



Insight

Commercial Dispute Resolution

14 July 2010

Personal Liability for Misrepresentations – Recent Developments

A recent NSW Court of Appeal case sends a salutary message to individual officers, directors and employees of any business that they can be held personally liable for their own misleading conduct under the State Fair Trading laws throughout Australia. The decision of *CH Real Estate Pty Ltd v Jainran Pty Ltd* [2010] NSWCA 37 reinforces a trend towards the Courts imposing personal liability on individuals and indicates a willingness of the Courts to bypass the more restrictive accessory liability provisions under the *Trade Practices Act 1974* (Cth) (TPA).

Background to personal liability under State laws

The *Fair Trading Act 1987* (NSW) (FTA) and other State Fair Trading laws were introduced to supplement the TPA. The intention was to cover non-corporate businesses, such as partnerships, making misrepresentations. The FTA also has the effect of imposing liability directly on individuals for engaging in misleading and deceptive conduct. This approach differs from the TPA which primarily imposes liability on the corporation and only accessory liability on an individual who has some knowledge of the representations as well as the fact that the representations were false.

In the landmark decision of *Houghton v Arms* [2006] HCA 59, the High Court held that employees of a company were individually liable for their misleading and deceptive conduct under section 9 of the Victorian *Fair Trading Act 1999*. The High Court held that, as long as the individual's conduct was "in trade or commerce" the individual could be liable to pay damages for that conduct, even if they were only acting as an employee of the company at the time. The High Court confirmed that "in trade or commerce" meant that the individual's conduct still had to have "the character of an aspect or element of trading or commercial activities or transactions".

That case involved a claim by Mr Arms against employees of WSA Online Limited, including Mr Houghton, who were engaged to provide web design services to Mr Arms in relation to a direct marketing proposal for independent wineries. Mr Houghton was alleged to have made representations regarding a bank's financial product which he said would enable customers to pay by means of all major credit cards with minor cost. This information was not correct and Mr Arms suffered loss in the amount of about \$58,000. Mr Houghton and another employee were found personally liable for those damages.

The facts in the Jainran case

Jainran Pty Ltd (**Jainran**) entered into a contract to purchase commercial property including a service station and a convenience store from Boyana Pty Ltd (**Boyana**), a company controlled by Mr Sgro. Attached to the contract was a standard form of requisitions with answers representing:

- a. that there would be no affection resulting from a proposal to widen an adjacent road; and
- b. that Boyana was not aware of any contemplated or current legal proceedings affecting the property. A brochure provided by the agent to Jainran also represented that there was a good relationship between the tenant and Boyana.

Jainran later rescinded the contract on the basis that the above representations made by Boyana were false. The land was in fact affected by a road widening proposal and the current tenant had commenced proceedings against Boyana for misleading and deceptive conduct.

The claim by Jainran

Jainran commenced proceedings against Boyana for the return of the deposit by reason of:

- a. a contractual entitlement on rescission; or alternatively
- b. damages under the TPA for misleading or deceptive conduct in breach of [section 52](#).

Jainran also claimed damages against Mr Sgro under the TPA and FTA for misleading or deceptive conduct. Mr Sgro was the principal and sole director/shareholder of Boyana and was the only source of instructions to Boyana's real estate agents and solicitors during the transaction.

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Mr Sgro gave evidence that he was not aware of any reference to the road widening affectation. His lawyers submitted that, consistently with *Yorke v Lucas* [1985] HCA 65, Mr Sgro could not be liable unless he knew of the existence of the representations. Further, even if he was aware of the existence of the representations, it was necessary that he also have knowledge of their falsity before he could be found to be accessorially liable pursuant to section 75B of the TPA.

The decision at first instance

At first instance, his Honour Justice Bryson found that Jainran was entitled to rescind the contract and recover its deposit from Boyana as Jainran was induced to enter into the contract by material misrepresentations. His Honour considered that the answers provided in the requisitions form were misrepresentations amounting to misleading and deceptive conduct, as was the advertising brochure which represented that Boyana had a good relationship with the tenant. However, his Honour acknowledged that judgment against Boyana for recovery of the deposit was of no value as it was evident that Boyana had no resources and would not be able to satisfy any judgment.

His Honour also held that Mr Sgro was personally liable under the FTA¹ for the misrepresentations contained within the contract on the basis that he was the “human embodiment” of Boyana and “all its actions were his actions”. His Honour continued:

“Mr Sgro cannot escape liability for his engagement in misleading and deceptive conduct by showing that he did not know of the inclusion of the requisitions and answers, or of the Planning Certificate in the contract ... He no less engaged in the conduct of putting forward the contract in the terms it had and entering into the contract whether or not he had a full understanding of what he was doing; he can no more escape on this ground than Boyana can”.

The decision in the Court of Appeal

On appeal, Mr Sgro argued that there was no evidence that he had given instructions to include the relevant form of requisitions and answers. The Court of Appeal agreed that while Mr Sgro should not be held liable for contraventions by Boyana under the TPA, this did not dispose of the claim against him under section 42 of the FTA.

Their Honours followed the construction of an act done “*in trade or commerce*” from the leading judgment in *Houghton* and found that section 42 of the FTA requires neither intent, nor negligence on the part of the person engaging in the prohibited conduct. Accordingly, the fact that Mr Sgro may not have been aware of the existence of the statements in the contract did not relieve him of liability.

The Court of Appeal found that, just as the corporation is liable if it presents a contract to a purchaser containing statements which were in fact misleading and deceptive, so Mr Sgro was liable under section 42 of the FTA as he engaged in conduct of the same kind. The Court held that:

“It follows that His Honour was correct in concluding that Mr Sgro was directly liable for the misleading conduct because “he engaged in it” and “his liability is the product of his own conduct” and was not merely accessorial liability.”

Effect of decision for companies and employees

The effect of this decision is to arguably render redundant the accessorial liability provisions in the TPA insofar as employees, officers, directors of the company or business are concerned. This is due to the fact that plaintiffs are no longer required to prove the maker of the representation knew that the statement was false.

Under the various State Fair Trading laws, officers and employees may now be subject to a higher risk of being personally liable for acts undertaken within the course of their employment. This risk will be heightened in circumstances where a company does not have sufficient assets to meet an award of damages against it for misleading and deceptive conduct or in cases where the company has a sole director who engaged in the conduct.

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