Loss and damage in misleading and deceptive conduct cases

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It is unsurprising that, more than 40 years after the enactment of the *Trade Practices Act 1974* (Cth), there is a great deal of general knowledge among legal practitioners regarding liability for misleading and deceptive conduct under what is now s 18 of the Australian Consumer Law. For example, most readers will already be aware that:

1. misleading and deceptive 'conduct' can include silence, where a plaintiff had a reasonable expectation of disclosure;[1]
2. the conduct must be in trade or commerce, not merely an activity incidental to trade or commerce;[2] and
3. the Australian Consumer Law applies to corporations as a law of the Commonwealth,[3] and also to natural persons as a law of New South Wales.[4]

Another very well-known feature of liability for misleading and deceptive conduct is that conduct which is 'likely to mislead or deceive' also attracts liability. This is often expressed by saying that conduct is capable of attracting liability even if no one was actually misled or deceived; conduct is likely to mislead or deceive if there is a real and not remote chance, whether or not there is a more than 50 percent chance.

But unless one is acting for the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, or the Department of Fair Trading to enforce the Australian Consumer Law, s 18 is only half the story. An action for damages for misleading and deceptive conduct is brought not under s 18, but under s 236 of the Australian Consumer Law, which provides:

> *If:*
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> *(a) a person (the claimant) suffers loss or damage because of the conduct of another person; and*
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> *(b) the conduct contravened a provision of Chapter 2 or 3;*
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> *the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.*

Section 236 requires a plaintiff to establish actual loss or damage, and a causative link between the contravening conduct and that loss.

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[1] *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357.
[2] *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 92 ALR 193.
[3] *Competition and Consumer Act 2010* (Cth), s 131.
[4] *Fair Trading Act 1987* (NSW), Part 3.

Sometimes, the received wisdom about liability for misleading and deceptive conduct obfuscates the realities of succeeding in an action for damages. This paper will survey a selection of recent cases concerning causation and damage in misleading and deceptive conduct cases, particularly concerning the role of reliance in causation.

Reliance on misleading and deceptive conduct – *Jewelsnloo Pty Ltd v Sengos* [2016] NSWCA 309

With some exceptions (that will be covered later in this paper), in the vast majority of misleading and deceptive conduct cases, the causative link between loss and conduct is reliance; the plaintiff being induced into acting to its detriment by the conduct. This case is a demonstration of several different ways in which a plaintiff can fall short of establishing reliance.

The facts

Mr Sengos operated a business, Amazing Water, which sold water coolers. In February 2012, Mr Sengos sold Amazing Water to Mr Kotsiopoulos. As one would expect, Mr Sengos was subject to a non-compete deed following the sale. Shortly after the sale, Mr Sengos and Mr Kotsiopoulos also entered into a profit-sharing arrangement, where Mr Sengos would receive a portion of the profit from sales to clients that Mr Sengos introduced to Amazing Water.

In July 2012, very shortly after Mr Kotsiopoulos purchased Amazing Water, he put the business back on the market. In around September 2012, his agent began negotiations with Jewelsnloo Pty Ltd (**Jewelsnloo**). After Jewelsnloo signed a Confidentiality Agreement that included a disclaimer that any information disclosed pursuant to it was to be 'checked independently for accuracy and truth', Jewelsnloo received an information memorandum about Amazing Water, including some trading figures for the period 2009 to 2012. That included a representation that between 1 February 2012 and 30 June 2012 (that is, the time Mr Kotsiopoulos owned the business), the turnover of the business was $166,375.60. Jewelsnloo would later allege that this was one instance of misleading and deceptive conduct (**the Turnover Representation**).

Subsequently, Jewelsnloo received bank statements from Mr Kotsiopoulos which showed a much lower turnover in the period between February 2012 and June 2012. Jewelsnloo asked Mr Kotsiopoulos to provide material to verify the Turnover Representation, but he could not. Jewelsnloo made an offer to purchase Amazing Water, at a price much lower than the asking price, on the basis that the figures in the Turnover Representation could not be verified. The offer was accepted.

Jewelsnloo, being aware of the profit-sharing arrangement between Mr Sengos and Mr Kotsiopoulos, asked Mr Sengos if he intended to compete with Amazing Water after Jewelsnloo completed its purchase. On 1 October 2012, Mr Sengos responded by saying 'I have no intentions at getting back

into the water cooler business'. Jewelsnloo would later allege that this was a further instance of misleading and deceptive conduct (**the Competition Representation**).

On 9 October 2012, Mr Sengos asked Mr Kotsiopoulos to release him from the non-compete agreement. Mr Kotsiopoulos agreed. A deed to achieve that was signed either in October or December.

Jewelsnloo and Mr Kotsiopoulos exchanged contracts on 18 October 2012; they are from that point on each bound to complete the sale.

Jewelsnloo sent requisitions to Mr Kotsiopoulos, asking if Mr Kotsiopoulos received the benefit of any restraint of trade when he bought Amazing Water from Mr Sengos. Mr Kotsiopoulos responded by providing a copy of the non-compete deed, saying nothing about the plan to release Mr Sengos from that deed. Both the provision of the non-compete deed (**Non-compete Deed Representation**), and silence as to the plan to release Mr Sengos (**Silence on Release**), were alleged to be further instances of misleading and deceptive conduct.

At the end of October 2012, Mr Sengos asked Jewelsnloo if it had any interest in a profit-sharing arrangement similar to the one Mr Sengos and Mr Kotsiopoulos had. Jewelsnloo declined the proposal. The sale completed shortly thereafter.

The outcome

You will recall that there were 4 instances of alleged misleading and deceptive conduct:

1. *The Turnover Representation*

   The Turnover Representation was misleading and deceptive, in terms of liability. However, the Court was not satisfied that Jewelsnloo placed any reliance on the Turnover Representation; it was not actually misled or deceived. That was the result of a confluence of surrounding circumstances:

   a. the disclaimer in the Confidentiality Agreement Jewelsnloo signed before receiving the Turnover Representation;
   b. the fact that Jewelsnloo later saw inconsistent bank statements, which put it on notice of the unreliability of the Turnover Representation; and
   c. Jewelsnloo's lower purchase price offer, which was made because the trading figures could not be verified.

   Note that the disclaimer in the Confidentiality Agreement was not a panacea; it was just one of a number of factors that contributed to a finding of fact that Jewelsnloo did not rely on the Turnover Representation.

2. *The Non-compete Deed Representation*

This representation was also misleading and deceptive. However, Jewelsnloo suffered no damage as a result of it, as Jewelsnloo could not have acted in reliance on it, because there was no other course of action available to Jewelsnloo. At the time of the Non-compete Deed Representation, contracts had been exchanged. Jewelsnloo sent requisitions to Mr Kotsiopoulos, but it had no right to rescind or make a claim based on the answers to those requisitions, so even if it had known that Mr Kotsiopoulos planned to release Mr Sengos from the Non-compete Deed, it was still bound to complete the sale.

3. *The Competition Representation*

   This representation was not misleading and deceptive, because it was true at the time it was made. Mr Sengos had no intention of competing with Amazing Water, until he later learned that Jewelsnloo would not take up the profit-sharing arrangement he had enjoyed with Mr Kotsiopoulos.

4. *The Silence on Release*

   This silence was not misleading and deceptive, because Jewelsnloo had no reasonable expectation of disclosure of the plan to release Mr Sengos from the Non-compete Deed.

Reliance on misleading and deceptive conduct – *OXS Pty Ltd v Sydney Harbour Foreshore Authority* [2016] NSWCA 120

Jewelsnloo Pty Ltd v Sengos [2016] NSWCA 309 demonstrates two ways in which a plaintiff may fail in its misleading and deceptive conduct action, for want of reliance:

1. the plaintiff was not actually misled or deceived by the defendant's conduct, and therefore placed no reliance on it; and
2. where the plaintiff has no alternative course of action available to it, the plaintiff is unable to act in reliance on the conduct.

OXS Pty Ltd v Sydney Harbour Foreshore Authority [2016] NSWCA 120 is a case where those two failures of reliance converge.

The facts

OXS Pty Ltd (**OXS**) operated a restaurant in The Rocks. The Sydney Harbour Foreshore Authority (**SHFA**) leased the restaurant premises to the OXS, but decisions about the lease ultimately rested with the responsible Minister, first the Honourable Tony Kelly MLC, and later the Honourable Brad Hazzard MP.

OXS' lease was to expire in 2014, but in January 2011 it contacted SHFA to request an extension of the lease. In February 2011, SHFA responded by saying that it would offer OXS another ten-year lease, subject to lodgement of a development application and entry into a licence for outdoor seating (the

Prerequisites). OXS purported to accept that 'offer', and from that point on OXS asserted there was a binding agreement for lease between it and SHFA.

In August 2011, SHFA wrote to OXS to say that the responsible Minister would not consent to its earlier proposal. That was misleading and deceptive, because the responsible Minister had not said that; he had just 'noted' SHFA's recommendation on the proposal. In reply, OXS asserts a binding agreement for lease.

About a year later in August 2012, SHFA wrote to OXS and said it will not negotiate with OXS on a new lease until OXS addressed the Prerequisites.

In November 2013, OXS satisfied the Prerequisites. In December 2013, SHFA said that OXS' lease would not be renewed.

The outcome

OXS alleged that SHFA had engaged in misleading and deceptive conduct by:

1. representing that there was a binding agreement for lease;
2. representing that the responsible Minister would not consent to a new lease;
3. representing that once the Prerequisites were satisfied, SHFA would negotiate with OXS for a new lease.

OXS had to establish reliance on the representations. Its evidence on reliance, given by Mr Kazal, OXS' sole director, was:[5]

> *I **could** have caused OXS in 2011 to sell the business conducted at the Premises, as OXS then still had three years remaining under the [2009 Lease]. OXS has now lost the opportunity to do so by being misled by SHFA as to the basis for refusing to continue with the grant of a new lease.* (emphasis in original judgment)

OXS said that it *could* have sold its business, if it had known the lease would not be renewed. But *would* it have done so? Gleeson JA found that this was more than a semantic distinction, holding at [260]:

> *it was incumbent on OXS to establish, on the issue of causation, that had OXS been informed in August 2011 that SHFA did not (at least at that time) support the grant of a new lease… OXS **would** have initiated a sale of the business… the claim by OXS failed because of an absence of evidence of what OXS **would** have done.* (emphasis in original)

An inference could not be drawn from Mr Kazal's evidence about what OXS *would* have done. After all, when SHFA first said that the responsible Minister would not consent to its earlier proposal, OXS asserted the existence of an agreement for lease.

[5] *OXS Pty Ltd v Sydney Harbour Foreshore Authority* [2016] NSWCA 120, [246].

Unlike Jewelsnloo, OXS *could* have taken an alternative course of action. But there being no evidence of actual reliance, that in the absence of that conduct OXS *would* have taken that course, causation could not be established.

Causation without reliance? *Re HIH Insurance Limited (In Liquidation)* [2016] NSWSC 432

Earlier in this paper, I wrote that in the vast majority of misleading and deceptive conduct actions, causation will be proved by showing the plaintiff's actual reliance on the contravening conduct. This case is an illustration of a theory of causation which, at least on the surface, appears not to require any reliance on the misleading and deceptive conduct.

The plaintiffs were investors in the formerly publicly listed HIH Insurance Limited (In Liquidation) (**HIH**). The misleading and deceptive conduct was misstated information in HIH's financial reports and prospectus. The plaintiffs alleged that they had suffered damage by paying more for HIH shares than the shares were worth.

The unusual feature of this case is that the plaintiffs had not actually read the misleading financial information published by HIH. They could not have relied on the conduct. Nevertheless, Brereton J found that there was a causative link between HIH's conduct and the investors' loss. At [75]:

> *The chain of causation was*
>
> *(1) HIH released overstated financial results to the market,*
>
> *(2) the market was deceived into a misapprehension that HIH was trading more profitably than it really was and had greater net assets than it really had,*
>
> *(3) HIH shares traded on the market at an inflated price, and*
>
> *(4) investors paid that inflated price to acquire their shares, and thereby suffered loss.*
>
> *Thus, the contravening conduct materially contributed to that outcome.*

Does this mean that reliance played no reliance in establishing causation in this case, or that the plaintiffs were entitled to recover damages even though no one was actually misled or deceived?

Reliance remained a necessary step in establishing a causative link between conduct and loss in this case; but it was not the *plaintiff's* reliance. Summarising the effect of earlier authority at [56], Brereton J said:

> *… the applicant must establish that somewhere in the chain of causation, someone relied on the contravening conduct — in other words, that someone was misled or deceived, and that such deception brought about prejudice to the applicant. Unless someone in the chain of causation is deceived, it cannot be said that the ultimate loss to the applicant is "by conduct of" the respondent, because the conduct would be immaterial to the ultimate loss unless it impacted somehow on the causative process.*

Quantum – *Bartlett v Weatherill* [2017] NSWSC 31

After a causative link between conduct and loss is established, it is necessary to establish the quantum of that loss. Damages for misleading and deceptive conduct are compensatory in nature, but an

award of damages in misleading and deceptive conduct can be surprisingly different in the method of its calculation than an award in contract or tort, and *Bartlett v Weatherill* [2017] NSWSC 31, a decision in an appeal from the Local Court of NSW, is a recent demonstration of this.

Dr Weatherill wanted to buy a Cessna 400 aircraft. A Cessna 400 is worth about $500,000 in Australia. However, a Cessna 400 can be acquired for significantly less in the United States, around $370,000.

Dr Weatherill did not want to pay any more than $438,000 in total for both the cost of the aircraft and the cost of transporting it to Australia. He enlisted the aid of Mr Bartlett to estimate the transport costs. Mr Bartlett estimated those costs would be $52,395. Dr Weatherill decided he would buy a Cessna 400 from the United States and have it brought to Australia.

Dr Weatherill actually spent around $120,000 on bringing the Cessna 400 to Australia. Together with the $370,000 cost of the aircraft itself, Dr Weatherill paid around $490,000, significantly more than he wanted to spend.

At first instance, the parties, and the Court, characterised the plaintiff's loss in the following ways:

Plaintiff	**Defendant**	**The Court**
Actual import costs, and other associated costs, of $130,703.02; *less* 1. The defendant's estimate of $52,395; and 2. some other 'agreed extras'; *equals*	Approximate actual cost of aircraft and bringing it to Australia, $490,000; *less* The value of the aircraft in Australia, $500,000; *equals*	Approximate actual cost of aircraft and bringing it to Australia, $490,000; *less* What the plaintiff had been prepared to pay, $438,000; *equals* $52,000; *less* $27,000, recognising that the plaintiff obtained an asset of considerable value; *equals*
Total loss: $58,857.77	Total loss: $0 ($10,000 better off)	Total loss: $25,000

The defendant was correct. The plaintiff had not suffered any loss at all, because the value of the asset the plaintiff received exceeded the amount the plaintiff paid. Per Adamson J at [26]:

> *There are two principal errors in the Magistrate's approach, which I note for completeness was ultimately supported by neither party. First, it ignored the principle that the wronged party needs to establish actual loss before an award of damages can be made. Secondly, it contaminated the assessment of damages by including "expectation" loss and by using what Mr Weatherill was prepared to pay as an integer in the calculation. This second matter was inconsistent with what the plurality of the High Court said in Marks v GIO at [49]… "What is important is what that party could have done, not what it might have hoped for or expected."*

In an award for misleading and deceptive conduct, a plaintiff cannot seek a discrete award of damages for being induced into a transaction, without recognising the value obtained from the transaction.

This reflects the legislative purpose of s 18 of the Australian Consumer Law; it prohibits misleading and deceptive conduct, but does not seek to enforce misleading and deceptive promises. As McHugh J said in *Henville v Walker* [2001] HCA 52 at [132]:

> *The measure of that loss is not determined by reference to what he would have received if* [the] *representations had been true… the wrong which* [s 18] *prohibits is the making of, not the failure to honour, the false representation…*

This can be readily contrasted with an award of damages for breach of contract. Had Mr Bartlett's estimate been a contractual promise, and had it been sued on as such, an award of damages would have been made to put Dr Weatherill in the position he would have been in had the promise been performed. That award would have matched the quantum of damages advanced for Dr Weatherill; the actual import costs, less the estimated costs. Because the purpose of an award of damages in each context is different, the quantum of damages is different as well.

Practice points

1. When commencing proceedings including a cause of action for misleading and deceptive conduct:
    a. after pleading the facts giving rise to the defendant's liability, also identify and plead:
        i. the reliance that the client placed on the conduct (or in the unlikely event that the client's loss was caused by third party reliance, that third party reliance); and
        ii. a more beneficial course of action the client *would* have (and not merely *could* have) taken, had they not relied on the defendant's misleading and deceptive conduct; and
    b. if misleading and deceptive conduct is one of a number of alternative causes of action, consider whether the quantum of damage might differ between those causes of action.
2. When drafting commercial agreements:
    a. do not expect a non-reliance warranty or a disclaimer to be a complete answer to any claim in misleading and deceptive conduct in relation to misinformation in promotional material and due diligence material. All of the circumstances are relevant to determining reliance.
    b. consider whether a third party, other than your counterparty, could rely on the information and suffer loss themselves, or cause loss to the counterparty.

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