NEGLIGENCE AND MISLEADING AND DECEPTIVE CONDUCT UNDER SECTION 52

Comment by

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Well, I suppose the participants of the Conference decided to come to this particular discussion, with a view to finding out the good oil, and being told by His Honour, and a couple of lawyers, what answer there was to the questions, if I do this particular thing, if I tell my client that, will I be sued for it. And with the usual judicial approach of giving on one hand and taking away with the other, His Honour has offered you two conclusions about which I want to make a comment, one optimistic, one pessimistic. I think I disagree with both of them.

The view expressed in relation to negligence, that His Honour told you about, was cunningly stated as follows, that on this review of the authorities one can only conclude as a matter of policy, courts are reluctant to hold public authorities liable for negligent conduct causing economic loss, except the case in response to a specific request which can reasonably be expected to be relied upon, thus requiring some measure or formality.

Of course, what His Honour didn't point out to you, is that by and large the sort of advice that banks will be asked to give, will not be in the capacity of a public authority, so I think there is very little comfort for banks in that particular prognostication.

I also think that the trend of authority is not very favourable to people getting away with it, in the sense of giving advice to clients and the like, and not being held responsible. And the trend of authority in my view is more in line with the prospect of recovery than otherwise, and perhaps not because of the law of negligence, but because of another branch of the law to which I will refer you in a moment.

Which brings me to His Honour's pessimistic conclusion, which in my view is not pessimistic enough. His Honour summed up and said, that it would seem that the private section of the banking industry is exposed to potential liability both under Hedley Byrne and now under section 52 of the Trade Practices Act. And I don't think there is any doubt that is correct.

The bad news is, that it is probably not the law of negligence or even section 52, which is going to cause trouble, if the bank is giving advice. And His Honour touched on it to some extent by referring you to the recent New South Wales legislation, the Contracts Review Act 1980, which provides an opportunity for courts to look at contracts and decide whether they are unconscionable, and do something about it.

Now there is no such law in Victoria pursuant to statute, but there certainly is a very vigorous and alive common law. The case that ought to strike terror into the heart of all bankers, and those advising bankers, is the recent decision of the High Court in the case called Commercial Bank of Australia Limited v Amadio which many of you probably now have already heard. And the facts are very short and can simply be stated.

There was an elderly Italian couple in their 70s, with a number of sons, one of whom was a fairly racy building developer, who got into a lot of trouble with the bank. You all know the story. He had an overdraft, the limits of which he continued to ignore, which was extended, the limits of which he continued to ignore, and there were all sorts of arrangements made between him and the bank, with a view to keeping him in business and the bank recovering its money.

Finally it came to pass, that the bank, one suspects it wasn't the bank manager concerned but somebody who had some authority over him, insisted that something more be done. And the elderly parents, Mr Amadio I think it was, were prevailed upon to give to the bank, an unlimited guarantee, which was secured by their one and only asset, and in due course when the inevitable happened and their son went broke, the bank sought to recover the sum of money which was close to a quarter of a million dollars. They called up the guarantee, which also took the form of a mortgage, and succeeded at first instance against these elderly Italians. The wife had little use of English, the husband had fairly workable English, but neither had any business experience.

Ultimately the bank did very badly in the High Court, it got rolled, if I can use that expression, four-one, and the basis for the decision was that three of the Judges took the view that the bank's special knowledge was such, that it was unconscionable for the bank to allow these elderly people, with their obviously deficient knowledge of English and business practices, to give an unlimited guarantee, which could have been predicted would have been called up.

The Chief Justice took a more limited view, and in effect decided that the bank's silence in the case, not telling the parents about the son's financial position, amounted in effect to a representation that his position was sound, and that the guarantee was something that they could safely give.

Now if I were a banker, I would be very worried about that case, because it opens the door to a new form of action, which I think is probably in some respects more dangerous to banks than the action in negligence and section 52 actions. It is going to be very difficult in cases where the facts justify the conclusion,

that the bank (we are talking of banks) with special knowledge, acted unconscionably to rely upon any disclaimer. After all, if you are getting a disclaimer, it would make it even more likely or even more fair that you should tell the people with whom you are concerned, why it is that you are seeking it.

So that whilst I don't find myself in violent disagreement with His Honour, I think the bad news is that the conclusions to which His Honour came, concerning negligence and section 52, are probably correct, but it is not the end of the story by any means.