

When will a boast be misleading and deceptive?

Bannerhey Pty Ltd v 1800 000 000 Pty Ltd [2008] FCA 53

The recent decision of Edmonds J in *Bannerhey Pty Ltd v 1800 000 000 Pty Ltd* [2008] FCA 53 considers whether the respondents engaged in misleading and deceptive conduct. The allegations were based upon representations made in relation to the sale of master licences to use, and to licence others the use, the telephone number '1800 000 000' and relevant know-how. This case highlights the fact that findings on issues of credit will be critical when the majority of the alleged representations are oral. This is because whether conduct is misleading or deceptive is ultimately a question of fact, to be determined in the context of known facts and circumstances, and in situations where there is conflicting evidence a Judge's findings on credibility will determine which evidence is to be preferred.

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FACTS

In this matter two proceedings were heard concurrently, with evidence in one being evidence in the other.

The applicants in the first matter, Bannerhey Pty Ltd ("Bannerhey") and Englert Nominees Pty Ltd, were companies associated with Mr Terrence Gretton. The applicants in the second matter were husband and wife, Mr and Mrs David Horton (together, "the Hortons"). The respondent, 1800 000 000 Pty Ltd ("1800"), was common to both proceedings and was associated with Mr Antony and Andrew Jacobson (together, "the Jacobsons"). The applicants in both proceedings alleged that 1800 engaged in misleading and deceptive conduct in contravention of the *Trade Practices Act 1974* (Cth), and that the Jacobsons were persons involved in that contravention.

Edmonds J held that at the time that Bannerhey and the Hortons entered into Master Licence Agreements with 1800 for the States of NSW and Queensland they knew that:

1. 1800's business had not commenced save for its activity, through its directors, of marketing State licences for NSW and Queensland.
2. They were to be the instrumentalities through which 1800's business was to be commenced.
3. They were purchasing no more than an exclusive right to use and to licence others to use the 1800 000 000 telephone number and the domain names associated with it, as well as the right to access the know-how (i.e. the ideas, concepts and proposals of the Jacobsons as to how the potentiality of this number might best be exploited).

The majority of the pleaded representations were said to have been made orally, over a period of around three months, prior to the Hortons and Bannerhey entering into the Master Licence Agreements. In both proceedings, there were only a couple of written representations pleaded, the primary one being a representation that 1800 was the owner of a unique business system and method comprising confidential information, trade secrets and know-how throughout Australia involving the exclusive right to use and licence others to use the 1800 000 000 telephone number and the domain names '1800000000.com' and '1800000000.com.au', together with goodwill attaching to those rights (the "Unique Business System Representation"). This was said to have been made on 1800's website and in Recital A of the Master Licence Agreements, as well as orally. In both proceedings, the Unique Business System Representation was effectively admitted, but in the case of all other alleged representations, the vast majority were denied. Thus, there was a preliminary issue as to whether the representations were made. As they were nearly all alleged to have been made orally, issues of credit inevitably arose.

FINDINGS

Findings on credit

The principal witness called on behalf of Bannerhey was Mr Gretton. Justice Edmonds was not impressed by Mr Gretton as a witness, finding his recall in evidence-in-chief to be 'extremely poor' and his evidence in cross-examination to be 'evasive': [79]-[80].



The principal witness called on behalf of the Hortons was Mr Horton. Edmonds J found that he was a more impressive witness than Mr Gretton, but that Mr Horton appeared to have prepared for his testimony by reading the pleadings and seemed to have 'little independent recollection' of what had been said: [100].

Both Mr Antony and Andrew Jacobson were called to give evidence on behalf of 1800. His Honour held that Mr Antony Jacobson was able to recall conversations with 'remarkable precision' and 'in a manner which can rightly be described as an exercise in spontaneity': [119]. His Honour formed the impression that a lot of the evidence given by Antony was what he wanted to believe occurred, rather than what actually happened. Despite this, Edmonds J held that 'to the extent of any inconsistency, I prefer the evidence of Mr Antony Jacobson to Mr Gretton': [119].

The Unique Business System Representation

This representation was effectively admitted by the respondents, so the substantive issue was not whether it was made, but whether the applicants relied upon it in entering into their respective Master Licence Agreements and, if so, whether it was misleading and deceptive, or likely to mislead or deceive: [149]. Assuming that the admitted representation had been relied upon, Edmonds J held that 1800 clearly had a business system or model and this was made available to Bannerhey and the Hortons. It may not have been as 'comprehensive' or 'full' a business system or model as they expected, but the evidence established that it was 'unique'. Furthermore, there was no evidence that the business system or model that was made available was not capable of exploiting the 1800 000 000 telephone number or the domain names associated with it. The fact that Bannerhey and the Hortons were unable to generate any sales revenue from the sale of unit licences in their respective States did not mean that the system they were provided with was incapable of exploiting the telephone number or domain names: [151]. Accordingly, the representation was held not to be misleading and deceptive or likely to mislead or deceive.

Other Representations

Preferring the evidence of Mr Antony Jacobson to that of Mr Horton or Mr Gretton, Edmonds J held (at [149]-[172]) that all of the other alleged representations fell into one of the following three categories:

- There was no evidence that the representation had been made, or that it had been made in the alleged terms;
- Even if made, the representation had not been relied upon; or
- Even if made and relied upon, the representation was not misleading or deceptive.

CONCLUSIONS

Edmonds J concluded that the applicants' claims in both proceedings had no foundation and dismissed both claims. In particular, his Honour found (at [175]) that the applicants had:

"...entered into their respective Master Licence Agreements not in reliance on misleading and deceptive conduct on the part of the respondents, but in reliance on their attraction to the telephone number and their respective perceptions, based on their successful experiences in franchise operations, of its potential to make money. There is no doubt that their attraction and interest in this regard was fostered and promoted, indeed inflamed, by the enthusiasm of the respondents ... But it was only when the applicants in both proceedings realised that the potentiality was as 'dead as a doornail', to use the words of Mr Gretton, that they formed the view that they had been misled and deceived. Prior to that time they were ready, willing and able to sell 'the product' into the market in respect of which their monopoly existed, and attempted to do so."

Edmonds J was of the view that the respondents made boasts about the potentiality of 'the product' which went beyond the truth, but held that the applicants recognised these boasts for what they were and did not rely on them for that reason or because they knew them to be false, as illustrated by his findings in relation to the Unique Business System Representation: [175]. His Honour referred to the following passage from the reasons of Nettle JA in *Steutel v Kimple Pty Ltd* [2005] VSCA 312 at



[43], which he held to be apposite to the case:

“But as Chernov JA makes plain, conduct is only misleading or deceptive if it is capable of inducing error. Whether it is misleading or deceptive is therefore a question of fact to be determined in the context of known facts and circumstances. In the end, conduct cannot be characterised as misleading and deceptive unless it conveys a misrepresentation. And if the circumstances of the communication, and the knowledge of the recipient, are such as to prevent misrepresentation, it matters not that in other circumstances the result could have been different.”

IMPLICATIONS

1. This case highlights the fact that in misleading and deceptive conduct cases where the majority of representations alleged to have been made are oral findings on issues of credit will be critical.
2. Even if a party makes a boast about the potentiality of a product or service which goes beyond the truth, it will not be possible succeed in a claim against that party for misleading and deceptive conduct if the evidence shows that you recognised the boast for what it was and did not rely on it for that reason, or if you knew the representation made to be false.

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FURTHER INFORMATION

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