

NEGLIGENCE AND MISLEADING AND DECEPTIVE
CONDUCT UNDER SECTION 52

Questions and Answers

Comment - Gerrick McQuade:

I would like to make a brief observation, if I may, in relation to the question of liability for negligent mis-statement and comparing it to potential liability under section 52 of the Trade Practices Act. It appears to me that section 52 does widen substantially the scope for liability for negligent mis-statement. Negligent mis-statement, as I understand the law, requires a special relationship and an element of negligence, but as far as section 52 is concerned, that requires no negligence. It applies only to conduct which is misleading or deceptive, and as such it can be attacked, or conduct can be attacked pursuant to section 52, even if it is not negligent and is given honestly. I wonder if Mr Justice Beaumont could comment on that?

Response - Mr Justice Beaumont:

I agree with that.

Comment - David Bruce (National Australia Bank Ltd):

Mr Sher referred to the Amadio case. There was a decision of the New South Wales Supreme Court given this year, in which my bank had the misfortune to be the defendant, and my bank was unsuccessful. The facts of that case were that the bank did not disclose all information to a proposed guarantor, although the guarantor was in fact involved in the business of the company which was to be guaranteed. And further, the proposed guarantor took the guarantee to a solicitor, but he had the misfortune to be the solicitor for the company. The solicitor told the guarantor not to be silly, but nevertheless she did sign the guarantee. And in all the circumstances, the court found that it would be unconscionable to hold the guarantor bound by the guarantee. That is the case of Roberts.

Comment - Annabelle Bennett (Barrister):

I was counsel for the Roberts in that case, and it was an interesting extension of Amadio. We did actually run a Contracts Review Act as well, but the judge found it unnecessary to deal with that. It was of interest because, unlike Mr & Mrs Amadio, who had less knowledge and less command of English, Mrs Roberts, who was the original guarantor, was involved in the company, although she was a rather naive lady. But there the situation

was, as the facts came out, that the bank manager, as in Amadio's case, kept the company afloat until the moneys were advanced, because the bank had allowed the overdraft to go on and on, unsecured. Further, in that case, Mrs Roberts' daughter had given a mortgage over her property, and the judge held that the problem was that the bank owed a duty to her. The bank had no contact with her whatsoever, and allowed her to sign the mortgage without any advice at all. And it was the duty owed by the bank to her, that the judge also relied upon in setting aside the mortgage and the guarantee.

Response - Mr Justice Beaumont:

Could I just add something about Amadio, as I would read the facts of the case, certainly so far as Mr Justice Deane who wrote one of the majority judgments was concerned. He was really looking at it as a case of active misrepresentation so far as the Commercial Bank was concerned, in the sense that it was creating this facade for the parents, the guarantors of the bank's debtor, that his financial condition was very healthy indeed.

And you will remember, there was this understanding between the bank manager in Amadio and the debtor, who was in very poor shape indeed, that, for example, only some cheques would be honoured. Now that, as I would see it, is most unusual conduct, and again, I would suggest to you, it can be seen as conduct which is in the form of a positive mis-representation.

In other words, I am not sure that I agree with Jeffrey Sher, that it is any extension of existing principle, and I think you will find the main cases referred to in the majority (I know Mr Justice Dawson took a different view) are well established and early precedent.