Stabilization Trust Fund of $1 Million for common expenses.
>
> The project will be done in two (2) phases. Phase 1 will feature four (4) 2-bedroom and six (6) 3-bedroom units in The Estate Homes of Forrest Hills Phase.....Phase 1 is estimated to be completed in nine (9) months and Phase 2 six (6) months later.
> ...
>
> SBH Holdings Limited and Forest Hills Joint Venture Limited now offer you the "*Ultimate in Affordable Living*" and invite you to read the contents of this brochure, and contact us at ..."

Donna McLaren in her affidavit sworn to on the 26th January 2000 has deposed to facts similar in terms to the affidavit filed by DeLisser. She has stated inter alia:

> "...
>
> 8. That because of the said representations made in the said brochures and the pamphlets, and the high standards of the other developments completed by the Respondents I became interested in purchasing a unit in the Development ".
> ...
>
> 22. That the association has successfully completed the tasks in an attempt to make the Development more pleasant and to complete some of the tasks that the Respondents had represented that they would have provided in the Development. These include landscaping the development, demolishing a dilapidated structure which was the proposed site of the clubhouse.
>
> 23. That despite several attempts made by me personally, as well as in my capacity as a member of the association of proprietors, the

Respondents have failed to provide the features and services advertised...and to provide a swimming pool, tennis court, clubhouse and security fencing for the Development.

24. That I verily believe that I was misled in a material respect by the representations made to me in the advertisement and brochures for the Development and by the oral representations of the officers of the Respondent companies on sundry occasions, that the Respondents would provide the features and services referred to in paragraph 3 hereof.

..."

Owen Brodber, a Director in the Respondent companies responded to the affidavit of Hopeton DeLisser. He has stated inter alia:

"...

4. That in relation to the paragraphs numbered 2 to 10 of the said affidavit, I have no material disagreements with the statements made therein.

5. (a) That in relation to paragraphs numbered 11, 13, 14, 15, 16, 17 and 18 of the said affidavit, the problems complained of therein were caused and/or exacerbated by the non-payment, or the slow pace of the payments of the balances of the purchase money due from the purchaser of the units in the Development, as well as the general market conditions brought on by the downturn in the Jamaican economy at the material times which were never in the contemplation of the officers of the Respondents...

(b) It should be noted that in relation to the clubhouse and swimming pool referred to in paragraph 18 of the said affidavit, there was a

> dwelling house and swimming pool from the outset. They were both in need of extensive repairs. The plan was to refurbish both, and, at the completion of this exercise, they would have served as the clubhouse and swimming pool envisaged for the Development. We note that the dwelling house was demolished by the unit owners.
>
> ...
>
> 7. That in relation to the paragraphs numbered 19 and 20 of the said affidavit, there was at no time any attempt made by any of the officers of the Respondents to mislead Mr. DeLisser and/or any of the purchasers of other units in the Development. The inability of the Respondents to provide the features and services referred to in the said paragraph numbered 3 of the said affidavit is now a direct result of the inability of both Respondents to meet their Financial Commitments to their various creditors referred to hereunder:
>
> ...."

The listed creditors were Refin Trust Limited, Jamaica National Building Society and Eagle Permanent Building Society. He then concludes:

> "8.That in relation to the prayer in the paragraph numbered 21 of the said affidavit, the Respondents have not in any manner whatsoever contravened the obligations and/or prohibitions, (or any of the said obligations and/or prohibitions) imposed in Part VII of the Fair Competition Act, and/or, in particular, the Respondents have not in any manner whatsoever, in pursuance of trade or business, engaged in misleading advertising in contravention of section 37 of the Fair Competition Act. Consequently, on behalf of the Respondents I humbly pray that this Honourable Court will deem it fit to dismiss in all

> respects the Originating Motion herein and order that the costs incidental to such Motion be paid to the Respondents by the Applicant and further that such costs be agreed or taxed."

Hopeton DeLisser in response to the above affidavit deponed inter alia in his affidavit sworn to on the 26th July 2000:

> "3. That in reply to paragraphs 4 and 6 outlining the financial difficulties of the Respondents, I was astounded when I was informed of this fact. The brochures and promotional material issued by the Respondents, advertising the Development, represented and/or implied that the Respondents were reputable, financially sound companies. I refer especially to promotional material from a daily newspaper attached and marked 'HD1' for identification.
>
> ...
>
> 5. That I have never been indebted to the Respondent companies, having paid all sums due to the said companies promptly. I firmly believe that the Respondents have an obligation to all proprietors who are not indebted to them, to honour the representations made to us. Further, even where the Respondents allege that some proprietors are indebted to them, these proprietors are contesting the allegations."

Brodber also filed an affidavit in reply to the Affidavit filed on behalf of Donna McLaren. He has no material disagreements with respect to her allegations regarding the advertisements concerning the provision of tennis court, jogging trail, swimming pool, security fencing and a clubhouse as facilities that would be available to residents of the

Development. Basically, Brodber's reply to McLaren's affidavit is similar in other respects to the reply made to DeLisser's affidavit.

The Submissions

Mr. Foster, Counsel for the appellant, submitted that the offence created by section 37(1)(a) of the Act is one which belongs to that class of offences that cannot strictly be described as criminal, but is rather an act prohibited by statute under a penalty. He submitted that when one considers the legislation as a whole, it was clear that Parliament did not intend to create a criminal offence for contravention of the sections in Parts III, IV, VI or VII because where penal offences were intended, Parliament had specifically so indicated. He referred to and relied upon the case of ***Alphacell Ltd v Woodward*** [1972] 2 All E.R 475 where it was held inter alia, that an offence created by section 2(1) of the Rivers (Prevention of Pollution) Act 1951 was in the nature of a public nuisance and belonged to that class of offences which could not strictly be described as criminal but were rather acts prohibited by statute under a penalty.

According to Mr. Foster, the thrust of the respondents' case is that they cannot be held liable for any breaches of section 37 (1)(a) of the Act unless there is evidence disclosing an intention on the part of the respondents to make a representation that is false and misleading. He submitted however, that having regard to the authorities, where acts are

prohibited by statute under a penalty, one should not read into the words of the statute the requirement for **mens rea**. He argued that the issue for consideration therefore, was whether the absence of intention to make a false or misleading representation was a sufficient basis upon which a Court could find that a party had not contravened section 37(1)(a) of the Act.

Mr. Foster also submitted that in addressing this issue the Act must be interpreted in accordance with the established principles of statutory interpretation. It was clear he said, that the Act is intended to protect the public from entering into contracts based on material representations that induce them to so contract but which representations have been proven to be untrue or false. He argued that the circumstances of the instant case are exactly what the Act was designed to deal with. In the circumstances, he submitted that the Act does not require proof of an intention to make a misrepresentation to the public or to make a false and misleading statement. All that is required is the fact that a representation has been made to the public that is false and misleading in a material respect. Accordingly, he argued that the statute does not require anything more.

Mr. Foster referred to a number of Australian authorities. He also referred to section 52(1) of the Australian Trade Practices Act that is similar in terms to section 37(1)(a) of the Fair Competition Act (Jamaica) and

submitted that the Australian cases can offer some guidance to the Court.

The first case referred to was ***Hornsby Building Information Centre Pty. Ltd. v Sydney Building Information Centre Limited***(1978) 140 CLR 216. This was a case dealing with passing off but in his view the case is helpful in the interpretation of section 52 of the Australian Trade Practices Act. The section reads as follows:

> "(1) a Corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive."

In that case Stephen J stated inter alia at page 228:

> "...
>
> As I read s. 52(1) the same may be said of it, it is concerned with consequences as giving to particular conduct a particular colour. If the consequence is deception, that suffices to make the conduct deceptive. Section 52(1) creates no offence, it only prescribes a course of conduct deviation from which may result in an Order of the Court, made under s. 80 of the Act, forbidding further deviation in the future. The section should be understood as meaning precisely what it says and as involving no questions of intent upon the part of the corporation whose conduct is in question.
>
> When, as in section 52(1), the focus is upon the misleading of others rather than upon the injury to a competitor, it becomes of particular importance to identify the respect in which there is said to be any misleading or deception. The particular feature of the Hornsby Centre's conduct of which the Sydney Centre complains as being misleading and deceptive is not simply

> the use of its corporate name, so similar in part to its own name, but rather that by that use others are led to believe that the Hornsby Centre is a branch of, or is otherwise associated with, the Sydney Centre." (Emphasis supplied)

Mr. Foster also referred to the case of ***Australian Competition and Consumer Commission v Top Snack Foods Pty. Ltd.*** (1999) FCA 752 delivered on the 4th June 1999. In that case the Commission contended and the Federal Court of Australia found that in the marketing and operation of a particular distribution scheme, the Respondents were engaged in or involved in conduct that was misleading and deceptive and they were held to be in contravention of the Trade Practices Act. The Court was of the view that where on the evidence it can be shown that the misleading conduct influenced or induced the claimants to enter into the distribution agreements then the Respondents would be held in breach of the Act. The Court also had to address its mind as to whether reasonable grounds had existed for making the representations.

Parkdale Custom Built Furniture Pty. Ltd [1999] FCA 752 delivered on the 4th June 1999 was another Australian case relied upon by Mr. Foster. The High Court of Australia in deciding the issues whether the conduct was misleading or deceptive or that it was likely to mislead or deceive, agreed with the reasoning in ***Hornsby*** (supra) regarding the irrelevance of intention when determining whether section 52(1) has been contravened.

Mr. Foster also referred to and relied upon the case of ***Yorke v Lucas*** (1985) 158 CLR 661. He submitted that this case is useful on the issue of intention. At paragraph 7 of the judgment, Mason J stated inter alia:

> " It should be observed at the outset that the facts as found by the trial judge raise the question whether the Lucas Company itself was guilty of any contravention of section 52. It is, of course, established that contravention of that section does not require an intent to mislead or deceive and even though a corporation acts honestly and reasonably, it may nonetheless engage in conduct that is misleading or deceptive or is likely to mislead or deceive: ***Hornsby Building Information Centre Pty. Ltd v Sydney Building Information Centre Ltd.*** (1978) 140 CLR 216 at p. 228; ***Parkdale Custom Built Furniture Pty. Ltd v Puxu Pty. Ltd.*** (1982) 149 CLR 191 at p. 197..."

At paragraph 12, Mason J continues:

> "The nature of the prohibition imposed by section 52 is, however, governed by the terms in which it is created and the context in which it is found. Section 75B, on the other hand, in speaking of aiding and abetting, counseling or procuring, makes use of an existing concept drawn from the criminal law and unless the context requires otherwise, there is every reason to suppose that it was intended to carry with it the settled meaning which it already bore. Cf ***Barker v The Queen*** (1983) 153 CLR 338. Nor is there any reason to suppose that because the application of section 75B may occur in conjunction with a provision such as section 52, which requires no intent, it must also be construed so as to dispense with intent as an element of aiding, abetting, counseling or procuring. In ***Giorgianni v The Queen*** it was held that secondary participation required intent based upon knowledge,

> notwithstanding that the statutory provision creating the principal offence imposed strict liability."

Finally, Mr. Foster submitted that there were no grounds for arguing that the provision of the facilities advertised did not induce the purchasers to acquire townhouses. Furthermore, he contended that this was not a matter in dispute. It was clear he said, that the Respondents have breached section 37(1)(a) of the Act by making representations to the public that were false and misleading in a material respect. He further submitted that the Court should set aside the order of the learned trial judge and substitute therefor the Order in terms of the Originating Motion dated 22nd November 1999.

Mr. Ramsay submitted on the other hand, that some intent to deceive is required if the Appellant were to succeed on a claim brought under section 37(1)(a) of the Act. He further submitted that to the ordinary man the question of misleading indicates an intention to deceive and/or to induce someone to do something. Accordingly, he submitted that the section requires **mens rea** since the words "false" and "misleading" require proof of intention.

He also submitted that the facts in the cases of ***Lucas***, ***Hornsby*** and ***Parkdale*** are distinguishable from the instant matter, since they are aiding and abetting and passing off actions respectively. He argued that some

intent to deceive is required based upon the decision of the ***Top Snack*** case (supra).

With respect to the representation in the brochure where it stated that the Jamaica National Building Society was financing the project, Mr. Ramsay agreed that this advertisement would have caused prospective purchasers to believe that all the money was in place. However, he argued that it would have been impossible for the developers on their own to put up millions of dollars for the construction of the facilities in dispute.

In relation to the construction of the clubhouse and swimming pool, Mr. Ramsay submitted that the Respondents had plans to refurbish the old dwelling house and swimming pool but this was no longer possible since the unit owners had demolished both structures.

The law

This appeal turns on the construction to be put on certain words in the context of section 37(1)(a) of the Act. Put very briefly, the basic issue between the parties is whether on its proper construction, section 37(1)(a) of the Act creates an offence of absolute liability or is it one requiring the existence of **mens rea**. This issue has provoked elaborate legal argument between the parties in this Court but the point is, really a short one, how ought the words of a statute passed to protect the public, to be construed in a way that the public can understand?

Section 37 so far as material, is in these terms:

> " 37(1) A person shall not, in pursuance of trade and for the purpose of promoting, directly or indirectly, the supply or use of goods or services or for the purpose of promoting, directly or indirectly, any business interest, by any means –
>
> (a) make a representation to the public that is false or misleading in a material respect."

In the instant case, business, as between the Respondents and the general public was done on the basis of oral and written representations. The articles, brochures and pamphlets were the means by which the proprietors of the development were invited to make their choices and it was on the faith of the representations contained in them that they placed reliance upon and made their purchases. The undisputed fact at the end of the day is that none of the facilities and services advertised, that is, the provision of tennis court, swimming pool and clubhouse, have been constructed by the Respondents.

To my mind, the subject matter and structure of the Act make plain that the Act belongs to that class of legislation which prohibits some acts that "are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty", as Wright J put it in ***Sherras v De Rutzen***,[1895] 1 QB 918 at 922, [1895–9] All ER Rep 1167 at 1169.

The question then, whether an offence created by statute requires **mens rea**, guilty knowledge or intention, in whole, in part, or not at all, turns on the subject matter, the language and the structure of the Act

studied as a whole. It depends also on the language of the particular statutory provision under consideration construed in the light of the legislative purpose embodied in the Act, and on whether strict liability in respect of all or any of the essential ingredients of the offence would promote the object of the provision. See ***Gammon (Hong Kong) Ltd v A-G of Hong Kong***[1984] 2 All ER 503 at 507.

It is now necessary to determine what is the proper construction to be put on the words of section 37(1)(a). The necessary ingredients of the offence as formulated in the section are that (1) a person in pursuance of trade (2) makes a representation to the public (3) that is false or misleading and, (4) for the purpose of promoting, directly or indirectly, the supply or use of goods and services.

The Respondents submit that the essence of the offence is that there has to be an intention to make a false representation. They say, to the ordinary man the question of misleading indicates an intention to deceive and/or to induce someone to do something. Accordingly, it was submitted on their behalf that the section requires **mens rea** since the words "false" and "misleading" require proof of intention. The Appellant submits however, that it suffices to prove that the representation was made in pursuance of trade and that its content was false or misleading.

What are the meanings of the words "false" and "misleading" within the context of the Act? These words are not defined in the Act so one

has to consider them literally. The word "false" to my mind, means any representation that is inconsistent with facts, and where the deviation would be unacceptable to a significant number of the general public and would lead to misunderstanding or incorrect decisions. The word "misleading" also means a representation that would cause the general public to misunderstand or make incorrect decisions, regardless of whether such representation is consistent with facts.

In light of the foregoing, I would accept the Appellant's construction of section 37(1)(a) as correct. First, it advances the legislative purpose embodied in the Act, in that it strikes directly against the false representation irrespective of the reason for, or explanation of, its falsity. It involves, of course, construing the offence as one of absolute liability that is consistent with the social purpose of the statute.

The representations no doubt, were false and misleading. Mr. DeLisser and Miss McLaren, were interested members of the public, doing business with the Respondents on the basis of these representations and they were in fact misled in a material respect. These representations were made without limitations or conditions and to date no attempt has been made to put the facilities in place. I do agree with the submission of Mr. Foster that the purchasers would have acquired property of substantially less value having regard to the absence of the features and facilities advertised.

I would therefore, allow the appeal and set aside the order of the learned trial judge.

The Penalty

What is an appropriate pecuniary penalty that should be imposed in the circumstances of this case?

PART VIII of the Act deals with Enforcement, Remedies and Appeals and section 46 provides as follows:

> "46. If the Court is satisfied on an application by the Commission that any person-
>
> (a) has contravened any of the obligations or prohibitions imposed in Part III, IV, VI OR VII; or
> (b) has failed to comply with any direction of the Commission,
>
> the Court may exercise any of the powers referred to in section 47."

Section 47 provides inter alia, as follows:

> "47-- (1) Pursuant to section 45 the Court may –
>
> (a) order the offending person to pay to the Crown such pecuniary penalty not exceeding one million dollars in the case of an individual and not exceeding five million dollars in the case of a person other than an individual;
>
> (b) ...
>
> (2) that in exercising its powers under this section the Court shall have regard to –
>
> (a) the nature and extent of the default;

(b) the nature and extent of any loss suffered by any person as a result of the default;

(c) the circumstances of the default

(d) any previous determination against the offending person."

A desperate attempt was made by the Respondents' Counsel to suggest that, it was never in the contemplation of the Respondents at the outset to default on their obligations. The Respondents have sought to place the blame on the non-payment, or the slow pace of the payments of the balances of the purchase prices as well the downturn in the Jamaican economy. An ingenious point, but I believe it fails. I agree with Mr. Foster that in preparing for the development, costing analyses would have or should have been carried out to include the advertised facilities. Furthermore, the Respondents having publicly stated that the project was financed by the Jamaica National Building Society ought not to be believed now when they say that the default has been caused by some purchasers who were in arrears and that there was a downturn in the economy at the material time. In my judgment, these factors are not strong enough to overcome the difficulties in the Respondents' way.

The Fair Competition Act is clearly a very important safeguard for members of the public who choose to do business through the medium of advertising. In the circumstances, where representations are false or misleading, a very clear and strong message must be sent to those

persons or corporations who are in breach of the law. I am therefore of the firm view, that the imposition of a pecuniary penalty of Two Million Five Hundred Thousand Dollars ($2,500,000.00) would be appropriate in the circumstances.

ORDER:

FORTE, P

Appeal allowed. Order of James J dismissing the motion set aside.

Declaration that respondents have in pursuance of trade or business engaged in misleading advertising and thereby contravened the provisions of the Fair Competition Act. Pecuniary penalty of Two Million Five Hundred Thousand Dollars ($2,500,000.) to be paid by the respondents.

Costs of the appeal and costs below to the appellants to be agreed or taxed.