

THE LANGUAGE OF NEGOTIATION: WHO CARES ABOUT THE LIABILITY?  
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THE LANGUAGE OF NEGOTIATION:  
WHO CARES ABOUT THE LIABILITY?

An exploration of the liability of developers and agents under  
Trade Practices  
and Common Law for misleading and unconscionable conduct.

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KEY WORDS \_\_\_\_\_

Increase in agents and developers liability - new provisions in  
Trade Practices Act ss 51A, 51AA, 51AC and 52 discussed -  
misleading, deceptive language and conduct - silence, disclosures,  
future expectations - disclaimers and indemnities.

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ABSTRACT \_\_\_\_\_

There has been a marked increase since 1990 in the number of court  
decisions exposing the culpability of developers, landlords and  
agents for practices amounting to misleading, deceptive or  
unconscionable conduct in the negotiation of property dealings.  
This paper examines a number of cases where disclosures were not  
founded on reasonable expectations or were misleading due to the  
language and conduct of the negotiators. The appropriate use of  
indemnities and disclaimer clauses is demonstrated in recent  
Federal Court decisions.

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The federal courts have had their fair share of shopping centre developers, leasing agents and disappointed tenants in recent times. The court's judicial findings often highlight misleading representations concerning the characteristics of a shopping centre or unrealistic projections of the centre's future performance, and not infrequently the court's criticisms are levelled at the unconscionable conduct of representatives who, in their enthusiasm to conclude a deal with prospective tenants, sometimes neglect to consider what is fair and reasonable for all concerned.

To be fair to the courts, judges usually go to considerable lengths to explain in broad language why a developer's dream fell seriously short of what was promised or reasonably expected. From one perspective the judgements present a review of the language and conduct of representatives and agents, along with a review of the promotional literature, letters of intention and preliminary leasing agreements. From another perspective the judgements are a perfect prescription for reducing a landlord's exposure to legal liability under the Trade Practices Act. What are the obvious points to be made?

The language of negotiation should not attract liability. Many landlords are still talking with the bravado of the 1980's, seemingly ignorant of the perils which await them in the deep and murky waters of S52 of the Trade Practices Act. The Act's most recent enactments, S51AA and S51AC, extend the principles of unconscionable conduct by introducing ordinary concepts of morality together with a test of fairness. For the purpose of determining whether any of the parties engaged in misleading conduct however, statements cannot be assessed in isolation but must be viewed in the overall context of the negotiations (see *Pappas v Soulac Pty Ltd* (1984) 2FCR82 at 88 per Fisher J [another shopping centre case]). In this respect Gibb CJ in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982 42ALR1 (at page 7) observed: "The conduct of the defendant must be viewed as a whole. It would be wrong to select some words or acts which alone, would be likely to mislead if those words or acts, when viewed in their context were not capable of misleading."

Silence, it seems, could still be virtue. The Full Court of Australia in *Fraser v NRMA Holdings Ltd* (1995) ATPR 41-374 made it clear that S52 of the Trade Practices Act "gives rise to no duty provided information". "Where the contravention of S52 allegedly involves a failure to make a full and fair disclosure of information, the applicant carries the onus of establishing how or in what manner, that which was said, involved error, or how that which was unsaid had the potential to mislead or deceive." [my emphasis.] If parties are negotiating at arms length with any special disability, the relationship of landlord and tenant would not normally give rise to any obligation of disclosure (see *Leda Holdings Pty Limited v Oraka Pty Limited and Anor* (1997) ATPR 41-601 at 40, 514). When parties are dealing at arms' length in a commercial situation, it may well be that one party will be aware of information which, if known to the other, would cause the other to take a different negotiating stance. That however, is not a

situation which requires disclosure of that information (see *Lam v Ausintel Investments Australia Pty Ltd* (1990) ATPR 40-990 per Gleeson CJ). There are, it must be said, times when words are called for and silence may constitute misleading conduct. In *Henjo Investments Pty Ltd v Colins Marrickville Pty Ltd* (1998) 79ALR 83

at 95 Lockhart J said: "at common law, silence can give rise to an actionable misrepresentation where there is a duty upon the representor to reveal a matter if it exists, and where the other party is therefore entitled to infer that matter does not exist from the silence of the representor.... silence may be relied on in order to show a breach of S52 when the circumstances give rise to an obligation to disclose relevant facts..."

The latest major case decision in this respect was handed down on 9 December 1997. The Full Court of the Federal Court of Australia reversed the decision Burchett J made on 4 April 1997 (see *Leda v Oraka* (supra) ). Branson and Emmett JJ said: "the case so far as it was framed on the failure of the Landlord to disclose the actual number of shops in Rosemeadow that would be tenanted or open for business as at 30 November 1993, was... bound to fail. The silence of the landlord in all the circumstances did not amount to misleading or deceptive conduct".

Foretelling the future is always fraught with danger. The information given must be based on reasonable expectations, avoiding predictions which could be construed as being reckless. If promises are made about future events there must be a real intention of knowledge of the fact that promises will be kept. A person may, in the first place, express an intention as to the future which is sincerely meant at the time, but may subsequently have a genuine change of mind. In that case, there is no liability [see *James v ANZ Banking Group* (1986) 64ALR347 per Toohey J at 372]. Where a corporation makes a representation with respect to any future matter... and the corporation does not have reasonable grounds for making the representation... S51A(1) of the Act deems a representation to be misleading.

The case of *Jaldiver Pty Ltd v Nelumbo Pty Ltd* (1993) ATPR (Digest) 46-097 is a classic study in future prediction liability. Twenty four lessees of the Central Square Shopping Centre in Ballarat, Victoria instituted a class action relying on S51A. Some of the predictions proven to be without foundation included: The level of outgoing charges, promotion contributions by major tenants, provision of an International Food Court of similar standards to shopping centres in Melbourne and "660 easy access car spaces, directly into the Centre".

Heerey J held that those representations. when depending on present facts, were untrue, and when relying on future matters were untrue and made without any reasonable grounds for making them. His Honour made orders declaring each of the leases and guarantees void and awarded damages to each lessee (ranging from \$103,00 to \$580,00 plus interest).

Disclaimers and indemnities are indispensable tools of trade. Every "Letter of Intention" and "Agreement for Lease" provides an opportunity to legally protect the landlord from any reliance a tenant may place on statements or representations which concern the fitness, suitability, potential profitability of the subject premises or the future viability of the shopping centre itself. Superbly drafted disclaimers and indemnities will never cover

every eventuality arising from negotiations prior to execution of the Agreement of Lease or lease contract, but they will constitute a persuasive body of evidence to be considered by the court in its final deliberations.

Ultimately it is the effective use of disclaimers and indemnities which may provide a springboard for a successful crossclaim by the landlord against the tenant if the landlord is found to have breached any representation, promise, warranty or undertaking. In *Leda v Oraka* (supra), JLW demonstrated the appropriate care and attention which should accompany an Agreement of Lease. On the same day the tenant executed the lease contract, it had earlier executed under seal an Agreement of Lease containing the following clause:

"9.1 The Tenant represents and warrants that:

(a) the Tenant was not induced to enter into this deed by and has not relied on any statements, representations or warranties whether orally or in writing or contained in any brochure including, without limitation, statements, representations or warranties about the fitness or suitability for any purpose of the Premises or about any financial return or income to be derived from the Premises; and

(b) in entering into this deed the Tenant has relied entirely on enquires relating to and inspection of the Premises made by or on behalf of the Tenant; and

(c) The Tenant has obtained independent legal advice on and is satisfied about the Tenant's obligations and rights under this deed; and

(d) The Tenant has obtained independent expert advice on and is satisfied about the nature of the Premises and the purpose for which the Premises may be lawfully used.

9.2 The Tenant acknowledges that the Landlord has entered into this deed on the basis that the representations and warranties contained in clause 9.1 are true and not misleading.

9.3 The Tenant indemnifies the Landlord against any liability or loss arising from, and any costs, charges and expenses incurred in clause 9.1 including, without limitation, legal expenses on a full indemnity basis or solicitor and own client basis whichever is the higher.

9.4 References to this deed set in this clause includes the Lease".

The Full Court, in considering the landlord's appeal, came to the conclusion, inter alia, that the trial judge had failed to consider the importance placed by the landlord on the tenant's representation and warranty contained in the Agreement for Lease (see Clause 9).

The discussion in summary, offers the following salutary lessons!

pursue negotiations on the basis of fact not opinion (ask whether the representations that are likely to be made are founded on fact or reasonable expectations).

choose persuasive statements carefully (silence is only a potential liability if the prospective tenant forms an assumption about a situation because the representative failed to say anything when there was an obligation to speak).

if the conversation ventures into the arena of future performance of the shopping centre or the actual viability of the subject premises, be prepared to support any statement or representation with reliable data, based on reasonable expectations.

re-examine all indemnities and disclaimers to establish whether the documents currently in use provide the appropriate legal protection and the ability to launch a cross-claim.

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