

## **HOUGHTON & ANOR v ARMS (M107/2006)**

Court appealed from: Full Court, Federal Court of Australia

Date of judgment: 30 March 2006

Date special leave granted: 4 August 2006

This appeal concerns the liability of employees for misleading and deceptive conduct for actions taken within the scope of their actual authority.

In early 1999 the respondent (Arms) conceived the idea of providing an internet-based wine market service called "austcellardoor". He retained WSA Online Limited to design and construct the website. The appellants were employees of WSA. They recommended that the respondent use "ANZ e-Gate" to process electronic payments. They advised him that wineries could be added to the web-site and receive payment through ANZ e-Gate by simply filling in a form. This information was wrong: in fact, ANZ required each winery to become an accredited merchant and to provide acceptable profit and loss statements for the last two years and a business plan. At the time he discovered this, in June 2000, Arms had already signed up about 30 wineries and the web-site was to be launched within 5 days. It was impossible for him to require wineries to comply with the conditions imposed by ANZ, before the launch of the web-site. To preserve his credibility and goodwill in the industry, Arms changed the original concept of the business and operated it as a wine retailer, incurring losses of \$58,331 in the first 12 months.

Arms sued WSA in the Federal Court for breach of contract and contraventions of the *Trade Practices Act* 1974 (Cth). He also sought to make the appellants personally liable on the basis of contraventions of ss 4 and 9 of the *Fair Trading Act* 1999 (Vic) ("the FTA"). Ryan J gave judgment against WSA in the sum of \$58,331, but dismissed the claim against the appellants, because he did not consider it was open to him at law to find that an employee acting within the scope of his or her actual authority could also be liable under s 9 of the FTA.

Arms appealed to the Full Federal Court (Nicholson, Mansfield and Bennett JJ) against the dismissal of the claim against the appellants. The Court found that the primary judge had made an error of law, because there were at least two decisions at appellate level (*Arktos Pty Ltd v Idyllic Nominees Pty Ltd* (2004) ATPR 42-005 and *Wong v Citibank Ltd* [2004] NSWCA 396) in which the principle of the possibility of employee liability for acts in trade or commerce had been accepted. The appeal was therefore allowed.

The grounds of appeal include:

- The Full Court erred in construing s 9 of the *Fair Trading Act* 1999 (Vic) ("the FTA") to impose on the appellants liability in damages for misleading or deceptive conduct in "trade or commerce" when no conduct distinct from their corporate employer's conduct could be

imputed to them and when neither of them could, in any sense, be said to have been engaged in trade or commerce of their own account.

- The Full Court ought to have found as a matter of statutory construction a company director, officer or employee, who makes misrepresentations as the company's alter ego is not liable "in trade or commerce" under s 9 of the FTA.