Negotiating In Good Faith - The Trade Practices Act and Property Transactions

Section 52 of the *Trade Practices Act* ("the Act") demands that a corporation shall not in trade or commerce engage in conduct which is misleading or deceptive or likely to mislead or deceive. If such conduct can be proved, the *Act* provides a wide range of remedies to a party seeking redress.

A number of recent cases demonstrate that section 52 imposes an obligation of good faith in commercial dealings including negotiations for the sale or lease of property. These cases constitute a substantial attack on the principle of caveat emptor (i.e. let the buyer beware). The following principles can be extracted from the recent cases:

- negotiators (including a vendor and his or her agent) are liable for false statements made during the course of a negotiation for the sale or lease of a property even if they are made honestly and innocently, with no intention to mislead;
- negotiators must be able to prove they had a reasonable basis for their predictions and opinions, for example a vendor must be able to show that he or she had a basis for making a statement such as "property values are likely to rise by 10% over the next two years";
- negotiators are liable for information which they simply pass on, unless it is obvious that they are not the source of the information and do not express any belief in its truth;
- negotiators who are experts will be taken to have verified information which they provide;
- negotiators are liable for their misleading statements even if the truth could have been discovered by the other parties on reasonable enquiry;
- generally, negotiators do not have to reveal a fact that, if known, would depress the price (i.e. in the case of real estate, the price of the property). However, negotiators who do speak on a particular topic must ensure that they do not create a false impression by what is left unsaid (the circumstances of the *Krakowski* decision discussed below demonstrates this proposition);
- negotiators will be liable for misleading statements made during "without prejudice" negotiations;
- it is misleading for negotiators to suggest that there are other "interested parties" when there are not;
- in most cases, negotiators cannot exclude liability for misleading or deceptive conduct, but a written disclaimer may be effective if it is specific to the facts and clearly stated; and
- negotiators are unlikely to be liable for oral misleading statements if the facts relied on by the parties are clearly stated in the written agreement.

The applicability of these principles to the sphere of commercial property transactions was recently reinforced by the decision of the High Court of Australia in *Krakowski & Anor v Eurolynx Properties Ltd & Anor* (19950 130 ALR 1. The case outlines circumstances in which courts may impose an obligation on a party to disclose certain facts during the negotiation of a commercial contract.

In that case, the High Court held that the failure by a vendor of commercial property to disclose the full nature and terms of a separate leasing agreement or "rent deal" was a positive misrepresentation by the vendor of the true position of the leasing arrangements between the vendor and the tenant.

Actionable Silence Cases

The *Krakowski* decision is consistent with the sub-set of cases decided under Section 52 which demonstrate that silence will only constitute misleading or deceptive conduct where circumstances surrounding the silence render it misleading or deceptive.

For practical purposes, actionable silence cases have generally fallen into three categories, namely:

- where there is found to be some duty on the negotiating party to disclose information;
- where there is something said or done which, without more, communicates only a half truth;
- where there is a reasonable expectation by one of the negotiating parties that silence will be broken by the other party in the circumstances.

However, the courts have consistently struggled to draw the fine distinction between conduct which is bona fide commercial dealing and that which constitutes misleading or deceptive conduct (*General Newspapers Pty Ltd & Ors v Telstra Corporation* (1993) 45 FCR 164.) It is clear that Section 52 does not require full disclosure in commercial negotiations at all times. It is only where the facts indicate that a person has a reasonable expectation that the party making the representation will further disclose material facts, that a court will hold the party liable for loss or damage suffered as a result of the non-disclosure.

Misleading Conduct in Relation to Property Transactions

Section 53A of the *Act* prohibits a corporation from making a false or misleading representation in connection

with the sale or grant of an interest in land or in connection with the advertising of the sale or grant of any interest in land.

The cases decided under Section 53A demonstrate that false representations made in relation to land generally fall into the following categories:

- statements as to the nature of an interest in land;
- statements as to price;
- statements in relation to the location of the land or its dimensions;
- statements as to the characteristics of the land;
- statements as to the use to which the land may be put;
- the existence or availability of facilities associated with the land.

There is obviously substantial overlap between Section 52 and 53A of the *Act*, though corporations should be aware that even though they may not be in breach of Section 53A they may nevertheless be in breach of Section 52.

One should also note the effect of Section 12 of the *Sale of Land Act* 1962 (Vic) which prescribes potential liability for any person who with the intention of inducing another to buy land, knowingly or recklessly makes any false representation or wilfully false promise to the purchaser.

Finally, the Trade Practices Commission in conjunction with the Real Estate Institute of Australia has published guidelines for use by information provided to them by the vendor, but that they disclaim any belief in the truth of the information which they convey. However, it is immediately apparent that it would be against the agent's commercial interests to be making such disclaimers.

Disclaimers and Exclusion Clauses

Parties to a contract cannot exclude the operation of Section 52 from their prior dealings. The cases make clear that a disclaimer contained in a contract which is made subsequent to the misrepresentation which induced the party to enter into the contract is ineffective to prevent liability from arising under Section 52.

Courts appear to have been more accepting of disclaimers which are made contemporaneously with the misrepresentation. The disclaimer may be an important factor in considering whether the conduct of a party during a transaction as a whole is misleading or deceptive. It is also relevant to the question of whether the party to whom the representation was made relied upon that representation in entering into a subsequent agreement.

A contemporaneous disclaimer is most likely to be effective where it is clear that a person is simply passing on information which contains the misrepresentation. Similarly, a disclaimer is more likely to be successful where negotiations have taken place between "sophisticated commercial enterprises" who have sought the assistance of legal advice. (*Pappas v Soulac* (1983) 50 ACR 231).

It has been suggested that the key factor is whether the disclaimer is sufficiently "bold, precise and compelling" to neutralise the misrepresentation which constitutes the misleading or deceptive conduct (*Norman v Bennett* (1974) 3 ALR 351).

Reliance

The effect of a disclaimer is relevant to the issue of whether the party to whom the representation was made relied upon the representation in entering the contract. Thus, even if the disclaimer is ineffective to prevent a contravention of Section 52, it may preclude reliance on the misleading or deceptive conduct and thereby prevent an applicant from recovering under the *Act*.

From the recent cases it is apparent that, for a disclaimer to have any effect:

- the disclaimer should state that there is no belief in the truth or accuracy of the information provided;
- the disclaimer must be brought to the attention of any prospective contracting parties;
- the disclaimer should not include any statements such as "we have no reason to doubt the accuracy or completeness of this information, but ...";
- real estate agents should state they are not the source of the information and are only passing it on on behalf of the vendor.

As commented above, it is unlikely to be commercially viable for a real estate agent to disclaim the truthfulness or accuracy of information concerning the essential characteristics of the property passed on by the vendor. A purchaser would expect an agent to know and have verified the accuracy of those very characteristics.

Hence, for a real estate agent to limit their potential exposure to liability under Section 52 it is recommended that they should check the accuracy of any information which they are given by the vendor to pass on to the purchaser. This is particularly so where the information is of a kind that purchasers would expect to be within the real estate agent's field of expertise.

Conclusion

The recent decision of the High Court in the *Krakowski* case appears to have little regard for commercial reality, and constitutes a further substantial attack on the caveat emptor principle.

The question is whether the courts have gone too far in favour of the buyer in their interpretation and application of Section 52 of the *Trade Practices Act*. It is also open to enquiry whether this development will be tempered by the recognition and applicability of disclaimer clauses. Whilst these matters remain uncertain, it is prudent for parties to take particular care in their conduct during negotiations so as to avoid the potential operation of Section 52 of the *Act*.

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