

Contract Law Update

Reliance on non-reliance clauses – not a safe harbour

WHAT YOU NEED TO KNOW

- A non-reliance clause may assist in defending common law or equitable causes of action but, by itself, may be ineffective in excluding statutory claims for misleading or deceptive conduct.
- Consideration needs to be given to separately disproving reliance by another party on pre-contractual representations.

What is a non-reliance clause?

The non-reliance clause has achieved the status of boilerplate in commercial contracts. It acknowledges that a contracting party has not relied upon any pre-contractual representations in entering into a contract. It typically provides:

"Each party acknowledges, to the fullest extent allowable by law, that in entering into this agreement it has not relied on any statement, representation, assurance or warranty other than as expressly set out in this agreement."

Other clauses excluding or limiting liability

Other clauses which seek to exclude or limit the risks of liability arising from pre-contractual representations include:

- a) an entire agreement clause, which states that the document constitutes the entire agreement between the parties;
- b) an exclusion clause, which expressly excludes, restricts or limits the liability of a party;
- c) a merger clause, which provides that pre-contractual misrepresentations are superseded or merged in the contract;
- d) a disclaimer of liability, either as a separate disclaimer or as a clause within the contract; and

- e) a deed of acknowledgment (containing a non-reliance clause), which provides that a party entering into the contract has not relied upon any representation, warranty or assurance.

A non-reliance clause can operate to remove or reduce the risk of liability in respect of common law or equitable causes of action arising from pre-contractual misrepresentations, but there is a real question as to its effectiveness in defending statutory claims.

The High Court's view on non-reliance clauses and misleading or deceptive conduct

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304 is the most recent High Court decision on the effectiveness of non-reliance clauses. That case involved allegations of misleading or deceptive representations concerning the financial position of a company being purchased. The relevant share sale agreement contained an entire agreement clause and a warranty that the information provided was substantially accurate and not misleading.

The majority of the Court was of the opinion that neither non-reliance clauses nor entire agreement clauses will necessarily prevent the relevant conduct from being found to be misleading or deceptive. The majority held that the question of whether conduct is misleading or deceptive is a question of fact to be decided by reference to all of the relevant circumstances, including the terms of the contract.

The majority agreed with the earlier opinion of Justice McHugh, stating that the fact of inducement cannot be negated by a mere statement to the contrary in the contract (see *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 21 ALR 357, [174]).

In a separate judgment, Chief Justice French observed that the existence of the non-reliance clause is one factor to be considered in proving causation.

Non-reliance clauses have proven ineffective against claims for misleading or deceptive conduct

In *Mark Bain Constructions Pty Ltd v Avis and Mark Bain Constructions Pty Ltd v Barnscape* [2012] QCA 100, a property vendor sought to rely on a non-reliance clause, a merger clause and an entire agreement clause in defending a proceeding for alleged misleading or deceptive conduct.

The Queensland Court of Appeal held that the clauses were ineffective to exclude a claim for misleading or deceptive conduct. The Court stated that the proper test for reliance is whether the non-reliance clause demonstrates that the relevant party "did not, in fact, rely on the conduct or where the conduct could not, as a whole, have been seen to be misleading." ([37] and [49], quoting *Warwick Entertainment Centre Pty Ltd v Alpine Holdings Pty Ltd* [2005] WASCA 174, [59]).

The Court held that, in all of the circumstances and despite the presence of non-reliance and exclusion clauses, there was evidence of reliance on misleading or deceptive conduct.

More recently in *Caffey v Leatt-Hayter [No 3]* [2013] WASC 348, the Supreme Court of Western Australia

held that a non-reliance clause was ineffective to exclude liability for misleading or deceptive conduct.

Implications

Non-reliance clauses will be taken into account when courts consider proof of causation in cases alleging misleading or deceptive conduct. There are increasingly few cases in which courts have found non-reliance clauses to be effective in excluding liability.

Where there is a material representation before entering into a contract, which is misleading or deceptive, it is easy for a party to allege that it relied upon that representation in agreeing to the contract, including any clause seeking to exclude or limit liability for pre-contractual representations.

Negotiators should consider how they can separately disprove reliance by another party on pre-contractual representations. This would include:

- a) considering whether any of their pre-contractual conduct or representations could be considered misleading or deceptive; and
- b) where appropriate, notifying the other party of the true state of affairs in relation to that conduct.

This should be done on a case-by-case basis, having regard to the fact that there is no general duty to disclose information during negotiations (see *Lam v Ausintel Investments Australia Pty Ltd* (1990) 97 FLR 458, 475 per Gleeson CJ; Samuels AJA and Meagher JA agreeing).

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