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Misleading or Deceptive Conduct and Financial Institutions

Abstract
In this paper I wish to discuss overseas loan litigation as this is currently the most trendy area in which to dabble. I will concentrate on s 52 of the Trade Practices Act for the same reason. Nonetheless, it is important not to get tunnel vision. There are a large number of cases which deal with a financier's general obligationsmto explain documents for example. I will also deal with some of these obligations. Further, there is a tendency to regard s 52 prohibiting misleading or deceptive conduct as a type of Rosetta stone in the area and not adequately to consider the development of the common law in relation to unconscionable conduct, breach of contract and negligence. This is a tendency which must be resisted. There is no doubt that the law of unconscionable conduct and negligence is very much alive and well in all cases in which a writ has a financial institution as its recipient.

Keywords
trade practices, financial institutions

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MISLEADING OR DECEPTIVE CONDUCT AND FINANCIAL INSTITUTIONS*

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Introductory observations

There are, it seems to me, various types of entities which it is, at particular times, fashionable to sue. Much of the law covering misleading or deceptive conduct under s 52 of the *Trade Practices Act* was, for example, made in the Gold Coast boom days of the early 1980s. Inevitably, as drought follows deluge, bust follows boom. People no longer wanted their Gold Coast home units, many of which had been purchased 'off the plan'. So we saw the launch of a whole series of often innovative trade practices cases. This litigation was brought with mixed results. The applicants invariably alleged that a vendor or an agent had made some misleading representation about the views available from the units or about the height of the balcony rail and, because of this, the purchaser should be released from his purchase obligation. Much of the law of s 52 of the *Trade Practices Act* is found in these cases and the trade practices practitioner is indebted to Gold Coast developers and Gold Coast home unit purchasers alike for the enlightened manner in which they have freely used their funds for this purpose.

A second wave of litigation seems to have developed from commercial leasing. Business profitability was alleged to have been misrepresented by various vendors. The promised chaos of customers refused to present itself at the tenants' doors. The Myers, David Jones and Grace Brothers stores which had been faithfully promised as tenants in shopping centres failed to appear. Inevitably claims of misleading or deceptive conduct were made and s 52 of the *Trade Practices Act* was used as the chief weapon of the allegedly oppressed and downtrodden tenants.

Those involved with banks and financial institutions consider themselves to be the currently fashionable target of customers riding to battle mounted on their s 52 white chargers. They are probably right in this regard. The reason is known to us all. The gnomes of Zurich were very happy to lend at unbelievably low bargain basement interest rates. Australians were more than happy to borrow from the yodelling Swiss—and did so. The mercantile road to Switzerland, however, became strewn with casualties

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when the foreign exchange rate of the 'banana republic' more than justified the world's greatest treasurer's description of his country. The then Australian currency devaluation at what many regarded as being a roller coaster rate meant that the capital costs of loan repayments to the gnomes of Zurich escalated correspondingly illustrating, of course, that the principle of physics that 'for every action, there is an equal and opposite reaction' has its equivalent also in the field of economics. Destitute borrowers looked around for someone to blame. Who better than the party who arranged the transaction?

Now that the Australian dollar no longer hangs its head in abject shame, foreign loans litigation may be something of bygone days. The cases now coming to the courts are in respect of losses some years ago. Once again, the trade practices practitioner has to express thanks to a couple of sections of the community for the enlightened way in which they have spent, and are spending, funds to assist in a lawyer-led recovery of the economy.

The interesting thing about foreign currency litigation cases is that most of them are currently single judge decisions and many are unreported. I think at the moment that there is some considerable uncertainty and inconsistency in the whole area but, on the principle that lawyers are paid for their opinions and not their doubts, I will set out later the principles which I see as evolving from the decisions to date.

Initially in this paper I wish to discuss overseas loan litigation as this is currently the most trendy area in which to dabble. I will concentrate on s 52 of the *Trade Practices Act* for the same reason. Nonetheless, it is important not to get tunnel vision. There are a large number of cases which deal with a financier's general obligations—to explain documents for example. I will also deal with some of these obligations. Further, there is a tendency to regard s 52 prohibiting misleading or deceptive conduct as a type of Rosetta stone in the area and not adequately to consider the development of the common law in relation to unconscionable conduct, breach of contract and negligence. This is a tendency which must be resisted. There is no doubt that the law of unconscionable conduct and negligence is very much alive and well in all cases in which a writ has a financial institution as its recipient.

The importance of the evolving law of s 52 and breach of contract and negligence in relation to financial transactions is self evident. With but one major exception, all of the relevant cases cited in the text of this paper are decisions given within the last three years. The respondents named in such cases include the ANZ Banking Group, the Commonwealth Bank, the National Australia Bank, the Banque Nationale de Paris, the State Bank of New South Wales, Citicorp, Esanda and AGC. A more illustrious bevy of financial institutions would be hard to assemble. The fact that such a range of respondents has appeared in the recent cases may indicate that a significant number of major financial institutions may need to look to their managerial systems more thoroughly in the future than they appear to have done in the past.

AN OUTLINE OF SECTION 52 OF THE TRADE PRACTICES ACT

General points in relation to s 52

I will deal firstly with s 52 of the *Trade Practices Act* because this is what the title to my paper would lead you to think is my topic.

I am amazed that many lawyers still often have only a passing knowledge of s 52. It has, after all, been the law of the land for a decade and a half. It is little tribute to the speed at which lawyers adapt to change that many have still not heard of—or have only the vaguest of ideas about—s 52. Possibly this is because the exclusive jurisdiction of the Federal Court of Australia until recently made the legislation a little remote—something that will certainly change with the enactment at the State level of *Fair Trading Acts* and with cross-vesting legislation.

For the reasons stated, I will summarise what I regard as the more important relevant principles relating to s 52 which I will do without cluttering the paper by the citation of voluminous authority for the various points made.

Section 52 states, with simplicity rare in modern statutes, that a party:

> shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

The major general principles of interpretation of s 52 are:

(i) The section is expressed in general terms. It is aimed at having a broad reach and to prevent persons from being misled or deceived.

(ii) Misleading conduct involves no question of intent. The common law concepts of innocent and fraudulent misrepresentation, and the differences between the two, are, for example, quite irrelevant to s 52.

(iii) Misleading conduct is generally constituted by a misrepresentation but it does not have to be. Silence may breach s 52 when there is an obligation to reveal facts. In negotiations, there is a duty to speak out when:

- failure to disclose the whole truth makes the residue false
- active concealment of a fact may amount to a false statement that a fact does not exist
- failure to correct a false statement creates the impression that it is, in fact, true
- circumstances generally give rise to an obligation to disclose certain facts

(iv) The conduct involved is assessed not from the viewpoint of the traditional yardstick by which the law judges conduct—that is, from the viewpoint of the reasonable man. Conduct must be looked at in light of the class of persons to whom it is directed and must be assessed in light of the gullible and the uneducated as well as the astute and knowledgeable within that class. One case states that what must be looked at is the effect of conduct on 'the unsuspecting modest

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member of the community'. In other words, we no longer look after the person who rides in the Clapham omnibus. The person who missed the Clapham omnibus must also be taken into account.

(v) In order to claim damages, there must be a reliance upon the misleading or deceptive conduct. If a person knows the true situation and enters into a contract in such knowledge, he has no complaint whatever conduct is involved. Likewise if a party does not rely upon the conduct but would have entered into the contract whether or not the conduct took place, then he has no complaint. This is an important point in foreign currency transactions where a bank, for example, will have a defence if the customer knew the circumstances of currency fluctuations and took the risk or was determined to go ahead regardless of what was said about the proposed course. Although there must be reliance on conduct for damages to flow, it is not necessary that the conduct be the only contributing cause of the loss or damage. It is sufficient so long as the misrepresentation plays some part even if only a minor part in contributing to the arrangement and the losses which flow from it.

(vi) It is not a pre-requisite to recovery under s 52 that an applicant take reasonable care to protect his own interests. A party can proceed successfully under s 52 if misled notwithstanding the fact that he did not make such inquiries as a reasonable person would make to establish the true position.

Section 52 and representations as to the future

Section 52 is not breached purely because of the non-fulfilment of a promise when the time for performance arises. Likewise, if a prediction proves inaccurate, this does not, of itself, demonstrate that the maker of the statement made it without any, or any adequate, foundation.

In order for s 52 to be infringed, conduct must be misleading or deceptive as to an existing or past fact. Representations as to future matters cannot be true or false at the time they are made. Prior to 1986, s 52 could be infringed in relation to statements as to the future only if the person making the statement did not believe it or was recklessly indifferent as to its accuracy.

In 1986, s 51A was inserted into the *Trade Practices Act* the provisions of which specifically now cover what lawyers tautologously seem to refer to as 'future predictions'. Since 1986, if a statement is made as to the future, it will be misleading or deceptive unless made on reasonable grounds. The onus of proof in relation to demonstrating reasonable grounds lies on the person making the statement.

Section 51A has not had great relevance to foreign currency loan cases to date because of the time when such loans were generally taken out (pre-1986). However, the section does have immense potentiality in this area and anyone making statements as to the future must do so bearing the provisions of s 51A in mind.

Section 52 and subsequent contractual provisions

The provisions of s 52 in relation to subsequently concluded contracts are often also not completely understood in a number of circles. Again, I may be trite in covering the basic points. The law is that:

(i) A person cannot be deprived of his s 52 remedies if misleading or deceptive conduct is engaged in prior to contract.

(ii) 'Complete contract' clauses (ie clauses negating the effect of pre-contractual representations) are effective as a matter of contract but not to negate the effect of s 52. This is for a number of policy reasons, the most important of which is probably that parties cannot assert promissory estoppel to negate a statutory right of action. Another reason is that:

> If in fact the misleading conduct of the respondent has induced an applicant to enter an agreement, that inducement is not negated because, in the agreement itself, the applicant says to the contrary. Of course the fact that the applicant so says may bear upon the question whether he or she should be believed in asserting that the misleading conduct was an inducement, although in the case of a printed exclusion clause this may be of little moment . . . it would seem that it must always remain a question of fact whether . . . (a) disclaimer has succeeded in negativing . . . (a) representation.[1]

(iii) Section 52 has created a right of action for innocently inducing a person to enter into a contract. No such right of action exists at common law. At common law a non-fraudulent misrepresentation inducing entry into a contract is not actionable unless the misrepresentation is also a term of the contract. If the misrepresentation is a condition of the contract, rescission and/or damages are available. If the misrepresentation is a warranty, only damages are available at common law. In the case of misleading or deceptive conduct, the problems of distinguishing conditions from warranties are not relevant and a remedy is available regardless of the answer to these questions. Further, an action is available in respect of the inducement regardless of whether such inducement forms a term of the contract.

Section 52 and opinions

An opinion is not a representation and does not give rise to a breach of s 52 if it is incorrect. However, caution still has to be exercised in giving opinions. An opinion may convey that there is a basis for it, that it is honestly held, and when it is the opinion of an expert, that it is honestly held upon rational grounds involving the application of the relevant expertise. If this is not the case, the expression of an opinion will be regarded as misleading or deceptive conduct.

1 *Collins Marrickville Pty Limited v Henjo Investments* (1987) ATPR 40-782 (Wilcox J).

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HOW HAVE SECTION 52 AND OTHER DEVELOPMENTS IN THE LAW AFFECTED BANKS AND FINANCIAL INSTITUTIONS IN RELATION TO FOREIGN CURRENCY DEALINGS?

The case law in relation to foreign exchange liability is a highly unscientific amalgam of s 52 claims and claims at common law for negligence and/or breach of contract, all such pleadings generally being run in tandem. The cases, I believe, fall into the following groups:

(i) Cases which establish various principles as to what will and what will not constitute a breach of s 52.

(ii) Cases in which s 52 conduct has been established but the applicant has, nonetheless, failed because reliance on the conduct has not been demonstrated.

(iii) Cases in which a s 52 claim has not succeeded (either because s 52 conduct has not been established or has not been relied upon or, in the case of cases brought in State courts to date, has been unable to be pleaded) but the applicant has succeeded in negligence or breach of contract at common law.

(iv) Cases involving damages assessments.

Cases which establish principles as to what will and what will not infringe s 52

In *Cedric Constructions v Elders,*[2] it was claimed that Elders was in breach of s 52 in that it had represented, amongst other things, that it offered financial services which would result in financial benefit to the applicant and that foreign currency dealings would have minimal risk. Einfeld J dismissed the claim on the basis that the statements made were statements as to the future and could not be true or false at the time they were made. Statements as to the future at the time of relevance had, in order to be actionable under s 52, not to be believed by the maker of the statement or had to be made with recklessness or indifference. Section 51A if it had been available at the time may perhaps have made the case more difficult for Elders. Whilst the result of the case in the ultimate may have been a correct one, I tend to think that Elders was treated somewhat kindly on the s 52 point.

In *David Securities Pty Limited v The Commonwealth Bank of Australia*[3] it was alleged that the manager of the Commonwealth Bank had said that it would be advantageous to borrow in Swiss currency. No warning was given as to the possibility of exchange rate fluctuations. The court found no s 52 breach because any initial misleading or deceptive conduct which may have occurred was corrected prior to the transaction being entered into. This correction was by advice given over a considerable period of time prior to the bank's customers finally committing themselves.

The importance of the case is the clear finding of Hill J that a statement that a representation which offers 'cheap money' but fails to advise of the potential of currency fluctuations can constitute misleading or deceptive conduct under s 52. His Honour also held that misleading or deceptive

2 (1988) ATPR 40-879.

3 Federal Court of Australia (Hill J): 11 May 1989. Unreported at time of writing.

conduct may come about no matter how informal the occasion upon which the advice was given.

It is, therefore, quite crucial, in order to avoid liability that parties represent the whole of the transaction—including the possibility that exchange rate fluctuations may, in fact, make the transaction quite expensive. One should also be careful not to become too generous in advising at cocktail parties!

In *Chiarabaglio v Westpac*[4] the question was whether a representation that an offshore loan was without significant risk and that it was 'good business' to so borrow constituted a breach of s 52. Foster J had no difficulty in finding a breach of s 52. His Honour held that:

(i) Even allowing for the bank manager's statement as to the absence of significant risk being a statement of opinion rather than of fact, there was no reasonable basis for the opinion held; and

(ii) A person such as Mr Chiarabaglio (who was Italian with limited English and had genuine difficulties in oral comprehension, expression and reading) should have been given:

> a most careful explanation of offshore borrowing with clear emphasis on the 'open ended' nature of the risks associated with it, together with a clear and detailed exposition of the steps such as short term hedging which the borrower would himself be required to undertake in order to exercise some control over those risks.

Even allowing for the difficulties Mr Chiarabaglio had in using and understanding English, the standards of explanation and disclosure required by His Honour are obviously very high. The detailed explanations are ones which probably have to be given to all customers—not just those having language difficulties.

The *Chiarabaglio Case* also demonstrates the importance which can attach to contemporary diary notes and indicates the importance of contemporary record keeping.

Cases in which s 52 conduct has been established but the applicant has, nonetheless, failed because reliance on the conduct has not been demonstrated

The most interesting case in this area is probably *Kullack v ANZ Banking Group.*[5] Mr Pincus J in that case found that, even if the bank had not fully advised of the legal repercussions involved in a foreign currency transaction, the customer had not relied on the bank in entering into the transaction. Furthermore, in any event, the applicant was aware of the fact that exchange rates fluctuated and foreign currency loans had risks which did not accompany loans in domestic currency. In claiming such a lack of knowledge, His Honour found that 'the applicant exaggerated her commercial or pecuniary naivety'.

4 Federal Court of Australia (Foster J): 21 July 1989. Unreported at time of writing.
5 (1988) ATPR 40-861.

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Reliance is a matter often overlooked by many when considering s 52. It is an important aspect in any damages claim. Put simply, reliance may be rebutted by showing that a person:

- knew the true facts; or
- did not rely upon the representation in entering into the transaction.

The question of reliance is a cardinal one in explaining why applicants in s 52 cases are usually under some disability of age, infirmity or language. The business person frequently has problems in recovering under s 52 because the court generally thinks that such persons are well aware of the fact that currencies do, in fact, fluctuate. Indeed, now that the dollar rate is quoted on just about every news bulletin, the courts in the future may well be inclined to hold that the general public, even perhaps the 'unsuspecting modest member of the community', is fully aware of the yo-yo qualities of our currency.

Cases in which an applicant has succeeded in negligence or breach of contract at common law

Negligence and/or breach of contract at common law have been far more successfully used in foreign currency loan cases than s 52, notwithstanding the wider press appeal of s 52. Indeed, it is fair to say that successful cases to date have all fundamentally been cases based on common law pleadings.

The first point in establishing a common law breach is to ascertain just what the relationship between the parties was. If a bank, for example, refers a customer to an independent adviser believed by the bank to be competent, then the bank cannot be in breach of any duty to advise on the matters upon which the customer retained the adviser.[6]

It is very important, I believe, that any advice retainers be properly documented. This is protection to the bank but it is also of importance to any adviser retained by a customer. In *David Securities v The Commonwealth Bank,*[7] for example, an initial request for advice was made to a practising accountant. The accountant claimed that he had never accepted instructions to advise the applicant on foreign exchange matters generally or to manage his loan. The court found that the accountant would have been correct in this regard on the basis of his initial instructions. However, it was found that the reliance of the client on his adviser was based not only on the initial instructions but upon subsequent conversations and conduct. It was found that the accountant's retainer had thus been extended, that the retainer included an obligation on the part of the accountant to look after the loan and that this obligation was accepted by the accountant. The court had difficulty in establishing the various specifics as to how the retainer had been extended. Nonetheless, it was of the view that, after a period of time, an extended retainer had been accepted.

6 above n 3.
7 above n 3

The Banker-Customer relationship does not give rise to an implied contract to advise on loan management

In some cases, it has been asserted that an implied contractual obligation to advise on risk management techniques throughout the period of a foreign loan should be part of the banker-customer relationship. This argument is a valid one only if the circumstances exist which, as a matter of general law, give rise to an implied contractual obligation to this effect. Some of these circumstances are:

(i) that the implication of such a term is necessary to give business efficacy to the contract;

(ii) that the implied term is so obvious that it goes without saying; and

(iii) the term is not inconsistent with any express term in contractual arrangements between the parties.[8]

It is clear that it will not be a usual case where an implied contract will arise to advise on risk management throughout the period of a foreign loan.

The Banker-Customer relationship does not give rise to a duty to pass on information relevant to risk management decisions

Another attempt to impose liability on banks because of their bank-customer relationship has been to seek to imply a term in such relationship that a bank should pass on to a customer information received during the course of a loan which is relevant to risk management decisions. This has been claimed to be a bank's duty because it possesses special skills or sources of knowledge in foreign exchange markets and it is reasonable for the customer to expect the bank's experience and skill to be made available to the customer. Such a claim has, to date, been held not to be a part of the general bank-customer relationship as to accept the proposition would impose an intolerable burden on bank.[9] There is, of course, no reason why such an obligation cannot be entered into as a matter of specific contract. For example, a duty of care may be implied where:

> the defendant bank has involved itself far more closely than a mere arm's length agreement to lend a sum of money . . . (the relationship being) not just that of acting as a banker on behalf of its customer . . . there was both the professional banking element in the transaction and the personal rights and duties of a bank lending money to a group of people in the particular way in which (the) transaction was set up . . . clearly the plaintiff relied upon the defendant bank (for specialist knowledge and advice).[10]

An obligation to monitor loans or supply information is not, however, imposed on banks by virtue alone of the banker-customer relationship.

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8 above n 3.

9 above n 3.

10 *Foti & Ors v Banque Nationale de Paris*: Supreme Court of South Australia (Legoe J): 17 March 1989. Unreported at time of writing.

If a contractual relationship or a duty of care arises, what are the performance obligations involved?

If a contractual relationship or a duty of care is found, the question then arises as to the obligations of a bank or financial institution in performance terms.

The one aspect which clearly comes from the decisions to date is that an adviser has no obligation to guarantee success in foreign loan transactions.[11] This is because there is no scientific basis upon which forecasts can be made as to the movement of currency. Some operators are better than others but ultimately it is a gamble. No foreign exchange adviser is capable of always being correct.

Courts have, however, held banks, financial institutions and foreign currency advisers liable when such institutions have undertaken express obligations to manage funds or advise customers and have not done so or have negligently done so. The liability imposed is not one for failure to succeed but for failure properly to manage and advise.

The most obvious case of contractual or negligent breach is when the adviser simply does nothing at all.[12] Secondly, there can be a breach should there be careless management and negligent advice or failure to advise after the loans have been taken up and were in operation at rollover times. Thirdly, there can be negligence in failing to advise about hedge contracts and their availability.[13]

If a party adopts the role of advisor, without qualification as to his expertise, he accepts the responsibility of advising at the level of an advisor of ordinary competent skill and experience in foreign exchange borrowing. This involves a full and proper explanation of the nature and effect of the transaction. All matters must be put before a borrower which would affect his decisions in relation to the loan. Matters in relation to short term and long term hedging should be advised. This duty of care is at its highest when the threshold question is being considered—that is, whether a foreign currency loan should be engaged in at all.[14] In making such an assessment, the courts have held that it is important that hindsight does not produce a distorted version of the reality at the time the matter is being considered.[15]

Cases involving damages assessments

Even if a bank or financial institution is held liable in negligence or for breach of contract, it may not follow that any damages are payable. There is still the question of causation to be considered. In most cases of negligence or contractual breach, it will be readily inferred that the applicant relied upon the wrong advice or negligent act involved and that, as a consequence, damage was suffered. Provided the damage was reasonably foreseeable, the applicant will be entitled to succeed.

11 above n 2, n 3 and see *Lloyd v Citicorp & Anor* (1986) 11 NSWLR 286 (Rogers J); *Stafford v Conti Commodity Services Ltd* [1981] 1 All ER 691.
12 As in the case of the accountant in *David Securities Pty Limited v The Commonwealth Bank of Australia* (above n 3).
13 above n 10.
14 above n 4.
15 above n 4.

In *David Securities v The Commonwealth Bank,*[16] the advice of a private practising accountant was relied upon and the relevant obligations of the accountant to give proper advice were found to exist. The customer had been referred to the accountant by the Commonwealth Bank. The accountant, in fact, did nothing. Clearly he was negligent. However, the court found that no damages were payable. Even if the accountant had monitored the loan and advised the client on the possibility of selective hedging (at a cost to the client), it was not demonstrated on the balance of probabilities that the client would have taken any action to avoid the loss. It could not be inferred that the client would necessarily have acted other than as it did. Furthermore, the obligation of the accountant was found to be only to provide the relevant information to the client from time to time. The client would then, presumably, have had to seek expert opinion as to what it should do. The evidence in the case was that there was complete disagreement between the experts as to what would have been the most appropriate action to be taken at any particular point in time. One course of action was no more probable than another. In the circumstances, the court was unable to form a view one way or the other as to what would have been done if the client had received expert advice at various points of time.

If the experts are in agreement, however,[17] this avenue of escape will not be available. If, therefore, experts agree that certain hedging should and would have been engaged in at a particular time, there will be liability imposed for a failure to so advise.

Damages calculations depend upon the circumstances of each case. In this regard:

- it is not necessary for an applicant to prove damages with exactitude;
- the existence of a contingency which is dependent upon the volition of a third person does not necessarily render damages for breach of contract incapable of assessment;
- where actual loss has occurred, the court must award more than nominal damages; and
- the court must do its best to quantify loss even if a degree of speculation or guessworkis involved.[18]

THE OBLIGATIONS OF FINANCIERS IN RELATION TO LOANS AND DOCUMENTATION GENERALLY

It is appropriate to make some observations on the expanding law in relation to the more general obligations of financiers.

There have been, of recent times, expanding frontiers in terms of contractual performance and duty of care obligations. In particular, the concept of unconscionable conduct has both become a part of the law of torts and has been specifically written into the *Trade Practices Act* (s 52A) and the *Fair Trading Acts* of the various States.

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16 above n 3.
17 As in *Foti* (above n 10).
18 *Foti* (above n 10) and cases there cited.

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Commercial Bank of Australia v Amadio

The leading case on unconscionability is the 1983 High Court decision in *Commercial Bank of Australia v Amadio.*[19]

In *Amadio*, the Court held that unconscionable conduct occurred when a stronger party attempted to enforce, or retain, the benefit of a dealing with a person under special disability when it was not consistent with equity and good conscience for this to be done.

Amadio was decided in the context of a fiduciary relationship. Section 52A of the *Trade Practices Act* and kindred State legislation make unconscionable conduct actionable whether or not a fiduciary relationship is involved provided that the goods or services involved are of a kind ordinarily acquired for personal, domestic or household use or consumption.

A person may be under special disability in a wide range of circumstances. Unconscionable conduct is a little like the views of the United States Supreme Court on pornography. It is hard to describe but you know it when you see it. Mason J (as he then was) put the matter in the following way in Amadio:

> Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is unable to make a worth-while judgment as to what is in his best interest.

Unconscionable conduct: The Trade Practices Act—s 52A

Section 52A(2) of the *Trade Practices Act* and akin State legislation sets out various factors which may be taken into account in assessing whether or not conduct is unconscionable. Some of these factors are:

- relevant bargaining strengths of a corporation and a consumer;
- whether conditions are imposed which are not reasonably necessary for the protection of a corporation's legitimate interests;
- whether a consumer is reasonably able to understand relevant documents;
- whether undue influence or pressure or unfair tactics were used against a consumer.

For present purposes, probably the most frequent claims to date in respect of unconscionable conduct (whether pleaded in terms of negligence, in terms of the *Trade Practices Act or the Fair Trading Act* of the various States) have involved:

- a party under disability (usually a literacy, age or mental disability); and/or
- lack of understanding of the true effect of a document either because of the complexity of the document or because of an inadequate or incorrect explanation of it.

19 (1983) 46 ALR 402.

Inaccurate explanation or completion of documentation

Levenson-Gower v Esanda[20] involved documentation executed in blank. The assurance of an Esanda employee was given that the documentation would be completed in accordance with prior arrangements. The documentation was not so completed. Relief was given under s 52. In *Kennard v AGC (Advances) Ltd,*[21] documentation was said to be a 'third party mortgage' which did not put any part of a Kennard's share of a property at risk. Kennard held the property as co-owner with one Demster and Demster was mortgaging his share of the property to AGC (Advances) Ltd as security for a loan. In fact, the mortgage, when executed, made Kennard fully liable for Demster's obligations and contained no provision protecting Kennard's equity. The court, not surprisingly, rectified the situation. In relation to an argument that Kennard knew what he was doing because of the documentation he had signed, Pincus J commented that:

> . . . the mortgage contains a great deal of verbiage which is inapplicable to the circumstances of the case and might with advantage have been deleted; but even if it had been, I think few laymen would undertake the task of analysing such a complicated document to ascertain its true effect.

His Honour held that there was a duty of positive disclosure as to the effect of a document 'where there are some unusual features in the particular case relating to the particular account which is to be guaranteed'.

Guarantee documents

Guarantee documents are documents of particular importance and documents in relation to which courts have had much to say. From two cases (*Nobile v The National Australia Bank*[22] and *S.H. Lock Australia Ltd v Kennedy*)[23] and from other relevant decisions, the following conclusions can be drawn specifically in relation to guarantees but with perhaps also wider ramifications:

(i) A financier should not induce the execution of a guarantee document by a statement as to the trading position of the guaranteed entity which is misleading or deceptive. Thus, if a representation is made that a company is 'trading satisfactorily', a right of action will arise if the company in fact is trading in a manner which exceeds its overdraft limit.

(ii) A transaction may be set aside as unconscionable conduct where there is a 'special disability' which the guarantor suffers in dealing with the creditor. The onus of showing that conduct is fair is on the financier if the conduct is challenged.

(iii) Other factors in the assessment of unconscionability are:

- whether the guarantor parties, if called upon to pay pursuant to the guarantee would have lost all their assets, and they were not fully advised of this consequence;

20 (1986) ATPR 40-647.
21 (1986) ATPR 40-747.
22 (1987) ATPR 40-787; (1988) ATPR 40-858.
23 (1988) ATPR 40-859 (NSW Court of Appeal). This case was brought under the *Contracts Review Act* (NSW). The broad principles of review under that Act are akin to those under section 52A of the *Trade Practices Act* and the Court (notably Priestly J A) relied extensively on the principles set out by the High Court in *Amadio* (above n 19).

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- whether the security was for advances and obligations *already made or incurred* rather than for new obligations;
- whether the transaction was one into which parties would not have entered if they had been separately advised;
- whether the transaction was one where it was plainly foolhardy and wrong for the parties to risk all their assets in a failing business in which they had no involvement or interest;
- whether the contract of guarantee was very much to the disadvantage of the guarantor parties;
- whether the contract of guarantee was very much to the advantage of the financier in securing repayment commitments;
- whether the guarantors are under a special disability as regards their relationship with the financier. There is an onus on the stronger party to justify the transaction as fair, just and reasonable if the transaction is challenged.

It may be unconscionable that a bank manager, if in a conflict of interest situation, does not advise parties that they should seek independent advice. In *Nobile* it was said by the Full Federal Court that the circumstances of the case 'called out for the parties to be given the opportunity to take separate advice'.

It may be unconscionable if a document is executed which is contrary to the arrangements made between the parties. Thus if an arrangement is made as to limited liability and the document executed imposes unlimited liability, unconscionability will result. Further aspects which may be considered in unconscionability are:

(i) Whether a false picture of the arrangement was given—for example was the liability imposed by the document immediate when it was said that it would be postponed?

(ii) The potentiality for injustice at the time the document is executed. For example, the amount outstanding by the principal debtor may be extremely high but this is not explained to a guarantor.

(iii) The circumstances of the execution of the document. Unconscionability may result if a document is simply given to a party to sign without any explanation being given of any of its terms and without the party reading it or understanding it. In *Lock (Australia) Limited* for example, Priestley J said:

> It seems to me unjust in the circumstances that the moneylender obtained a signature to a virtually unread document containing a term having little relation to the substance of what the parties were doing.

A Banker's duty of confidentiality

A banker's duty of disclosure can come into conflict with its duty of customer confidentiality. The duty of confidentiality can work in favour of banks on occasions. In *Kabwand Pty Ltd v National Australia Bank*,[24]

24 (1989) ATPR 40-950.

it was argued that the National Australia Bank should have disclosed information relating to one customer to another customer of the bank and that the failure to do so constituted silence in circumstances where there was a duty on the bank to speak out. The bank's conduct, it was alleged, thus constituted misleading or deceptive conduct under s 52 of the *Trade Practices Act.* Lockhart J canvassed the law concluding that, in various circumstances, there was a duty to speak out if conduct was not to be regarded as misleading or deceptive. However, the bank's duty was not to speak out in relation to a customer's affairs but to keep such affairs confidential—the direct opposite of what was being argued against the bank.

Conflicts of disclosure and confidentiality probably arise most starkly in guarantee situations. In such a case, the guarantor may want to know precisely what he is guaranteeing and it is important that the bank accurately represent the facts to a guarantor.

There is currently disagreement amongst learned commentators as to whether a bank has the implied authority of its customer to disclose customer information to a guarantor.[25] The case law is also not clear in all respects.[26] One recent learned commentary[27] suggests that the safest, and the usual course, is to arrange for a joint meeting between the guarantor, the customer and the banker at which the guarantor may, in the customer's presence, ask for information on any matters concerning the customer's affairs.

What banks particularly have to watch, in light of s 52 of the *Trade Practices Act*, is giving generalised opinions or opinions which tell only part of the story. Giving such opinions can be held to constitute the making of positive representations which, if misleading or deceptive, can give rise to a successful s 52 action against the bank.

Banker's opinions

Banker's opinions can also be subject to s 52 scrutiny. Banker's opinions must conform with the general law of s 52 as it relates to opinions. The law in this regard is set out earlier in this paper.

An opinion does not have to be a studied or a detailed written opinion in order to bring out the litigious urge in customers. The ANZ Banking Group was sued by one Stanton[28] because its employee had offered the opinion that a person was 'a good bloke' and that 'he would not do the

25 Lord Chorley, *Law of Banking* 6th ed 1974 p 335. cf *Paget's Law of Banking* 9th ed 1982 p 502.

26 *Ross v Bank of New South Wales* (1928) SR (NSW) 539 says that a guarantor is entitled to demand from a bank information as to the balance then owing, the interest rate and the amount, if any, realised by the bank in respect of collateral securities. This is not a complete statement of what can be disclosed and is not a statement of what cannot be disclosed. In *Goodwin v National Bank of Australasia* (1968) 42 ALJR 110, Barwick C J stated that a bank is bound to disclose to an intending surety anything which has taken place between the bank and the principal debtor 'which was not naturally to be expected'.

27 J M Walter and N Elrich: 'Confidences—Bankers and Customers: Powers of Banks to Maintain Secrecy and Confidentiality' 63 ALJ 404, 418. The view expressed endorses that in Milnes Holden *The Law and Practice of Banking* 4th ed 1983 p 75.

28 *Stanton v ANZ Banking Group* (1987) ATPR 40-755.

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dirty on anyone'. The case was unsuccessful because the opinion was, to the employee's knowledge, true when expressed. It did not constitute misleading or deceptive conduct merely because the eulogised party did, in fact, 'do the dirty' on Stanton. The case does illustrate, however, the necessity for care in expressing even the most casual view as to a person's financial status and character.

The Trade Practices Act—Section 74

I draw to the attention of readers the fact that s 74 of the *Trade Practices Act* provides that there is an implied term in a contract for the supply in the course of a business of services to a consumer that the services will be rendered with due care and skill. There is a further implied term that if a consumer makes known the particular purpose for which the services are required or the result which he desires to achieve, then such services shall be reasonably fit for the purpose or shall be of such a nature and quality that they might reasonably be expected to achieve that result. This is so unless the supplying entity can show that the consumer did not rely, or that it was unreasonable for him to rely, on the supplier's skill and judgment. A consumer is a person acquiring services of a value less than $40,000.00 or in relation to matters ordinarily acquired for personal, domestic or household use or consumption.

Prior to 1986, the *Trade Practices Act* warranties were not nearly as strict as at present.

Despite what appears to be a great potential for litigation against financiers under s 74 of the *Trade Practices Act*, I know of no case where the section has been used by a customer against a bank or financial institution.

State Banks

A recent decision[29] held that the Trade Practices Act did not apply to the State Bank of New South Wales. This is the decision of a single judge of the Federal Court (Mr Wilcox J). I think it is probably wrong. In expressing his views, his Honour said:

> In reaching (my) conclusion I am aware of the seriousness of the step which is involved in a judge, sitting at first instance, disposing of an important aspect of a case upon the basis that an enactment of the Commonwealth Government is . . . constitutionally invalid . . . Fortunately, any such determination is reviewable upon appeal.

I understand that the case is on appeal. It is my belief that the decision of His Honour will be reversed.

Advertising Practices of Financial Institutions

It is not the prime purpose of this article to discuss the advertising practices of financial institutions. There is little doubt that much financial advertising in relation to deposits and loans leaves a good deal to be desired. Such advertising must comply with the general requirements of s 52. The Trade Practices Commission has published a valuable Information Circular on this subject entitled '*Deposits and Loans: Their*

29 *Bourke v State Bank of New South Wales* (1989) ATPR 40-924.

Advertising and the Trade Practices Act'. I commend this Circular to all financial institutions engaging in advertising. The Circular also has in it a valuable check list. The prime test is encapsulated in the Circular in the following words:

> A safe test for all promotional material (is): Is what it states the truth and does it convey, overall, a truthful impression? In relation to the latter point, it should be understood that what is *not* disclosed can sometimes be as misleading as incorrect statements.

Sources, other than the case law, which indicate concern as to the practices of Banks and financial institutions

Case law, of course, is often only the tip of the iceberg. The problems of banks and financial institutions and their managerial systems may be far deeper than is apparent from the litigation. Some support for this suspicion is contained in Clem Mitchelmore's *Rural Credit Inquiry* of 1987 in New South Wales. Mr Mitchelmore is Deputy Chairman of the Commercial Tribunal of New South Wales. His report showed numerous breaches of the NSW *Credit Act* by financial institutions and attempted by-passing of that legislation. Compliance with the *Credit Act* is not the subject of this paper. What is, however, disturbing from Mr Mitchelmore's report is the citing of transactions such as:

- A finance company saying that 'leasing is the only form of financing available' when this was not the case.
- The misleading of customers by banks imposing undisclosed or misleadingly disclosed 'charges' which could have the effect of increasing interest rates by up to two per cent. One accountant described these charges as the 'fudge factor'. Perhaps the most dramatic illustration of the point was that of a farmer whose account was debited $31,700.00, the debit being described, without further explanation, as a 'Miscellaneous Debit'.
- The non-disclosure by banks of interest rates or as to how interest was calculated. There were many cases reported of the inability of bank managers to explain interest rate calculations.
- Interest charges being debited at variable times at the whim of banks.
- Letters forwarded by banks in relation to interest charges not revealing the true picture. For example, a letter saying that interest will be charged quarterly instead of half yearly may completely omit to advise the customer of the effect of this change on the amount the customer is ultimately required to pay. This point may not be mentioned at all. Nor may it be mentioned that the change in practice amounts to an effective increase in the rate of interest.
- Incomprehensibility of documentation.

It is not the purpose of this paper to underwrite the Mitchelmore Report. However, there is a tendency, I believe, for litigated cases to be explained by some financiers as being 'one off' and not repeated elsewhere. The Mitchelmore Report gives credibility to the argument that the

managerial systems of financial institutions appear to require investigation on more than a 'one off' basis.

A managerial checklist of relevant principles

It is not for me here to attempt to devise a general managerial checklist for banks and financial institutions. Neither could I do so on a general basis. The problem is one to be solved in an 'institution-specific' manner.

Having said that, however, I think the principles which should be looked at in looking at any managerial system with the purpose of avoiding legal liability can be broadly stated as follows:

(i) Is the bank or financial institution's branch manager (whom I will assume for present purposes is the customer's first point of contact with the institution) competent to give advice? Any system should segment those matters where it is thought that the manager is competent from those where he is not.

(ii) As regards those matters in respect of which the manager is not competent, does the system provide for referral of the customer to independent legal and/or financial advice? The system should provide for any oral statements to be followed by written confirmatory advice. The manager should make clear in relation to such matters that the institution he represents does not hold itself out as being competent to give advice and does not do so.

In view of the problems shown up by the case law in relation to guarantees, I believe that guarantee transactions are transactions where a guarantor party should always be referred to independent advice.

(iii) As regards those matters where it is thought the manager is competent to give advice, the following aspects should be noted:

(a) if there is any conflict of interest between the institution's position and that of the customer, the customer should be referred to independent legal and/or financial advice.

(b) if there is any question that the customer is under some disability by virtue of age, language or mental capacity, the customer must be referred to independent legal and/or financial advice.

(c) in many cases, it may, in any event, be wise to refer customers to independent legal and/or financial advice even if they do not appear to be suffering the usual disabilities. This is because it could well be held that the financial documentation itself is incomprehensible and the customer did not know what he was signing. [See also (vii) below.]

(d) there should (regardless of whether or not a customer is referred to independent legal and/or financial advice) be 'follow up' correspondence with the customer which clearly sets out the proper position. This is to ensure, so far as it

can be ensured, that any misleading representations are corrected prior to the customer finally committing himself to the transaction.

(iv) Full diary notes should be kept by the manager.

(v) Complete information should be given at all times and this should be confirmed by correspondence. A settled form of letter tailored for various forms of transaction will limit the possibility of inadequate disclosure or non-disclosure in respect of transactions. It is to be remembered that non-disclosure of basic information may be misleading or deceptive conduct. Inadequate or partial disclosure of such information is certainly misleading or deceptive conduct.

(vi) The basis upon which documentation is to be completed must be clearly stated. It is, I believe, quite inadequate to send a general authority to a customer authorising completion of all blanks without further explanation as to how the blanks are, in fact, going to be completed.

(vii) If documents are not clear, then the customer should be referred to independent advice in respect of them. Key terms should be explained. I believe, for example, that it is very doubtful if an authority to debit all the bank's 'usual charges' is any longer adequate. I am probably quite cynical but I believe that the documentation of most financial institutions is quite incomprehensible—at least to lay persons. I, therefore, believe that there is much to be said for a managerial policy that all customers are referred to independent advice as regards documentation. At the very least, the effect of complex documentation should be explained by covering correspondence. The alternative to this is for financial institutions to re-write all their documentation in 'plain English' style—something to be highly encouraged but which does not appear to have been embraced with enthusiasm by many financial institutions to date.

(viii) Banker's opinions, when given, should be confined to already known facts. This is not difficult but needs some education of staff. It is just as useful (and, indeed, is more accurate) to say: 'Our institution has had no experience whereby Mr X has paid other than in accordance with arrangements' as it is to say 'We believe that no institution has any cause for concern as to Mr X's capacity to pay and no institution to date has had any such concern'. The second statement warrants the future and contains other material which, if incorrect, grounds a s 52 action. The first statement relates to the past, can be objectively verified and says nothing about other institutions.

(ix) The question which is often put is whether a financial institution having referred a customer to independent advice, does, in fact, have to ensure that the customer seeks such independent advice. My view on this is that the financial institution does have to ensure that the independent advice is, in fact, obtained. Amongst the loan or other documentation

held by the financial institution should be a certificate from the independent advisor (in most cases, probably an independently instructed solicitor) to the effect that he has advised on the documentation. This certificate should be one which is drafted by the financial institution and completed by the solicitor and not one drafted by the solicitor giving the independent advice.

The reasons I put for a financial institution requiring that a party referred for independent advice in fact seek it are as follows:

(a) If a party is in a position of disability and referred for independent advice, I think it is highly likely that the courts will hold the financier under an obligation to ensure that such advice is sought. Though I know of no such case to date, I think it highly likely that the courts, if pressed, would hold this to be part of a financier's obligations.

(b) It is not a bar to recovery under s 52 of the *Trade Practices Act* that an applicant has not taken reasonable care to protect his own interests. Thus an applicant can proceed against a financial institution if he claims a misrepresentation by that institution in respect of documentation. This is so, in my view, even if the institution has referred him elsewhere but the institution's advice has not been heeded. The only way in which a financial institution can defeat a claim for misrepresentation, in my view, is by a demonstration that the customer knows the true situation prior to embarking upon the transaction. It is only by *actually taking* independent advice that this occurs.

(c) Independent advice is relevant to reliance and thus upon damages liability. If a party takes independent advice in relation to documentation, it is reasonable to suggest that the party relies upon the advice he receives—and thus not upon that the financial institution gives. The financial institution should ensure that this is the situation in fact and that the situation is so documented—by way, for example, of confirmatory correspondence.

It should not be thought that independent advice will necessarily be cheap. In many cases, indeed, the independent adviser may have to go through extremely complex documentation and a possibly extremely complex fact situation. No doubt the independent adviser will be happier to advise if the financial institution takes appropriate steps to obtain the consent of the potential client to pay such adviser and undertakes to do so.

It may be said that independent legal advice adds to the cost of financial transactions. Some may say that this is a needless addition to financing costs. I cannot argue with those who look at the matter in this way. However, the courts have imposed standards in relation to financial transactions. Well trained staff of a financial institution may be able to comply with these standards. It is obvious, however, that independent

advice is the best safeguard. It is only this, which, ultimately, in my view, the courts will respect. Any system which operates to less exacting standards has inbuilt risks built into it.

(x) In relation to advertising by financial institutions, an obvious check is to follow the terms of, and the check list in, the Trade Practices Commission's Information Circular entitled *'Deposits and Loans: Their Advertising and the Trade Practices Act'*.

Concluding comments

There are some who bewail the new trends in the law as they affect financial institutions. Whilst recognising the problems entailed, I must say that I am not one of the bewailers. I think sometimes that lawyers, because they are lawyers, tend to ascribe magical meanings to certain documents and their wording. To hold, as by and large the common law has done, that a party can say or do virtually anything so long as its documents are right seems to me to fly in the face of reality. Those unblessed with legal knowledge could well regard the law as being quite unusually stupid in relation to some of its principles, many of which appear to be aimed at precluding an assessment by the courts of the actuality of transactions. For myself, I believe that the recent developments in the law are merely bringing it into line with what laypersons would assume it to be, and always to have been. I believe this to be a sensible development and one which should be welcomed by responsible business. It is, however, a development which involves considerable re-thinking in relation to training and in relation to a number of the managerial systems and practices currently adopted by a substantial number of financial institutions.

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