

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2017 0007

FAIRBANK'S SELECTED SEED CO PTY LTD

Applicant

v

AMAR PRODUCE PTY LTD

Respondent

JUDGES: MAXWELL P, WHELAN and SANTAMARIA JJA
WHERE HELD: MELBOURNE
DATE OF HEARING: 30 March 2017
DATE OF JUDGMENT: 16 June 2017
MEDIUM NEUTRAL CITATION: [2017] VSCA 139
JUDGMENT APPEALED FROM: [2016] VCC 1908 (Judge Smith)

TRADE PRACTICES - Misleading or deceptive conduct - Sale of goods - Representations - Reliance - Oral representations as to suitability of seeds - Whether representations made - Whether relied on - Findings of fact - No error - Appeal dismissed - *Trade Practices Act 1974* (Cth) ss 52, 53(c).

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicant	Mr P H Solomon QC with Mr M W Seelig	Norris Coates
For the Respondent	Mr D G Collins QC with Mr J D Catlin	Sofra Solicitors

MAXWELL P
WHELAN JA
SANTAMARIA JA:

Introduction

1 Amar Produce Pty Ltd ('Amar') was a horticulturalist in the Goulburn Valley. In February 2009 it planted and successfully harvested a crop of broccoli. Recognising that prices for broccoli were better in the summer, its managers gave consideration to planting broccoli in October to November 2009 with a view to their being harvested in January onwards. Amar sourced its broccoli seedlings from Barooga Nurseries Pty Ltd ('Barooga'). Barooga sourced the seeds from which it propagated seedlings from various seed suppliers, including Fairbank's Selected Seed Co Pty Ltd ('Fairbank's'). The managers of Amar were aware that there was a problem growing crops of broccoli in the Goulburn Valley in the summer. They sought advice from Barooga as to which seeds - propagated as seedlings - were appropriate to plant. The principal of Barooga consulted a representative of Fairbank's. The trial judge found that Fairbank's had told Barooga that the seed known as 'Ironman' was suitable for planting over the period October to December and that another variety of broccoli known as 'Atomic' should be avoided. He found that Barooga had conveyed that information to Amar, which went ahead and directed Barooga to purchase the Ironman seeds and propagate them as seedlings. When the seedlings had become available, Barooga supplied them to Amar, which went ahead and planted them. The crop was a failure; no broccoli could be grown successfully there at that time. The trial judge held that, by telling Barooga that Ironman was suitable for planting in that period, Fairbank's had engaged in misleading and deceptive conduct. He also held that Amar had relied on that advice and that it had suffered loss. Amar was awarded damages.

2 Fairbank's now applies for leave to appeal. In its proposed grounds of appeal, it contends that the trial judge should not have found that (1) Fairbank's conveyed to Barooga that Ironman seed was suitable for a summer crop and (2) Barooga

conveyed that information to Amar. Both proposed grounds of appeal seek to impeach findings of fact made below. For the reasons that follow, we would grant leave to appeal and dismiss the appeal.

The facts

3 Alexandra Milosevic ('Ms Milosevic') was the sole director and shareholder of the respondent, Amar. Her partner was Anthony Rullo ('Mr Rullo'), who at all material times acted on behalf of Amar in relation to its horticultural activities.

4 In late 2008 Mr Rullo, on behalf of Amar, entered into an arrangement with a local land owner, Danny Demetrijevic ('Danny'), who owned a block of land near Shepparton ('the block'), whereby Amar would farm broccoli on the block. The block consisted of 77 hectares.

5 Amar had not engaged in the growing of broccoli or any other crop before 2009. However, Mr Rullo and others associated with Amar had been involved in the growing of vegetable crops on a small scale for a considerable time prior to that year. In 2009 Amar planted two broccoli crops on the block.

6 The first broccoli crop was planted by transplanting seedlings over a period commencing in February 2009. There were different varieties of broccoli seeds available in the market. The variety of broccoli planted in that first crop was known as Atomic. Mr Rullo knew of no other varieties at that time.

7 Barooga, which was joined as the second defendant to the proceeding, operated a plant nursery in the Goulburn Valley. That nursery, among other things, purchased various seeds from seed suppliers, propagated those seeds into seedlings over six to eight weeks – depending on season and temperature – and delivered the seedlings to commercial growers such as Amar for them to plant. Michael Florence ('Mr Florence') was the owner and manager of Barooga. The usual manner in which a grower obtained broccoli seedlings was to request a nursery, such as Barooga, to provide them.

8 In general, it would be expected that broccoli would be ready for harvest about
two months after transplanting.

9 Mr Florence had operated Barooga's business for 33 years. His customers were
mainly located in the Goulburn Valley and in the Southern Riverina regions. He did
not have any dealings with Mr Rullo or Amar before 2009.

10 The system was that seeds would be propagated over a period of time. Batches
of seedlings would be delivered to Amar periodically - usually fortnightly. They
were transplanted by Amar soon after each batch was supplied to it. They were
harvested as each planting matured.

11 Following what Mr Rullo and Ms Milosevic considered to be the success of
Amar's first crop, they determined that Amar should plant a second crop later in
2009, on a larger scale. Mr Rullo's initial plan was to plant another crop of Atomic
broccoli - the same variety.

12 Mr Rullo planned to transplant the crop in sequential plantings from early
October 2009. He had previously observed that there was generally a shortage of
broccoli in the market over the summer months and that, as a consequence, broccoli
prices were higher over that period. He saw this as an opportunity to make
additional profits from a broccoli crop.

13 Mr Rullo did not have expert knowledge of the various varieties of broccoli to
determine what he should plant for a summer harvest.

14 In June 2009 Mr Rullo approached Mr Florence to discuss an order for Atomic
seeds for transplanting from October 2009. He discussed with him issues of supply,
timing of harvest and suitable varieties of broccoli.

15 Prior to June 2009 Mr Florence had little or no knowledge of Ironman seeds and
whether they would be suited for a summer crop in the Goulburn Valley. In general,
broccoli had not been produced in the spring/summer period in Northern Victoria

due to inappropriate climatic conditions.

16 Mr Florence told Mr Rullo that a seed supplier, South Pacific Seeds, had previously told him that the Atomic variety was not suitable for that period but there were other seed suppliers and he would make enquiries of them and phone him back.

17 Fairbank's supplied agricultural seeds and supplied the broccoli seeds in question to Barooga. Mr Florence had been dealing with Fairbank's for 20 to 25 years.

18 The trial judge set out the evidence of Mr Florence in his reasons and noted that, after Mr Rullo spoke to Mr Florence about his intention to plant a broccoli crop from October 2009 onwards for the purpose of growing a summer harvest, Mr Florence sought advice from Fairbank's as to what type of broccoli seed was suitable for transplanting in the period October to approximately December 2009 and for a summer harvest. The evidence given by Mr Florence is challenged by Fairbank's, which contends that any enquiry made by Mr Florence of Fairbank's, in response to which Mr Florence was advised to use Ironman, was for another grower, Lucky Khakh. Fairbank's says that, when such advice was given to Mr Florence in June 2009, it was in response to a request for advice as to what broccoli seeds were suited for immediate sowing.¹

19 According to Amar, Fairbank's advised Mr Florence that the Ironman variety of broccoli was suitable for planting in North Eastern Victoria over the period between October to December and for harvesting over the summer months.

20 Mr Florence's evidence was that he passed the advice that he received from Fairbank's on to Mr Rullo.

21 Mr Rullo's evidence was that Mr Florence came back to him and said that Fairbank's had a new variety called Ironman and that they recommended this to be

¹ This forms the basis of the first proposed ground of appeal.

the variety to plant.

22 Mr Rullo gave evidence of several discussions with Mr Florence regarding the purchase of seedlings for planting. In the course of those discussions, Mr Rullo discussed the recommendation of Ironman seeds with Ms Milosevic and her mother, and, later, spoke to Mr Florence by phone and confirmed that they had decided to proceed with the order of Ironman seeds. Mr Florence told him that he would need to make a payment in advance.

23 Mr Rullo remained very sceptical about proceeding with the Ironman variety for planting from October onwards for a summer harvest. In late August 2009 he attended at Barooga's nursery to pay Mr Florence \$12,000 cash. Just prior to handing over the cash, Mr Rullo said to Mr Florence words to the effect, 'You have to make sure and I want to hear it from the seed company to make sure it's the right variety'. Mr Florence said that he would ring the seed company in front of Mr Rullo. Mr Florence went into his office in response to Mr Rullo's request to confirm the advice. Mr Florence subsequently came out of the office and said to Mr Rullo that 'Bruno Tigani of Fairbank's has said Ironman is the only variety to plant for this time of year'. Mr Rullo did not himself hear any conversation between Mr Florence and Mr Tigani.

24 Immediately thereafter, Mr Rullo paid the \$12,000 deposit and instructed Mr Florence to obtain Ironman seeds from Fairbank's and to propagate those seeds. Mr Rullo agreed to pay \$0.01 for each seed and \$0.06 for each propagated seedling supplied.

25 Mr Florence ordered and received some 750,000 Ironman seeds from Fairbank's for five different customers between June and October 2009. Barooga propagated 258,000 of these seeds for Amar over sequential periods. The seeds were delivered as seedlings to Amar as follows:

8 October	60,000
16 October	50,000
3 November	40,000
15 November	50,000
7 December	50,000
20 December	8,000
Total seedlings	258,000

26 Each batch was usually transplanted by Amar during the week following its delivery.

27 The Ironman broccoli variety was unsuitable and virtually bound to fail, no matter how it was transplanted, grown and harvested. There was no variety of broccoli suitable for growing in this region at the time grown by Amar.

28 By late December 2009, it was evident that earlier transplantings of the second crop were unsatisfactory. Some of the earlier harvested plants were sent to the marketplace but were rejected.

Summary of issues and proceedings

29 Originally, in 2012, Amar sued Fairbank's alone. In November 2014, Amar joined Barooga as the second defendant.

30 Amar claimed damages against Barooga for losses sustained when the subject summer crop failed to grow to a merchantable quality. Amar claimed that its loss was caused by advice that it alleged had been given by Fairbank's to Barooga, and which had been conveyed by Barooga to Amar, in or about June 2009.

31 The conduct of Fairbank's which was alleged to constitute misleading and deceptive conduct was giving advice to Mr Florence, as alleged in paragraph 7 of the further amended statement of claim. Paragraph 7 reads as follows:

On or about June 2009 [Fairbank's] advised [Amar] via its agent [Mr Florence] that for transplanting broccoli seedlings in the months of October to December:

- (a) The 'Atomic' brand/strain should be avoided;
- (b) The 'Ironman' brand/strain was preferable,
(the 'Advice').

32 Particulars of the allegation concerning the advice were provided on 18 April 2013, when Fairbank's was the only defendant. There was no substantive amendment to the allegation after the provision of the particulars. The particulars of the allegation were:

Re paragraph 7 Mr Michael Florence of Barooga Nurseries made inquiries of the Defendant as to what variety of seeds were appropriate to plant in the Goulburn Valley area in the months of October and November for harvest in December and January and was advised by an officer or employee of the Defendant, Mr Bruno Tigani, that the 'only appropriate' variety was 'Ironman' and the 'Atomic' variety should be avoided. Mr Florence conveyed this advice to Mr Rullo of the Plaintiff initially by telephone during June, 2009 and then during a meeting at Barooga Nursery between Mr Rullo and Mr Florence in late June 2009.

33 It will be observed that no direct communication between Amar and Fairbank's was alleged; the advice was communicated through Barooga.

Fairbank's Defence

34 Fairbank's denied that it gave the advice; alternatively, if the advice had been given, it denied that it had been relied upon.² Fairbank's denied that there was an agency agreement between Amar and Barooga, and alleged that, if there was an agency, then Amar was bound by the commercial terms and conditions between

² Fairbank's defence to further amended statement of claim [7].

Fairbank's and Barooga that limited Fairbank's liability.³

Barooga's defence

35 In its defence to the further amended statement of claim, Barooga made a series of allegations that would prove damaging to Fairbank's. Barooga alleged that:

- (a) in or about June 2009, Amar informed Barooga that it wished to purchase broccoli seedlings for transplanting for the period October 2009 to approximately December 2009 and for a summer harvest up to and including January 2010 ('the transplanting period');⁴
- (b) at that time, Amar was aware that Barooga did not have any broccoli seeds or seedlings and that it would need to source broccoli seeds from Fairbank's;⁵
- (c) Amar asked Barooga what would be the appropriate broccoli seed type to be transplanted and harvested during the transplanting period;⁶
- (d) Barooga informed Amar that it did not know and it would need to ask Fairbank's what broccoli seed type was best suited to transplant and harvest during the transplanting period;⁷ and
- (e) Amar instructed Barooga to obtain advice from Fairbank's as to what broccoli seed type was most suited to transplant and harvest during the transplanting period and to purchase the seeds recommended by Fairbank's on behalf of Amar.⁸

36 Barooga's defence then pleaded that:

- (f) in or about June/July 2009, Barooga, in its capacity as agent for Amar, sought advice from Fairbank's as to what type of broccoli seed was suitable for transplanting for the transplanting period;⁹

3 Ibid [6], [29].

4 Barooga's defence to the second further amended statement of claim [5.1(a)].

5 Ibid [5.1(b)].

6 Ibid [5.1(c)].

7 Ibid [5.1(d)].

8 Ibid [5.1(e)].

9 Ibid [6.1(a)].

- (g) Fairbank's advised Barooga that Ironman broccoli seeds were suitable for transplanting and harvesting during the transplanting period and Atomic seeds were not suitable;¹⁰
- (h) prior to receipt of the advice, Barooga had never heard of or had any experience with Ironman broccoli seeds;¹¹
- (i) after receiving the advice from Fairbank's and in June/July 2009, Barooga, as agent for Amar and as a conduit, passed on the advice to Amar;¹²
- (j) in reliance on the advice, Barooga, on instruction from Amar and in its capacity as agent for Amar, purchased Ironman broccoli seeds from Fairbank's on behalf of Amar;¹³
- (k) it denies seeking or ordering 1 million seeds from Fairbank's in its capacity as agent for Amar in or about July 2009;¹⁴ and
- (l) it only ever invoiced Amar for 258,000 Ironman broccoli seeds.¹⁵

37 Barooga gave particulars of its positive allegations as follows:

In or about June 2009, after the June Seed Discussion, Mr Florance [sic] telephoned [Fairbank's] and had a discussion with a representative of [Fairbank's], whose name he cannot recall. The discussion was to the above effect.

In or about June 2009 and after the June Rullo Discussion and the June Fairbanks Call [sic], Mr Florance spoke with Mr Rullo either in person or via telephone and conveyed the Advice and Broccoli Advice to Mr Rullo.

On or about 22 July 2009, [Fairbank's] issued a tax invoice to [Barooga] for 200,000 Ironman broccoli seeds that were intended for [Amar].

On or about 21 October 2009, [Fairbank's] issued a tax invoice to [Barooga] for, amongst other things, 100,000 Ironman broccoli seeds and 100,000 Atomic broccoli seeds, part of which was intended for Amar and part of which was

¹⁰ Ibid [6.1(b)]. Barooga refers to this advice as 'the Broccoli Advice' and appears to draw a distinction between 'the Broccoli Advice' and what is referred to as 'the Advice' in Amar's statement of claim. There does not appear to be any difference between the two.

¹¹ Barooga's defence to the second further amended statement of claim [6.1(c)].

¹² Ibid [6.1(d)].

¹³ Ibid [6.1(e)].

¹⁴ Ibid [6.1(f)].

¹⁵ Ibid [6.1(g)].

intended for other growers.¹⁶

38 Barooga admitted the allegation in paragraph 7 of the amended statement of claim that Fairbank's had advised Amar 'via its agent Mr Florance' that Ironman was preferable 'for transplanting broccoli seedlings in the months of October to December'.

39 In a later paragraph of its defence, Barooga alleged that, in June 2009, 'as a conduit', it passed on the advice from Fairbank's to Amar.¹⁷

The course of the proceeding

40 Shortly before the commencement of the trial, Amar resolved its claim against Barooga. By consent, the claim against Barooga was dismissed and the trial proceeded against Fairbank's alone.

41 The trial proceeded in September and October 2016 over 12 days. The three central lay witnesses for the purposes of the appeal were Messrs Rullo, Florence and Tigani.

The reasons of the trial judge

42 On 14 December 2016, the trial judge delivered judgment in favour of Amar.¹⁸ In the course of his judgment, the trial judge:

(m) described the usual manner in which seedlings were acquired and transplanted:

The usual manner in which a grower obtained broccoli seedlings was to request a nursery such as Barooga to obtain seeds from a seed supplier. On delivery to the nursery of the requested seeds, the nursery would propagate the seedlings over a period of six to eight weeks, the time depending on seasonal temperatures.

¹⁶ Particulars to Barooga's defence to the second further amended statement of claim [6.1].

¹⁷ Barooga's defence to the second further amended statement of claim [7A].

¹⁸ *Amar Produce Pty Ltd v Fairbank's Selected Seed Co Pty Ltd* [2016] VCC 1908 (Judge Smith) ('Reasons').

Once the seedlings had reached a stage of maturity when they could be transplanted, the nursery sold and delivered the seedlings to the grower.¹⁹

- (n) accepted Mr Rullo's evidence that:
- (a) In mid-2009, he approached Florence to discuss an order for Atomic seeds for transplanting from October 2009. He discussed with him issues of supply, timing of harvest and suitable varieties of broccoli. He told Florence he wanted to harvest over the summer period when prices were good for broccoli;
 - (b) Florence told him that a seed supplier, South Pacific Seeds, had previously advised him that the Atomic variety was not suitable for that period but there were other seed suppliers and that he would make enquiries and get back to him;
 - (c) Sometime later, Florence called him by telephone and told him that Fairbanks had Ironman broccoli seeds which it recommended for that period. Florence told him that Fairbanks had advised him that for planting from October to December, Atomic was unsuitable but that the Ironman variety was suitable;
 - (d) In mid to late June, he had another discussion with Florence in person at his office. Florence again told him that Ironman was the only variety to be planted at the relevant time. He went home and discussed the recommendation with Milosevic and her mother. He later spoke to Florence by phone and confirmed the order. Rullo said he told Florence they wished to go ahead. Florence told him he would have to pay for the seeds in advance;
 - (e) Later, he attended at Barooga where he gave Florence \$12,000 cash. \$10,000 was for the broccoli seeds and \$2,000 was for some pumpkin seeds he bought. Just prior to handing over the cash, Rullo said he was still worried about the project. Florence said he would ring the seed company there and then. Florence went into his office. He returned and said Bruno Tigani of Fairbanks had said it was the only variety suitable;
 - (f) On that basis, Rullo instructed Florence to obtain Ironman seeds from Fairbanks and to propagate those seeds ...²⁰
- (o) made findings about what Mr Florence said was the advice (i) sought by Mr Rullo, (ii) given to Mr Florence by Fairbank's and then (iii) conveyed to Mr Rullo. The trial judge said:

¹⁹ Ibid [15]-[16].

²⁰ Ibid [21] (citation omitted).

Florence was taken to the Defence filed by Barooga in January 2016 (at a time when Barooga was the second defendant in this proceeding). He agreed that the allegations made in it were correct. In particular, he was taken to paragraphs 5.1, 6.1 and 7A. He agreed that:

- (a) In about June 2009, Rullo informed him that he wished to purchase broccoli seedlings for transplanting for the period October 2009 to approximately December 2009 and for a Summer harvest up to and including January 2010;
 - (b) Rullo asked him what would be the appropriate broccoli seed type to be transplanted and harvested in that period;
 - (c) He told Rullo that he did not know and would need to ask Fairbanks what broccoli seed type would be best suited to transplant and harvest during that period;
 - (d) Rullo instructed him to obtain that advice from Fairbanks and to purchase the seeds recommended by Fairbanks on behalf of Amar;
 - (e) In about June-July 2009, he sought advice from Fairbanks as to what type of broccoli seed was suitable for transplanting in the period October to approximately December 2009 and for a Summer harvest;
 - (f) Fairbanks (Florence could not recall if it was Bruno Tigani or someone else at Fairbanks) advised Florence that Ironman broccoli seeds were suitable for transplanting and harvesting during that period and that Atomic seeds were not;
 - (g) After receiving that advice from Fairbanks in June-July 2009, he passed that advice on to Rullo;
 - (h) In due course, on instructions from Rullo, he purchased Ironman broccoli seeds from Fairbanks on behalf of Amar ...²¹
- (p) made findings about what Fairbank's had represented to Mr Florence. The trial judge said:

I accept that Rullo did not have expert knowledge of the various varieties of broccoli to determine what he should plant for a summer harvest. It is quite understandable he would approach Florence for advice. Rullo states that he did seek such advice and Florence agreed that he did. I find that he did.

Prior to 2009, Florence had little or no knowledge of Ironman seeds and whether they would be suited for a summer crop in the Goulburn Valley. It is again understandable that he would seek advice from his major seed supplier, Fairbanks. I find that he did do so. Fairbanks did not have a large

²¹ Ibid [42]. Mr Florence was called by Amar. It appears that Mr Florence was a reluctant witness. In the event, the trial judge gave counsel for Amar leave to cross examine him pursuant to s 38 of the *Evidence Act 2008*.

staff. I consider it likely that Florence sought the advice from Tigani notwithstanding that Tigani states that he cannot now recall it.

On the balance of probabilities, I am satisfied that Fairbanks (probably through Tigani but possibly through Muir) represented to Florence that the Ironman variety of broccoli was suitable for planting in North Eastern Victoria over the period between October to December and for harvesting over the summer months.²²

...

The representation that I have found to have been given by Fairbanks was that Ironman broccoli is a suitable variety of broccoli to be transplanted in North East Victoria in the period October to approximately December and for a summer harvest up to and including January.²³

- (q) made findings as to the suitability of Ironman broccoli for transplanting during the relevant period. The trial judge found:

I am comfortably satisfied that the cause of the failure of the crop was that, over the relevant timeslot, the Ironman broccoli variety was unsuitable for the Goulburn Valley region and was virtually bound to fail no matter how it was transplanted, grown and harvested. I conclude, on the basis of the evidence before me that it is likely that there was no variety of broccoli that was suitable for growing in that timeslot and region.²⁴

- (r) made findings that Amar relied upon what Fairbank's had advised. In doing so, the trial judge made findings about a series further conversations between (i) Mr Rullo and Mr Florence and (ii) Mr Florence and Fairbank's at the point at which Mr Rullo paid cash for the Ironman seeds. The trial judge said:

Prior to 2009, Rullo had planted crops of broccoli on a half-acre Block in the Goulburn Valley. None were summer crops. His interest in planting a summer crop had arisen because of his awareness that summer prices for broccoli were higher than at other times of the year. I assume that this was because traditionally there was less broccoli grown for summer harvesting – principles of supply and demand would be likely to have influenced the market.

Rullo had harvested a successful Atomic broccoli crop on the Block earlier in 2009 and his initial intention was to plant the same variety later that year. His enquiries of Florence had led to discussions as to whether Atomic was a suitable variety for a summer crop in the Goulburn Valley. I accept that these discussions led to Florence making the enquiries of Fairbanks discussed earlier in these Reasons. I accept that Florence passed onto Rullo the advice he

22 Reasons [51]-[53].

23 Ibid [96].

24 Ibid [91].

had received from Fairbanks – that is, that Ironman was a suitable variety to be planted as a summer crop in North Eastern Victoria and that Atomic was not.

I accept that Rullo relied upon that advice in determining to plant an Ironman crop in the relevant timeslot.

Fairbanks submitted that, in considering the reliance issue, much turned on the particular date that the representation was made.

In its Statement of Claim, Amar pleaded that Fairbanks had advised in about June 2009 that, for transplanting in the October to December timeslot, Atomic should be avoided and that Ironman was preferable. In Further and Better Particulars dated 18 April 2013, Amar stated that Florence had conveyed the advice of Fairbanks to Rullo by telephone in June 2009 and at a meeting at Barooga in late June 2009.

In evidence, Rullo said that his first discussions with Florence about varieties of broccoli and timing of planting in relation to the second crop occurred at the Block and later by telephone. He said that Florence had told him that one seed supplier, Pacific Seeds, did not recommend Atomic seeds for a summer harvest but there were other seed suppliers and he would get back to him. He later passed on the advice he had received from Fairbanks that I have referred to above. I accept Rullo's evidence that he wanted to discuss the advice with Milosevic and her mother and told Florence that he would get back to him. At this point, Rullo said there was no firm arrangement. Having discussed the matter with [Ms Milosevic] and her mother, Rullo spoke with Florence by telephone and told him they had decided to go ahead. On a later date of which he was unsure, [the landowner] had driven him to Barooga (Rullo had lost his driver's licence at the time) and he paid \$12,000 cash to Florence. He said that, before handing over the cash, he was still worried about the Ironman venture and that Florence had said to him that he would ring Fairbanks then and there. He said that Florence went into the office and returned saying he had spoken to Tigani who had said that Ironman was the only variety suited for that time. Upon being told that, Rullo confirmed he was going ahead and handed over the cash.

Rullo was unable to say exactly when this conversation had occurred. Fairbanks pointed to exhibit 4 which was an adjustment note issued by Barooga to Amar dated 12 August 2009, relating to what was described as an outstanding credit in the sum of \$12,000. The document does not describe the transaction to which it relates. Fairbanks submitted that this was likely to be a part payment or deposit for the seeds the subject of this proceeding. It submitted that this was evidence that Rullo had not acted on the advice provided to Barooga by Fairbanks in June or July but on a later representation. It submitted that in Further and Better Particulars dated April 2013, the only representations relied upon were made 'during June 2009' and then in 'late June 2009'. In its original Statement of Claim dated December 2012 and the Further Amended Statement of Claim of December 2015, Amar had alleged that the relevant representation was made by Fairbanks in 'about July 2009'.

I do not consider that the variation of dates referred to is of any great significance. At trial, Rullo and Florence were recalling conversations that had

occurred more than seven years before and it is unsurprising that their memories as to dates were somewhat vague. Likewise, it seems relatively unimportant that the pleadings referred to the representation having been made in 'about July' as opposed 'late August'. In any event, as stated previously, I am satisfied on the balance of probabilities that the representation was made by Fairbanks to Florence – whether it was made in about July or June or in August is not, in my view, an important distinction.

I am satisfied that Florence conveyed the advice to Rullo and that Rullo relied upon it in determining to transplant the 258,000 Ironman seedlings on the Block between October and December 2009.²⁵

43 The trial judge found that there was no agency between Amar and Barooga²⁶ and that the commercial terms and conditions limiting liability between Barooga and Fairbank's did not apply to Amar's misleading and deceptive conduct claim.²⁷

44 The trial judge assessed damages at \$239,468.²⁸ He made the following orders:

- 1 Judgment for [the respondent] against [the applicant] in the sum of \$239,468.00, together with interest in the amount of \$97,463.00.
- 2 [The applicant] pay [the respondent's] costs of and incidental to the proceeding (including any reserved costs) on the standard basis up to and including 15 September 2015 and thereafter on an indemnity basis, such costs to be determined by the Costs Court in default of agreement.
- 3 There be a stay of 30 days in respect of these orders.

Proposed grounds of appeal

45 Fairbank's now seeks leave to appeal against the judgment on two proposed grounds set out in the application for leave to appeal. They are as follows:

1. The trial judge found, to the requisite satisfaction, that Fairbank's represented to Florence that the Ironman variety of broccoli was suitable for planting in North Eastern Victoria over the period between October to December for harvesting over the summer months.

The trial judge ought not to have been so satisfied. In so finding, accordingly, the trial judge erred.

²⁵ Ibid [116]–[124] (citation omitted).

²⁶ Ibid [161].

²⁷ Ibid [170].

²⁸ Ibid [171]–[228].

2. The trial judge found, to the requisite satisfaction, that Florence conveyed to Rullo that Fairbank's had represented that the Ironman variety of broccoli was suitable for planting in North Eastern Victoria over the period between October to December for harvesting over summer months, and that Rullo relied upon that advice in determining to transplant Ironman seedlings between October and December 2009.

The trial judge ought not to have been so satisfied. In so finding, accordingly the trial judge erred.²⁹

46 In other words, Fairbank's contends that the trial judge should not have found that (1) a representative of Fairbank's had conveyed to Mr Florence that the Ironman seed was suitable for a summer crop, and, (2) Mr Florence had conveyed that information to Mr Rullo.

Submissions with respect to the first proposed ground

47 The first factual controversy relates to the content of a discussion between Mr Florence and a representative of Fairbank's about Ironman seeds in June 2009.

48 In the Reasons, the trial judge said:

On the balance of probabilities, I am satisfied that Fairbanks (probably through Tigani but possibly through Muir) represented to Florence that the Ironman variety of broccoli was suitable for planting in North Eastern Victoria over the period between October to December and for harvesting over the summer months.³⁰

49 Fairbank's contends that this finding is in error. Fairbank's contends that the trial judge should not have been satisfied that there was any discussion in June 2009 as to the suitability for planting Ironman in the period October to December.

50 In its written submissions, Fairbank's accepted that one of its representatives had a conversation with Mr Florence, in June 2009, about broccoli seeds and seedlings. However, it said that that conversation was about the supply of seeds and seedlings to Lucky Khakh, another customer of Barooga. Further, it said that the conversation

²⁹ Fairbank's also applied for a stay of the orders of the trial judge until the determination of the application for leave to appeal. Amar did not oppose the grant of a stay.

³⁰ Reasons [53].

was about the supply of Ironman seeds in June 2009 with a view to their being propagated as seedlings and transplanted five or six weeks later. It pointed to (a) its delivery of Ironman seeds to Barooga on about 11 June 2009 (and the handwritten annotation on its invoice of the words 'Lucky Khakh') and (b) Barooga's turning them into seedlings and supplying those seedlings to Lucky Khakh for planting in the middle of August 2009.

51 Fairbank's said that the trial judge made no finding at all on whether the June 2009 conversation between Mr Florence and the representative of Fairbank's was in relation to a purchase by Lucky Khakh. That being so, the trial judge had no occasion to evaluate the circumstances pursuant to which the seeds were delivered to Barooga in June 2009 for Lucky Khakh, and, thereafter, placed into punnets to be propagated as seedlings by Barooga, and, then, supplied to Lucky Khakh for transplanting in the middle of August 2009. This circumstance, however, rendered it most improbable that there was any representation conveyed in the June 2009 call as to suitability for planting Ironman between October and December.

52 Moreover, Fairbank's contended that, although Mr Tigani had no recollection of any discussion with Mr Florence in June 2009 (or at any other time) as to suitability for the planting of Ironman seeds, his evidence was that, if asked in June 2009, he would not have recommended Ironman seeds to have been suitable for transplanting *from late October*. That evidence was adduced,³¹ was not the subject of attack in cross-examination, and was consistent with his signed statement of 11 June 2013.

53 Amar responded to the first proposed ground of appeal in two ways. First, it contended that Fairbank's had not advanced its 'Lucky Khakh contention' at trial. Second, it said that there was ample evidence supporting the finding that the relevant advice, as found by the trial judge, was given.

54 In order to consider the various arguments, it is necessary to examine closely the

³¹ Transcript of Proceedings, *Amar Produce Pty Ltd v Fairbank's Selected Seed Co Pty Ltd* (County Court of Victoria, Judge Smith, 5 October 2016) 745-8.

evidence given by Mr Florence in which he describes his communications with Fairbank's.

The evidence of Mr Florence

55 It will be recalled that Mr Florence conducted the business of Barooga, which was the second defendant. Amar had compromised its claim against Barooga a week or so before the commencement of the trial. However, Mr Florence remained an important witness in Amar's claim against Fairbank's: he was said to have been the conduit for the representation from Fairbank's to Amar. Mr Florence proved to be a reluctant witness. The trial judge gave counsel for Amar leave to ask him leading questions.³²

56 A sense of Mr Florence's evidence may be gained from the following:

The Court If I tell you that I am going to assume, unless there is evidence to the contrary, that pleadings are made on instructions, not made up by the solicitor or the barrister but made on the basis of instructions given to them, does this solve your problem?

Counsel Yes, it does. Then what I was next going to do is take him to court book page 30 and 31. At the moment they are pleadings. Put them to him and ask whether he recalls whether they are accurate.

Counsel When Barooga was a defendant in this proceeding a defence was drawn for Barooga. You recall that?

Florence No, I don't.

The Court Do you not recall when Barooga Nurseries was a defendant to this action? Do you not recall it ever being a defendant to this action?

Florence Yes, in Wangaratta.

Counsel I am talking about a document whereby Barooga responds to allegations against it and that's called a defence. Does that ring a bell?

Florence No, it doesn't actually, no.

The Court I am not suggesting and [counsel] is not suggesting that you

³² Transcript of Proceedings, *Amar Produce Pty Ltd v Fairbank's Selected Seed Co Pty Ltd* (County Court of Victoria, Judge Smith, 4 October 2016) 621.

drew the defence?

Florence Well, I can't -my secretary would have done that, yeah.

...

Counsel You spoke to your solicitors about what happened with Mr Rullo and the second broccoli crop back in 2009, didn't you?

Florence If you say so.³³

57 At this stage, the trial judge invited counsel for Amar to take Mr Florence through the individual allegations made in Barooga's defence 'and ask him if it's correct'.³⁴ As a result, Mr Florence was taken to paragraphs 5.1 to 6.1 of Barooga's defence, and he was asked to confirm the allegations they contained. In large part, the questioning was taken over by the trial judge himself.³⁵ The transcript reads as follows:³⁶

Counsel That's responding to an allegation made by the plaintiff which I will read to you, which is court book page 2. The allegation at that time was: 'On or about June 2009 the plaintiff instructed Michael Florence to procure the necessary seeds for transplanting from act (sic) 2009 onwards. The instructions were given by Mr Rullo.' In response, it says at 5.1(a): 'In about June 2009 the plaintiff informed the second defendant'. Can you read that?

Florence Yes.

Counsel Is that accurate, what's written in 5.1(a)?

The Court Take it as read that 'the plaintiff' means Amar Produce or one of its people. In this case I understand that there's no doubt that it's Mr Rullo. The second defendant is Barooga Nurseries Pty Ltd. So the first allegation is that in or around June - this is an allegation made by your company, presumably by you or on your instructions - the plaintiff informed the second defendant that it wished to purchase broccoli seedlings for

³³ Ibid 629-30.

³⁴ Ibid 630.

³⁵ It seems that the trial judge considered that this was a more efficient way of proceeding. Counsel for Amar, holding the defence that contained the relevant allegations, had been approaching the matter by asking Mr Florence what he had told his lawyers.

³⁶ What follows is an extract from the transcript at 630-4. At the hearing of the application, counsel for Fairbank's responsibly conceded that, if this Court were to act on the reliability of that part of the transcript extracted below, 'that is wholly sufficient for the case to be made good', except for the issue of reliance (at 11.55 am).

transplanting for the period October 2009 to approximately December and for a summer harvest up to and including January 2010. So that's what Barooga Nurseries has pleaded in this document. Was that correct?

Florence Yes.

The Court You can come back to these, of course, Mr Catlin, but read number (b) if you would: 'At the time of the above the plaintiff was aware that the second defendant did not have any broccoli seeds or seedlings and that it would need to source broccoli seeds from the first defendant.' That's Fairbanks?

Florence Yes.

The Court Is that correct?

Florence I assume so, yes.

The Court When you say you assume so - - -?

Florence Well, we used to buy seed in when we needed it and I can't recall the circumstances. I assume that that's what I have done.

The Court All right. Then (c): 'The plaintiff asked the second defendant what would be the appropriate broccoli seed type to be transplanted and harvested during that period.' Is that right?

Florence Yes.

The Court Then (d): 'The second defendant informed the plaintiff that it did not know and it would need to ask the first defendant what broccoli seed would be best suited to transplant and harvest during the period.' Is that correct?

Florence Yes.

The Court Then (e): 'The plaintiff instructed the second defendant that Mr Rullo instructed you to obtain advice from the first defendant as to what broccoli seed type was most suited to transplant and harvest during the period and to purchase the seeds recommended by the first defendant on behalf of the plaintiff.' Is that correct?

Florence Yes.

The Court Go on to 6.1 for the moment.

Counsel Can you read him the particulars, Your Honour, at the top of that page?

The Court The discussions said to have taken place in 5.1(a) down to (e) are said to have occurred in about June 2009, between Anthony Rullo acting for the plaintiff and you, the director of Barooga Nurseries to the effect that's set out above there. Is that correct?

Florence Yes.

The Court In paragraph 6.1(a): 'In or about June or July of 2009 the second defendant, as agent for the plaintiff, sought advice from the first defendant as to what type of broccoli seed was suitable for transplanting and harvesting during the period.' Is that true?

Florence Yes.

The Court Then (b): 'The first defendant advised the second defendant that iron man broccoli seeds were suitable for transplanting and harvesting during the period and atomic seeds were not suitable.' Is that correct?

Florence Yes.

The Court Is that the advice that you got?

Florence Yes.

The Court Who was that from?

Florence Fairbanks.

The Court Who at Fairbanks?

Florence I can't recall.

The Court Advice over the phone?

Florence Over the phone.

The Court Oral discussion?

Florence Over the phone.

The Court Not in writing?

Florence Over the phone.

The Court Mr Tigani?

Florence I can't recall. I really don't know.

The Court Who else at Fairbanks did you ever speak to about this sort of thing?

Florence James Muir. I can't recall who else, actually.

The Court It might be James Muir?

Florence I can't think of his name.

The Court Another gentleman employee of - - -?

Florence Fairbanks, yeah.

The Court Mr Stockton?

Florence No.

The Court In any event, (c): 'Prior to the receipt of the advice the second defendant had never heard of or had any experience with iron man broccoli seeds.' Is that correct?

Florence That's correct.

The Court Then (d): 'After receiving the broccoli advice from the first defendant and in June/July 2009, the second defendant, as agent for the plaintiff and as a conduit, passed on the advice and the broccoli advice to the plaintiff.' That's to Mr Rullo. Is that correct?

Florence Yes.

The Court Follow me through (e) for the moment. The broccoli advice is the advice whereby you say that Fairbanks told you that iron man seeds were suitable and atomic seeds were not harvesting in that period. What's the advice as opposed to the broccoli advice, Mr Catlin?

Counsel The advice is at paragraph 7 of the claim, that atomic should be avoided and iron man was preferable.

The Court 'In reliance on the broccoli advice the second defendant, on instruction from the plaintiff, in its capacity as agent for the plaintiff purchased iron man broccoli seeds from Fairbanks on behalf of Amar.' Is that correct?

Florence Yes.

The Court Then (f): 'It denies seeking or ordering a million seeds from the first defendant; and (g) it ever only invoiced the plaintiff for 258.' What you invoiced him for and what you ordered from Fairbanks might or might not be the same but you say you never ordered a million. How many did you order?

Florence I can't recall.

The Court The particulars of those conversations are set out on the following page, where you say: 'In or about June 2009, after the June seed discussion, Mr Florence telephoned the first defendant and had a discussion with a representative of the first defendant, whose name he cannot recall.' The discussion was as we have just gone through before. Is that correct?

Florence That's correct.

The Court And that you have conveyed the advice about what was the appropriate broccoli to Mr Rullo in a telephone conversation - sorry, either in person or by telephone in about June of 2009. Is that correct, to the best of your recollection?

Florence I would say so, yes.

The Court And that on 22 July 2009 you issued a tax invoice to -sorry, the first defendant issued a tax invoice to Barooga Nurseries for 200,000 iron man broccoli seeds intended for the plaintiff, Amar?

Florence Correct.

58 As the transcript shows, there was a clear basis in the evidence for the trial judge's finding that a representative of Fairbank's had conveyed to Mr Florence that the Ironman seed was suitable for a summer crop. Indeed, the finding was the result of a thorough analysis of the evidence by the trial judge.

59 Fairbank's accepted that there had been communications in June 2009 between its representative and Mr Florence about the supply of Ironman seeds but said, in its application for leave to appeal, that the trial judge should have found that those communications were about the supply of seeds to Barooga for it to propagate for another customer, Lucky Khakh: 'it was tolerably clear that the June 2009 discussion was in respect of seeds for Lucky Khakh'.

60 During his cross-examination, counsel for Fairbank's asked Mr Florence whether he remembered Lucky Khakh 'wanting broccoli seeds in June 2009?'³⁷ Mr Florence could not remember. Counsel then said:

I am going to take you through some documents shortly and I am going to put to you that any enquiry made of Fairbanks in June 2009 was on behalf of Lucky (Khakh) and not Amar.³⁸

Counsel for Amar objected to the questioning. Counsel for Fairbank's then referred to a document dated 11 June 2009 whereby Fairbank's had invoiced Barooga for Ironman seeds. The objection was disallowed.

61 Thereafter, the evidence revealed that Barooga received Ironman seeds from Fairbank's in June 2009 and delivered Ironman seedlings to Lucky Khakh in August

³⁷ Transcript of Proceedings, *Amar Produce Pty Ltd v Fairbank's Selected Seed Co Pty Ltd* (County Court of Victoria, Judge Smith, 5 October 2016) 690.

³⁸ Ibid.

2009.³⁹ It also disclosed that, on 26 August 2009, Amar had paid Barooga \$12,000 for Ironman seeds and that Barooga had delivered to Amar seedlings in three batches: (1) on 8 October 2009, (2) on 16 October 2009 and (3) on 3 November 2009.⁴⁰ Mr Florence gave evidence that the seedlings should have been ready for harvesting within 8 to 12 weeks; so, assuming that they were planted when they were received, the first harvest should have occurred in mid-December.⁴¹

62 The evidence led fell well short of establishing that any conversation that Mr Florence had with Fairbank's in June about Ironman seeds was confined to the order of Lucky Khakh that was invoiced on 11 June 2009. First, Mr Florence gave unequivocal evidence that he had had a conversation with a representative of Fairbank's about whether Ironman was suitable for a summer harvest. He was not cross-examined about that evidence. Second, the cross-examination established that there were communications about Ironman with Lucky Khakh in June for a planting of seedlings in August; but, it did not seek to exclude the existence of other conversations with Fairbank's about the supply of seeds for a summer planting. Third, the seeds that were invoiced in June 2009 were for seedlings to be transplanted in August 2009; they could not have been for a summer harvest.

63 At the hearing of the present application, Fairbank's criticised the manner in which the evidence of Mr Florence had been given in respect of his communications with Fairbank's. It will be recalled that he was asked to confirm the truth of the allegations contained in Barooga's defence and that that was principally done by the trial judge himself. Counsel for Fairbank's said that, given the centrality of the evidence to the issues in the trial, this was a wholly inappropriate manner of proceeding. First, it treated a lawyer's document - a pleading - as if it were an affidavit or witness statement. Second, evidence advanced in that manner should be

³⁹ Ibid 698

⁴⁰ Ibid 705.

⁴¹ Ibid 707.

given little weight.⁴²

64 While we accept that the evidence of Mr Florence as to what he had been told by Fairbank's was central to the case, we do not think that the trial judge was in error in accepting it. None of the propositions that was adopted by the witness was particularly subtle. There was no objection taken at trial to this manner of proceeding. There was no cross-examination of Mr Florence in which the truth of his evidence about his conversation with Fairbank's was challenged. On the contrary, the cross-examination seems to have accepted the force of what had taken place when Mr Florence had adopted the allegations in Barooga's defence.⁴³

65 We also accept the contentions of Amar that it is implausible to suggest that Mr Florence did not receive the relevant advice from Fairbank's. Mr Rullo was seeking advice on the question whether there was a broccoli seed suitable for propagating and planting in the October to December period. Mr Florence had no expertise in the matter and had to seek it elsewhere.

Submissions with respect to the second proposed ground

66 The second factual controversy related to the trial judge's conclusion that he was 'satisfied that Florence conveyed the advice to Mr Rullo and that Mr Rullo relied upon it in determining to transplant the 258,000 Ironman seedlings on the block between October and December 2009'.⁴⁴ Fairbank's said that evidence was given of several relevant conversations and that, although the trial judge did not date the conversations, the relevant conversation, it submitted, must have taken place either in June 2009 or on 26 August 2009.⁴⁵

42 This complaint does not appear in either of the proposed grounds of appeal.

43 See Transcript of Proceedings, *Amar Produce Pty Ltd v Fairbank's Selected Seed Co Pty Ltd* (County Court of Victoria, Judge Smith, 5 October 2016) 685-9.

44 Reasons [124].

45 Fairbank's contended that, by reference to documentation that showed that Mr Rullo had paid Barooga \$12,000 on 26 August 2009, the conversation took place on that day.

67 Fairbank's said that, in an oral representation case for which there was no contemporaneous documentation, there was a need for precision, especially where there was a series of conversations and the representation was said to have been conveyed by an intermediary.

68 If the conversation took place in June 2009, as pleaded, then there was no false representation. The representation concerned the Lucky Khakh purchase and was accurate: Ironman was suitable for planting at that time of the year; that is, in winter.

69 If the conversation took place in late August 2009, the trial judge's conclusion was said to be 'replete with error'. First, the advice was arguably correct: Ironman was suitable for planting at that time and remained suitable for planting at least until October. Next, Fairbank's said that it could not reasonably be concluded, on Mr Rullo's evidence, that he relied on any representation made before the last discussion about which evidence was given. In late August 2009, Mr Rullo remained very sceptical about growing a new variety. He required reassurance. On the probabilities, that was the advice on which Mr Rullo relied.

70 In its oral submissions, Fairbank's emphasised that Amar should be held to its pleading. In its amended statement of claim, it had pleaded that on or about 'June 2009' it had received advice as to the suitability of the seeds for a summer crop. In its further particulars of this allegation, it had referred to there being two conversations where the representation was made. The evidence should have been confined to those two conversations. However, the trial judge disallowed an objection to evidence being given of several more conversations.

71 Amar submits that the finding that Mr Florence conveyed the advice to Mr Rullo and that Mr Rullo relied upon it in determining to transplant the 258,000 Ironman seedlings on the block between October and December 2009⁴⁶ is a finding based on the advice provided by Fairbank's to Mr Florence when he first made an enquiry after speaking to Mr Rullo, irrespective of the date when that conversation occurred,

⁴⁶ Reasons [124].

and not on the later confirmation. The relevant finding concerns the advice that the trial judge found Mr Florence had passed on, namely the advice from Fairbank's that Ironman was a suitable variety to be planted as a summer crop in North Eastern Victoria and that Atomic was not,⁴⁷ not the statement by Mr Florence that, just before the cash was handed over, he had rung Fairbank's and that Mr Tigani had said that Ironman was the only variety suited for that time.

72 Amar makes the following contentions in respect of the second proposed ground of appeal:

- (s) After Mr Florence had conveyed the result of his enquiries of Fairbank's to Mr Rullo, and prior to Mr Rullo going to pay the deposit to Mr Florence, Mr Rullo had told Mr Florence, after speaking with Ms Milosevic and her mother, that they were quite happy for him to go ahead to start with the Ironman variety, and that they wanted to go ahead. The fact that confirmation of the advice was sought when the payment was made does not mean the previous recommendation of Fairbank's conveyed by Mr Florence was not relied upon or was not a cause of the loss.
- (t) The evidence of Mr Rullo concerning the confirmation of the relevant advice 'does not accord with the evidence in chief of Mr Florence'. The evidence in chief of Mr Florence relates to the advice conveyed in the earlier conversation.

73 Amar submits that, at the time of the confirmation, the planting schedule had already been discussed. It was for the planting of Ironman from October to December 2009. The statement by Mr Florence that Mr Tigani had said that Ironman is the only variety to plant for this time of year has to be construed in the context that the sowing was to commence almost immediately and continue over the next couple of months with a view to transplantation during the October to December 2009 period. The purpose and effect of Mr Rullo seeking and receiving the confirmation was to confirm the advice previously received and to reassure him. Having received that reassurance, he proceeded in reliance on the advice previously conveyed,

⁴⁷ Reasons [117], [121].

having been reassured that it had been confirmed.

74 In oral submissions, counsel for Amar said that there was no proposed ground of appeal complaining that the case had travelled beyond the pleadings; nor could there be, as the finding at [53] of the Reasons was within the pleadings. Counsel also said that it had not been improper to adduce evidence from Mr Florence by having him adopt paragraphs in Barooga's defence. What is more, the evidence had not been subject to cross-examination. Amar submitted that, in any event, the findings on the representations did not depend solely upon that evidence. Further, it was plain that the inquiry directed by Mr Florence to the representative of Fairbank's related to a spring planting for a summer crop. Counsel distinguished the findings relating to the representation from that relating to reliance. The former were based on the earlier conversations; the August conversation was relevant only to the question of reliance.

Mr Rullo's examination in chief

75 In order to consider the various arguments, it is necessary to examine closely another part of the transcript of the oral evidence. This part involves Mr Rullo's examination in chief, in which he gave evidence of his conversations with Mr Florence. When this part of the transcript of evidence is considered, it becomes clear that the second of Fairbank's proposed grounds of appeal must also be rejected because we can detect no error in the trial judge's findings.

76 Mr Rullo was the first witness who gave evidence for Amar. It will be recalled that, in Amar's pleadings, there was an allegation that 'on or about June 2009', Fairbanks had advised Amar 'via its agent Mr Florence' that Ironman was the preferable seedling for transplanting in the months of October to December. Alternatively, it was alleged that the advice was given to Amar by Barooga. In its further particulars, Amar said that Mr Florence had made inquiries of Fairbank's and had been told that Ironman was the 'only appropriate' variety. The particulars continued: 'Mr Florence conveyed this advice to Mr Rullo of the plaintiff initially by

telephone during June 2009 and then during a meeting at Barooga Nursery between Mr Rullo and Mr Florence in late June 2009’.

77 In his oral evidence, Mr Rullo gave evidence about the circumstances in which Amar had its first crop of broccoli. Planting commenced on 21 February 2009⁴⁸ and, in the first week of June 2009, harvesting had been completed.⁴⁹ Immediately, Amar began considering planting a second crop during the summer as no-one ‘could grow it, so we wanted to be in that area’.⁵⁰ He was asked whether he spoke to Mr Florence. The transcript of Mr Rullo’s examination in chief then reads as follows:

Counsel Obviously the crop in question is an Ironman crop, but before you have any discussions about Ironman with anyone, do you talk with Mr Florence and what about?

Rullo Yes, I do. We speak to Michael about the numbers, how many seedlings per week we wanted to receive, when we were going to start planting and definitely to seek from advice from a seed company to when we could plant and what variety.

Counsel Are these discussions in person or on the phone?

Rullo The first one was at the farm with myself; the second and third was probably over the phone, relaying messages back to Amar.

Counsel So this is before any discussion of Ironman and you are talking to Mr Florence about how much you are going to grow?

Rullo Yes.

Counsel Being mindful of exhortation of my friend to be careful in this important area, I am going to ask you to tell the court as best you can in sequential order the discussion you had about Ironman, who with, how they took place. When do you first have a conversation about Ironman with anyone?

Rullo The first time was after we said to Michael we wanted to plant broccoli in October onwards. Michael had said to me that he had to get advice to get the correct strain because he didn’t know what strain was possible to be grown at that time of year. We requested the Atomic from South Pacific Seeds because it was so good, we just wanted it, but he said he needed to get the advice first and the advice was given back

⁴⁸ Transcript of Proceedings, *Amar Produce Pty Ltd v Fairbank’s Selected Seed Co Pty Ltd* (County Court of Victoria, Judge Smith, 26 September 2016) 55.

⁴⁹ Ibid.

⁵⁰ Ibid 57.

over the phone to me to say that South Pacific Seeds did not want to supply Atomic, they could not recommend it, it wasn't the time of year to plant it and therefore they couldn't supply seeds. But Michael said that there were other seed companies who were supplying broccoli seeds, that he could approach other seed companies to see if they could - -⁵¹

At this stage there was a conversation between the Court and the barristers. The examination in chief resumed:

Counsel Was the last thing you said that Mr Florence said South Pacific won't provide because what?

Rullo Because it wasn't suitable for that time of year, they could not recommend us to plant it because, yeah, it wasn't suitable for the time of year we wanted to plant.

Counsel Remember, as I said - - -?

Rullo Amar, yes.

Counsel In sequential order saying where and how, do you have any further discussion with him at that time when he says that about South Pacific?

Rullo At that time, he said that there were other seed companies that supplied broccoli seed and he said to me that he would phone me back and let me know upon what their advice would be about other varieties.

Counsel What is the next conversation you have with him?---

Rullo The next phone call would've been that he come back to me and said to me that Fairbanks have got a new variety, it's called Ironman, they recommend that this is the only variety to plant, and I was querying Michael and he said, 'That's what the seed company said.'

Counsel Is that conversation you are referring to on the phone or in person?

Rullo Firstly, that particular right there was on the phone.

Counsel Do you then discuss that with anyone else?

Rullo Yes, and I've come back and discussed it with Amar, [Ms Milosevic] and her mother, to let her know that there was a new strain of broccoli to be planted and we should be careful and make sure that the advice is correct.

Counsel What is the next conversation you had with Mr Florence about the second crop?

51 Ibid 57-8

Rullo I drive to - I took a drive to Barooga to see Michael in person to make sure that the variety was correct and it was definitely coming from the seed company and he assured me that was the case.

Counsel I would like you to outline as best as you can recollect what happened. So you drive to Barooga Nursery?

Rullo Yep.

The Court When is this, approximately?

Rullo Two weeks after the planting, maybe mid to late June 2009.

Counsel So you go to the nursery?

Rullo Yes.

Counsel By whatever mode of transportation. Then where do you go in the nursery?

Rullo I see Michael.

Counsel Where do you go in the nursery?

Rullo I just - on that occasion, I just see Michael - to the office, and we discussed the varieties and the potential varieties that we could plant. I also discussed - - -

Counsel Do you go to the office? You do go in the office?

Rullo Yep.

Counsel Is there anyone else in the office?

Rullo No.

Counsel What is discussed there?

Rullo Again that Ironman was the only variety that should be planted and we discussed the amount that we needed as well and the planting schedule. Then I never gave him an answer, I said I'd have to speak to [Ms Milosevic] and her mother before I could give an answer on this and I went away.

Counsel When is the next time you talk to Mr Florence about Ironman?

Rullo I rang Michael to say if it was possible for us to visit the nursery, 'us' meaning [Ms Milosevic], her mother and myself, to make sure that they felt confident in Michael to perform the job. So we went to Barooga.

Counsel Who went?

Rullo [Ms Milosevic], myself and Jovanka.

- Counsel Who do you speak to there?
- Rullo We speak to Michael Florence.
- Counsel Where in the nursery do you speak to him?
- Rullo We speak to him outside the office firstly. We then move through a tour through his nursery.
- Counsel Is Ironman discussed at all at that time?
- Rullo Definitely, yes.
- Counsel What did Mr Florence say?
- Rullo Mr Florence said that that was the only variety that the seed companies could recommend for that time of year and it should be planted.
- Counsel Is that it? You then leave the nursery?
- Rullo No, we do give a basic confirmation to Michael that we are leaning towards going to that way, that he was to prepare himself.
- Counsel But you haven't paid for them at that stage?
- Rullo No, definitely not, no.
- Counsel Do you have any further conversations with Mr Florence about Ironman?
- Rullo Yes, we - I did verbally speak to Michael over the phone after returning to Shepparton to say that, 'Yes, the others are quite happy for you to go ahead to start with that variety.'
- The Court Was that the same day as the trip, was it?
- Rullo It could've been a number of days after, a couple of days, but not more than a couple of days, Your Honour.
- Counsel The next conversation with him?
- Rullo I decided - Michael said that he would be able to supply the seedlings like on a - he will grow the seedlings for us with no money until we started receiving money for the broccoli itself from the broccoli returns, but he said to us we definitely have to pay for the seeds up front because that wasn't his area, the seed company would only give 30 days.
- Counsel Was this over the phone or in person?
- Rullo It was actually mentioned between Jovanka and [Ms Milosevic] at the - - -

- Counsel Were you present at that conversation?
- Rullo Yes, I was, at the Barooga Nursery.
- Counsel So that was at the nursery?
- Rullo Yes.
- Counsel When is the next time you see or speak to Mr Florence?
- Rullo It was right after the phone call that we said that we wanted to go ahead and we appreciate the offer to propagate the seedlings for us, but we said that we would visit him to pay him for the seeds up front and Danny and I, who is the owner of the farm, drove up with me just to accompany me and we went to Michael's office to pay him the money for the seeds.
- Counsel Was that cash or a cheque?
- Rullo It was cash.
- Counsel How much money did you have?
- Rullo We had 12,000 on us.
- Counsel How much of that was for broccoli?
- Rullo 10,000 was for broccoli and 2,000 was for pumpkin seeds.
- Counsel Any discussions happen then?
- Rullo Yes. I was still very sceptical about growing a new variety. I asked Michael, 'Before I give you this money', I said, 'You have to make sure and I want to hear it from the seed company to make sure it's the right variety.'
- Counsel What happens then?
- Rullo And Michael turned to me and said, 'I will ring the seed company in front of you.' Michael went into the office - I wasn't actually in the office, I was outside the office - and made a phone call to the general manager of Fairbanks.
- Counsel You are not in the office with him?
- Rullo No.
- Counsel When he comes out of the office, what does he say to you?
- Rullo He said, 'I just got off the phone with Bruno Tigani', who was the general manager of Fairbanks, 'and he said that, yes, Ironman is the only variety to plant for this time of year.'
- Counsel You then pay him?

The Court Who was it he said he had spoken to?
Rullo Bruno Tigani.
Counsel Did you know who Bruno Tigani was at that point?
Rullo No.⁵²

78 At this stage, counsel for Fairbank's complained that the witness had given evidence of several conversations whereas only two had been referred to in the further particulars. In the event, he objected that the evidence of conversations, other than those that had been referred to in the further particulars, should be excluded on the grounds of relevance.⁵³ The objection was overruled.⁵⁴

Analysis of the second proposed ground of appeal

79 In our opinion, there was no departure from the allegations in the amended statement of claim or from the particulars. Those documents cannot be read as confining Amar to two conversations. In the event, the witness deposed to several conversations, all of which supported the principal allegation in the pleading.

80 It is true that, in a case based on oral representations, the court needs to be cautious.⁵⁵ But, in the present case, the pleaded representation – that Ironman was suitable for planting for a summer crop – was simple and clear and the evidence that that very representation was made and conveyed similarly clear.

81 The evidence was that there were several conversations between Mr Rullo and Mr Florence. In the first phone conversation, which took place at the end of the June harvest, Mr Rullo conveyed that he needed advice as to the correct strain of broccoli for planting in October; Mr Florence responded by phone that he would find out and get back to Mr Rullo. In the next conversation, Mr Florence told Mr Rullo 'that

52 Ibid 62-4.

53 Transcript of Proceedings, *Amar Produce Pty Ltd v Fairbank's Selected Seed Co Pty Ltd* (County Court of Victoria, Judge Smith, 5 October 2016) 67.

54 Ibid.

55 *Watson v Foxman* (1995) 49 NSWLR 315, 318-9 (McLelland CJ in Eq).

Fairbanks have got a new variety, it's called Ironman, they recommend that this is the only variety to plant ... [t]hat's what the seed company said.' In mid to late June 2009, they met 'at Barooga': Mr Rullo wanted a reassurance from Mr Florence. The substance of their conversation was 'that Ironman was the only variety that should be planted'. A further meeting was arranged. It also took place 'at Barooga'. This time, Mr Rullo was accompanied by Ms Milosevic and her mother. Ironman was discussed: 'Mr Florence said that that was the only variety that the seed companies could recommend for that time of year and it should be planted.' Mr Rullo told Mr Florence that 'we are leaning towards going to that way, that he was to prepare himself'. At this stage no money had changed hands. There was a further phone conversation that took place 'a couple of days' after the trip. And, 'Michael said that he would be able to supply the seedlings like on a - he will grow the seedlings for us with no money until we started receiving money for the broccoli itself from the broccoli returns, but he said to us we definitely have to pay for the seeds up front because that wasn't his area, the seed company would only give 30 days.' Mr Florence said: 'I did verbally speak to Michael over the phone after returning to Shepparton to say that, [sic] "Yes, the others are quite happy for you to go ahead to start with that variety"'. The final conversation took place at Barooga. Mr Florence wanted cash up front. So, in company with Danny, Mr Rullo went to Barooga. He said that he was still sceptical and wanted further reassurance. Mr Florence said to him: 'I will ring the seed company in front of you'. In the event, Mr Rullo was not present when that conversation took place. But, after a delay, Mr Florence came out of his office and told Mr Rullo: 'I just got off the phone with Bruno Tigani', who was the general manager of Fairbanks, 'and he said that, yes, Ironman is the only variety to plant for this time of year'. At this point, Mr Rullo confirmed the deal and handed over \$12,000 in cash.

82 Mr Florence gave evidence that Fairbank's had advised him, in June 2009, that Ironman broccoli seeds were suitable for transplanting for the period October 2009 up to approximately December 2009 and for a summer harvest up to and including

January 2010.

83 This evidence has to be taken as a whole; there is no useful point in extracting phrases out from the context in which they were the subject of evidence. In its submissions, Fairbank's said that the advice given ('the only variety to plant for this time of year') was literally correct (the time of the last conversation being August). However, that is not what Mr Rullo was seeking to convey and it is not a fair account of his evidence. His story commenced with his telling Mr Florence that 'we wanted to plant Broccoli "in October onwards"'. The first advice that Mr Rullo received was in June 2009. His question was answered: the seed company recommended Ironman as the only seed to plant. The premise of every conversation was that the seeds were required for planting from October to be harvested in the summer. Moreover, the exchanges are to be read cumulatively: the later built upon the earlier conversations. What had been conveyed was that Ironman was suitable for planting for a summer harvest; and that is what was confirmed in August 2009 just before the money was paid.

84 We reject the submission that Mr Rullo, when he paid the \$12,000, was not relying upon the original advice which had been given to him in June and which had been confirmed in August.

85 In the circumstances, the second proposed ground of appeal must be rejected.

Conclusion

86 The proposed grounds were arguable and we would grant leave to appeal on both grounds. For the reasons given, the appeal will be dismissed.