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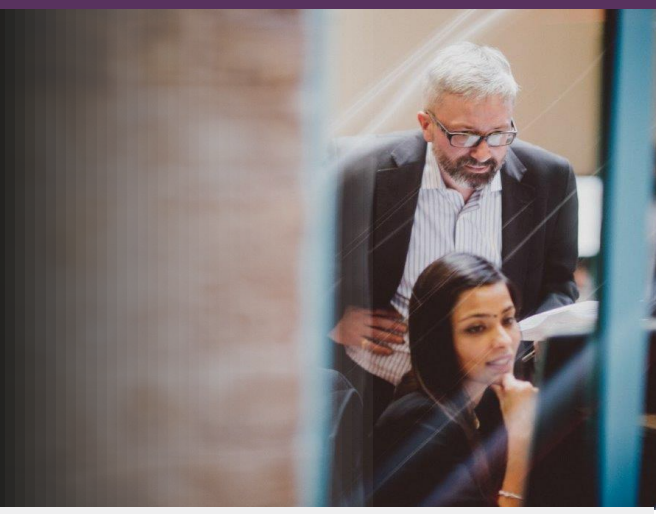
Dangers of deceit



April 2022

In the case of Pisante v Logothetis, the Commercial Court ruled that false statements made by the Defendant encouraged the Claimant to make substantial investments in the Defendant's business. The Court relied on the law of deceit awarding the Claimant significant damages plus the rescission of the contract.

The Claimant believed he was encouraged to make substantial investments in the Defendant's business due to false statements made by the Defendant during pre-contractual negotiations. Therefore, the Claimant issued proceedings, seeking a primary claim in deceit.

To establish liability in deceit, the Claimant needed to prove that the Defendant intended his representations to be false.

The Defendant pleaded that he was not aware that his representations would be conveyed or interpreted as false and, therefore, he could not be liable in deceit. He stated that at no stage did he seek to hide anything from the Claimant and that the Claimant always had access to legal documents and accounts relating to the investments.

Background

The Defendant and Claimant each ran respective businesses within the shipping industry. During 2013, the parties entered into a joint venture arrangement (**ETFA 1**) on a 50/50 basis.

Shortly after, a third party, Kohlberg Kravis Roberts, approached the Defendant with a further joint venture proposal, as they wanted to make investments within the shipping market, and a joint venture vehicle was set up (**OML**).

The Defendant asked the Claimant whether he would like to participate in the OML venture and advised that the Claimant's contribution to EFTA 1 would be used. The Claimant confirmed that he would be happy to roll over his entire interest to the OML venture and in July 2014, the Claimant and Defendant entered into a second JV agreement (**ETFA 2**) to reflect this.

In August 2014, the Defendant advised the Claimant that the OML venture had completed, and the Defendant would finalise "*whatever the number is*" for the Claimant's share in the deal. The parties agreed that the Claimant should receive a 30% interest and entered into a third JV agreement (**ETFA 3**), which effectively superseded ETFA 1 and 2.

In November 2018, the Claimant voiced concerns over the setup of the OML venture. He could not see how his investment in ETFA 1 had gone into the OML venture (despite what he was led to believe by the Defendant). He felt that he had been "*outsmarted*" and "*cheated*".

The Defendant suggested that the Claimant appoint an auditor of his choice to investigate the matter, but the Claimant rejected this and issued proceedings for deceit in May 2019.

The Court's decision

The Court considered whether the representations made by the Defendant were made with the intention to induce the Claimant to enter into ETFA 3 and whether the representations given were deceitful.

The Defendant attempted to rely on a non-reliance clause contained in ETFA 3 for any information or representations given. However, the Court held that the clause failed as a defence, as it could not shield the Defendant against any liability in deceit. The non-reliance

clause could only come into effect against claims for non-fraudulent misrepresentations.

The Court considered the principle of deceit by recklessness and whether the Defendant, in making false representations recklessly and not caring about what they conveyed, was any different than a person making statements, not caring about whether they were true or false. The Court took from the judgment in Derry v Peek that liability in deceit is proven when a "*false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.*" The Court found the representations made by the Defendant in the OML venture were knowingly false and because of those representations, the Claimant was induced to entering into ETFA 3, giving up all rights under ETFA 1 and 2.

The Court held that, although it was highly unlikely that the Defendant set out to defraud the Claimant, nevertheless, it was proven that the Defendant was liable in deceit for the false representations made to the Claimant when entering into ETFA 3. The Claimant was therefore awarded damages with interest and rescission of the contract.

What does this mean for commercial vendors?

The judgment illustrates the potential dangers in transactions for commercial vendors and how important it is to be careful when making representations in pre-contractual negotiations.

Non-reliance clauses are generally used to try and exclude reliance on pre-contractual representation, so that claims for overselling/exaggerating the performance of a business can be protected. This Judgment however, highlights that a party cannot contract out of its liability for misrepresentation under the Misrepresentations Act 1967, no matter how well drafted their clause is.

A good non-reliance clause can defeat most claims; however, it won't be sufficient on its own to defeat claims in deceit.

The importance of understanding how statements could be interpreted or conveyed by a counterparty is imperative during negotiations, so that both parties have a clear picture of the transaction and there is no overselling of a business. The Judgment highlights that simply being unaware of or not recognising what has been said will not shield a party from its liability in deceit.

If you have any concerns over your pre-contractual representations, non-reliance clauses or joint venture agreements, contact Victoria Holland today.

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