WARRANTIES REPRESENTATIONS, INDEMNITIES AND EXCLUSION CLAUSES IN CONTRACTS

Paper written by Steven Brown, Etienne Lawyers, B.Ec, LL.B, (Sydney), M. App. Fin (Macquarie), FAICD, Accredited Business Law Specialist, FPIAA, College of Law Seminars, 11 February, 2011, Sydney Updated for LawAustralsia Seminar 24 August, 2012

Introduction

The Rational for Warranties, Representations, Indemnities and Exclusion Clauses in Contracts - Risk and (expected) Return in commerce

People engaging in commercial activities, such as, buying and selling a business, do so to earn what they expect will be a return on their efforts, or the investment of their money. The very act of engaging in such activities is risky. There is always the chance of the bargain being sought by entering into a contract not being as profitable as was thought. As there is risk in entering most, if not all commercial activities from which people expect to earn a return, it is inevitable that the inherent risks of entering into a contract will be borne by one or other of the transacting parties[1].

For instance when selling, a vendor may be asked to accept payment on a terms basis or to finance the purchaser's acquisition of the business. In doing so, the vendor is taking on the credit risk of the purchaser being able to complete the payments when and as promised. This is illustrated by ***WR Ruffler Pty Ltd v Idohold Pty Ltd & Ors*** *(NSW Supreme Court, 19 November 1990, Unreported decision C9001737).* The case concerned the sale by Ruffler to Idohold of an amusement machine business for $600,000 with the payment of the balance of $475,000 to be secured by a fixed and floating charge granted by Idohold. Idohold took possession of the business, paid most of the purchase price but defaulted and eventually went into liquidation. As illustrated, the risk of the vendor not receiving payment came to fruition.

As well as clearly identified risks in commercial transactions there can be unseen risks. For an example of unseen risks, look at the implied contract terms cases, such as, ***Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales***[2]***.***

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[1] Boyce, T, ***Commercial Risk Management***, Thorogood Ltd, 1995, p 6

[2] (1982) 149 CLR 337

In Codelfa Constructions Pty Ltd, Codlefa had to bear the risk that it could not amend the contract when injuncted from being able to perform the works in the manner expressly agreed upon and stated between the parties. This case illustrates that where the parties to a commercial transaction do not clearly determine who is to bear certain risks or how the risks are to be shared, each may end up bearing or sharing risks they never contemplated: as a consequence of a court after the event determining who has to bear the risk by implying a term into the contract.

Drafting contracts is the process of identifying the inherent risks of the commercial transaction to be entered upon, the analysis of how to manage the risk bearing and sharing of those inherent risks and the negotiation of the terms of the sales contract between the parties (e.g vendor and purchaser); thereby minimizing the risks inherent in the transaction for all concerned.

How do we determine what risks to bear, or share - The Risk Pendulum

As Boyce says:

> "Perhaps in an ideal world the risk pendulum would lie perfectly balanced between the two sides (figure 1.3).
>
> figure 1.3 The Risk Pendulum
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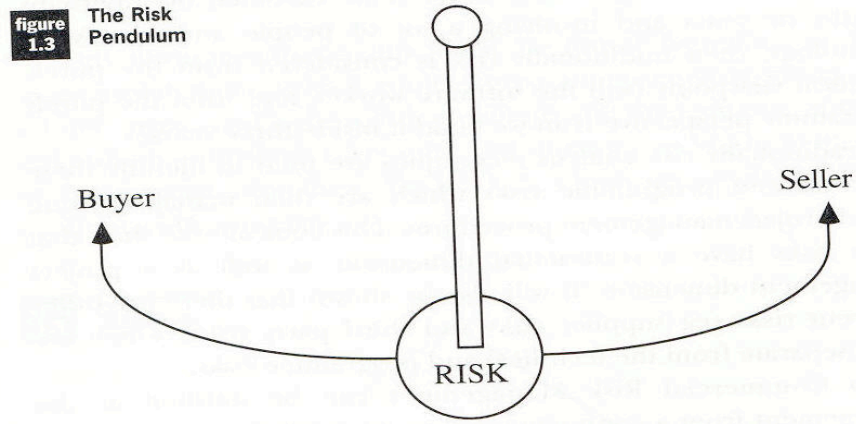
> 
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> However, **in reality the position of the pendulum largely depends upon the bargaining positions of the two sides**. Theoretically it should be decided purely, on the basis of which side can best cope with or absorb the risk. For example, in a contract in which a UK company is buying from a US supplier the question will arise as to whether payment of the contract price should be in Sterling or Dollars. …Each would prefer its own national currency. If the US company also makes purchases from the UK in Sterling it

> is in the best position to avoid the currency risk by using Sterling earned in one transaction to fund another transaction. On the other hand, if the US company wishes to be paid in Dollars, it will get its way if the UK company has no alternative source of the product."[3]

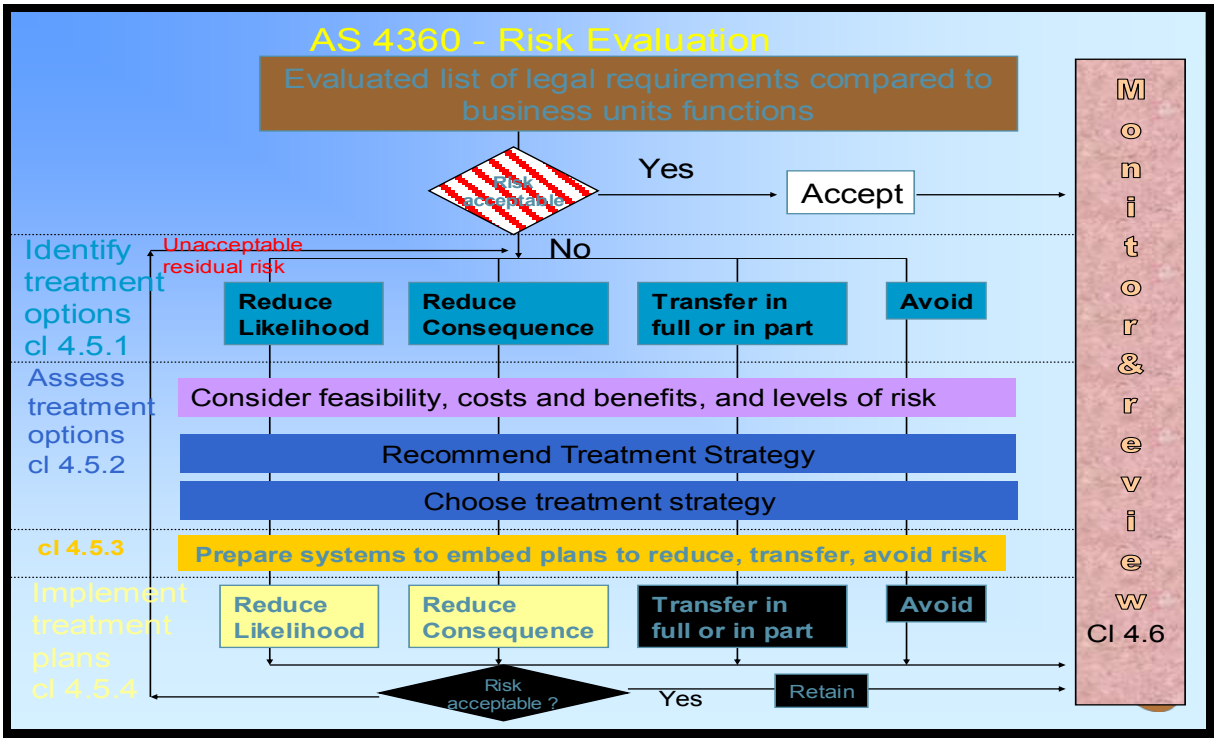
As the real world is where we practice law, then the bargaining positions of our clients will be the determinative factor in who bears or shares the commercial risk inherent in each transaction. Although the bargaining strengths of the parties is a determinative factor on who bears the inherent risks of the transaction, as lawyers we must still fully inform our clients of the risks and provide recommendations as to how they should deal with the risks identified, having regard to the practical reality of the relative bargaining strengths of the parties. Our role (as lawyers) is to inform our clients of the risks of the proposed transaction and the ways of dealing with each risk so that they may make informed commercial decisions on how they wish to deal with them. The process used to identify the risks that our clients should consider in arriving at a concluded agreement, is the process known as risk analysis.

Risk Analysis

There are numerous methods of analyzing the inherent risk in commercial transactions. One method is that proposed by AS 4360 – Risk Evaluation. This Australian Standard offers 4 methods of dealing with an unacceptable risk as can be seen in figure 1.

Figure 1

[3] Boyce, T, ***Commercial Risk Management***, Thorogood Ltd, 1995, p 6



The four risk bearing or sharing tools from this risk analysis model comprise taking actions that:

1. Reduce the likelihood of an event;

2. Reduce the consequences of an event;

3. Transfer in full or in part the consequences of an event (Negotiate a price to accept the risk); and/or

4. Avoid the event.

Once the risks are identified, and the risk analysis undertaken for each risk, your client will have a better understanding of what steps to take in deciding how to bear or share such risks. While this can be done in isolation, in sales transactions it is usually undertaken by the negotiation of the terms and conditions in the sales agreement. The risk assessment process then moves from ascertaining the inherent risks to negotiating with the other side, who is to bear the risk or how the risk is to be shared.

The Contractual Tools of Minimizing the Inherent Risk of Commercial Transactions

This paper deals with just one aspect of the risk sharing tools available to draftspersons, that of seeking to reduce the consequences of an event.

The tools at our disposal are the contractual terms within the contract, being those of:

- Representations;
- Warranties;
- Indemnities; and
- Exclusion Clauses.

Each do not seek to reduce the likelihood of an event, rather the tools transfer in full or in part the consequences of an event (Negotiate a price to accept the risk); and/or avoid the event.

In acting for parties in for example a sales transaction, legal advisers are involved in ascertaining, and highlighting for their clients the risks inherent in the transaction by identifying the risks in the transaction so:

a. that the risks that can be quantified, for example, that a purchaser may not pay all of the purchase price when the purchase price is to be paid by installments, are quantified; and

b. the risks that cannot be quantified, for example, acquiring a business that manufactures products and as such there is the risk of a product re-call due to the product being manufactured by the vendor still being in the market post the purchasers acquisition of the business are made known to the parties;

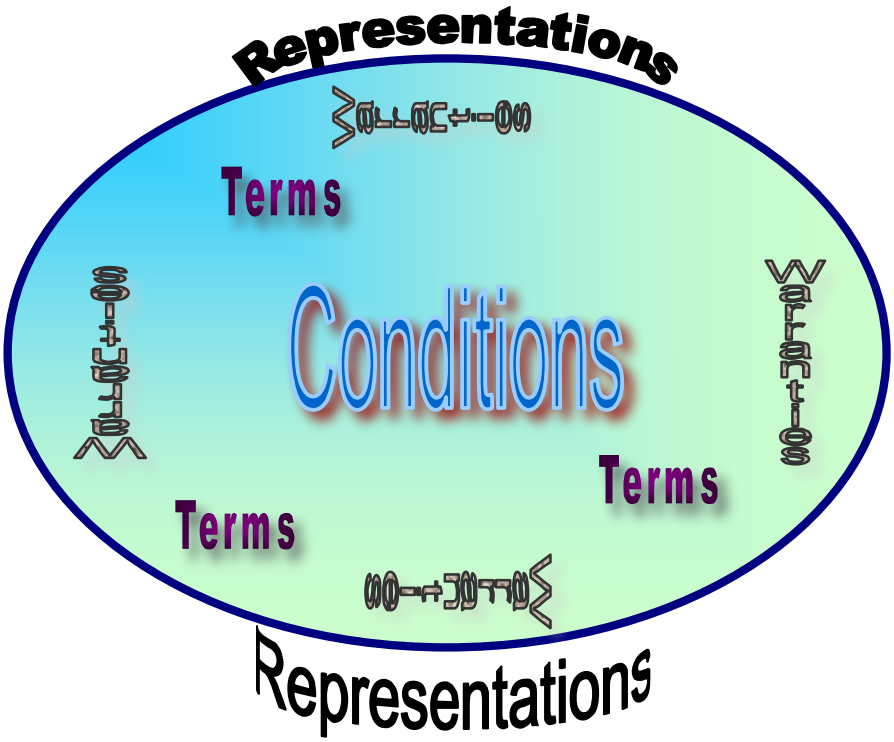
for the parties to be able to frankly discuss who is better placed to share or bear those risks and if not able to be borne or shared how to adjust the sales price so as to made the party who is having to take the risk willing to proceed with the transaction.

Reduce the consequences of an event

Warranties, representations, indemnities (for example liquidated damages clauses) and exclusion clauses are all contractual methods of reducing the consequences of an event.

Contracts are brought about from negotiations which comprise representations, which either are not included into the final contract or which do become part of the final contract. The representations that become part of the terms of the contract fall into two categories. Conditions and warranties. See figure 2

Figure 2



Representations

At common law for a representation to have contractual effect it must either be included as a term of the contract dealing with the main subject matter or it may form the subject matter of a separate subsidiary or collateral contract. Where the transaction is between only two parties and there is no written record of it, the representation will usually be regarded as a term of the main contract; there is no need to resort to the device of a collateral contract. If, however, the transaction does not meet the formality requirements or is reduced to writing so that the parol

evidence rule applies, the representation cannot be imported into the contract as an express term and resort must be had to the collateral contract device.

The same device must be used where the representor is a third party who is not privy to the main contract: ***Irwin v Poole*** (1953) 70 WN (NSW) 186

If the contract is reduced to writing, the parol evidence rule will be strictly applied, (***LG Thorne & Co Pty Ltd v Thomas Borthwick & Sons (Australasia) Ltd*** (1956) 56 SR (NSW) 81; 73 WN (NSW) 9) so that any express representation not recorded in the document will not be regarded as a term of the contract. The only recourse open to the buyer is to rely upon the terms implied by the sale of goods legislation or to plead a collateral contract, since any right of action based on a misrepresentation is severely circumscribed at common law.

In ***Heilbut, Symons & Co v Buckleton*** [1913] AC 30, a firm of rubber merchants, Heilbut, underwrot a large number of shares in a company called Filisola Rubber and Produce Estates Ltd, and instructed a Mr Johnson to obtain applications for shares in the company. Johnson had seen a draft prospectus but did not at the time have a final copy, Buckleton telephoned the person and said “I understand you are bringing out a rubber company”. Johnston replied in the affirmative. Buckleton asked “Is it alright?” and Johnson replied “We are bringin it out”. Buckleton rejoined, “That is good enough for me.” As a result of this conversation, a large number of shares were applied for by Buckleton. Later the shares fell in value because it was discovered that the plantation had few rubber trees on it. Buckleton bought an action against Heilbut for breach of warranty that the company was a rubber company. The House of Lords, held that the existence of a collateral contract depended upon the intention of the parties to contract deduced from the whole of the evidence and this intention must be strictly proved. On the facts the House of Lords held the statement that it was a rubber company was not one which was intended to be binding upon Heilbut. Australian courts have indorsed this rule: ***Blakney v JJ Savage & Sons Pty Ltd*** [1973] VR 385 (affirmed by ***JJ Savage & Sons Pty Ltd v Blakney*** (1970) 119 CLR 435; 44 ALJR 123. One limitation on the existence of a collateral contract is the rule that if it is inconsistent with the main agreement it cannot stand with it, for it is supplementary only and if it modifies the principal agreement it detracts from the very consideration which supports the collateral promise, namely the entry into the principal agreement: ***Blakney v JJ Savage & Sons Pty Ltd*** [1973] VR 385. Thus, in

Marks v Hunt Bros (Sydney) Pty Ltd (1958) 58 SR (NSW) 380, the written sale agreement was expressed to embody the entire terms of the transaction and all other conditions or warranties were expressly negatived. The Full Court of New South Wales held that, in respect of a representation as to description which was alleged to amount to an antecedent collateral agreement, there was no intention of the parties to contract, and even if there was, the language of the written agreement had effectively excluded any reference to the collateral agreement. However, it has been held that an oral warranty given at the time of sale may override printed conditions of sale stipulating that no warranty is given, (***Gardiner v Grigg*** (1938) 38 SR (NSW) 524 (FC), Jordan CJ at 532) on the basis that the express statement at the sale modifies the prior printed conditions.

The rule as to inconsistency has no application in a situation involving a third party. In ***Wells (Merstham) Ltd v Buckland Sand & Silica Co Ltd*** [1965] 2 QB 170; [1964] 2 WLR 453; [1964] 1 All ER 41,[10] a case involving a third party, it was said that two ingredients only were required to bring about a collateral contract:

(1) a promise or assertion by a potential seller as to the nature, quality or quantity of the goods which the potential purchaser might reasonably regard as being made with the intention of contracting; and

(2) acquisition by the purchaser of the goods (from a third party) in reliance on that assertion.

As a consequence of legislation, representations at common law have only a limited use in Australia. For instance, section 18 of the ***Australian Consumer Law*** (the replacement of section 52 of the ***Trade Practices Act***, 1974 (Cth)) which reads:

> *(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*
>
> (2) *Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subdivision (1).*

The concepts of common law representations that do not form part of a contract have limited application because of these sections of statutory misleading and deceptive conduct.

Warranties

A warranty is a term collateral to the main purpose of a contract and which, if breached, gives rise only to a claim for damages: The Laws of Australia at 7.6.60.
Technically, a "warranty" is a subsidiary term of a contract which gives rise to a right to damages if the term is breached, but which does not give the injured party a right to treat the contract as at an end: ***Oscar Chess Ltd v Williams*** [1957] 1 All ER 325 at 328 per Denning LJ. In that case, Williams owned a Morris motorcar, which according to the registration book was first registered in 1948. It had changed ownership 5 times prior to Williams owning it. Williams purchased a new car from Oscar Chess. The purchase price was reduced by the trade in value of the Morris. An employee of Oscar Chess valued the Morris for the trade in value based upon the registration book and credited Williams with a standard trade-in allowance for a 1948 model Morris. Oscar Chess after the sale discovered that the Morris was not a 1948 model but a 1939 model. The difference in value between a 1939 and 1948 model for trade-in purposes was substantial. Oscar Chess sued Williams for the difference between the two amounts upon the grounds that the Morris had been falsely represented by Williams to be a 1948 model. The invoice given by Oscar Chess to Williams described the car as a “1948 Morris 10 saloon”. The Court of Appeal that the statement by William as to the age of the car was a mere representation and not a term of the contract and that, accordingly, William was not liable for breach of a contractual term.

The term "warranty" will be used in this paper to:

- refer to a term of a contract deals with "the title, quality or quantity of a thing sold": (Parsons, The Law of Contracts (5th ed, Little, Brown and Co, 1866) Vol 2, p 3, quoted in de Colyar HA, n 1, p 2.); and/or

- an undertaking that the title, quality or quantity of the subject matter of a contract is as it appears to be or as it has been represented.

Unlike a guarantee, a warranty does not necessarily relate to the obligations of a third party. In ***Waterson v Barclay*** (1863) 3 SCR (NSW) 14 there was a clear example of such a warranty in relation to realty. William White agreed to sell to the plaintiff land on which the defendant had a claim. The defendant gave the plaintiff a signed memorandum containing the following promise:

> *I … do hereby guarantee a genuine title to the farm purchased by … [the plaintiff] from William White … in consideration of his causing to be placed to my account, or in the Commercial Bank, Sydney, at once, the amount of the balance of purchase money.*

The Supreme Court of New South Wales held that this document constituted a warranty that the vendor held, and should be in a position to convey, a valid title to the land.

Warranties can be used as follows. Take for example a sale of business transaction. The purchaser will seek to negotiate that the profitability of a business is maintained (if not increased) after they have acquired it. Confident vendors will provide warranties, such as: the turn-over will not decrease after the purchaser takes control. By providing a warranty, the purchaser is reducing the consequences of the event of a change in control of the business. However, by providing the warranty the vendor can ask for a higher price given that they are willing to stand behind and financially support the success of the business in the hands of the purchaser.

Indemnity Clauses

An indemnity is a term in a contract that constitutes a binding promise by which one party undertakes to accept the risk of loss or damage another party may suffer. Essentially, it is a promise to 'hold harmless', and these exact words are often used in indemnity provisions, particularly older ones.

Indemnity clauses play an important role in managing the risks associated with commercial transactions by protecting against the effects of an act, a contractual default or another party's negligence. The normal tendency is to seek an indemnity which will protect a party to the greatest possible extent against liabilities arising from the actions of another. Care should be taken with drafting indemnity clauses as, by reason of the breadth of commercial arrangements and often the complexities of the

contracts themselves, the resulting interpretation of an indemnity and the manner in which it operates may in fact be very different to that which the parties thought they were agreeing.

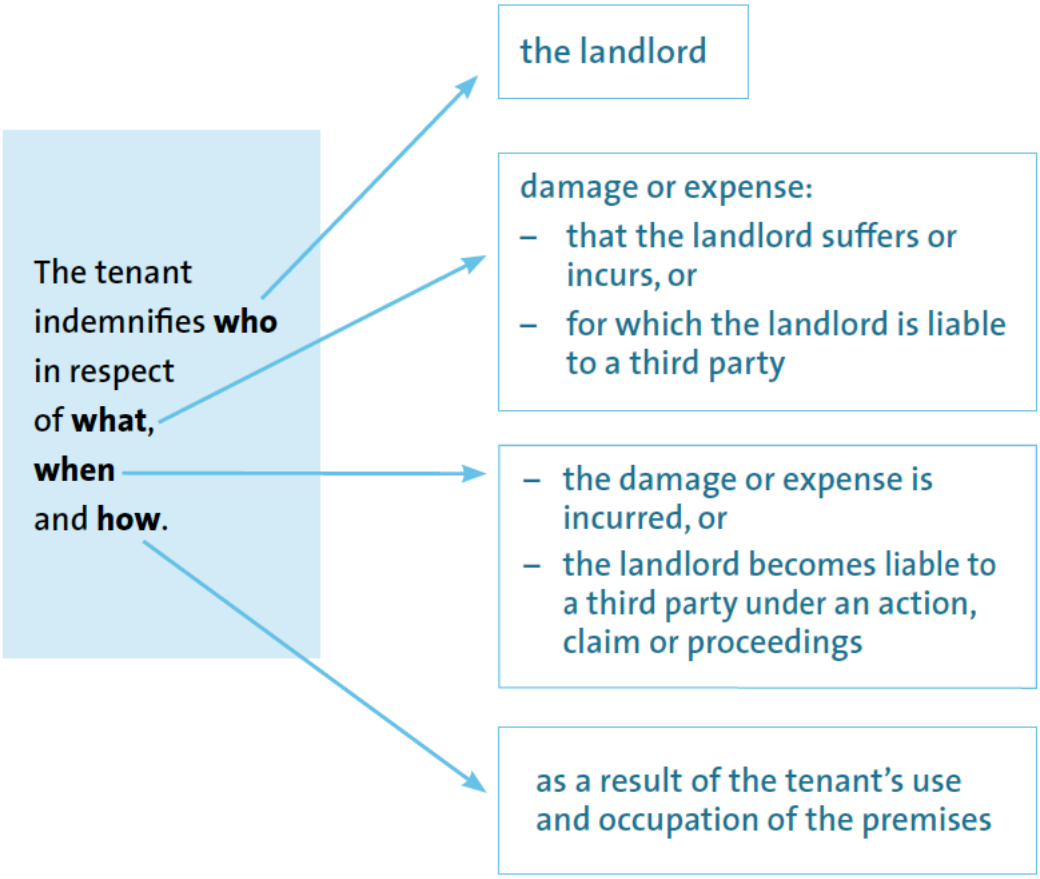
A contractual indemnity is a term or provision of a commercial transaction that states that one party agrees to hold harmless another party against the risk of loss or damage that that other party may suffer (including that party's liability to third parties for third party loss resulting from activities under the contract).

Indemnities create contingent liabilities. Where a contract does not explicitly allocate liability between the parties, each party's liability will be determined at general law on the facts of each event. To provide greater certainty and/or to shift risk of the a party having to bear the loss as a consequence of an event occurring, a liability regime is agreed and set out in the contract. The regime usually imposes a contractual obligation to pay money if the specified event occurs. Accordingly, the liability to pay is contingent upon the event occurring.

Take for instance a landlord who requests an indemnity from the tenant in the following terms:

> *The tenant indemnifies the landlord in respect of all actions, claims, proceedings, losses, costs, expenses and damages which the landlord suffers, incurs or becomes liable for and which arise from the tenant's use and occupation of the premises.*

Indemnities can be analyzed by looking at who has a contingent liability over what, when and how. See the diagram below:



The 'who': refers to the person that the tenant is indemnifying. In this example, the landlord. For most indemnities, the 'who' will almost invariably be the other party to the contract, although sometimes the language used in the contract will be broad enough to extend the 'who' to also include officers, employees, agents, sub-contractors, and, in some cases, related parties such as holding companies.

The 'what': refers to those things for which the indemnity is granted. In this example, 'all actions, claims, proceedings, losses, costs, expenses and damages'. These are fairly standard terms in an indemnity.

There can be a range of different types of liability that might be picked up by this type of language, including liabilities for:

— tangible losses (for example, death and injury, damage to property)
— intangible losses (for example, infringement of intellectual property rights, damage to data, disclosure of personal or confidential information)
— pure economic losses (for example, statutory fines or penalties, lost productivity, loss of opportunity).

The ‘when’: In this example, is those things ‘which the landlord suffers, incurs or becomes liable for’. Note that it could have just said those losses, costs and so on ‘that the landlord becomes liable for’, which is much narrower than losses, costs and so on which the landlord suffers or incurs. This is because the use of the term ‘liable’ implies a legal obligation to pay (that is, there is no choice) whereas the term ‘losses incurred’ is broad enough to encompass voluntary expenditure incurred by the landlord in the absence of legal compulsion.

The fourth element is ‘how’: It is the most important element of all as it triggers the indemnity. In this example, the trigger is all of those things ‘which arise from the tenant’s use and occupation of the premises’. This is extremely broad indemnity can be activated whether or not there is any fault on the part of the tenant. A much narrower provision would be something like ‘arising out of the negligence of the tenant’. This actually requires actionable negligence on the part of the tenant before the indemnity is triggered. Importantly, this form of indemnity, subject to one qualification, does not extend the tenant’s exposure beyond that for which it would be liable, because the common law of negligence would apply in any.

Indemnities come in all shapes and sizes, although the wording (especially in similar classes of legal agreement) can be similar. Nonetheless, it is important to examine what the terms will be used in the drafting of an indemnity when inserting it into a contract, because seemingly innocuous indemnities have the potential to markedly increase risk exposure. Moreover, they are not necessarily labeled as indemnities in the contract.

We set out below some practical drafting tips and identify how to avoid some common pitfalls in contractual indemnity clauses.

Types of Indemnity Clauses

There are loosely six types of indemnity clauses, which provide a guide to their scope and operation, including:

1. ***Bare Indemnities*** – Party A indemnifies Party B for all liabilities or losses incurred in connection with specified events or circumstances, but without setting out any specific limitations. These indemnities will be silent as to

whether they indemnify losses arising out of Party B's own acts and/ or omissions, and maybe be interpreted to have the effect of a reverse indemnity

2. ***Reverse or Reflexive Indemnities*** – Party A indemnifies Party B against losses incurred as a result of Party B's own acts and/ or omissions (mostly Party B's own negligence)

3. ***Proportionate or Limited Indemnities*** – These are the opposite of Reverse Indemnities. Party A indemnifies Party B against losses except those incurred as a result of Party B's own acts and/ or omissions

4. ***Third Party Indemnities*** – Party A indemnifies Party B against liabilities to or claims by Party C

5. ***Financing Indemnities*** – Party A indemnifies Party B against losses incurred if Party C fails to honour the financial obligation (ie the primary obligation) to Party B (most often these are coupled with a **guarantee**), and

6. ***Party/ Party Indemnities*** – Each party to a contract indemnifies the other(s) for losses occasioned by the indemnifier's breach of the contract.

The scope and operation of indemnity clauses frequently employed are often misunderstood by parties and their lawyers. They may not receive the application that a party may have expected when the term was negotiated. Applying the principles of construction discussed earlier in this paper, broadly drafted indemnities may ultimately be construed by the courts much more narrowly than the parties intended. This is illustrated by the decision of the High Court in ***Andar Transport Pty Limited v Brambles Limited*** (2004) 317 CLR 424 ("***Andar v Brambles***").

In ***Andar v Brambles***, a contract between Brambles Limited (Brambles), a company providing laundry delivery services to hospitals, and an independent contractor, Andar Transport Pty Limited (Andar Transport) which carried out those services, contained an indemnity with the following relevant provisions:

[Andar Transport] shall:

...

8.2 Indemnify [Brambles] from and against all actions, claims, demands, losses, damages, proceedings, compensation, costs, charges and expenses for which [Brambles] shall or may be or become liable whether during or after the currency of the Agreement and any variation renewal or extension in respect of or arising from..

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8.2.1 loss, damage or injury from any cause to property or person occasioned or contributed to by the neglect of default of [Andar Transport] to fully, duly, punctually and properly pay, observe and perform the obligations, covenants, terms and conditions contained in the Agreement and on the part of [Andar Transport] to be paid, observed and performed.

8.2.2 loss, damage injury or accidental death from any cause to property or person caused or contributed to by the conduct of the Delivery Round by [Andar Transport];

8.2.3 loss, damage, injury or accidental death from any cause to property or person occasioned or contributed to by any act, omission, neglect or breach or default of [Andar Transport]...

Mr Wail, a director and shareholder of Andar Transport was injured during a delivery round when he was forced to separate two laundry trolleys (owned by Brambles) that had become joined. He sued Brambles for negligence based upon the lack of manoeuvrability of the trolleys, especially when full.

Was the clause sufficiently broad so as to extend to loss arising from Brambles own negligence? The clause itself made no express reference to this situation.

The Victorian Court of Appeal, applying the principles enunciated in ***Darlington v Delco***, held that that 'on their plain and ordinary meaning', the provisions of the contract were sufficiently broad and did not exclude Brambles' own negligence: ***Brambles Limited v Wail*** (2002) 5 VR 169. The Court held that the effect of that clause was that Andar Transport was required to indemnify Brambles.

The High Court disagreed and overturned the decision.

Curiously, the majority decision makes no reference to ***K & S Lake City Freighters, Darlington v Delco or McCann v Switzerland Insurance***. Instead, their Honours referred to more ancient authorities, including the decision of the Barons of the Exchequer in ***Mayer v Isaac*** (1840) 6 M&W 605. This line culminated, in the Australian context, with ***Ankar Pty Limited v National Westminster Finance (Australia) Limited***, (1987) 162 549 at 557, which concerned not a general commercial contract, but a suretyship contract in respect of which the Court considered special rules applied.

The majority in ***Andar v Brambles*** (Gleeson CJ, McHugh, Gummow, Heydon and Hayne JJ) at 437 held that indemnity provisions (as opposed to other types of clauses that purport to limit or exclude liability) in commercial contracts ought to be treated in the same way as guarantees in suretyship contracts because '... notwithstanding the differences in the operation of guarantees and indemnities, both are designed to satisfy a liability owed by someone other than the guarantor or the indemnifier to a third person'.'(at 437)

The majority decision quoted, with approval, the statement of the majority in ***Andar v Brambles*** at 433,:

> *At law, as in equity, the traditional view is that the liability of the surety is strictissimi juris and that ambiguous contractual provisions should be construed in favour of the surety.*

Their Honours invoked ***Chan v Cresdon Pty Limited*** (189) 168 CLR 242 as authority for the proposition that this statement was a 'settled principle governing the interpretation of contracts of guarantee' and that '[t]he principles adopted in ***Andar v Brambles***, and applied in Chan, are therefore relevant to the construction of indemnity clauses'. (***Andar v Brambles*** at 437***)***

Their Honours held, therefore, in the case of ambiguity, that the clause should be construed strictly, read *contra proferentem* and construed in favour of the surety. As the clause did not expressly mention loss arising from Brambles' own negligence, therein arose the ambiguity. Construed against the *proferens* Brambles their Honours held that the indemnity did not extend to the injury caused to Mr Wail by Brambles' negligence.

Dissenting, Callinan J agreed with the Court of Appeal's approach to the construction of the indemnity clauses (***Andar v Brambles*** at 467). Callinan J quoted, with approval, the decision of the High Court in ***Darlington v Delco*** and also in ***McCann v Switzerland Insurance***, each of which, supported the proposition that no special rules of construction should applied to indemnities in commercial contracts. Callinan J found in the indemnity clauses, 'the clearest possible intention on the part of the parties to ensure that [Brambles] is not to be liable for any loss arising out of the performance of the work by the appellant' (***Andar v Brambles*** at 464).

The majority decision in ***Andar v Brambles*** at 467 is made all the more perplexing by the High Court's approach to the construction of indemnities, less than a year later, in ***Pacific Carriers Limited v BNP Paribas*** [2004] HCA 35 in which the Court at [22] said:

> *The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction.*

In the 2007 case of ***Gardiner v Agricultural and Rural Finance Pty Limited*** [2007] NSWCA 235, Spigelman CJ considered the High Court's decision in ***Andar v Brambles*** and more recent New South Wales cases that made reference to it. Spigelman CJ found that the principles of construction relevant to commercial contracts have, over the last few decades, been brought into line with the High Court's approach to statutory interpretation, which 'requires attention to the broader context of the words in issue in the first instance, not only after some kind of "ambiguity" has been identified'. Spigelman CJ concluded that 'there is more than one principle involved in the task of contractual interpretation, which must be undertaken in accordance with the general approach … applicable to commercial contracts' (at [11] to [13])[4].

[4] The decision was overturned by the High Court on appeal. In doing so the majority did not contradict the interpretation and construction aspects of the judgment delivered by Spigelman CJ in ***Andar v Brambles*** in the NSWCA.

Drafting Recommendations For Indemnity Clauses

The precise scope and operation of an indemnity will depend fundamentally on how it is drafted and the extent to which that drafting properly reflects the intention of the parties. Some indemnity clause negotiation and drafting tips include:

- Consider whether or not there is a need for an indemnity at all. Is it intended that an indemnity give rise to greater protection than would normally be available for breach of warranty or breach of contract? If not, the indemnity is not needed. For instance in construction contracts the guiding principle for the allocation of risk is that the party or parties best able to manage it should bear the risk
- Pay close attention to the drafting of the indemnity and do not treat it as a "boilerplate" provision
- If you are the indemnifier:
    - limit the amount of indemnities that you give when entering into an indemnity clause. For example, you may find adequate protection under the common law in relation to breaches of contract and negligence
    - consider imposing an express obligation to mitigate loss, and
    - limit the time during which claims can be brought under the indemnity clause. For example, within 6 years from the completion of work
- If you are the indemnified party:
    - avoid drafting the clause too widely as it risks achieving the effect of being read down to exclude even some anticipated liabilities, and
    - consider including indemnities for breach of contract and negligence in addition to the existing common law rights.
- Take care to confine the effect of the indemnity to one that either gives rise to damages for breach of contract (debt) or damages generally (ie compensation). Identify whether, in the event of a breach of contract, should the effect of the indemnity be that:
    - the breach will give rise to other remedies under the contract (eg termination or liquidated damages or rights to payment, suspension or termination of payments), or
    - the breach will allow the indemnified party to an entitlement to a payment, compensation or a reimbursement.

- Mutual indemnities regarding the same subject matter are frequently either redundant or operate inconsistently by reason of the differing roles of parties on a project
- Indemnities drafted in the broadest possible terms may well fall foul of the approach in ***Andar v Brambles***. Care must be taken to identify with the greatest degree of clarity the circumstances in which they will apply and the loss and damage they will address. A failure adequately to identify either of these elements may result in the indemnity being read down and construed against the party seeking to rely upon it
- Similarly, if it is intended that the indemnities are triggered even by the negligence of the indemnified party, the safest course is for the contract to be drafted so as to make this express. "Weasel words" are likely to be troublesome but then parties often resort to "weasel words" when they are being less than open about their intentions
- Indemnities should be drafted so as to ensure consistency with other exclusion and limitation clauses in the contract

Exclusion Clauses

In commercial transactions, the parties can use exclusion clauses to limit or exempt one party from liability which might otherwise fall on them. The areas that are subject to exclusion are:

1. the liability for breach of an event contemplated by the contract; and

2. the liability to perform as expected.

The law on exclusion clauses has always been one of complexity. Courts are not fond of them. The motorcar park cases illustrate this point.

Besides the Courts reading exclusion clauses strictly, they are now interpreting words that were always thought to be understood differently. Before the decision by the Victorian Court of Appeal in ***Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd*** [2008] VSCA 26 ("***Peerless***"), it was widely held that an exclusion of indirect or consequential loss was a reference to the second limb of ***Hadley v Baxendale*** 9 Exch. 341; (1854) 156 ER 145. The seminal case of ***Hadley v Baxendale*** established that:

"*where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be:*

such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or

such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it"

(paragraphing added).

In other words, an exclusion of indirect and consequential loss prevented the recovery of losses that were specific to the circumstances of the plaintiff, but not those arising naturally.

In ***Peerless***, the Court stated that the English authorities were flawed, and that the true distinction was "*between 'normal loss', which is loss that every plaintiff in a like situation will suffer, and 'consequential losses', which are anything beyond the normal measure.*" This narrowed the types of damages recoverable under a contract that excluded liability for consequential loss, to only those damages that every plaintiff would suffer in that situation.

The facts in ***Peerless***, arose from a breach of contract. Environmental Systems Pty Limited ("Environmental Systems") contracted to supply of a system to limit the odour emissions from an animal rendering plant operated by Peerless Holdings Pty Limited ("Peerless Holdings"). The contract in question contained the following clause:

> As a matter of policy, Environmental Systems does not accept liquidated damages or consequential loss. Environmental Systems is motivated to achieving agreed milestones through respect for the client's needs and the obvious financial advantage gained from completion of projects in the shortest possible period.

Notwithstanding the idiosyncratic wording of the clause and the fact that the document elsewhere purported to impose liquidated damages, it was held to be a

clause excluding consequential loss from any damages recoverable by Peerless in the event of a breach of contract by Environmental Systems. The odour elimination system supplied by Environment Systems had comprehensively failed.

In determining the damages that Peerless was entitled to recover for this failure, the Court had to decide what nature of the losses were capable of being characterised as being "consequential" in nature and therefore excluded.

The heads of loss the subject of Peerless' claims fell generally within the following categories:

- Purchase, installation and commissioning costs of $1,272,520 ("Purchase Claim");
- Employee and contractor costs involved in attempts to make the system functional of $223,560 ("Wasted Labour claim");
- Costs involved in dismantling and disposing of the system of $34,000 ("Disposal Claim"); and
- Additional energy costs incurred as a consequence of the system not being functional of $1,712,419 ("Additional Gas Claim").

At first instance, Hansen J:

1. held that the Purchase Claim and Wasted Labour Claim were claims for liquidated damages and were not recoverable by reason of the express wording of the exclusion clause;
2. rejected the Disposal Claim on the basis that these costs would have been eventually incurred even if the system had functioned properly;
3. allowed the Additional Gas Claim after deciding that it fell within the first limb of the rule in ***Hadley v Baxendale*** and was not a consequential loss. However, he subtracted from it the purchase and installation costs. In relation to this point, his Honour relevantly said (***Peerless Holdings v Environmental Systems Pty Ltd*** [2006] VSC 194 at [896]):

> That brings me to the matter of consequential loss. In my view "consequential" should be read as referring to losses recoverable only under the second limb of ***Hadley v Baxendale***. And see ***Frank Davies Pty Ltd v Container Haulage Group Pty Ltd (No 1)*** and ***BHP***

> ***Petroleum Ltd v British Steel PLC*** in the latter of which Rix J discussed a number of authorities as to the meaning of "consequential" and the determination in particular circumstances whether an item of loss was consequential. In my view the claim for additional energy costs is not a claim for consequential loss. The loss arises naturally and directly from the failure of the plaintiff to provide [a system] that could perform as intended under the terms of contract. It was a principal reason for the plaintiff agreeing to the defendant's proposal that the RTO would use less gas than the existing afterburner thus earning savings in the cost of gas. The defendant knew this and it was reflected in various provisions of the proposal, for example cll 1.2(a) and (d), 7.2 and 7.7.2.

On appeal Nettle JA, who delivered the opinion of the Court, rejected Hansen J's characterisation of the Purchase Claim as liquidated damages and excluded by the contract. However, his Honour found the proper approach to the question which, if any, of the claims fell within the exclusion of consequential loss was "a vexed one".

The Court of Appeal acknowledged that the view expressed by Hansen J accorded with the body of English authority (***Hadley v Baxendale***) as had been applied in Australia by judges at first instance. The Court of Appeal adopted the test expressed in McGregor on Damages (McGregor Test) to express the difference between normal loss and consequential loss, namely (***Peerless*** at [87]):

> …the true distinction is between "normal loss", which is loss that every plaintiff in a like situation will suffer, and "consequential losses", which are beyond the normal measure, such as profits lost or expenses incurred through breach. In the view of Nettle JA (and the Court of Appeal), however, this dichotomy was not necessarily consistent with the application of the rule ***in Hadley v Baxendale*** because some "consequential loss" (in the McGregor Test) 'may well fall within the first rule in ***Hadley v Baxendale*** as loss arising "naturally", ie. According to the usual course of things, from the breach of contract'.(at Peerless [88]

His Honour then cites at [88] a series of cases in the English Court of Appeal in which loss of profit and the like which one would in the traditional operation of that distinction consider to be "consequential loss" were held to be not consequential loss. These cases showed a readiness on the part of the English Court of Appeal to

contemplate that “consequential losses” were not forever consigned to the second limb of Hadley v Baxendale but that they could well fall into the first limb.

The Court of Appeal concluded that it was ‘not correct to construe “consequential loss” as limited to the second rule in ***Hadley v Baxendale*** (***Peerless*** at [93]). In the words of Nettle JA:

> In my view, ordinary reasonable business persons would naturally conceive of “consequential loss” in contract as everything beyond the normal measure of damages, such as profits lost or expenses incurred through breach. Despite the construction which has been put on “consequential loss” by cases such as ***Millar*** and ***Croudace*** [upon which the rule in ***Hadley v Baxendale*** is based], it would be unrealistic to suppose that the appellant and the respondent employed the expression “consequential loss” in [the contract] advisedly in that sense. It is more likely in this context that they intended the expression to have its ordinary and natural meaning…Read in the light of the contract as a whole, and giving due weight to the context in which the clause appears, including the nature and object of the contract, I see no ambiguity which as a matter of principle would warrant a departure from that view.

According the words in the exclusion clause their “natural and ordinary” meaning, as set out above, Nettle JA went on to find that the losses the subject of the Wasted Labour Claim and the Additional Gas Claim were in the nature of consequential losses and were therefore excluded under the relevant clause of the contract.
Nettle JA repeated the formula for construction established in ***Darlington Futures Limited v Delco Australia Pty Limited.*** At [92] Nettle JA cites the relevant passage from that case with approval.

There are a number of features about ***Peerless*** that may lead others to a different conclusion. Quite apart from the rather curious expression used in the limitation clause (namely, a statement of the "policy" of the company which is readily contradicted by express terms in the very same agreement to pay liquidated damages for specified events) the court was critical of the agreement as being:

> ...a poorly drafted instrument. It bears the hallmarks of having being cobbled together from a combination of boiler plate clauses and bespoke provisions ...[82]

If the true purpose of construction is to divine the intention of the contracting parties then can one comfortably ascribe natural and ordinary meanings flowing from a document having such a dubious genesis? Why wouldn't a relevant part of the "context" be the cut-and-paste way in which the contract was created?

The reasoning of Nettle JA in ***Peerless*** has been followed at first instance by McDougall J in the Supreme Court of New South Wales in ***Waterbrook at Yowie Bay Pty Limited v Allianz Australia Insurance Limited*** [2008] NSWSC 1451 ("***Waterbrook v Allianz***").

In ***Waterbook v Allianze*** McDougall J considered the scope of an exclusion of consequential loss in a policy of insurance. Addressing the issue with brevity, McDougall J said at [77] to [78]:

> In [***Peerless***] Nettle JA … said at [88] that some "consequential loss" may well fall within the first limb of ***Hadley v Baxendale*** … On the authority of the decisions to which I have referred:
>
> The measure of damages is that laid down in ***Bellgrove*** (of course, with the limitation also there laid down);
>
> That measure reflects the first limb in ***Hadley v Baxendale***;
>
> Those damages may include consequential loss…

On appeal, the Court of Appeal agreed with McDougall J: ***Allianz v Waterbrook*** [2009] NSWCA 224 at [126].[5]

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[5] However, it should be borne in mind that McDougall J (and the Court of Appeal) was considering four preliminary questions regarding entitlement to indemnity under the policy and whether certain of the policy's clauses were void in the face of statutory or public policy considerations. His Honour did not consider in detail the applicability of the clause excluding

A recent case has thrown more confusion for us lawyers.

The decision in ***Alstom Ltd v Yokogawa Australia Pty Ltd and Anor (No 7)*** [2012] SASC 49 (“*Alstom v Yokogawa”)* concerned the interpretation of a subcontract to refurbish a coal fired power station at Port Augusta. The judgment is extremely lengthy, (461 pages) but is an interesting read that touches on many issues that lawyers drafting commercial contracts ought to be familiar with.

Relevantly, the subcontract provided for the recovery of liquidated damages for a failure to meet certain milestones. The subcontract also contained an exclusion of liability by the subcontractor “*for any indirect, economic or consequential loss whatsoever*”.

Alstom (the plaintiff) argued that it ought to be allowed to recover the full amount of its losses where they exceeded the specified liquidated damages. In considering whether the exclusion of consequential loss defeated such a claim, the Court found that the words “consequential loss” would, unless qualified by their context, extend to all damages suffered as a consequence of a breach of contract. The Court found that such an exclusion was sufficient to exclude the subcontractor’s liability for “any loss consequential or following, immediate or eventual, flowing from a breach of contract” was excluded from recovery, including loss in excess of specified liquidated damages.

Some relevant parts of Bleby J’s judgment relevant to the exclusion clause case are as follows:

> **6.3 Article 12 is an exclusive remedy**
>
> *252 Alstom’s argument is to be rejected for a number of reasons. In the first place, the textual alterations proposed by Alstom make no difference to the amount of Liquidated Damages payable by YDRML if delays were in fact caused by YDRML. The liability for and the amount of Liquidated Damages remain unaltered. It therefore makes a mockery of the deliberate and clear*

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consequential loss to particular heads of claim. Further guidance on the issue has not been forthcoming from the High Court and it is not apparent that Nettle JA’s decision was the subject of an application for leave to appeal.

limitations intended to be placed on the agreed amount of Liquidated Damages to be paid for delay. Why would parties agree to an elaborate provision for Liquidated Damages for delay at all if damages for the same cause were to be at large?

267[6] *I accept that exclusion clauses of this nature which purport to restrict or eliminate all remedies for breach of contract must be strictly construed. In Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd**[4]** Lord Diplock observed*:[5]

It is of course. open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law or such remedy may be excluded by usage binding upon the parties (cf. Sale of Goods Act 1893, section 55). But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law and clear express words must be used in order to rebut this presumption.

268 However, the expression "any indirect, economic or consequential loss whatsoever" in Article 3 is an expression of very wide import. It is not a term of art. It has no fixed meaning. It must be read as a whole and considered in the light of the other terms of the EC&I contract and in the light of any relevant background circumstances…

281 To limit the meaning of indirect or consequential losses and like expressions, in whatever context they may appear, to losses arising only under the second limb of Hadley v Baxendale is, in my view, unduly restrictive and fails to do justice to the language used. The word "consequential", according to the Shorter Oxford English Dictionary means "following, especially as an effect, immediate or eventual or as a logical inference". That means that, unless qualified by its context, it would normally extend, subject to rules relating to remoteness, to all damages suffered as a consequence of a breach of contract. That is not necessarily the same as loss or damage consequential upon a defect in material where other remedies are also provided…

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[6] This is of a piece with Bleby J's general position in this case that Alstom was not entitled to any relief from its subcontractor other than pursuant to the express terms of the contract.

292 In my opinion the expression in the context of the opening words of Article 3 is sufficient to exclude liability for any loss other than in respect of Liquidated Damages and Performance Guarantee Payments.

294[7] *The expression "Economic Loss" is defined in Article 2.5 of the EC&I contract as follows:*

"Economic Loss" means loss of use, production, profit, income, business or power generation, and includes:

(a) loss of any revenues that could-have been earned from the generation of electricity from hedges, market contracts or market insurance;

(b) the cost of entering into hedges or market insurance to minimise market exposure; and

(c) any indirect or consequential loss of that nature.

295 The first question which arises is whether, in the phrase "any indirect, economic or consequential loss whatsoever" the defined expression "Economic Loss" has any application at all. In my opinion it does not…

*302 That means that the expression "economic … loss" must be given its ordinary meaning. That is extremely wide. In tort it includes any financial loss not consequential upon loss of or damage to property in which the plaintiff has a proprietary or possessory interest or consequential upon personal injury to the plaintiff.**[6]** It is difficult to conceive how any of the claims by Alstom could be for other than economic loss sustained by Alstom.*[8]

*306 When speaking of the particular contract in question in that case Cole J said in Turner Corporation Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd:**[7]***

There is, in my view, no room for a "wider common law right" in the proprietor to treat non-compliance with the contractual obligations by the builder as a separate basis for claiming damages being the cost of having a third party

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[7] These passages, taken together, are quite a remarkable departure from the usual understanding of what "consequential loss" means. In effect, Bleby J is saying that pretty much all loss of the type normally seen in construction cases is consequential loss.

[8] Again, the construction given to the words "economic loss" is really rather wider than what is normally understood by that term, which is much closer to the definition of economic loss in article 2.5 of the contract itself.

rectify or complete defective or omitted works. That is because the contract specifies and confers upon the proprietor its rights flowing from such breach; that is, the parties have, by contract, agreed upon the consequences to each of the proprietor and the builder, both as to rights and powers flowing from and consequences of, such breach.

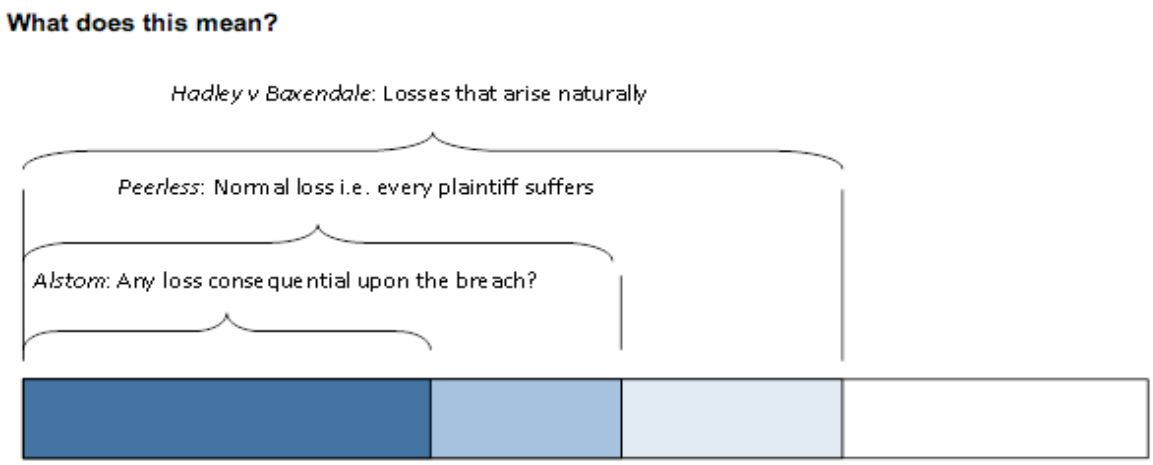
…

307 Without more, the combined effect of Articles 12 and 13 and the opening words of Article 3 would seem to make clear in this case that the parties have agreed to limit Alstom's remedy for breach of the EC&I contract to the specific remedies contained in Article 12.

Excluding "consequential loss"

Unfortunately, the decisions in ***Peerless*** and ***Alstom v Yokogawa*** seem precisely to have resulted in the realization of the situation envisaged by Spigelman CJ: an increase in uncertainty and an increase in risk which makes the task of those negotiating contracts harder. The consideration of issues of causation and deciding whether they arose "naturally, according to the usual course of things, from the breach itself" is far from being an exact science. There is nothing remarkable about the inherent imprecision of this approach and its propensity to lead to disparate findings, even in cases which involve similar facts – such is the nature of the judicial process.

The possible meaning of 'consequential loss' is not certain it is in a range of possible meanings as can be seen from the diagram below:



Where lawyers are employed in the drafting and negotiation of commercial contracts it is likely that the parties would receive advice on that very point. Such advice would no doubt have been referable to the rule in ***Hadley v Baxendale***.

From the foregoing, it ought to be apparent that the term "consequential loss" has lost any firm juridical foothold in Australia.

In these circumstances, it appears that the only approach that offers a degree of certainty and, accordingly, a reduced risk, is for parties to commercial contracts to specify those heads of damage that are intended to be excluded from liability or, at the very least, those that are not.

Drafting Recommendations For Exclusion Clauses

For an exclusion clause to be effective the follow criteria must be satisfied[9]:

1. Notice of the clause must have been given at the time of the contract;

2. notice must be in the contract;

3. the clause must apply to the event to which it was intended to apply;

4. In light of ***Peerless***, the only approach that offers a degree of certainty and, accordingly, a reduced risk, is for parties to commercial contracts to specify those heads of damage that are intended to be excluded from liability or, at the very least, those that are not when drafting an exclusion clause.

Liquidated Damages Clauses

Liquidated damages and damages clauses can be used to reduce the consequence of an event. For instance, if a party is confident that an event will not occur, they are generally willing to provide a warranty. By providing a warranty they are standing behind their opinion that the event will not happen. By providing the warranty should the event occur, then the other party will be entitled to damages to compensate them and thereby to reduce the consequence of the event happening.

[9] See Yates, D ***Exclusion Clauses in Contracts***, Sweet & Maxwell, 1978, especially chp 2

The scope of the prohibition of misleading and deceptive conduct

The misleading and deceptive conduct under section 18 of the ***Australian Consumer Law*** will most likely be interpreted expansively by the Courts and will have application into many fields of law that were not generally foreseen by the framers of its predecessor in the ***Trade Practices Act*** (now repealed).

Although most misleading or deceptive actions will consist of misrepresentations, it is erroneous to limit these claims exclusively to circumstances that constitute some form of representation. Misleading or deceptive claims have been successfully made against exaggerated sales puffs (***General Newspapers Pty Ltd v Telstra Corporation*** (1993) 45 FCR 164, 178 (Davies & Einfield JJ) and mere silence - ***Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd [No.1]*** (1988) 39 FCR 546 and are actionable as misleading conduct.

The breadth of section 18 of the ***Australian Consumer Law***, can be seen from the following interpretations that have been given to section 52 of the repealed Trade Practices Act:

1. **Intention is Irrelevant -** Section 52 is concerned with the impact of the conduct, not upon the state of mind of the person engaging in the conduct.

2. **Actual Deceptions is not Required -** It is not necessary to prove that anyone is actually misled or deceived. All that is necessary is to establish that someone in the target would be likely to be misled or deceived. On a larger field of conflict directors of the NRMA obtained a Federal Court declaration that a prospectus issued as part of a proposed de-mutualisation was misleading: ***Fraser v NRMA Holdings Limited*** (1955) 55 FCR 452.

3. **A Part Truth is Misleading -** A statement that contains some truth, but is incorrect in other respects, or those which are literally true but produce a false impression, can amount to misleading and deceptive conduct. For example:

"To announce an opera in which a named and famous prima-donna will appear and then to produce an unknown young lady bearing by chance the same name, would clearly be to mislead and deceive. The announcement would be literally true, but nonetheless, deceptive, and this is because it conveyed to others something more than the literal meaning which the words spelled out." (This example was given in ***Hornsby Building Information Centre v Sydney Building Information Centre*** 1978] 35 FLR 372).

4. **Silence can be Misleading or Deceptive -** If an overall impression is created, and the person making the advertising statements knows that to say something or provide some further information may fix a false impression, then not to do so amounts to misleading and deceptive conduct. The case law on whether silence is actionable has been inconsistent. Differing approaches have been taken. In ***Rhone – Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd*** (1986) 12 FCR 477 the court held that failure to disclose certain information was not misleading and deceptive conduct. Whereas in the ***Henjo*** case the failure to disclose details was held to be misleading and deceptive conduct.

To demonstrate a breach of (section 18 of the ***Australian Consumer Law)***, it is not necessary that the impinged conduct actually lead a person into error; to engage in conduct that is likely to lead into error is sufficient: ***Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*** (1982) 149 CLR 191. However, in contract related actions it has still been held necessary that there has to be a cause or nexus between conduct and loss in order to claim remedies under the Trade Practices Act: ***Brown v Jam Factory Pty Ltd*** (1981) 53 FLR 340). Consequently, it is irrelevant whether ….. intended to mislead the Jacob Interests or that ……'s actions were neither dishonest nor negligent. Nevertheless, the conduct may still amount to misleading and deceptive conduct.

In deciding whether or not conduct is misleading, especially in establishing whether there was a cause or nexus between conduct and loss, the courts have had to grapple with the question of how much intelligence should be accorded to the subject of any impinged conduct. In the case of contractual representations, the capacity of

the conduct to deceive or mislead is determined with reference to the characteristics of the actual recipient.

Gzell J quoting Hill J, set out a useful summary of the principles Appliable to applying s 52 of the Trade Practice Act in ***Yolarno Pty Ltd v TransGlobal Capital Pty Ltd & Ors (No 2)*** [2003] NSWSC 1004 (19 November 2003)

> The principles applicable to the operation of the *Trade Practices Act* 1974 (Cth), s 52 are usefully set out by Hill J in ***Equity Access Pty Ltd v Westpac Banking Corporation*** (1989) 16 IPR 431 at 440-441.
>
> First, in order for impugned conduct to be misleading or deceptive it must convey, in all the circumstances, a misrepresentation. That what was said at the September 1999 meeting amounted to a misrepresentation is established by the subsequent conduct of Mr Taylor and the difficulty TransGlobal experienced in obtaining anyone to underwrite the issue.
>
> Secondly, there is no contravention of the *Trade Practices Act* 1974 (Cth), s 52(1) unless error or misconception results from the conduct of the corporation and not from other circumstances for which the corporation is not responsible. That requirement is satisfied in the instant circumstances. Mr Taylor was the managing director of TransGlobal.
>
> Thirdly, conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of misleading or deception regardless of whether that is more or less than 50%. The question whether conduct is misleading or deceptive or is likely to be so, is an objective one to be determined by the court itself. Evidence that persons of the relevant class were misled, although admissible, is not determinative although in some cases it may be highly persuasive. In light of the clear dichotomy between the representation and the fact, there can be no doubt that the conduct of Mr Taylor on behalf of TransGlobal was misleading or deceptive.
>
> Fourthly, conduct of a corporation causing mere confusion or uncertainty in the sense that the public may be caused to wonder whether two products may have come from the same source is not necessarily co-extensive with

misleading or deceptive conduct. That aspect has no application in the instant circumstances.

Fifthly, in certain cases the applicant must establish that it has acquired a relevant reputation in a name that has become distinctive of its business in a particular country or geographical area. That aspect, also, has no application in the instant circumstances.

Finally, the *Trade Practices Act 1974* (Cth), s 52 is not confined to conduct that is intended to mislead or deceive and a corporation that acts honestly and reasonably may, nonetheless, engage in conduct that is likely to mislead or deceive. That aspect is also inapplicable in the instant circumstances.

The high water mark in this regard is ***Collins Marrickville Pty Limited v Henjo Investments Pty Limited*** (1987) 72 ALR 601. The short facts in Collins are that the purchaser of a restaurant which was represented as having an approved seating capacity in excess of that in fact permitted by its licenses. Action under section 52 was taken successfully by the purchaser against Henjo, the vendor company and one of its directors, Mr Saade.

Saade, a director of Henjo (the vendor company) represented in writing to the selling agent that the premises were "fully licensed" and could seat 128 diners. The subsequent contract for sale of business contained an exclusion and entire contract clause which stated:

> *"6. The purchaser acknowledges that it accepts the premises in their present condition and state of repair, subject to any infestation and dilapidation and as a result of its own inspection of the premises. In entering into this agreement the purchaser acknowledges that it has not relied on any statement, representation or warranty by or on behalf of the vendor whether express or implied as to:*
>
> *(a) The premises;*
>
> *(b) The neighbourhood in which the premises are situated and adjoining properties;*

(c) The suitability for any use or purpose of the premises or any improvements erected thereon;

(d) The rights and privileges (if any) pertaining to the premises;

(e) Any matter having or which might have an effect beneficial or otherwise on the premises

The purchaser acknowledges that the only statements, representations and warranties on behalf of the vendor are such as are expressly set out in this agreement."

After completion it was discovered by the purchaser that the premises did not possess a liquor licence for the bar or "reception" area then being used as an area for the service of alcohol and that the restaurant was licensed only for 84 people. The purchaser took its action against the vendor relying upon both active misrepresentations, as to hat was actually said about seating capacity, and representations by conduct or silence, being the failure to disclose the actual licensed seating capacity and status of the reception area.

Having made a finding of fact that there had been an active misrepresentation by the agent Willcox J. went on to deal with the representation by conduct, namely, silence. Wilcox J at 609 held:

"In Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Limited (1986) 68 ALR 77 a Full Court considered the circumstances under which silence may constitute misleading conduct (at 84 Bowen CJ said):
"Where silence is relied on in order to show a breach of s52 it will depend upon the circumstances whether the silence constitutes conduct which is misleading or deceptive. As in the case of other sections of the Trade Practices Act the court may gain assistance from consideration of cases at common law and in equity dealing with related types of situations. However, the court is not confined by such cases because it is concerned with the interpretation and application of the words of the particular statute."

"Dealing with the question of misrepresentation constituted by silence, there are cases which show, for example, that an omission to mention a qualification, in the absence of which some absolute statement made is *rendered misleading, is conduct which should be regarded as misleading. So too, is the omission to mention a subsequent change which has occurred after some statement which is correct at the time has been made where the result of the change is to render the statement incorrect so that thereafter ft becomes misleading. This also may be regarded as misleading conduct. However, the general position between contracting parties has been expressed in the following way: 'the general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not avoid a contract, although it operates as an injury to the party from whom it is concealed' (Smith v Hughes (1871) LR 6 QB* 597 *at 604; .... Under the general law it is important to consider whether there is a legal obligation to divulge. There are particular relationships which have been held to raise an obligation of disclosure. Contracts* uberrimae fidel *come to mind as examples of this type of relationship. Indeed, there are many particular relationships which raise duties of disclosure. These include trustee and beneficiary, solicitor and client, principal and agent and guardian and ward. Where an* obligation to disclose arises an omission to in form the person to whom the obligation is owed may, perhaps on the basis that the person is entitled to assume some fact or circumstance which does not exist, constitute or be an ingredient in misleading conduct.

"*The notion of relationships giving rise to an obligation to make disclosure is one which may well prove useful in determining some of the cases which may arise under s52 of the Trade Practices Act. However, the court will not be restricted to cases where such a relationship has already been held to exist at common law or in equity. The court is likely to be faced with situations under s52 between particular parties, where it will feel bound to hold that such an obligation to disclose arises from the circumstances."*

In Rhone-Poulenc Bowen CJ went on to observe that the relationship of vendor and purchaser is not one which involves a special relationship of confidence. However, as his Honour pointed out, that does not necessarily conclude the matter. There may be circumstances importing an obligation

to speak out is misleading conduct is to be avoided. One such case is where a qualification is necessary to avoid a party being actively mislead. I think that this is such a case.

The defendant had argued that in any event the purchaser had not placed reliance on the representations. In relation to this point Willcox J said (at 611):

"In Gould v Vaggelas (1985) 157 CLR 215 at 236 Wilson J summarised in the following manner the applicable principles in relation to inducement in actions for deceit:

"(i) Notwithstanding that a representation is both false and fraudulent, if the representee does not rely upon it he has no case.

(ii) If a material representation is made which is calculated to induce the representee to enter into a contract and that person in fact enters into the contract there arises a fair inference of fact that he was induced to do so by the representation.

(iii) The inference may be rebutted, for example, by showing that the representee, before he entered into the contract, eftther was possessed of actual knowledge of the true facts and knew them to be true or alternatively made it plain that whether he knew the true facts or not he did not rely on the representation.

(iv) The representation need not be the sole inducement. It is sufficient so long as it plays some part even if only a minor part in contributing to the formation of the contract."

There is a close similarity between the conduct constituting deceit at common law and conduct which contravenes s52 of the Trade Practices Act. The principles enunciated by Wilson J appear equally applicable to claims under that section. I apply those principles, and especially principle (iv) to the present case in saying that it is no answer to the applicant's claim that Mr Collins also put reliance upon Mr Tadd (the applicant's conveyancing solicitor) to ascertain the true facts concerning the terms of

the council approvals and the conditions of the liquor licence.

The respondent, having determination, had also relied on the exclusion clause set out in paragraph 13 above. Willcox J, at 613, set out the effect of the exclusion clauses and said:

> "These clauses contain an acknowledgment by the purchaser that ft has not relied upon any statement, representation or warranty given on behaif of the vendor and an agreement that the document constitutes the whole of the agreement made between the parties. But, whatever the effect such conditions may have in respect of an action for breach of contract, there is now abundant authority in this court that they do not operated to defeat a claim under 552: see **Byers v Dorotea Pty Limited** (1986) 69 ALR 715; **Bateman v Slayter** (1987) 71 ALR 553 The reason why an exclusion clause does not provide an answer to a claim under s52 is given by Sweeney J in ~L **Berry Estates Pty Limited v Manqalone Homestead Pty Limited** (1984) 6 APTR 40-489 at 45,638. In that case his Honour pointed out that the clause "cannot operate so as to oust the effect of the Act, to affect the nexus between the contravention of the Act and the execution of the agreement and the payment of monies under it, or to deprive the applicant of its remedies under the Act." If in fact the misleading conduct of the respondent has induced an applicant to enter into and 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 of 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. And, once it is found as a fact that the conduct induced the transaction, the Act gives a remedy. There may be scope for the introduction into this area of the law of the concept of disclaimer, as suggested in the editorial comment and in the article by Terry: "Disclaimers and Deceptive Conduct", 1986 Australian Business Law Review, pp 478-512, to which the second comment refers; although it would seem that it must always remain a question of fact whether the disclaimer has succeeded in negating the misrepresentation.

In proceedings based on a different form of allegation, It was held in ***Finucane v NSW Egg Corporation*** (1988) 80 ALR 486 a person who purchased an egg run

after approval by the Egg Corporation succeeded in an action under section 52 brought against the Corporation when the Corporation changed its distribution system and as a consequence the applicant suffered loss.

In a classic application of the principles in Henjo the court in ***Cameron v Goldtek Australia Pty Limited*** (1996) ATPR 41-513 awarded damages of $369,000.00 following misleading representations having been made in relation to future likely financial performance upon the applicants taking up a distributorship from the respondents.

It cannot be said, however, that ***Henjo*** makes it all plain sailing for those seeking to rely before the court on allegedly deceptive and misleading conduct. An illustrative example is found in ***Lake Koala Pty Limited v Walker*** [1991] 2Qd R 49 where the disappointed purchaser of a motel business failed in an action seeking damages for alleged deceptive and misleading conduct when accountants financial projections as to anticipated future operating costs of the business proved to be an understatement.

Exclusion Clauses after ***Henjo***

The position enunciated by Willcox J in Henio (see paragraph 17 above), has been embroidered upon by Buchett J, firstly in ***Lezam Pty Limited v Seabridge Australia Pty Limited*** (1992) 107 ALR 291 where his Honour said:

> *"A misrepresenter does not obliterate the effect of a misrepresentation clearly made, which induces an assent to proposed terms, by adding, as the time final agreement approaches, a qualification capable of conveying merely that the misrepresentation, the substance of which is not withdrawn, may not be accurate in every detail and may require some, possibly minor, qualification.*

Burchett J again addressed this area in 1997 in his judgment ***in Oraka Pty Limited v Leda Holdings Ltd*** (1997) ATPR 41-558 at 43,717 (reversed on appeal but not so as to effect this point) when he said:

> *"It cannot be thought that the very agreement that was obtained by a misrepresentation can be made good by incorporating in ft a further*

misrepresentation falsely asserting that it was not procured by the means that were in fact employed. The agreement that so speaks to sustain ftseif was obtained by a misrepresentation, and no verbal magic of an added clause can change that."

Disclaimers

The disclaimer may be regarded as a variant of the Exclusion Clause and is subject to similar difficulties, especially as the vendor himself is concerned. In recent years vendors' agents have found some comfort from the courts in relation to disclaimers.

In ***Butcher and Anor v Lachlan Elder Realty*** [2002] NSWCA 237 the agent had included in a promotional brochure an incorrect survey diagram for the property. The agent's brochure contained a disclaimer as to the accuracy of information contained therein. In proceedings in the Court of Appeal relating, inter alia to s52 issues the court stated at paragraphs 41 et seq.:

> *"It is well established for the purpose of s2 and its equivalents that a disclosed agent conveying a representation on behalf of his principal may properly be understood as conveying a more limited representation in his own right. Thus in* ***York v Lucas*** *(1985) 158 CLR 661 the joint judgment, having said that a person may engage in misleading or deceptive conduct although he acted reasonably and had no intention to deceive, continued:*
> *That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false. If the circumstances are such as to make ft apparent that the corporation is not the source of the in formation and that it expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive"*
>
> *42. Any implied disclaimer of a belief in the truth of information passed on to another would have to be quiet clear because of the general principle established in Derry v Peek (1889) 14 App Cas 337, at 374 per Lord Hershell:*

> *"to prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth."*

This line of authority has also been followed in ***Dalton v Lawson Hill Pty Limited*** [2005] FCAFC 169 where the agent, relying on a vendor's assertions as to area under vines produced a brochure mis-stating the area of vines in a vineyard. The agent's disclaimer in the brochure was in terms:

> *"whilst every care has been taken in respect of the in formation contained herein no warranty is given as to its accuracy and prospective purchasers should rely on their own enquiries."*

The Full Court found that the agent having an honest belief in the vendor's assertions was entitled to rely on its disclaimer. The decision is also of interest for the position of the Full Court in relation to mis-statements made by a water drilling contractor, whose mis-statement as to bore capacity was republished by the vendor.

Reliance

While the authorities concentrated on in popularising concepts of actionable deceptive and misleading conduct deal properly with the concepts of what does constitute such conduct a vital sub text is whether the aggrieved party in fact placed reliance on the representations complained of.

The importance of "reliance" has been brought to the fore in three recent cases in the New South Wales Supreme Court. The first is the decision of White J in ***Phillips Contracting v Yensong*** [2008] NSWSC 769 (28 July 2008). In this case the defendant was conducting an electrical contracting business providing engineering services to mines. The plaintiff complained of misleading statements in documents intended to induce the plaintiff to purchase, assertions as to income and assertions as to expenses of performing a contract known as the Bulga Coal contract. In some respects the defendant conceded the misrepresentations but contended that prior to contract the plaintiff came to know the true facts and did not rely on any untrue representation.

31 . The contract in question contained a term that:

> *"3 Non Reliance*
>
> *The purchasers* [sic] *acknowledge that they have in entering this agreement not relied upon any statement representation warranty or condition made or given by the vendor or anyone on behalf of the vendor in respect of the subject matter of this agreement other than those that are expressly herein contained."*

In cross examination the principal witness for the plaintiff conceded that in relation to the Bulga contract he had become aware prior to entering into the contract that the vendor would be unable to obtain the renewal of that contract and indicated that in relation to certain assets intended to be sold the purchaser, prior to contracting had in fact obtained separate valuations and relied on those valuations rather than the vendor's representations.

The trial judge did not make any profound restatement of the law but the case is significant to drive home the need for a plaintiff to not only face misleading and deceptive representations upon which it can act at law but also to demonstrate actual reliance on those representations and not for the representations to exist against a background wherein the plaintiff can be demonstrated to have actual knowledge which was acquired prior to contract and must shed doubt on the representations. The defendant's position in this regard was undoubtedly strengthened by the quoted clause 3 of the contract.

The second recent authority is a decision of Debelle J sitting as an acting judge of the Supreme Court of New South Wales in Veranda Cafe Northbridcie Pty Limited v Morgan [2008] NSWSC 1032 (1 October 2008). This matter turned upon representations made in the course of the sale of a café business. Representations made as to net profit, turnover and food costs were found to be false and misleading.

Debelle J summarised the law in relation to reliance and its application as follows:

> 68 The plaintiff must establish that it was induced to purchase the business in reliance on the misrepresentations. The relevant principles are well-settled especially in proceedings brought pursuant to s 52 and ss 87 and 88 of the *Trade Practices Act* 1974 (Cth), the terms of which are in all

material respects the same as in s 42 and s 68 of the *Fair Trading Act.* A person claiming damages under these provisions of the *Fair Trading Act* must demonstrate that he has been induced to do something or to refrain from doing something which gives rise to damage or has been influenced to do or refrained from doing something which gives rise to damage by conduct contravening s 42:

Kabwand Ply Ltd v National Australia Bank Ltd (1989) ATPR 40-950 at 50, 378 per Lockhart J. Recovery is founded by the plaintiff's factual reliance upon the misleading or deceptive conduct of the respondent, although that conduct was not the only factor in the plaintiffis decision and notwithstanding that the plaintiff did not seek to verify the representations or did so inadequately and so failed to discover the falsity: *Henjo Investments Ply Ltd v Collins Marrickville Ply Ltd (No. 1)* (1988) 39 FCR 546 at *558* per Lockhart J; see also *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511 at 517 per Heerey J.

69 The evidence shows that Morgan's representations as to turnover, net, and food costs were not only relied upon by Baume and Bruhl but were also important in inducing them to decide on behalf of the plaintiff to enter into a contract to purchase the business. I have already referred to the calculations made by Mrs Baume. She made certain assumptions for the purpose of calculating the net profit in each week of a business. Those assumptions included assumptions as to the turnover which are based on the representations made by Morgan. In addition, Mrs Baume assumed that the cost of food purchases was 21 per cent. The calculations were made before the plaintiff had decided to purchase the business. They were reduced to writing and the document was proved. It shows that the plaintiff relied on both the representations as to turnover as well as the representations as to food costs. The amount allowed for wages was very realistic, particularly given the information as to wages supplied by Morgan. It was not suggested that any part ofthe calculations were unrealistic.

70 For these reasons, I am satisfied that the plaintiff relied on the representations made to Baume and Bruhl who were acting as the agents

for the plaintiff. Baume gave evidence to that effect. He said that the representations made by Morgan regarding the turnover and profit earned by the business were critical to his decision to purchase the business. More importantly, the evidence as a whole points to that conclusion. In making that finding, I do not overlook the fact that Baume and Bruhl visited the premises frequently. I find they did so for the purpose of attempting to gauge how busy the business was. However, observations of that kind are no substitute for true and correct statements as to the turnover and profitability of the business. Neither do I overlook the fact that Morgan supplied turnover figures for the 22 weeks from 1 August 2003. Those figures show that in that period the weekly turnover ranged from $22,875 to $16,733, the average weekly turnover being $19,980. As Morgan had ceased to operate the bakery business, the figures are effectively for the café business only. They show that the turnover for the whole business including the pastry products sold was $20,000, not $27,000 as represented by Morgan. As noted already, the fact that they show an average turnover of about $20,000 per week does not assist Morgan. In addition, Morgan had completely misrepresented the profitability ofthe business.

71 In *Elders Trustee & Executor Co Ltd v E G Reeves Ply Ltd* (1987) 78 ALR 193 at 241 Gummow J expressed the view that s 52 is not intended to benefit those who fail to take reasonable care of their own interests. The question is whether the plaintiff's conduct has been sufficiently careless as to break the chain of causation: *Munchies Management Ply Ltd v Belperio* (1989) ATPR 40-926; *Sykes v Reserve Bank of Australia.* I am entirely satisfied that the plaintiff through its agents Baume and Bruhl took reasonable care, that Baume and Bruhl relied on the misrepresentations and that they were not so careless as to break the chain of causation. They were supplied with documentary evidence that confirmed that the representations the turnover of the café business was of the order of $20,000 per week. They were entitled to assume that, as those figures confirmed the represented turnover of the café business, the representations as to the bakery business were also correct.

72 I have also considered whether Baume was so determined that the

plaintiff should purchase this business that he was not influenced by the representations made and did not in fact rely on them: *cf Sutton v A J Thompson Ply Ltd (in liq.)* (1987) 73 ALR 233. I am satisfied that he did in fact rely on the representations made. Not only was that his evidence but, more significantly, the projections made by Mrs Baume based on the representations show that Baume relied on them.

36. The third instructive recent authority is again White J this time in ***Zhang v VP302 SPV and others***_[2009] NSWSC 73 (23 February 2009). This mailer concernedthe sale of an "off the plan" unit in Green Square. Allegations were made of deceptive and misleading conduct by way of representations made as to future unit management fees and future capital gains. The agent does not appear to have sought to protect itself by any disclaimer and the representations were, in the main, alleged to have been made orally.

White J quoted McLelland CJ in Equity in relation to alleged oral misrepresentations:

In *Watson v Foxman* (1 995) 49 NSWLR 3 1 *5,* McLelland CJ in Eq said (at 318-319):

> "Where, in civil proceedings, a party alleges that the conduct of another was misleading or deceptive, or likely to mislead or deceive (which I will compendiously described as "misleading") within the meaning of s 52 of the Trade Practices Act 1974 (Cth) (or s 42 of the Fair Trading Act), it is ordinarily necessary for that party to prove to the reasonable satisfaction of the court: (1) what the alleged conduct was; and (2) circumstances which rendered the conduct misleading. Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a *conversation is fallible*

for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed All this is a matter of ordinary human experience.

Considerations of the above kinds can pose serious difficulties of proof for a party relying upon spoken words as the foundation of a causes of action based on s 52 of the Trade Practices Act *1974 (Ct/i) (or s 42 of the* Fair Trading Act), *in the absence of some reliable contemporaneous record or other satisfactory corroboration."*

Practical use of contracts as risk management systems

As seen all sales of business contracts, establish a risk management system. Consequently as lawyers for our clients we should use the contract as a risk management system so as to:

- identify the risks inherent in the sales process – for vendor and purchaser;
- agree how those risks will be dealt with; and
- take care to ensure that the contract itself does not create risks, such as contractual uncertainty.

As a general proposition, risk sharing should not be a hidden process. The risk of vendor and purchaser are different, because their interests are different. As the negotiation process identifies risks the nature of the risk and how it is to be dealt with should be openly discussed. Ideally the party that can most ably manage the commercial risk should bear the risk. In sales transactions as the risk is able to be commercially shared through the price that is negotiated, either party depending on the price can bear the risk. As

such in most sales negotiations, rarely will an attitude that "that is your problem, not mine" result in the successful sale of a business[10].

As the method of resolving the dealing with risk should be clearly spelt out in the sales agreement. Always remember, that contracts being risk management tools operate whereby the parties list:

- what each has to do,
- when they have to do it and
- how each has to do what they have promised to do.

To ensure that there is clarity and certainty, it is therefore necessary for the parties to negotiate the terms of the contract and for the sake of clarity and the record, reduce the agreed terms in writing.

Drafting a Contract – the Checklist Approach

A simple and effective way of putting together a contract is to get the parties to answer these three questions from each other's perspective:

1. What is to be done?
2. When is it to be done?
3. How is it to be done?

We will refer to the three questions as the "Checklist Questions".

For instance, we all have had clients come into our office and say: "I want you do draft for me a supply contract for my company to supply gas to X."

Being well trained, and with access to precedents, most lawyers would be able to cobble together a document that was on its face capable of representing an agreement for one party to supply gas and be paid for the

[10] Calvert & Reid p 472, para 15.16

provision of that service on a monthly basis. We could do this without asking or receiving answers to the three questions.

The devil though, as they say is in the detail. Will the generic contract be adequate for the parties need to ensure proper performance of the contract! That is the real test and it should be the goal of every lawyer in drafting a contract to ensure that the performance goals of the parties to the contract are achieved. By asking the Checklist Questions and insisting on getting answers the draftsperson can achieve this goal.

Take the situation of the contract to supply gas. Let us assume that the gas is to be supplied to fuel a furnace. The asking and answering of the Checklist Questions reveal the following:

Checklist Question	Gas Suppliers Answer	Gas Purchasers Answer
What is to be done?	Get paid for selling Gas.	Obtain Gas at the rate of 3000 metric tonnes per hour for 360 days a year, 24 hours a day, save for days of planned maintenance at the plant. Pay for the Gas on the longest credit terms that can be negotiated.
When is it to be done?	The gas is to be supplied when requested on 3 days notice by receipt of a	Gas is to be supplied from a pipeline which will be available 24 hours a day, 7 days a week, for 360 days a

Checklist Question	Gas Suppliers Answer	Gas Purchasers Answer
	purchase order. Payment for the gas is to be made on no more than 30 days credit terms.	year.
How is it to be done?	By the provision of cylinders containing 1500 metric tonnes of gas.	By pipeline that will be connect to a tank with sufficient gas for 2 days continuous operation of the furnace or continuous supply from a mains service.

As you can see the answers from both parties have inconsistencies. It is usual for these to be apparent in one off matters. Less obvious when the terms and conditions of one party are made on a take or leave it basis. Nevertheless the point is that is to operate continually we can see how the answers to the questions provide the information with the parties need to determine what risks each has with dealing with the other in order to therefore discuss and determine who will bear the risk or how the risk will be shared.

It is less risky and less costly for all concerned to clearly determine at the outset where the risks of a commercial transaction lie, who is to bear them or how are the risks to be shared.

In this way, contracts are checklists of who is to do what, when it is to be done and how it has to be done[11]. Being checklists of who is to do what, when and how, the contractual provisions should be clear and as plainly as possible dealt with. Often this means that contracts are long but for the checklist approach to be comprehensive this is unavoidable.

By the contracting parties clearing setting out what each expects of the other they are able to ensure performance and allow their performance to be objectively measured, thereby reducing the risk of non-performance on their behalf, and on behalf of the other party or parties to the contract.

Our roles as legal advisers require us to appreciate our client's expectations from the sales process and in doing so clarify their expectations. For example, using the contract as a risk management system that contains clear statements about what is and what is not warranted, indemnities, disclaimers and warnings[12].

* * *

[11] Haines, G ***The Manager's Guide to Supply Contracts and Tenders for Products and Services***, Information Australia, Melbourne, 1991 pp 17-28.

[12] Calvert, M & Reid, I, ***Technology Contracts: A Handbook for Law and Business in Australia***, 2nd edition, LexisNexis, 2002, p 470 para 15.5.

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